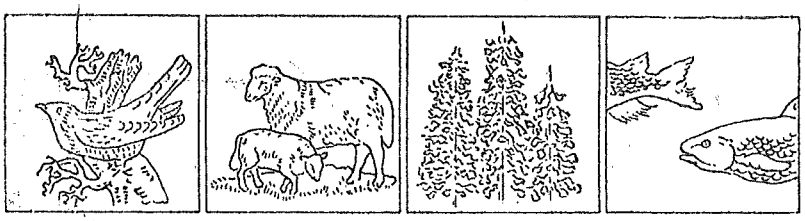

THE CONSERVATION COUNCIL OF ONTARIO Suite 604, 11 Adelaide St. West, Toronto 1, Ontario, Telephone 366-1387

A SEMINAR ON THE GREEN PAPER ON ENVIRONMENTAL IMPACT ASSESSMENT

HELD ON OCTOBER 24, 1973

SPONSORED BY THE CONSERVATION COUNCIL OF ONTARIO

The Conservation Council of Ontario has long understood the need for legislation on environmental impact assessment. This seminar is meant to provide those attending with background information on the Ministry of the Environment's Green Paper, so that they may respond more fully to the Minister of the Environment's invitation to comment.

Resume Of The Green Paper:

J.W. Gilbert
Director, Strategic Planning Branch,
Ministry of the Environment

Mr. Gilbert pointed out that the Green Paper was "a statement of a recognized need for legislation on the part of the Minister of the Environment". He then proceeded to describe systems of environmental impact assessment considered by the Ministry of the Environment. It was emphasized that all systems involved a degree of public participation in the decision making process. These alternative systems are summarized below:

System "A"

Independent Hearing Agency Established

Preparation Of Assessment By Ministry Of Environment

No Comprehensive Civil Service Review Of Environmental Assessment Document

Hearings Held By Hearing Agency

Decision Made By Hearing Agency, Subject To Appeal To Cabinet

System "B"

Independent Environmental Assessment Commission Established

Preparation Of Assessment Document By The Proponent

Review By Staff Of Environmental Assessment Commission

Public Hearings Held At Discretion Of Commission

Decision Made By Environmental Assessment Commission No Appeals.

System"C"

Assessment Document Prepared By Project Proponent

Review Co-Ordinated By Ministry Of The Environment

Hearings Held By Environmental Review Board At Discretion Of Minister Of The Environment

System "C" cont'd.

Approvals By Minister Of The Environment With Consultation Where Appropriate

Refusals By Cabinet

System "D"

Commissions Of Inquiry Established For Major Projects On AD HOC Basis

Assessment By Consultants Retained By Commission Of Inquiry

No Comprehensive Civil Service Review Of Assessments

Hearings Held By Commission

Decision Made By Cabinet

Mr. Gilbert indicated that the Ministry of the Environment favoured systems "A, C, or D" over "B", as it was felt that an appeal mechanism was necessary.

Response from The Sierra Club of Ontario:

Mr.P.B. Lind
Chairman, Sierra Club of Ontario

Finally, after much delay, the Government, through its Ministry of the Environment, has revealed its thinking on the subject of environmental impact legislation. The Government's real opinion is, however, anyone's guess because the Green Paper contains at least four ways to go at the problem.

The Minister says that he wants to solicit public opinion on this, and for this he is to be commended. We can expect, I'm certain, that the public's views will be carefully considered. Still, before commenting on the paper directly, let me share a suspicion with you. It is simply that the Ministry of the Environment wants as much of the action for itself as is possible. The Sierra Club is concerned by the apparent bias that seems to prevade the Green Paper. Alternatives suggesting that any decision making power be vested elsewhere than the Ministry are given considerably more critical comment than those alternatives suggesting a major role for the Ministry. Certainly, some lip service is given to the notion of independent decision making, but these are always dealt with in a devastating manner. Maybe this is not surprising; one could hardly expect a Ministry to preside over its partial self destruction. My own feeling is that the Ministry would see itself setting the environmental impact statement criteria, having the developer - proponent undertake the statement,

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then the Ministry would assess the document and perhaps have the decision made by a slightly stengthened Environmental Hearing Board (this Board being still under the direction of the Ministry). This would leave the Minister almost completely in control of the decision making process. You will appreciate that if this is what is to happen, it will mean virtually no change in what is in effect today, and let me assure you that many of us do not consider that things are in good shape now. If the Government approved a course that is predicted, the Government will not have our support. A slight alteration of the status quo is just not good enough from a Government that professes to have environmental concerns.

