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REFORMING ENVIRONMENTAL ASSESSMENT: THE ENVIRONMENTAL ASSESSMENT PROGRAM IMPROVEMENT PROJECT (EAPIP)

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I. INTRODUCTION AND BACKGROUND

The Environmental Assessment Act[1] (EA Act) was passed in 1975 and proclaimed in October 1976, three years after the production by the Ministry of the Environment of a Green Paper on Environmental Assessment.[2] Prior to the enactment of the EA Act, provincial environmental legislation was primarily directed to abating existing pollution by controlling and reducing emissions of contaminants to air, land and water. This "after the fact" or "remedial" approach had been heavily criticized and the government decided to put in place "preventative" legislation that would assess and mitigate the anticipated environmental impacts of an undertaking before it was approved.

Unfortunately, immediately after the Act was proclaimed, the Government published 200 pages of orders exempting various undertakings. While the numbers alone did not answer the question of whether the exemption power was being abused, substantial criticism has been directed at the fact that a number of environmentally significant but politically sensitive undertakings have been exempted from the Act. The first hearing under the Act did not take place until 1980, municipalities were not made subject to the Act until 1980, and the Act earned the title of the "Environmental Exemptions Act." While the benefits of environmental assessment as a planning tool have been largely recognized, the Act and its implementation have sparked criticism

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[1] R.S.O. 1980, c.140 as amended.

[2] Ministry of the Environment, Green Paper on Environmental Assessment, (1973).

from both proponents and opponents of undertakings.

The project that has become the Environmental Assessment Program Improvement Project, or EAPIP, has been in the works since 1984. Following the Spring 1984 Throne Speech, the Ministry of the Environment decided to initiate a review of the EA program. One of the first steps was to contribute to the funding of a major research project by the Canadian Environmental Law Research Foundation (CELRF) to review the Act. The CELRF report, by Dr. Robert Gibson and Dr. Beth Savan, entitled "Environmental Assessment in Ontario"[3] was published in January of 1986 and remains one of the major overviews of environmental assessment in Ontario.

The CELRF report contained detailed recommendations for reforming the Act and its administration. It's major findings were that the EA Act is basically sound in principle but flawed in practice. Major criticisms of the Act's implementation involve exemptions, delays, and the lack of public resources. The performance of the Act was evaluated and reforms were recommended on the basis of three criteria: effectiveness, efficiency and fairness. The report's recommendations fall into four categories: application of the Act; EA preparation and evaluation; decisions and appeals; and representation of interests; and resolution of conflicts.

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[3] Dr. Robert Gibson and Dr. Beth Savan, Environmental Assessment in Ontario (CELRF: Toronto, 1986).

Regarding application of the Act, the CELRF report recommended clarifying exemption procedures by establishing clear criteria and time lines; legalizing of class assessments (for dealing with groups of similar projects with minor environmental impacts) and providing for their consistent application; and bringing the private sector under the Act.

The report found that: environmental assessment preparation and evaluation require more rigorous early project planning; the government and public reviews should be merged; outside experts should be hired when appropriate; and thorough monitoring and inspection during and after project construction should be required.

Regarding decisions and appeals, the report recommended: that the two decisions on acceptance of the assessment document and approval of the project be amalgamated; that a formal appeal process be entrenched; and that the grounds for Cabinet variance of Board decisions be limited to policy matters.

Finally, regarding representation of interests and resolution of conflicts, the CELRF report recommended: that intervenors be funded throughout the process; that new guidelines be developed for mediation and for more streamlined hearings; and that a more open and fair government appointments process be developed.

The Ministry's response to the CELRF report was to set up its own review of the Act

in August 1987. In the spring of 1988, EAPIP made its first public appearance in the form of a package of material containing public information pamphlets explaining various elements of the process and a request for public input on a very general proposal to review the entire EA program in Ontario.

This paper will discuss EAPIP since 1988, focusing on the Phase I proposals, submissions by the public and the recent release of the reports by the Environmental Assessment Advisory Committee (EAAC) in response to these matters. I will then discuss the chronology of events, including the infamous Project X which lead to a restructuring of EAPIP and the present direction that EAPIP intends to take. The paper will conclude with some comments on suggestions for reforms to EA.

II. ENVIRONMENTAL ASSESSMENT PROGRAM IMPROVEMENT PROJECT (EAPIP)

A. Overview

The stated purpose of EAPIP was "to examine opportunities to improve Ontario's EA program through changes in legislation, regulations, policies, guidelines and administrative practices". The project was divided into two phases - I and II - and public consultation has occurred throughout in the form of regional workshops initially to scope the issues that are of concern to the public; invited input to documents including the initial proposal to conduct the review; and the Phase I report which was released in August of 1989. There has been a Public Advisory

Group (PAG) throughout the process which has held meetings approximately once a month since the project began (See Appendix A for list of PAG members). In addition, an Inter-Ministry Liaison Committee (IMLC) was established to advise the EAPIP team on policy matters and other government programs.

The intent of dividing the review into two phases was to deal with supposedly "non-controversial" short-term legislative and administrative improvements in Phase I and more "controversial" and complex questions requiring more substantive proposals for reform in Phase II. Phase I culminated in a series of recommendations that were initially to be presented in a White Paper in May 1989. Instead, they resurfaced in August 1989 as a package of suggested reforms without specific legislative language and for public review by the Environmental Assessment Advisory Committee (EAAC).[4] In the meantime, in May 1989, drafts of Phase II Working Papers began to be released to PAG by the EAPIP Project Team. These detailed Working Papers include: (1) Concept of EA and EA Program Structure; (2) Review and Approval of Environmental Assessments; (3) Environmental Assessment Monitoring; (4) Class Environmental Assessments, Bump-ups, Exemptions, Designations; (5) The Application of EA; and (6) Public Consultation (See Appendix B for list of papers and authors).

