

SUBMISSIONS OF THE
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
to the
PUBLIC HEARINGS ON
REPORT ON ENVIRONMENTAL IMPLICATIONS
FISHER HARBOUR DEVELOPMENT

Sudbury, Ontario

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Environmental
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Association
L'Association
canadienne
du droit
de l'environnement

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SUMMARY OF MAIN POINTS AND RECOMMENDATIONS

- * The Fisher Harbour Development would be incompatible with the dominant land uses and the environmental values of the area and should therefore be rejected.
- * Environmental assessment legislation is needed so that problems encountered in the Fisher Harbour Development proceedings can be avoided in the future.
- * Environmental assessments must contain sufficient information with which to rationally discuss the critical issues of choice surrounding a proposed project.
- * Procedures followed in public hearings should include:
 - * adequate advance notice
 - * special notice to parties known to have an interest in the proposed project
 - * readily accessible documents and other pertinent information, available to the public at the cost of copying only
 - * appropriate scheduling, to ensure the participation of all concerned parties

INTRODUCTION

The Canadian Environmental Law Association (CELA) is a national non-profit organization of citizens, scientists and lawyers, dedicated to enforcement and reform of present environmental laws.

Through our Toronto office, lawyers with the Association provide advice to approximately 150 complainants per year, which in many instances results in positive action by government agencies or in the complainants obtaining further legal advice and assistance through the CELA panel of lawyers. This panel is comprised of lawyers in Ontario who are willing to take cases, without charge if necessary, in environmental situations where legal assistance would otherwise not be forthcoming. In order to more effectively inform the public about both their environmental rights and remedies, and the legal reforms necessary for the establishment of a healthier and safer environment, the Association and the Canadian Environmental Law Research Foundation jointly published Environment On Trial: A Citizen's Guide to Ontario Environmental Law, the first Canadian book outlining these areas in layman's terms.

The Association has also written a draft of proposed amendments (hereinafter referred to as CELA'S model legislation) to the Ontario Environmental Protection Act dealing with environmental assessment, and submitted it to the Ontario Ministry of the Environment in October of 1974. In its model legislation, CELA has tried to give citizens the right to environmentally and socially sound planning on the part of government. Because of the work being done in this critical area by the Association, it has attracted a membership of about 500 from every segment of the public,

including many local, provincial and national organizations.

The Association's active involvement in the area of environmental assessment led naturally to a decision to submit a brief to the Environmental Hearing Board during its review of the environmental feasibility of the Fisher Harbour Development. The Association is especially concerned about this project because it represents one of the few times the provincial government has required a private developer to conduct at his own expense an environmental analysis of a project to be built on privately owned land.*

Although an environmental analysis is a limited concept without the scope and functions of environmental assessment,** the proceedings of this case are likely to set the tone for environmental analysis and/or assessment proceedings in the future. It is therefore essential that one analyze these proceedings and recommend improvements so that future proceedings of this type will be of equal benefit to all parties concerned and will achieve the fullest degree of environmental protection. Discussion of problems noted in this case and our recommendations for improvements follow.

*Exceptions are of course the statutory proceedings under the Planning Act in zoning matters, under the Ontario Water Resources Act in sewage matters, and under the Environmental Protection Act in waste management cases where the applicant must appear before a Board and therefore is likely to do a study sufficient to protect his interest.

** The distinction between environmental analysis (or environmental feasibility) and environmental assessment has been made by the Ontario Ministry of the Environment in its brief submitted to the Environmental Hearing Board in the Fisher Harbour Development public hearings and in its "Green Paper On Environmental Assessment" of September 1973.

ISSUES RELATING TO THE FISHER HARBOUR DEVELOPMENT

The proposed Fisher Harbour Development includes plans for a deepwater port to be installed on Little La Cloche Island, only a few miles from Killarney Provincial Park's eastern border, in the North Georgian Bay Recreational Reserve (NGBRR). The La Cloche landscape has been described as "unquestionably the scenic focal point of the NGBRR"¹, while the site of the Development is "one of the most magnificent regions for yachting and small pleasure craft on the North American continent."² Thus, a major industrial complex which includes plans for a limestone quarry, loading facilities for ocean and Great Lakes freighters carrying iron pellets, coal, containers, pulp, and paper products, is planned for an area of "unique cultural, historical, geological and ecological heritage."³

Those who are in favor of the project cite the commercial need for a deepwater port in the area and the need to boost the local economy.⁴ Those who question whether approval should be given to the project focus on the ecological implications for the area and the incompatibility of a large industrial complex in an area of scenic, recreational, and environmental significance to the entire province.⁵

The fundamental issues arising from the project are whether the need for regional economic development can be reconciled with the need to preserve a significant natural area, and if not, which need should be favored. Also important is the matter of the degree of land use controls needed in an area such as the Recreational Reserve, in view of its dominant land uses and natural values.