Let us now briefly examine the Green Paper and its alternatives. In our view, this is an excellent document - well written and well thought out. It gives this province an ideal opportunity to set up environmental impact procedures unique in Canada. The language in the Paper gives the reader the impression that the planners have carefully reviewed all existing attempts at legislation of this type. The Paper makes several important points that we endorse. First, we agree with the intent of the review process. Second, we agree that the public should have adequate access both to the information and to the decision makers. Third, we agree that, except in special circumstances (for example on James Bay Project), we would like the entire review process to proceed as expeditiously as possible. We think it significant to note that the Ministry considers that expenditures of between 4 - 7% of the total funds devoted to the study of the project, in the case of large projects, be dedicated to environmental assessment. We further agree as to the 4 basic elements that an impact assessment document should contain. Our one concern in the preamble of the document relates to phasing. The Sierra Club strongly opposes the proposal that would see only government ministries and agencies be initially subjected to these environmental review procedures. Although we quite agree that Ministries (yes, even the Ministry of the Environment) and government agencies (such as Ontario Hydro) can often be the worst environmental offenders, we still think that the proposed procedures should have as wide an application as possible. We would suggest that these procedures apply province-wide, as soon as possible. If it is not possible to institute those directly, then on private development, the supervising Ministries should impose their own impact assessment procedures, keeping the entire process as visible as possible. If this is done, then the phasing in process will proceed quickly.

We have three other immediate concerns. One relates to the possible overlap of this document with the Planning Act in Ontario. We suggest that the new legislation have precedence over the Planning Act. Second, we agree with a concern expressed by the Environmental Law Association relating to the cost of public groups participating in the hearings and in undertaking the vital evaluatory studies prior to appearance. We feel strongly that some public money should be available to fund serious efforts leading to more complete examination of the documents within the hearing process. Finally, we wish to express our concerns about "frivolous actions". Although it's difficult to determine when an action lies in that category, we wish to state our belief that these should be avoided.

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This is consistent with our earlier position that the entire screening policy should proceed as expeditiously as possible.

Now let me deal with our selection of the Available Options. The Sierra Club is strongly in favour of System B, although we do propose a few changes.

We favour creation of an Independent Environmental Assessment Commission. The Commission should be independent in fact as well as title. Members should be appointed by the Government directly and a budget should be allocated. The Commission should have a strong policy directive from the Government, and after the Commission was set up, both the Government and the Provincial Secretary for Resource Development should have the opportunity to indicate general government policy, so long as this is done by means of an entirely public process.

The preparation of the assessment document should be undertaken by the proponent. Although we agree that there are some obvious drawbacks, we cannot see the usefulness in any other group doing the statement.

The review of the document must be done by the Commission. However, we suggest that the Commission staff should not do this in isolation. We agree that there is a body of considerable expertise within the Ministry of the Environment. As such, we propose that every document received (except those directly sent from the Ministry of the Environment) should be dispatched to the Ministry and other ministries for their comments. The Sierra Club agrees that it would not be practical to have both the Commission and the Ministry of the Environment have large technical staffs. We envisage that the Commission should have a small but entirely expert staff. This staff would evaluate the document in terms of the comments submitted by the Ministry of the Environment and other affected ministries as well as those opinions by public interest groups. If the Commission felt that these comments were not useful enough, it would have the option of doing a thorough "in house" evaluation or even getting a contracted independent opinion.

Public hearings should be held at the discretion of the Commission. In the case of a major project, this might involve some or all members of the Commission. In cases of lesser importance, staff members would be eligible to conduct the hearings.

Decisions on whether or not the project can proceed or that the project can proceed with suggested changes must be made by the Independent Commission. We do not see the value of the political log-rolling and back-scratching process in this, the most important stage. We do, however, consider it important that the elected officials have a right to overrule the Commission. An overruling in this fashion would be done in public and would be accompanied by obvious political risks. As we have indicated earlier, we do see a real value to publicly expressed political opinion, both at the stage of policy announcements and in the option for overrule. What concerns us is the current secretive process, where a Minister can be instructed both within his Resource Field Group

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and also within Cabinet - all this being done in total secret.

We do not propose to comment much on the rather unfair attack given this Option "B" in the Green Paper. Many of the points in opposition have all the appearances of the authors pulling out all the stops to find objections to it.

We feel that the Government has a very real opportunity to come up with landmark legislation. We can only hope that it chooses wisely and those of us here can work to make sure that our views are heard.