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[4] Environment Ontario, EAPIP Phase I Recommendations for Improvements to the Current Program, July 1989.

B. The Phase I Proposals

The Phase I recommendations proposed changes to the EA Act to:

1. Allow public notices to be sent by regular pre-paid mail, rather than by registered mail;

2. Allow the Minister to authorize changes in an undertaking after the undertaking has been approved by the Minister or the EA Board;

3. Require the proponent to notify the public formally of the submission of an EA without undue delay;

4. Allow the Minister or the Environmental Assessment Board to delegate specific aspects of a decision to a Director in the Ministry, and provide for appeals from a Director's decision;

5. Make provision for the use of Class EAs, where a class of undertakings may be defined with respect to any characteristic, and provide for the Minister to waive content requirements when establishing a Class EA;

6. In order to clarify a previous decision, allow the Minister to amend that decision, or allow the EA Board to rehear a specific matter;

7. Establish that the EA Board, when it conducts a hearing, has the Minister's powers to make decisions;

8. Provide that if hearings are also required under the Environmental Protection Act or the Ontario Water Resources Act, the Environmental Assessment Act would apply and hearings under these other Acts can only be held if ordered by the Minister, or if ordered as a condition of approval under the Environmental Assessment Act; and;

9. Expand the authority to make regulations to prescribe:
   - contents of an EA;
   - procedures for public consultation, scoping of matters and non-acceptance of an EA; and

- requirements for record-keeping, reporting and monitoring of impacts.[5]

The Environmental Assessment Advisory Committee received 57 oral and/or written submissions on the Phase I proposals. A review of these documents reveals that most submissions focused their comments on proposals 2, 3, 4, 5, 6 and 9 (See Appendix C for list of Submissions to EAAC).

Before addressing each one of these however, it should be noted that many commentators found it difficult to comment on the proposals due either to the lack of detail or the failure to provide specific legislative wording. Most commentators spoke directly to the Phase I proposals but some made additional general comments about EA reform, provided recommendations for Phase II and, in some cases, made recommendations for additional proposals they felt necessary to augment the Phase I proposals. In the latter instance, several commentators spoke to the need for a greatly increased commitment of resources to the EA Branch. As well, the Environmental Assessment (EA) Board recommended that the Phase I proposals include the need to clarify the role of the review coordinator, specifically that he/she be recognized in the EA Act and in the administrative structure of the MOE as the person who provides the critical review of the EA, acts as a conduit between parties

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[5] Environmental Assessment Advisory Committee, Notice of Request for Submissions and Public Meetings on Proposed Recommendations of Phase I of EAPIP., Aug. 3/89.

concerned with the undertaking, and senior MOE officials including the Minister if necessary.

(i) Post Approval Changes to Undertaking by Minister

The Phase I proposal to allow the Minister to authorize changes in an undertaking after the undertaking has been approved by the Minister or the EA Board (number 2 above) raised the spectre of undue delay without provision for time limits on public notice and review. As well, the proposal was viewed with scepticism by public interest groups as open to abuse and requiring safeguards for public notice and review. The Environmental Law Section of the Canadian Bar Association - Ontario (CBAO) and others cautioned that this proposal could undermine the net effects analysis of Section 5(3) and suggested that changes might give rise to a hearing request for a project that had previously not had such a request. They echoed the call for adequate public notice and provision of opportunity to comment on such changes.

(ii) Notification by Proponent of EA Submissions

Regarding the proposal to require the proponent to notify the public formally of the submission of an EA without undue delay (number 3 above), many reviewers objected to the vague wording and suggested rather that the notice occur simultaneously. In addition, comments supporting this proposal frequently emphasized the value of pre-submission consultation. The Township of Peel, the

Hamilton Region Conservation Authority and others pointed out that effective pre-submission consultation would be thwarted without expansion of intervenor funding to public interest groups and smaller municipalities.

(iii) Delegation and Appeals

The proposal to allow the Minister or the EA Board to delegate specific aspects of a decision to a Director in the Ministry, and provide for appeals from a Director's decision (number 4 above) set off alarm bells for many commentators. For example, the Township of Peel expressed concern that, in the absence of precise wording, delegation of decision-making power to a civil servant could emasculate the rights of the affected public to review the specifics of the matter and could undermine the hearing process. They considered it "dangerous in the extreme to allow a proponent to come to a hearing with only a conceptual design for its activity and allow the specifics to be approved and implemented behind closed doors after the hearing is over".

The proposal was considered too vague and required clarification of the specific aspects of the decision that could be delegated and the circumstances that would justify such a delegation. Peel suggested that these criteria be set out in regulations and/or guidelines including provisions for what types and under what circumstances appeals of the Director's decision would be allowed. The Environmental Law Section of the CBAO suggested that the Director's decision-making power should be limited

to making determinations on details arising from the approval decision not on details of specific aspects of the decision.

(iv) Class EAs

The proposal to make clear provision for the use of Class EAs, (number 5 above) where a class of undertakings may be defined with respect to any characteristic, and provide for the Minister to waive content requirements when establishing a Class EA, was perhaps the most contentious Phase I recommendation.