Confronting these difficult issues of choice is not within the terms of reference for the public hearings called by the Environmental Hearing Board. They were called for

the purpose of reviewing a report entitled, "Environmental Implications, Fisher Harbour Development." As we will argue in this brief, the environmental feasibility study which is under review at the public hearings was ordered too late in the project's history to address the fundamental issues of choice described above.

Despite the constraints imposed on the report and on the public hearings, the Canadian Environmental Law Association believes that it is essential to address the issues of choice which the Fisher Harbour Development proposal raises. Thus, we have examined the report and the procedures followed in this case in terms of how well they confront the issues of choice and how much information is provided that helps the reader and those responsible make an environmentally sound choice.

LIMITATIONS OF ENVIRONMENTAL FEASIBILITY STUDIES^{*}

1. The environmental feasibility study is a planning and decision-making tool of extremely limited scope and function.
2. The environmental feasibility study prepared for the Fisher Harbour Development project was ordered too late in the project's history to assure meaningful mitigation of environmental effects.

Discussion

Although the Association fully supports the Ontario government's decision to order an environmental feasibility study before approving the water lot lease, we wish to point out that environmental feasibility studies are limited in their scope and functions. The Fisher Harbour Development case demonstrates just how limited the process is. The firm retained to prepare the report and the public reviewing it are confronted with at least a partial fait accompli. By the time the study was ordered in July of 1974, substantial construction had occurred at the site. As

^{*} "Environmental analysis" or "feasibility" studies are used interchangeably by provincial government officials and civil servants and are distinct from environmental assessment procedures, as outlined in the Green Paper on Environmental Assessment, Ontario Ministry of the Environment, September 1973. See footnotes 6 and 7 for other references.

described in the study, the following construction had occurred by May of 1974: a gravel roadway laid, ballast for a rail line was in place, the harbour site was cleared, some excavation work had occurred, and the basic concrete dock facility was installed.⁸ Thus, the landscape of a scenic recreational area has been altered and money invested in a project whose future is indefinite. It may now be too late to mitigate any adverse environmental effects caused by the construction.

A study ordered after construction begins can only deal with matters of detail, such as:

1. The projected environmental effects of the operation of the project
2. Measures which could mitigate adverse environmental effects
3. Monitoring programs which should be implemented during the lifetime of the project

It cannot possibly address the larger question of whether the project should be permitted at all because the project has already taken physical shape and has altered its environment. Thus, substantive questions of policy such as those listed below are left unresolved:

1. Given its planned location in the Recreational Reserve, is this project environmentally and socially compatible with the dominant uses of the area?
2. What will be the environmental effects, both short term and long term, of the project?
3. What will be the environmental, social, and economic costs and benefits of the project?
4. Is the project worth the costs, and if so, in what manner can the costs be reduced, particularly in terms of reducing adverse environmental effects?
5. What is the need (economic, commercial, etc.) for this project, and does that need outweigh the province's need for unspoiled areas of natural beauty which provide recreational opportunities for its citizens?
6. What are the special factors, if any, about this site which make it the most environmentally acceptable of the alternative sites considered?

In summary, an environmental feasibility study, particularly if ordered after construction of a project has begun, is a poor vehicle with which to address environmental protection considerations and is completely inadequate as a forum for addressing the question of whether a project should be permitted. At best, it provides a means for experts to list methods of mitigating adverse environmental effects anticipated by projects which are scheduled to be built regardless of environmental effects.

