

SUBMISSIONS ON THE
PROPOSED ENVIRONMENTAL ASSESSMENT ACT
REGULATION FOR MUNICIPALITIES

by

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

INTRODUCTION

The proposed regulation of municipal activities under the Environmental Assessment Act (hereinafter EAA) has been the subject of review by a municipal government-Ministry of the Environment working group since December 1975. The municipal group's recommendations were tabled in December 1976. The proposed regulation reviewed below is designed to implement the recommendations of the Municipal Working Group.

The scheme of the proposed regulation is: (1) to provide exemptions by types of undertaking where applicable; (2) to specify the types of undertakings covered by the Act in all circumstances; (3) to provide short-term transitional exemptions for phase-in of environmental assessment (hereinafter EA) requirements; and, (4) to allow municipalities time to adapt provincial class EAs to their own projects of a similar type.

The Canadian Environmental Law Association (hereinafter CELA) has reviewed the proposed regulation and offers the following comments. Our views are organized into (1) overview concerns; and, (2) selected concerns by section.

OVERVIEW CONCERNS

CELA's overall concerns with this regulation relate to (1) the lack of EA linkage to municipal land use planning decisions generally authorized under The Planning Act, and (2) the regulation's silence on how projects that are either not subject to an individual EA or that are only subject to a class EA will be satisfactorily controlled from an environmental perspective.

Lack of EA Linkage to Municipal Land Use Planning

When arguing for the passage of the EAA, between 1973-1975, the MOE frequently referred to it as a comprehensive environmental planning tool. It was this element that was said to be lacking in other environmental legislation such as The Environmental Protection Act (hereinafter EPA) and The Ontario Water Resources Act (hereinafter OWRA), that made the passage of the EAA so necessary. If there is any level of government decision-making that can be said to be in need of comprehensive environmental planning, it is the municipal level. Municipal land use decisions can frequently have important consequences for environmental quality. Whether it is designating or zoning significant marsh areas or prime agricultural land for development or approving subdivisions or severances without ensuring that construction activities will not adversely affect water quality, the municipal planning process is at the core of environmental issues. While some municipalities may wish to protect the environment, many are subject to heavy development pressure which, because of their limited local jurisdiction and resources, they may not be able - or willing - to balance with potential loss or degradation of environmental assets.

However, the proposed regulation only addresses municipally-owned (or proprietary) undertakings not municipally-regulated (i.e., private sector) land use and development activities. Indeed, the MOE's report on the EA process and municipalities¹ stated:

The Minister of the Environment has clearly stated to the Legislature that The Environmental Assessment Act would not have general application to the residential housing industry in Ontario. This eliminates a large area of potential overlap between The Environmental Assessment Act and The Planning Act. ... The Environmental Assessment Act is intended to apply only to undertakings of major significance.

To fragment control over municipal actions in this way is to eliminate any expectation that the EAA can be a comprehensive environmental planning tool for large geographic areas of the province. For example, in California the largest proportion of environmental impact reports, prepared under that state's EA process, have dealt with the environmental impact of housing and commercial developments and land sales. Indeed, the California statute emphasizes reform of the local land use decision-making process through environmental assessment procedures.

¹ Ontario Ministry of the Environment. The Environmental Assessment Act and Municipalities. October 1977, pp. 10-11.

While it is understood that the MOE has made a number of general proposals for integrating the EAA and The Planning Act processes², CELA is not aware of any timetable for implementation of these proposals, or indeed, what their status is. The government should state its intentions in this regard as soon as possible and institute the appropriate linkages to these proposed regulations.

CELA believes that to the extent The Planning Act remains a principal tool in this area, it must be amended to make it evident that there is a duty upon the appropriate Minister to preserve environmental quality. Policy changes or adjustments, without corresponding legislative changes, we believe, will otherwise have little influence on a statute which has been used primarily to facilitate development in the past.

Adequacy of Environmental Control for Projects Not Subject to Individual EAs or Only Subject to Class EAs

CELA has previously noted its concern that municipal programs such as pesticide road spraying; road salt application; dredging and; wayside pits and quarries be subject to the Act. We strongly urge that they be included in the regulation.