Many commentators including CELA and other public interest groups, the City of Toronto Department of Public Health, the CBAO Environmental Law Section and others felt that the proposal to amend the EA Act to provide for class EAs was highly controversial and should have been left to Phase II. The Phase I recommendation essentially provided blanket authority for the use of Class EAs on any class of undertakings regardless of the potential environmental impacts of individual undertakings. Concerns expressed were that the proposed changes to the Act would allow for the use of Class EA's without the benefit of specific, publicly-reviewed criteria to ensure: consistency in the process between proponents; appropriate application of a Class EA when projects have the potential for significant environmental impact; appropriate application of the screening out process for projects of minor environmental significance; and clarification of the procedures and criteria defining the need for the use of bump-ups.

Further, CELA and others were very concerned about the recommendation to allow the Minister to waive some or all of the requirements of sub-section 5(3) of the Act in relation to the content of EAs. At present, the requirements of sub-section 5(3) provide some of the only sources of protection of the public interest in relation to Class EAs by providing a minimum standard of content required. Several reviewers noted that the proposed elimination of this protection would undermine EA. The EA Board noted that Section 5(3) is the backbone of Act. They found the proposal extremely vague and stated that the need for it had not been established. The Board concluded that if recognition is given to Class EAs in Phase I, the definition of a class should be narrowed to "projects which occur routinely and are considered limited in scale and environmental impacts", there should be a public right to bump-up projects to full EA status and the criteria which would apply to warrant a bump-up must be clearly established and articulated and then made the subject of public discussion.

It is noteworthy however, that many commentators, particularly municipalities, applauded the proposals for Class EAs and the Ministry of Government Services, the only Ministry to make comments to EAAC, supported the Class EA proposals and envisioned a process whereby generic approval of a class would be followed by use of the provisions of the Planning Act, 1983 as the mechanism for individual project public consultation, issue identification (including environmental) and issue resolution.

MGS viewed such a change as one that would allow the public to bring site specific issues to their respective municipal councils and the MOE, as a government reviewer of changes governed by the Planning Act, would have the opportunity to modify plans using Planning Act provisions.

(v) Amendments and Re-hearings of Decisions

Proposal number 6 (above) allowing the Minister, in order to clarify a previous decision, to amend that decision, or allow the EA Board to rehear a specific matter, raised concerns about undue delay, the public's right to be notified and comment on changes, political influence and material changes to Board decisions. Many commentators suggested that time limits be placed on any process that is established for making changes. The EA Board suggested that the test for a re-hearing should be for changes that do not change the substance of the decision but merely add something that was omitted or substitute a correct statement for an incorrect one.

(vi) Regulation-Making Authority

The final proposal that generated a lot of comments was number 9 above; to expand the authority to make regulations to prescribe a number of requirements. Reviewers were mostly in favour of this proposal although some, such as Ontario Hydro and the Ontario Society for Environmental Management were opposed to regulations that would limit the flexibility they felt was essential to the EA process.

Most commentators emphasized that it would be essential to conduct further public review of more specific recommendations, including legislative wording, before such changes to the Act should go ahead. In addition, some commentators, including the consulting firm of Gore and Storrie and the Township of Peel suggested that scoping requirements should occur as an amendment to the Act rather than by regulations since such regulations could limit public rights available under the Act.

C. "Project X"

Many commentators prefaced their remarks on the Phase I proposals by voicing their concern about Project X, a document leaked to environmentalists just days before the Environmental Assessment Advisory Committee's scheduled hearings into the Phase I proposals.[6]

"Reforming Our Land-Use and Development System" or "Project X" as it came to be called was prepared under the direction of Treasurer Robert Nixon. This "discussion document" would have dramatically altered the development approval process in Ontario. Environmental groups and many other groups and private citizens from across the province condemned the development-at-all-costs tenor of the document and its proposals to minimize provincial government involvement in land-use

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[6] Reforming our Land-Use and Development System, August 1989.

planning.

The Environmental Assessment Act is clearly a target in the report. The authors suggest that strengthened environmental regulations (the MISA and CAP programs) may eliminate the need for environmental assessment over the long term. This suggestion betrayed a fundamental misunderstanding of Ontario's environmental legislation. MISA and CAP are end of pipe, remedial programs dealing with discharges to the environment, while environmental assessment is the critical strategy for protecting the environment before damage is done.

Another suggestion in the report was to consolidate all existing land use and environmental legislation into a new "sustainable development act" under the administration of the Ministry of Municipal Affairs - a ministry without any particular expertise in environmental protection.

Perhaps the most important concern over the document is the fact that it was developed in secret and that fact likely contributes to its unbalanced perspective. It represents the agenda of the development industry to the exclusion of other equally important points of view. Even the Ministry of the Environment was not consulted.

Project X may, however, have been just the thing needed to light a fire under EAPIP. From the perspective of the members of the Public Advisory Group, EAPIP had been

moving along at a slow, unfocused pace for almost a year. It had been the intention of the EAPIP team to use the Working Papers referred to above as the basis for detailed public consultation in Phase II. However, as PAG and others noted, although the papers contain useful and detailed information, they are too long and complex and do not clearly provide a set of basic proposals that could be considered during a broad consultative program. Neither are they complete. Although the Phase II public consultation was tentatively scheduled to begin in October 1989, one of the Working Papers had yet to be released to PAG and the others were still under revision. Regardless of earlier plans however, Project X changed the entire situation.

Environmental groups, including all of those who were members of PAG wrote to Premier Peterson outlining their concerns about Project X and asked for his assurance that EAPIP would be the legitimate vehicle for a critical evaluation of environmental assessment in Ontario and that the Project X proposals would not be implemented.[7] Without such assurances the groups felt that they could not contemplate continued involvement in the program.