Response from the Canadian Environmental Law Research Foundation:

Mr. Joe Castrilli

To listen to governmental pronouncements about the need for public involvement in the environmental impact assessment process, one would think that the government was putting itself on the very cutting edge of social change.

There are a number of lofty governmental sentiments and statements to choose from in this regard:

Minister Auld (Sept. 27, 1973) stated, for example, "We want the people of Ontario involved in environmental assessment from its very beginnings", and "Citizens are entitled to participate in decisions to ensure that the effects of development are beneficial."

The Green Paper itself states, "Direct public involvement should be a basic feature of whatever environmental assessment system is developed."

On their surface, such remarks are encouraging, almost euphoric. However, what the government gives with its left hand it may still be retrieving with its right. For example, the Green Paper also states, "The public should not demand the right to be meaningfully involved without accepting the obligation to participate in a responsible way. Decision-makers may wish to screen the inputs received from the public involvement process."

Frankly, I'm not quite sure why that statement was included in the Green Paper. It's ominously patronizing remark that trails off into obscurity, leaving practically the entire question of public involvement -- and the government's conception of it -- in a big question mark.

Therefore, because the issue of public involvement in this process is of vital concern (it is after all the public's air, land and water) I should like to test a few propositions in the Green Paper to see exactly what the government is -- at least -- hinting at when one juxtaposes public involvement with some of the institutional mechanisms that the government is apparently intent on or is leaning towards adopting.

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Because of time limitations I'll be focusing on two areas (I don't want you to think that I think that there are only two things wrong with the Green Paper; however, I do think these are two of the more important items which need discussion and a thorough airing.)

1) The Green Paper's so-called discretionary screening mechanism for determining which projects need an Environmental Assessment.

2) The Green Paper's conception of who makes the final decision in the process.

After some preliminary discussion of these two items, I'll discuss CELA's summary of recommendations on environmental assessment, and particularly four factors that, in CELA's estimation, inevitably effect the quality of public involvement in environmental assessment.

a) costs in preparation for hearings
b) access to information in preparation for hearings
c) standing (i.e., who can sue or, in the environmental assessment context, who can object)

A number of these factors will, of course, be alluded to at the outset in conjunction with the above two main issues.

1) At page 10 of the Green Paper, a discussion begins on the "discretionary screening mechanism". The Green Paper suggests that between the obvious extremes of projects that would certainly need an environmental assessment and those that certainly would not, there is "a large gray area comprised of projects which have significant impact in some circumstances and not in others".

Now in this "large gray area", the power to decide whether a proposed project needs an environmental assessment is apparently going to remain with a regulatory body or agency. In many instances, regulations will automatically excempt a project from environmental assessment requirements; in other circumstances the regulatory body or agency will examine the project itself before making the determination of the necessity of an environmental assessment.

In no instance from pages 10-12 (i.e., the pages that encompass the discussion of the screening mechanism) is there so much as an allusion to public involvement in this process.

That is to say, in this very fundamental area of which projects will require an environmental assessment before go-ahead, no discussion is made of the possibilities of the public constructively intervening in the matter when a regulatory decision not to make an environmental assessment is made.

(At page 32, the Green Paper says that the Hearing Board could delegate its power to decide whether an environmental assessment is necessary. If that is so, then public involvement is needed.)

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I don't have to tell this group how unavailable and inaccessible regulatory bodies are to public overview. Regulations and administrative procedures are the government talking itself. They are antithetical to public involvement.

Now, while regulations are probably necessary in many instances, two things should be said in this regard.

At its 1971 annual meeting in Banff, the Canadian Bar Association passed a resolution recommending public participation in pollution control. Part of the resolution deals with the determination of regulations:

> Provision should be made in provincial legislation for effective participation by individuals and groups through public hearings or other appropriate means in proceedings of environmental protection agencies relating to establishment of environmental quality standards and terms once established.

The Canadian Bar Association is essentially talking about what criteria should be used in the establishment of regulations. Ideally, this same type of public hearing process should also be available for determination of classifications of projects for environmental assessment requirements.

Failing this, or perhaps as a supplement to it, it should open to any person (defined as individuals, organizations, corporations or governmental units) to require the Environmental Review Board (which I'll discuss in more detail in a moment) to consider whether a proposed project needs an environmental assessment (regardless of whether it is exempted by the screening mechanism).

The problem with a conception of projects as falling into this "gray area" is that governmental and private undertakings might be so fragmented that each, taken separately, would not be considered significant. However, the cumulative effect of projects in the so-called "gray area", I think you'll agree, is by no means insignificant.