There is no evidence in this proposed regulation that projects that are not subject to EA procedures or that are only subject to class EAs will be adequately controlled. Certainly, there are no provisions in the Act or regulations for how control will be expected to be accomplished in such circumstances. The presumption for certain types of projects (e.g., agricultural outlet drainage schemes under The Drainage Act) is that they will remain uncontrolled. For projects subject to class EA procedures, doubt exists about the effectiveness of monitoring and enforcement of general conclusions in site-specific situations (e.g., roads, hydro-rights of way, etc.). Provision must be made for the assessment and mitigation of impacts particular to individual projects within the class. In this regard, a class assessment should not be viewed as a complete substitute for an individual assessment. The regulations are unclear on this point.

This general concern has quite serious and long-term implications for control of certain environmental contaminants that Ontario is now under international obligation to deal with. For example, the International Joint Commission's \$ 20 million study by the Great Lakes Pollution from Land Use Activities Reference Group (PLUARG) identified sediment, especially where it is contaminated by nutrient, chemical and pesticides residues, as a significant problem for Great Lakes water quality for at least the remainder of this century. Many of the land-based activities under municipal authority are sources of soil erosion and sediment-transport to streams, especially where poor construction practices are employed.

²Ibid., at pp. 16-18.

Appendix I of this submission outlines what CELA believes to be potential problems with the class EA process as a systematic control for sediment transport to water bodies.

In general, CELA requests that if class EAs are to be used they must be subject to the entire approval, hearing and enforcement process of the EAA. Moreover, a class assessment should not preclude the public from obtaining an individual assessment, hearing and approval of a project where necessary. This needs to be more explicitly brought into the terms and provisions of the Act and regulations.

SELECTED CONCERNS BY SECTION

The remainder of this review is a response to selected sections of the proposed regulations.

Section 5(3)(a)

CELA has previously expressed concern about a general exemption for projects costing less than \$ 1 million. Projects costing one-half or even one-tenth this much could well be environmentally significant. This could be the case if they were located in a floodplain, or headwater or groundwater recharge area, in our rapidly disappearing marsh or wetland areas, on prime agricultural land or in an area of high soil erosion potential or with unusual or unique slope, vegetation or rainfall characteristics.

CELA believes that this section entirely ducks the issue of screening criteria and a screening body. We believe it needs re-thinking and re-drafting.

The Premier has replied to CELA's concern in this regard by indicating that the Environmental Assessment Steering Committee will be available on request to carry out screening duties when particular issues arise. We believe this is a step in the right direction but only if it is undertaken in the following manner.

CELA submits that the composition and duties of the EA Steering Committee should appear in the regulations as well as the criteria it would use in determining whether to include or exclude an undertaking from the Act's provisions³. Moreover, the Committee's process should also be stipulated in the regulations. This would relate to questions of notice, how submissions may be made, whether the Committee could hold hearings, and related procedural matters, such as appeals.

³ We believe that the criteria that are listed in the Municipal Working Group's Report would be suitable for direct inclusion in the regulations. See Report of the Municipal Working Group, December 1976. Appendix I to that report.

Section 5(3)(c)

CELA believes that the decision to exempt drainage works under The Drainage Act is ill-founded. The exemption flies in the face of considerable evidence, including studies funded by MOE, that outlet drainage schemes have considerable adverse environmental impacts.

Drainage works, for example, are sources of water pollution during construction (silt/sediment) and of contaminants during operation (sediments, nutrients and pesticides)⁴. However, no approvals are necessary under the OWRA to establish or extend sewage works whose main purpose is to drain agricultural lands, or for drainage works under The Drainage Act. With the further exemptions under the EAA it is clear that such undertakings are essentially unregulated from an environmental perspective.