The groups received the Premier's assurance that Project X was not government

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[7] Correspondence from CELA and 14 other organizations and individuals to Premier Peterson, (September 20, 1989).

policy and that EAPIP would be the government's vehicle for EA reform.[8] Similar assurances were provided by Environment Minister Jim Bradley at a meeting held with PAG in October. A reorganization of EAPIP was undertaken. Phase II has been re-defined, placed under new management and given a very tight timeline to produce results. Instead of refining the detailed Working Papers to be sent out for public consultation, the new Task Force managing EAPIP intends to prepare a single document (a Government Discussion Paper) over the next few months to go out for public review in the early summer of 1990. The Working Papers will remain as draft discussion documents available for public review upon request.

D. Working Papers

The six working papers have been released in draft form by EAPIP. They were prepared by various authors and are not always consistent in their approaches to environmental assessment and the myriad of issues discussed. They do provide useful information on current practices and a review of these papers is instructive in discussing the kinds of reforms contemplated. Many of the papers do not provide a clear set of recommendations but rather a range of options for each of the areas investigated. As of the end of January, these papers have reached their "final draft" form and are available for discussion purposes only; they will not be finalized as

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[8] Correspondence from Premier Peterson to CELA, (Toronto: October 17, 1989).

MOE publications.

It should be noted that the approach taken in the first Working Paper is at odds with the other working papers. Working Paper #1, Concept of EA and EA Program Structure offers an analysis that the entire EA program is fundamentally flawed and needs a major overhaul. The alternative proposed relies heavily on an expanded class EA approach. However, the other working papers do not begin with this premise but rather discuss options for reforming the current process but leaving it intact. The papers were written concurrently and there is therefore a fairly fundamental inconsistency between the first paper and all the others. It is anticipated that the Government Discussion Document due for release in the Spring will be considerably more focused and provide a clear set of recommendations for public comment. As well, the Minister has recently stated that Phase I and II were in fact merged with the formation of the EA Task Force and EAAC's report on the Phase I proposals (also recently released) will be considered by the Task Force in preparing the Government Discussion Document. A discussion of EAAC's report is therefore useful at this point.

E. Environmental Assessment Advisory Committee (EAAC) Response to Phase I

EAAC submitted its conclusions and recommendations in two reports: the first

submitted to the Minister on October 20, 1989 and responding directly to the nine Phase I proposals;[9] and the second, submitted in December, responding to comments received on other matters which could be dealt with in either Phase I or Phase II.[10] This two-staged approach was taken on the assumption that the Minister was still intending to prepare legislative amendments for introduction into the Fall Session of the Legislature. These two reports were released to the public at the end of January 1990.

(i) The First Report

The Committee recommended full acceptance of one of the nine proposals (number 7 above), conditional acceptance of six (numbers 1,2,3,4,6 and 8 above), partial acceptance of one (number 9 above), and a rejection of one (number 5 above).

The rejected proposal was for changes concerning Class EAs. They agreed that it was by far the most controversial change proposed and noted that EAPIP had received comments during the development of the Phase I proposals from several groups and individuals that the complex and contentious nature of Class EAs warranted their deferral to Phase II. Recognizing the usefulness and appropriateness

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[9] Environmental Assessment Advisory Committee, Report on EAPIP Phase I (Toronto: October 20, 1989).

[10] Environmental Assessment Advisory Committee, Re: Part 2 of Report on EAPIP Phase I (Toronto: December 8, 1989).

of Class EAs, the Committee concurred with the sentiments of many commentators that the EAPIP proposal was so broad that it would not provide any safeguards against concerns raised over, for example, the definition of a class and the waiving of Section 5(3) content requirements.

Partial acceptance was given to the proposal to expand the authority to make regulations to prescribe a number of requirements. EAAC did not include the proposals to set regulations regarding pre-submission consultation, scoping and Section 5(3) requirements. Rather, EAAC considered these latter three to be suitably contentious for deferral to Phase II.

The one proposal which EAAC recommended be fully accepted was that subsection 12(2) and clause 13(b) of the EA Act be amended to provide that when the EA Board conducts a hearing, it exercises the Minister's powers to make decisions and impose terms and conditions.

I will briefly discuss four of the other six proposals with which EAAC provisionally agreed. Regarding the proposal to allow the Minister to authorize changes in an undertaking after the undertaking has been approved by the Minister or the EA Board, EAAC recommended the proposal be accepted provided that the legislation ensure a number of safeguards. For example, EAAC recommended that the proponent provide detailed information including how the change affects the net

effects analysis and the comparison of alternatives; public notice occur to all previously involved participants with a minimum 30 day public comment period and a public right to request a hearing on the change; if the matter was before the Board, only the Board would decide on approval or rejection and whether a new hearing or a new EA was required in regard to the change; and finally, the Minister or the Board would grant approval without a hearing or a full new EA only if the change does not have potentially significant environmental impacts and the accepted EA provides adequate information to make the decision.

Regarding the EAPIP proposal to allow the Minister or the EA Board to delegate specific aspects of a decision to a Director in the Ministry, and provide for appeals from a Director's decision, EAAC recommended the proposal be accepted with the following amendments: that such delegation power not be available to the Minister if a hearing is going to be held; that if the EA Board delegates to a Director, any party may appeal the Director's decision and the appeal is only to the EA Board; and if the Minister delegates to a Director, any party may appeal the Director's decision and the Minister decides whether the appeal is to the EA Board or the Environmental Appeal Board.