The Green Paper notes the problem of cumulative effect (page 4) and yet, beginning at page 10, it insists on a discretionary screening mechanism without a meaningful procedure for appeal by the public. Such an attitude is bound, in the long run, unless the public can be locked into the process to result in the ignoring of the cumulative effect of many smaller projects.

To paraphrase a quote from Prof. Elder of the Faculty of Law, University of Western Ontario: What is the use of cutting environmental deterioration from large projects by 90% if the exponential growth of smaller ones results in ten times as many sources of degradation.

In summary, the public must have the right to challenge, before the Commission or Board, screening mechanisms designed to exempt projects from environmental assessment.

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The public interest, as some have said, must not be left to hired hands.

I have already referred to the question of who makes the final decision as to (a) the necessity of an environmental assessment and (b) the necessity of the project itself. So at this point I think that a short discussion of the implications of the Green Paper's treatment of this matter in relation to the issue of public involvement is in order.

Let's look for a moment at the "model systems" proposed or suggested by the Green Paper. Where in reality, does the final decision about a project lie?

System A - final decision by Cabinet
System C - final decision by Cabinet
System D - final decision by Cabinet

Oh, yes - System B, an independent review board with no Cabinet appeal somewhat approximates the one supported by CELA, but one should note that, at his press conference last month, Minister Auld virtually rejected this model. The Minister admitted that the concept of an independent committee or board had been included among the options in the Green Paper because it was felt that otherwise, environmentalists would complain (!).

So, in reality, we are left with the other three. Now what do these three models have in common? No public involvement beyond the board stage, which means, in effect, that the public is locked out of the right to affect and be alerted to what's going on at one of the most important stages of the whole process.

Now let me backtrack a bit. The reasoning that pervades much of the Green Paper's treatment of this area, and its apparent rejection of System B (p. 45) is that - "an independent committee or board established outside of existing governmental structures with the power to make a final decision is inconsistent with one of the fundamental principles of the parliamentary system, i.e. accountability of decision-makers to the Legislature."

However, what the Green Paper substitutes for the right of the board to make a decision in a legal context, is the right of the Cabinet to make this decision.

Now I ask you how the Cabinet has the audacity to posit its particular governmental policy as legislative will, or, more importantly, as the final arbitor of law.

Many of you will answer, "Why, of course, the Cabinet, being the embodiment of the majority party in the legislature, is in effect the legislature."

Our response to that, while it is true that the Cabinet is the majority party, it is not the whole legislature. Moreover, in more than one place the Green Paper slips up and says "government policy", not "legislative

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policy", is in danger of being misinterpreted and altered over time by the independent board.

Now I think you'll all agree that in a court of law, as well as in a tribunal, there is only one standard, a legal standard, that is applicable. This country is governed by laws - not by the whim of the particular party that happens to be in power. Events in the U.S. notwithstanding.

The Board, in our estimation, must be the final arbiter on matters of law, subject to judical appeal.

Now, many of you may say, "Well, what about those instances where we have vague and conflicting statutory standards involving substantive legislative policy. Should we still leave the decision up to the board?

We say no. Send the matter to the legislature. If there are conflicting policies here, let the full legislature hammer it out, and hammer it out before an alerted public. Such a method is more in tune with the Green Paper's concern for public involvement than a decision by the Cabinet.

If public involvement really means anything to this government, then the Legislature is the best place for the public to see exactly what environmental trade-offs are being made in its name. Final appeal to the Cabinet locks the public out, and makes the concept of an alerted, active public a sham.

Let us also remember that this will not mean that other legislative work will come to a standstill. We're talking about only a few proposed projects a year going to the Legislature for full discussion. Obviously this is what the Cabinet had in mind too, for otherwise it too would be swamped with environmental impact proposal appeals, to the exclusion of its other governmental duties.

So don't be fooled by the suggestion that what we're proposing is administratively unworkable. The government obviously feels the Cabinet can handle it. We feel that the Legislature can do the job just as competently and legally as the Cabinet. More importantly, it will be done in the public eye.

To conclude, I should like to read to you the main recommendations which CELA makes in its brief to the Ontario Ministry of the Environment, and the conclusion of that brief.

CONCLUSION

The Environmental Impact Assessment Process, viewed from the perspective of those jurisdictions who will follow Ontario's lead, should be seen to be legislation that an enlightened government, attuned to the public interest, would adopt.

The assurance that responsible public participation will not only be

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tolerated, but encouraged, and regarded as a right and not merely a dispensation of government, would be the most positive expression of an enlightened approach. If a government is serious in encouraging such an approach, then it cannot fail to make public involvement a central feature in the decision-making process.