It is evident that the policies underlying provisions of The Drainage Act and the EAA belie a fundamental divergence of opinion within the province as to how - or whether - to control the adverse environmental impacts of proposed drainage works. The reasoning implicit in the EAA process is that he who stands to gain most from the undertaking should bear the cost of assuring that his gain is not the wider community's loss. The Drainage Act, however, stands this notion on its head by requiring that the funding for an environmental appraisal (undefined) be undertaken by an agency other than the proponent of the drain project. Such an approach is likely to provide a serious constraint to the systematic environmental review of drainage proposals where agencies lack sufficient funds to request and support an appraisal.

That environmental review of such projects is necessary is further suggested by recent studies on the subject. One such report, which investigated the pre-project planning, construction practices and induced changes of a \$ 500,000 municipal drain project in the Dundalk Plateau, Ontario, concluded that the project was based on inadequate planning and that poor construction practices led to unforeseen environmental damage.⁵

CELA requests that section 5(3)(c) be deleted from this proposed regulation.

⁴Legislative Assembly of Ontario. Agricultural Land Drainage in Ontario. Final Report of the Select Committee on Land Drainage, Toronto, June 1974; and, Ontario Ministries of the Environment and Natural Resources. Thames River Basin Water Management Study. 1975 at pp. 35 and 39.

⁵Day, J.C., et al. Outlet Drainage - An Assessment of Environmental Effects, 1976, funded with a grant from the Ontario Ministry of the Environment under the Experience '75 Program.

Section 5(3)(d)

See discussion in conjunction with section 5(4)(a) below.

Section 5(3)(e)

This section exempts interim phase waste management sites from the EAA except where construction of permanent structures or facilities is proposed.

CELA finds this section unacceptable on a number of grounds. First, "permanent" has not been defined in the Act or regulations. Thus, it is difficult to know what is intended by the use of this term. The term could end up being used so broadly that it would amount to a complete out for such facilities.

CELA requests that a definition for permanent be included in these regulations. The applicable rule should be that any such structure in excess of twelve (12) months will be regarded as permanent and thereby subject to the EAA.

The second problem with this section is that it appears to be predicated on the notion that negative environmental impact is necessarily decreased where a site is not used "for the final disposal of waste". However, this idea is belied by experience with such interim facilities as sludge transfer stations and the like. For example, residents in the Niagara area have recently successfully argued before the Ontario Municipal Board that sludge transfer stations are inappropriate if they're proposed for environmentally sensitive areas; or in close proximity to domestic water supplies.

The fact that a certificate of approval is required pursuant to the EPA is not automatically cause for assuming that the environment will be adequately protected. In granting a certificate under the EPA there is no requirement that an EA be conducted or that alternatives be considered. The EPA is designed to protect the natural environment; the EAA definition of environment includes the human component.

CELA requests that appropriate amendments to section 5(3)(e) be made to ensure that all phases of the management of waste including disposal, collection, handling, transportation, storage, treatment, conditioning, recovery or destruction are subject to the EAA.

Section 5(3)(g)

This section exempts municipalities when they carry out projects (e.g., transmission line construction) that are already exempt under Ontario Hydro exemption orders. The one proviso is that construction and maintenance for these municipal undertakings follow the guidelines established by Ontario Hydro and approved by the Environmental Approvals Branch, MOE.

CELA's concern is that in addition to the prescription of certain practices a better mechanism for ensuring adherence to them is also needed. For example, a recent study for the IJC noted that MOE officials who have had field experience in observing Ontario Hydro construction activities argue that the practices as described on paper are generally good but that Hydro has had a mixed fidelity to them in the field. They argued that, in their experience, the following were not pursued adequately or at all: timing of construction to minimize soil, water and other environmental damage; topsoil preservation; measures to avoid environmental harm at stream crossings; supervision of construction forces to ensure compliance with environmental guidelines; temporary or interim erosion control measures to avoid damage before final rehabilitation in areas of high erosion hazard; erosion control practices during counter-poising (grounding) and during the crossing of environmentally sensitive locations; research and development to lessen environmental impact of construction practices.

It remains to be seen whether, under the EAA, MOE monitoring and enforcement will be capable of dealing with Ontario Hydro activities, let alone the more numerous municipal ones.