Recommendations

Notwithstanding the merits or weaknesses of the environmental feasibility study prepared for the Fisher Harbour Development, a stronger mechanism for addressing matters of environmental policy and assessment is needed for future projects. In accordance with Sections 7 through 11 of CELA model legislation, an environmental impact statement (or assessment study) should be required during the planning stages of any project which is expected to have a significant effect on the environment. Such studies should be ordered at an early stage in the planning process to enable an assessment of the full range of environmental effects associated with various alternative sites.

EVALUATION OF THE ENVIRONMENTAL FEASIBILITY STUDY, " ENVIRONMENTAL IMPLICATIONS, FISHER HARBOUR DEVELOPMENT"

Although the authors of the above study were not given a mandate to answer the policy questions listed on page five of this brief, nor to confront the issues of choice relating to the proposed development, the provincial government did issue comprehensive guidelines to be followed in the study. (Appendix II). When compared to the guidelines, the report appears incomplete. Missing, for example, is a description of present ambient noise levels. We question how one can predict noise levels of a quarry and conclude that the noise will not create a significant disturbance when no comparison to present noise levels has been made.

In our opinion, the report does not provide sufficient information with which to weigh regional economic needs against provincial recreation and environmental preservation needs. For example, the report does not provide answers to section B.1) of the government's guidelines. Nor does it fully describe the implications and consequences, particularly those relating to future industrial development of the area. Those who are concerned about preserving the recreational and environmental values of the area are given no estimates regarding industries which may be attracted to the area if the port is constructed and permitted to operate.

The report is also deficient in providing recreational and related data. It fails to fully convey a sense of the area's special significance to the province, a sense which is clearly defined in an article which appeared in the Ontario Naturalist⁹. For example, the report's discussion of scenic views is limited to the projected angle of visibility of the deepwater port and does not include an inventory of scenic vistas, beaches, or archaeological sites as requested in the guidelines.

A final section of the report we wish to discuss is the section on public opinion about the project. It appears that some evidence of the opposition to the project is not included in the report, while evidence of the project's support is well-documented. CELA, for example, raised concerns about the project as long ago as 1972 (Appendix III). None of the concerns were included in the report, while recent correspondence between CELA and Pollutech Pollution Advisory Services Limited is reproduced in full. None of that correspondence happens to contain a discussion of the merits of the proposed project. One wonders if the opinions of other organizations or individuals received similar treatment.

Recommendations

In addition to the information requested in the government's guidelines, the environmental feasibility study prepared for the Fisher Harbour Development should contain the following information:

Who will benefit by the project?

Eg., the developer, people who would be employed at the project, users of the port

Who will pay?

Eg., Birchmount Lodge and other tourist facilities which may lose tourist business; the non-local public, i.e., tourists who visit the area to enjoy its recreational resources and natural beauty; cottagers who go to the area for reasons similar to those of tourists; future generations of Ontario who won't see the area as it was before the project and its related activities existed

What is the economic need and commercial need for the project?

Data should include:

- description of the local economy
- role of tourism in the local economy
- local unemployment statistics
- type of jobs to be provided by the project
- ability of local workers to fill jobs provided by project
- alternative means of providing full employment in the region

What will be the environmental effects of the project?

Data should include:

- present and anticipated noise levels
- present scenic, aesthetic, and recreational resources of project area
- significance of the area to the rest of the province
- effects of noise, man-made structures, traffic of large freighters, and unloading activity on the area as a significant tourist attraction

PROCEDURAL ASPECTS OF THE FISHER HARBOUR DEVELOPMENT PROCEEDINGS

1. The study under review by the public and by the Environmental Hearing Board was not readily available to the public.

Discussion

To support this point, a copy of a news clipping from the Manitoulin Expositor is attached (Appendix IV) which indicates the general unavailability of the environmental feasibility study. The Association wrote to Pollutech requesting a copy of the study and associated plans, but never received a reply (Appendix V). Once we learned of the public hearings we discovered that copies of the study were available from Pollutech for \$75 each. Although the price may reflect the production cost, CELA believes more copies should have been made available to the general public at a price they could afford. Certainly, CELA felt it could not afford the study. It is even more unlikely that individuals could afford the study at the price of \$75.

Recommendation

In view of the fact that public hearings were held expressly to review a certain document, copies of said document should have been more accessible to the general public. One method of doing so is described in Section 24 of CELA's model legislation. It suggests that copies of all material on file with the body convening public hearings should be available for public inspection and for copying at a cost not to exceed the direct cost of duplication.