The EAPIP proposal that would, in order to clarify a previous decision, allow the Minister to amend a decision or the EA Board to rehear a specific matter, was accepted by EAAC provided that the clarifying amendment does not materially

change the undertaking as approved; the Minister or the EA Board can only clarify their own decisions; the EA Board has the choice of clarifying a decision without a hearing; and although any party may request a clarification, only the Minister and the EA Board would determine the need for making a clarification.

(ii) The Second Report

In its second report, EAAC outlined additional concerns raised by some commentators about issues not directly related to the Phase I proposals or of an administrative nature. As a result of these comments, EAAC made some additional recommendations but restricted them to those that fell within the original Phase I mandate of non-controversial and relatively straightforward changes. As well, the Committee pointed out those matters that commentators raised in Phase I that should be addressed in Phase II.

The Committee felt that commentators had raised important issues that could be addressed immediately. They felt that the government has sufficient flexibility to immediately improve certain aspects of the EA Program administration including ensuring that the EA Branch take more initiative during pre-submission consultation; that EA Branch staff expertise and experience be recognized as important and useful to proponents and the public; that the government review be given an enforced time limit of 90 days with provisions for reasonable extensions where justified. In addition, regarding decisions on exemption requests, the Ministry and proponents should

more closely follow the Ministry's published exemption criteria and, in the short term, EAAC suggested that these criteria could be adapted for making decisions on designations. Finally, EAAC underlined the comments of many commentators that a greater commitment of government resources is essential to an improved EA program.

III. SUGGESTIONS FOR REFORM OF EA IN ONTARIO

The EA Task Force has presented the Public Advisory Group with a preliminary framework of its proposals for reform. I will discuss their proposals and as well make suggestions for reform at the same time. First, however, I believe that there are two general principles that should guide proposals for reform of EA. The first is the affirmation of a commitment to enlightened environmental assessment in Ontario with all that entails: a broad definition of the environment; the consideration of alternatives; and a public process. The second is the desire to improve the efficiency and effectiveness of the EA process in Ontario to enable its broadened application to policies and programs and the private sector.

A. EA Task Force Proposals

The Task Force introduced its proposals by stating the concerns that it felt it should address in reforming the EA process: issues of cost, timing, complexity, use of EA in

the context of other planning tools and exemptions or designations, and public involvement. The approach they intend to recommend is one that would eliminate the layering of review and approvals that currently exists, would increase consultation, would define accountability and would provide for streamlining. The Task Force has had and continues to have discussions with the Minister's office, Deputy Ministers in MOE and other Ministries, the Public Advisory Group, the Inter-ministry Liaison Committee, the EA Board, EAAC, the EA Branch, government reviewers, government proponents, the Urban Development Institute and others. These proposals are therefore preliminary, and subject to change and represent only interim views of the Task Force. Sixteen assumptions have been finalized that will guide the development of the government Discussion Paper. These assumptions are reproduced in Appendix D.

The Task Force plans to address critical issues surrounding the context or place of the EA Program within MOE. Four areas are identified: (1) recognition of the EA Program to ensure its equal standing with other MOE programs and to establish program obligations; (2) understanding of the EA Program by the rest of the MOE and by other Ministries; (3) recognition of the need for greater resources and training for MOE and other Ministry staff to participate in and administer the EA program; and (4) improved management of the EA Program to address the historical shifting directions of the program, the need for firm direction, responsibility and accountability and a program or policy unit within the MOE.

We agree that this contextual view of the EA Program within the Ministry and the rest of the Government is critical. It may be limited, however, by the first assumption of the Task Force's mandate that the review of the EA Act is independent of the review of the Planning Act. In our view, the Planning Act must be reviewed and revised to ensure that the land use planning and approvals process results in environmentally sound decisions. We submit that there should be a clear linkage between this initiative and the review of the EA Act.

(i) Streamlining of Process

The Task Force has developed a structure for the EA Act approvals process that is similar to the proponent-driven option developed in the Review and Approvals Working Paper. It is a simplified version of the current process which takes out much of the layered decision-making such as the Minister's power to order more research on an EA. Rather, the process is intended to be one pathway from identification of the undertaking through to the decision on a hearing or approval/refusal with or without conditions. Key differences in the process are that the proponent triggers critical stages such as identifying the undertaking, giving notice to the public and MOE, submitting the EA to the Minister and notifying the public of the EA submission, etc. As well, it is suggested that the public and government review begin simultaneously and be bounded by time limits. A very contentious proposal which we would support is that the EA must be accepted before a hearing

commences and the Director of the EA Branch would have the power to make a decision on acceptance or refusal, with reasons, of the EA. The Director's decision could be appealed to the EA Board only on the reasons for refusal. We would suggest that the Director's decision on acceptance should also be appealable to the Board. This final proposal for expanding the Director's role envisions a much more influential role for the EA Branch and the MOE than currently exists which many government departments may find very hard to accept.

The Task Force's streamlined process is founded upon assumptions of improvements in front-end planning and consultation. The Task Force envisions two mandatory steps to be taken by the proponent and an additional step that may be mandatory or optional. The first step would be the requirements surrounding the published notice. The proponent would be expected to publish the notice of an undertaking (previously identified by the proponent) to the general study area, municipal clerk(s), the MOE and other appropriate agencies. The content of the notice would include an outline of the undertaking, the proposed study area, the public consultation plan (PCP) to be filed, the study terms of reference to be filed, the proponent contact person, and the date of the initial public information session. The information session would be the second requirement and would have to provide the definition of the undertaking, the analysis of "alternatives to", the proposed study area, the proposed PCP, and the proposed terms of reference.