The section should be amended to permit public review of government field reports to determine the level of municipal - and, for that matter, Hydro - compliance with MOE approved guidelines.

Sections 5(3)(d) and 5(4)(a)

CELA is not convinced that the exemption of the types of roads listed in these sections is justified. For example, the fact that a road is less than one kilometre in length does not guarantee that there will be no adverse environmental effects. Such a realignment could include a bridge like the one proposed for Elora Gorge. Indeed, it could include two connecting roads to make one through a park; also an Elora Gorge type situation.

There should not be a carte blanche exemption for roads of less than one kilometre. Criteria for when such road proposals will be subject to the EA process should include potential for severing a park or environmentally sensitive area. Other criteria listed in Appendix I of the Municipal Working Group report should be incorporated into the regulation on this point as well.

The MOE should also provide figures on what percentage of municipal road building all the types of roads listed in these sections amounts to annually.

We understand that, at least at the provincial level, the proportion of major new highways relative to smaller road projects has been declining and is expected to continue to do so in the future. At the same time the province continues to subsidize municipal road construction activities with approximately \$ 300 million annually. Thus, the potential for much municipal road work being able to circumvent environmental controls is considerable.

At the same time, municipalities acting under The Planning Act (i.e., subdivision agreements) vary widely across the province in the environmental stipulations they include, if any, on subdivision and related roads.

CELA submits that such information be compiled and made available to the public under the authority of these sections to determine the continued viability of the exemptions.

Section 5(5)(a)

This section appears to be intended more to legalize municipal activities which technically require EAA approvals than to assure control of pollution from such activities. Municipalities have known about the EAA since 1975. To give them still more time to push development resolutions and budgetary authorizations through before the coming into force of this regulation is to make a mockery of the reform in municipal decision-making the public expected this Act to effectuate. It is, and will be seen to be, a last hurrah for business as usual.

The proposed formula for determining whether a municipal project will continue to enjoy EAA exemption will prove to be most unwieldy in practice. Moreover, it will allow much repetitious environmental injury for projects which may need environmental mitigation at a later point.

CELA submits that a fixed date ninety (90) days prior to the coming into force of the regulation should be established as the cutoff date and that this date should be announced in the first available issue of the Ontario Gazette. The proposed formula should be deleted.

Sections 5(5)(b) - (d)

These sections pre-condition the application of the EAA to certain municipal class activities twelve months after provincial class EAs on similar types of undertakings are approved. However, the lack of timetables in the Act or regulations for development and approval of provincial class EAs has fostered procrastination in their proper completion while pet projects have continued to come on stream. Witness the recent debacle in Wainfleet over the cutting of trees on the Heritage Highway.

CELA submits that deadlines must be authorized by statute for the submission of adequate class EAs in these areas. We also question the additional twelve months grace to municipalities given their awareness for the last three years that EA procedures were inevitable.

APPENDIX I

ENVIRONMENTAL ASSESSMENT LAW MAY NOT BE AN EFFECTIVE SUBSTITUTE FOR SEDIMENT CONTROL LAW.

Through the use of individual and class environmental assessments under the EAA, Ontario will attempt to achieve ancillary benefits of sediment control for a number of land use categories, particularly transportation corridors and forested areas. The use of class environmental assessments will especially be employed for the many smaller projects under these

categories. Because the EAA has only recently become law, it is difficult to ascertain whether general conclusions under a class assessment will be adequate and enforceable substitutes for site specific reviews conducted under a sediment control statute.

A class environmental assessment, according to the MOE, is an environmental assessment carried out on a category of projects having certain special characteristics which allow them to be grouped together. MOE describes such projects as usually relatively small in scale, similar in nature, predictable in effects, and of frequent occurrence. To be grouped into a class, the projects would have to have a common set of procedures for planning, construction and implementation (e.g. rural highway widenings).

The purpose of the class approach, according to MOE, is to allow application of environmental planning principles to projects which are too numerous for individual environmental assessments, and yet have environmental effects which are significant enough to warrant application of the Act.