2. Notice given of the public hearings was inadequate.

Discussion

The Association registered a protest against the inadequate notice given to the public regarding the public hearings (Appendix VI). Even had our staff seen the notice in the newspaper on 27 February, the twelve day period was hardly adequate for a party, particularly citizens without scientific expertise, to read and evaluate

the lengthy technical document.

Recommendation

In accordance with provisions (a) through (f) of Section 18(3) of CELA's model legislation, we recommend that notice be given at least three weeks in advance of any scheduled hearing date.

3. Notice was not given to parties such as the Canadian Environmental Law Association who were on record as having significant involvement and concerns about the proposed project.

The Association's views on this subject are spelled out in Appendix VI, a copy of a letter sent to the Environmental Hearing Board on March 10, 1975. In summary, the Association protested that despite being involved in this project since at least August of 1972, it was not sent a notice nor formally advised in any other manner, of the scheduled public hearings.

Recommendation

- 1) In accordance with provisions in Section 18(2) of CELA's model legislation, the convening body should establish a register of individuals who want to receive notice of proposed actions.
- 2) In accordance with provisions in Section 18(3) of CELA's model legislation, several methods of notice should be utilized, including the use of local and province-wide newspapers, mail to persons on the register and to affected property owners, and others as outlined in the model legislation.

4. The public hearings were scheduled at an awkward time for the general public, particularly the non-local public who use the NGBRR during the summer months only.

The North Georgian Bay Recreational Reserve is an area of environmental and recreational significance to the entire province. Surely this is the reason it merited the special status set out in the North Georgian Bay Recreational Reserve Act of 1963. The people who are likely to be affected by the proposed Fisher Harbour project will include year-round local residents, various seasonal and year-round businesses in the region, non-local people who use the area's tourist facilities during the summer months, and cottage owners who live in the area primarily during the summer. The combination of inadequate advance notice, lack of notice to groups such as the Canadian Environmental Law Association, and the timing of the hearings operated against participation of a full range of affected groups. Non-property owning tourists who enjoy the area, but live outside the province, for example, in all likelihood had no way of knowing about the public hearings. The difficulty our organization had in receiving notice has already been described.

In short, the Association would like to know what, if anything, would be lost by waiting until the summer months to hold public hearings. The approach would provide, in our view, the following benefits: a greater sample of the non-local public would have the opportunity to participate in the hearings and make their views known; essential spring and summer data could have been gathered by the authors of the environmental analysis, and all parties concerned would have had greater time to study the report and prepare a complete response to it.

Those who would not benefit by the delay include the project developer and the potential users of the completed project. The delay of a few months would be unlikely to cause undue hardship to users who have had to find other facilities until now. The developer will lose by any delay. The Association submits, however, that the project is of such significance to the province that opportunities for full public participation must be paramount.

Recommendation

Adequate consideration be given to the timing of hearings so as to include a full range of the interests likely to be affected by a project.

CONCLUSIONS

The Canadian Environmental Law Association cannot support approval of the Fisher Harbour Development because the procedures followed in this case not only prevented full public participation in the review process, but also failed to provide a complete assessment of the environmental, social, and economic costs to the region and to the province.

We are deeply concerned that even with environmental controls enforced by the government, the project will open the door to a multitude of industrial developments which will be incompatible with the natural beauty and current land uses of the Recreational Reserve. The unique values which the province saw fit to recognize in 1963 will be irretrievably lost if the government does not take preventive measures today.

NOTES

1. Mary Mastin, "La Cloche, Past, Present and Future," Ontario Naturalist, June 1974, p. 30.
2. Ibid., p. 34.
3. Ibid., p. 31.
4. See Pollutech Pollution Advisory Services Limited, "Environmental Implications, Fisher Harbour Development," February 1975.
5. See Mastin, op. cit., and Brief submitted to the Environmental Hearing Board by the McGregor Bay Association, March 1975.
6. Letter dated July 23, 1974 from Hon. Allan Grossman, Provincial Secretary for Resources Development, to John E. Low, Toronto.
7. Ministry of the Environment Brief submitted to the Environmental Hearing Board, March 1975.
8. "Environmental Implications, Fisher Harbour Development," p. 2.
9. Mastin, op. cit.