(ii) Early Consultation and the Issue of Funding

Three options for the next step are considered and the Task Force has suggested that they could be mandatory or occur optionally as set out in the PCP. The options are: (1) the proponent would hold an issue identification session and prepare a summary position document for which public notice would be given; (2) the proponent would hold a session for review and response to "alternative methods" for which public notice would be given; and (3) the proponent would hold a session for review and response to the "preferred alternative" for which public notice would also be given. In keeping with the desire to ensure early consultation in the process, it would seem that the first option would be most desirable.

We would support the notion of spelling out clear responsibility for early consultation and planning. However, the Task Force is so far very vague on the issue of how the public will be able to participate meaningfully in this early process without assurances of funding for intervenors or "participants" (since a hearing may not necessarily occur). At this point, the Task Force does not appear willing to recommend any formalized process for the funding of public participants in this early process but rather is deferring to the fact that when the Intervenor Funding Project Act expires in April of 1992, the government will decide on early funding of intervenors when it decides on the fate of that program.

The Task Force recognizes the dilemma posed by a proposal that encourages early

consultation to avoid costly hearings later, but provides no assurance of the means to ensure this public participation. The Task Force appears, at this point, to support the view presented by some members of the PAG, that it is sufficient to simply encourage proponents, including private sector proponents, to voluntarily fund public participation, using an intermediary to administer the funds, by pointing out the benefits of resolving issues early in the process with the involvement of an active and informed public. In practice, this is unlikely to occur and we do not believe that this solution is credible. In our view, if this early process is really intended to accomplish what it is proposing, the funding of public participation/intervention must be guaranteed throughout the process.

(iii) Class EAs

As in Phase I, the approach of the Task Force to the issue of Class EAs is the most contentious. The approach proposed is to amend the EA Act to allow for Class EAs, though the definition and scope of Class EAs is not spelled out. It is suggested that requirements would be put in place for submission of annual reports from proponents to include listings of projects "screened out", unanticipated occurrences, and the status of approved projects. The five year review of Class EAs would be retained. Provisions would be made for the transferability of parts of a Class EA for similar classes of projects. For example, the Task Force envisions a Class EA for a "linear facility" which could include such "similar" projects as a subway line, a hydro corridor or a gas pipeline. This proposal is highly problematic. We consider that the

definition of a class must be based on similarity of environmental impacts between members of the class, and similarities in the projects. It is inconceivable to us that the environmental impacts of a gas pipeline across a northern Ontario landscape could be comparable to those of subway construction in an urban area.

This critical issue of what constitutes a class must be addressed. When asked for its definition of a class, the Task Force responded that "we have gone beyond" the traditional definition of a class as including only similar projects of limited environmental impact. It seems clear that the Task Force is, at least at this point in time, envisioning a broad ambit for class EAs.

Examples noted by the Task force as not fitting the traditional definition of a class, were the Class EAs on Parks and Timber Management both of which are not yet approved. However, from the perspective of the intervenors participating in the Timber Management Class EA hearing, the definition of timber management as a class has always been unacceptable given the variety of projects, the scale of land on which they occur, and the diverse environmental effects.

Interestingly, the proponent, the Ministry of Natural Resources (MNR) recently took the position that approval should be given to the four activities of access, harvest, renewal and maintenance and not the planning process for those activities administered by MNR. However, on January 17, 1990, the EA Board decided that

the undertaking for which the MNR can gain approval is not the individual activities of timber management but rather the planning process administered by the government for timber management. The Board noted:

> "It was and continues to be the Board's view that the undertaking before the Board comprising the subject Class EA should properly be described in terms of a proposal, plan or program (i.e. a timber management planning process) in respect of the activities of harvest, access, renewal and maintenance. Furthermore, the Board advised Counsel for the proponent that, in its view, the description or definition of the undertaking as a timber management planning process in respect of the four named activities was the only one which could support the concept of a class environmental assessment."[11]

The Board clearly recognized that diverse on-ground activities are not the proper subject of a Class EA and that the planning process is the only one where the degree of commonality would support the concept of a Class EA.

We consider that the Task Force is making some false and dangerous assumptions about current Class EAs. To suggest that we move to an even broader definition of a "generic" Class EA to encompass diverse projects with even more diverse environmental impacts would make meaningful environmental assessment impossible. Approval of a conceptual evaluation of impacts without assessment of on-ground effects of individual projects defeats the purpose of the Act.

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[11] Re Proposed Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario (Registrar's File No. 87-02) Ruling and Reasons for Decision on Licensing Matters and the Definition of the Proponent's Undertaking dated January 17, 1990.

Reform of the Class EA approach requires clarifying the definition of what constitutes a class, the definition of environmental significance and what role the Class EA approach will assume in the overall program particularly with respect to private sector application and EA of policy and programs.

The definition of a class should, in our view, be that proposed by the EA Board in its Phase I submission: "projects which occur routinely and are considered limited in scale and environmental impacts". Following from this definition of a class, we would consider Class EAs of an entire sector to be an abuse of the Act and that the link to scale in the definition requires a definition of environmental significance. We suggest that consideration be given to size, cost (as a surrogate for measuring size or impacts), geographic scale, ecosystem limits and the establishment of thresholds. The concept of thresholds to define the environmental significance of a project should be accompanied by the ability to designate below that threshold in appropriate circumstances. We maintain that unless class EAs are limited to these types of projects, we will be seriously undermining the Act and the need for individual assessment of projects that have a significant environmental impact.