The advantages of the class approach are said to be a consolidation of documentation, review and approval procedures as well as provision for before-the-fact evaluation of the effects of the projects within the class.

However, the class environmental assessment approach would also appear to have a number of disadvantages that may cause special problems for the systematic incorporation and effectiveness of sediment controls. For example, the MOE notes that since a class environmental assessment deals with a group of projects, "it cannot be as specific about the characteristics or effects of a particular project, as an individual environmental assessment would be." Rather, the class assessment would be prepared identifying the range of environmental effects likely to be associated, "at least in some circumstances, with the projects in the class." The class assessment would also identify, or develop measures to prevent or mitigate, adverse effects, including alternatives.

While this process review will be of value, class assessments, as substitutes for individual site specific sediment control review, may pose difficulties. Even if such project types underwent class or program assessments to define general procedures to be followed on smaller projects, such a general approach may not be sufficient to determine, for each individual project, what should be done to prevent and abate nonpoint source water pollution. There may be many local factors such as slope, soils, vegetation, rainfall, etc. and different combinations thereof that class assessments not only may not have taken into account but for which the general recommendations might be wholly inappropriate. By analogy, the mining industry has frequently argued that mining operations and local environmental conditions are so diverse that each mine must be examined in relation to the actual local environment.

Not is it clear from the EAA how general conclusions reached in a class assessment, would be enforced with regard to each of the smaller activities that comprise the class.

The MOE indicates that acceptance by the province of a class environmental assessment leads to approval to proceed with the projects within the class, subject to the use of the methods outlined in the document, or any other conditions attached to the approval. Conditions of approval might include: a requirement that the proponent submit some type of report on each project; a requirement for monitoring by the proponent, or MOE; some mechanism for "elevating" individual projects within the class to an individual environmental assessment, and an expiry date allowing for re-assessment after a few years experience.

With respect to the issue of enforcement and monitoring, the MOE indicates that while it is possible that the proponent agency may be partly responsible for monitoring, MOE will be involved "to some extent in order to ensure that the proponent lives up to the conditions of approval." A class environmental assessment will normally contain a method for reporting to MOE on individual projects within that class. MOE suggests as an example, that an environmental study report (undefined) might be submitted for each project prior to implementation to allow MOE to see how the procedures described in the class environmental assessment documents are to be carried out for each project. "Such reports will likely be a condition of approval on all class environmental assessments and copies will be provided to the appropriate ministry and regional offices for monitoring and enforcement purposes".

The MOE decision to incorporate, through the EAA, general environmental planning principles into all projects within a class is an important one. The approach may go a long way toward instilling an environmental ethic into the way proponents carry out such projects. However, it is submitted that serious problems may persist with this approach in ensuring that comprehensive sediment control systematically takes place on all such "minor" projects:

- (1) Much of the detail surrounding how class environmental assessments will be used, in practice appears to create a whole new environmental approval process within the EAA. This "approval within an approval" does not appear to be explicit in the Act for those individual projects for which no environmental assessment was performed other than a class one. It may be arguable, under such circumstances, whether the courts, if the occasion arises, would uphold so sweeping an extension of approvals power which had no explicit reference in the Act.
- (2) The use of the EAA class assessment approach as a substitute for a statute directed to sediment control could result, in many instances, in a relatively proforma or perfunctory sediment control plan and field review. This would appear to be the case because of the large number of parameters likely to be dealt with under environmental assessments generally, of which sediment control is only one subset.

- (3) That environmental assessment statutes may not be adequate substitutes for statutes directly related to sediment control is suggested by the fact that a number of U.S. states have both environmental impact and sediment control laws. States which possess both types of laws include, Virginia, Hawaii, Maryland, Montana and North Carolina.

Nonetheless, it is probably still too early in the evolution of the EAA to judge whether the Ontario class environmental assessment approach can be an adequate mechanism for determining and ensuring the appropriate mix of sediment control measures on a site-by-site basis.