Moreover, the government should not fail to ensure that the public will be continuously informed of those factors which it finds to be influenced its preferences as to the nature of the forthcoming legislation.

Proposed legislation should not be a public surprise.

In keeping with this spirit, the government should publish a list of those individuals, groups, corporations, industries, agencies and ministries which make submissions in response to the Green Paper.

It might also be appropriate for the government to prepare a graph showing the number of times a particular point is reiterated, and from which category of responder the point originated.

The government might even provide a public forum to facilitate a better understanding and clarification of issues and suggestions, problems and remedies.

In any event, public input and other suggestions made in this paper can, we hope, contribute to a final end to the vulgarization of the environment.

Response from the National and Provincial Parks Association of Canada:

read by C.E. Goodwin
Conservation Council of Ontario

The proposal for legislation on Environmental Assessment procedures is one the Association wholeheartedly supports. The Association particularly welcomes the statement that: "It is the intention of the government to encourage the further development within its planning process, of an environmental conscience." (Green Paper, p. 1)

We are concerned, however, that the widespread promotion of an environmental conscience is not taken into account sufficiently well in the discussion in the Green Paper of various Environmental Assessment procedures. Throughout the Green Paper there runs the notion that a single agency, in association with hearing tribunals or independent commissions and the cabinet should oversee the activities of other agencies and the projects within their area of responsibility. In our opinion this approach is not likely to work as well as one tied to the notion of developing an environmental conscience in government and society.

In a system marked by an environmental conscience the various agencies

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seemingly would have a high level of responsibility for preparing, evaluating, and making judgements on the projects falling within their jurisdiction. Agencies might secure assistance at any stage from the Department of Environment or other sources of special expertise. Environmental Impact Assessments would be circulated for comments to the other government agencies and to interested public groups as well as being presented at public hearings.

One reason for leaning toward centralizing Environmental Impact Assessment appears to be duplication of personnel and facilities among government agencies. Yet, if the various agencies are to handle the assessment of major projects under their jurisdiction well there is little doubt that they will often have to develop reasonably independent and strong Environmental Assessment units. This does not mean that certain specialties or areas of expertise might not be concentrated in the Department of Environment and used by other agencies, especially on an interim basis. Nor does it mean that a hearing tribunal might not be more closely linked with the Environment than the other agencies. Environment ultimately could serve them all and the public -- although it should be noted that the hearing agency might achieve greatest independence and best meet its responsibilities by being attached to the Premier's office.

Furthermore, in the context of the previous discussion, what is to be the Environmental Assessment procedure for projects that might be undertaken under the auspices of regional governments or municipalities? Are the Environmental Impact Assessments of such projects to be prepared, evaluated, and judged through overriding government agency or agencies? Surely the ultimate success of Environmental Assessment procedures rests on the development of an environmental conscience, the hiring of qualified personnel and the creation of appropriate units and procedures at all levels of government.

The National and Provincial Parks Association would like to make the following additional points regarding the Green Paper:

1) Public hearings and public participation should be mandatory for all major projects. If any material is judged sensitive by an agency or government then it is up to them to convince society that certain information must be withheld in evaluating and judging the environmental impact of a project or projects.

2) No major government activity or project should be exempted from Environmental Assessment procedures.

3) Citizens should have access to all relevant reports and documents, other than those for which special exemption might be made as set out in point 1) above.

4) The Environmental Assessment legislation should contain clauses

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giving citizens legal basis for securing information or justice by appeal to courts or a comparable judical body.

5) The public should have access to environmental experts and high quality advice in dealing with Environmental Assessment of major projects. In the United States it has recently become possible for citizens to secure financial support from government in order to deal with the often profound and complicated issues involved in Environmental Impact Assessment.

6) Both the social and the physical effects of a major project should be very carefully considered. The Green Paper says little about study of the social effects. Moreover, the Department of Environment is not nearly as strong in this area as in the physical.

7) The composition of the hearing tribunal or agency should be as varied as possible and should include people representing many diverse interests and walks of life. Some of these people might be full-time employees serving at the pleasure of the government. Others might be appointed for terms on a part-time basis. Rough precedents in Alberta (Environmental Conservation Authority) and New Zealand deserve study.

8) To enable the public to know about major projects and that public hearings are to be held, notice of such hearings in the Ontario Gazette with a reasonable deadline for submissions be made mandatory. Hearings should be scheduled in Toronto as well as areas where such developments are to take place.