As well, the EA Board recommended that the public have a right to a bump-up, that there be an "articulation and publication of standardized criteria and procedures for requests and decisions on bump-up requests" and that decisions on requests for bump-ups be made by an independent tribunal. This right to a bump-up and the

need for criteria is essential in order to ensure that the individual projects within a class can be assessed. To date there have been 40 bump-up requests and only one request granted since 1983.[12] Many have languished for months on the Minister's desk without a response. There is a real opportunity for abuse if the definition of a class is expanded to include projects of any scale such as would be the case in Class EAs for entire sectors. Unless there is an absolute right of bump up, these individual projects would be unlikely to get assessed due to the exercise of ministerial discretion.

The Task Force makes a number of recommendations for improving procedural elements of the Class EA approach. For example, suggestions are made for standardizing the public consultation process for Class EAs to provide for mandatory public notice at the time of consideration of "alternatives to" and submission of the Environmental Study Report. Further consultation would be made contingent upon the response to the notice of "alternatives to". Suggestions are also made for the development of a model Class EA document to ensure consistency in terminology, content and standardization of information requirements. This Model Class EA process would, as well, ensure consistency in notice provisions, timing, screening criteria, public consultation provisions, the review period, and public access to the

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[12] Aurilio, Luigi M. (EAPIP) Working Paper #3 "Class Environmental Assessments, Bump-Ups, Exemptions, Designations", November 1989, p.12.

document. Finally, suggestions are made for developing procedures for the evaluation of bump-up and bump-down requests. While these suggestions for consistency are helpful, they must be done in the context of a definition of Class EAs that are restricted to those undertakings that are routine, and limited in scale and environmental impacts.

(iv) Application of the Act to the Private Sector

We concur with the EA Board in its preliminary comments to EAPIP that the private sector should be designated under the Act in a sectoral, staged approach.[13]

The list of sectors should be developed on the basis of anticipated impacts on the environment. The type of analysis that went into the development of the MISA sectors should be examined. Some sectors will be easy to define such as pulp and paper, mining, iron and steel, and aggregate extraction. Others will be more difficult. For example, designation of the energy sector could conceivably include petroleum refining which involves the production of fuels but also petrochemicals. Other examples of overlap between sectors are conceivable and these more difficult sectoral distinctions should be clarified in a public manner. The use of a staged implementation can proceed with the clearly defined sectors being the first to come

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[13] Environmental Assessment Board Preliminary Comments Addressed to the Environmental Assessment Program Improvement Project, (Toronto: March 1989).

under the ambit of the Act.

The application of the EA Act to the private sector should not be different from application to the public sector; the same rigour, comprehensiveness and openness should apply. However, regarding the problems faced by private sector proponents in being able to consider alternatives (lack of expropriation powers and corporate confidentiality issues), we suggest examination of a model similar to that being developed in California where the government funds that portion of the EA that considers alternatives. However, there would have to be safeguards put in place to ensure that the proponent continues to do a thorough examination of alternatives within his own ambit of control. This area will require further research and consultation over the next few months as the government Discussion Document is developed and reviewed.

We again state that the Class EA approach is not appropriate to those private sector activities with significant environmental impacts, nor is a class approach likely to be applicable to many private sectors at all. In regard to public sector activities, the government proponent prepares a class EA, outlining a planning process that will be applicable to the class of activities that will occur in the future - municipal road widenings is a good example of a class EA. The question of who would be the proponent in a class EA of private sector activities has not been examined by the Task Force in any detail yet. However, it is fundamental to the process. As

currently envisioned by the Task Force, sectoral Class EAs would have the effect of providing approval in advance to an infinite number of unnamed proponents to carry out an infinite number of widely diverse projects. If the public sector were to prepare a "sectoral" Class EA that would apply to private sector activities, the "proponent" would be seeking approval for undertakings it does not carry out. The integrity of the EA process, is undermined unless assurances remain for rigorous EAs on individual projects. The Class EA process as it currently exists or as the Task Force proposals contemplate, does not provide such assurances.

(v) Policy EAs

CELA envisions three levels in a reformed EA program: policy EAs; Class EAs (with the limited definition as discussed above); and individual EAs. The Task Force has not addressed the concept of policy EAs. We contend that at the policy level, there is a need for environmental analysis, not necessarily using the EA program as it currently exists or as it will be reformed, but nevertheless a thorough review of all new government policies and programs (including revisions to existing policies). The process requires public input throughout and public review of the final product. In fact, the analysis would be guided by the same principles of sound EA (i.e. consideration and evaluation of alternatives and their environmental impacts; public process; and broad definition of the environment) but might require a different structure than currently exists for evaluating EAs. An environmental assessment of policy will require clarification of what constitutes "policy"; what levels of policy exist in

different Ministries and at the Cabinet level and how far down the policy ladder the evaluation should go. We consider the recently announced review of Ontario Hydro's Demand/Supply Proposal to be an example of a policy EA. However, policy EAs can not be a substitute for individual EAs on specific undertakings. Class EAs of recurring, similar, low impact projects would then have a clearly defined role to play in this broader context. The designation of private sector activities would fit into this scheme without raising the spectre of enormous sectoral Class EAs for which it is not clear who the proponent would be or how the public interest could be protected.

IV. CONCLUSIONS

The Environmental Assessment Act is an important piece of preventative legislation which ensures that the anticipated environmental impacts of an undertaking are assessed before it is approved. The Brundtland Commission and National Task Force on Environment and Economy recognized the importance of environmental assessment legislation as being part of a strategy for sustainable development as it is a proactive rather than a reactive approach to environmental protection.

However, while the principles are sound, the present Act and its implementation have been the subject of criticism from many quarters. The Ministry of Environment has during the past 1-1/2 years through EAPIP started a review of the Act. This paper

has attempted to trace the chronology of the review, through Phase I, public input and EAAC report and the approach currently underway under the direction of the newly formed Task Force. The issues are complex, and we have identified those areas that we see as being problematic. We must ensure that the fundamentals of the Act as currently written are not abrogated by the class EA approach. Now, more than ever, there is a need for strengthening our environmental planning legislation to deal with policies, and individual undertakings to ensure that we anticipate and mitigate environmental impacts, rather than be faced with having to take remedial steps after the damage is done.

APPENDIX A

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APPENDIX B

List of EAPIP Phase II Working Papers and Authors

1. Concept of EA and EA Program Structure by David Smith, January 1990

2. Review and Approval of Environmental Assessments by EAPIP, January 1990

3. Class Environmental Assessments, Bump-ups, Exemptions, Designations by Luigi Aurilio, November 1989

4. Environmental Assessment Monitoring by C. Bancroft-Wilson and Alan Buck, December 1989

5. The Application of EA by Michael Jerrett and Walter Smithies, January 1990

6. Public Consultation by B.L. Fenoulhet, December, 1989

Requests for copies of these working papers should be forwarded to:

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APPENDIX C

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1. Ministry of Government Services - Director, Land Development Branch
2. County of Kent, County Engineer
3. Township of Colchester South, Council
4. Marie Baker of the School of Rural Planning and Development, University of Guelph
5. Association of Conservation Authorities of Ontario
6. Ontario Forestry Association, Executive Director
7. Lora Carney, Whitevale
8. Harry Poch of Gardiner, Roberts, Barristers & Solicitors, Toronto
9. Energy Probe Reserarch Foundation
10. Albert A. Shpyth, Toronto
11. Essex Region Conservation Authority
12. Ontario Hydro
13. Mark L. Dorfman, Planner Inc., Waterloo
14. Muskoka Bay Association
15. Ontario Native Affairs Directorate
16. Ontario Federation of Agriculture
17. Protect Our Water and Environmental Resources (POWER). Acton
18. Noranda Inc.
19. Corridor Area Ratepayers' Association, Whitby
20. Township of Peel
21. Lower Trent Region Conservation Authority

...2 cont'd List of Submitters to EAAC

22. Gore & Storrie Limited, Derek Coleman, Manager, Cambridge
23. Canadian Environmental Law Association
24. Helen MacDonald, Newtonville
25. Citizens' Coalition for Clean Water, Wallaceburg
26. Union of Ontario Indians
27. City of Etobicoke, Council
28. Bruce Schroeder, Goodwood
29. Transport Canada, Regional Director General, Airports Authority Group
30. Hamilton Region Conservation Authority
31. Ontario Soil and Crop Improvement Association
32. Ontario Environmental Assessment Board
33. Edward Hanna, VHB Research and Consulting Inc., Toronto
34. Glen Bell and Roger Cotton of Stitt, Baker & McKenzie, Barristers & Solicitors, Toronto
35. Joan Freeman, DPA Management Consulting, Ottawa
36. Citizens' Network on Waste Management
37. City of Toronto Department of Public Health
38. Regional Municipality of Niagara, Council
39. GO Transit
40. Regional Municipality of Halton, Environmental Approvals Co-ordinator
41. Prospectors and Developers Association of Canada
42. Clean Water Alliance, Windsor
43. Ontario Mining Association

...3 cont'd List of Submitters to EAAC

44. Ruth Grier, MPP, Etobicoke-Lakeshore
45. Association of Municipalities of Ontario
46. David McCallum, President, M + A Environmental Consultants Inc., Hamilton
47. The Federation of Ontario Cottagers' Associations Incorporated
48. City of Nanticoke, City Engineer
49. Canadian Bar Association - Ontario, Environmental Law Section
50. Toronto Transit Commission
51. Town of Flamborough, Council
52. Ontario Society for Environmental Management (OSEM), Paul Rennick
53. Minister of Transportation, The Honourable William Wrye
54. Municipality of Metropolitan Toronto, Council
55. Lynn MacMillan, Maple
56. Environment North
57. Ed Crosby, Reclamation Systems Inc.

APPENDIX D

EA Task Force Assumptions

1. *The EA Task Force mandate for review of the EAA is independent of the review of the Planning Act.*

2. *No departure from the basic principles of the* present Ontario EA model.

3. EAA requires a comprehensive review of all aspects of environment defined in S.1(c). A mechanism must be found to assure that only necessary aspects of the environment need to be addressed.

4. Public consultation will be *clarified,* strengthened *and specific minimum requirements defined.*

5. Definition of Environment and S.5(3) are not to be altered.

6. EA Board's powers *to be retained.*

7. Role of EA Coordinator to be *expanded,* formalized and strengthened *with responsibilities* and accountability defined.

8. Public consultation *during development of the Discussion Paper* will try to develop consensus but *the Task Force will have* to make *specific recommendations.*

9. Will *recognize* Class EAs and *develop* other scoping approaches.

10. Six Working Papers and summary to be used *primarily* as technical resource documents. Available to public on request.

11. Dispute resolution mechanisms *not to be formally recognized* in the EAA.

12. Discussion Paper to set out intent of government.

13. Monitoring/compliance/enforcement to be strengthened.

14. *Successful* implementation *of recommendations* may have *significant* government resource implications e.g., scoping, role of review Coordinator, monitoring/compliance/enforcement.

15. The EAA *provides for consideration of the* public interest along with environmental planning.

16. *EAAC continues to serve as an advisory committee to the Minister.*