Costrilli
- critique of Aggregates Act
J.

July 12, 1979

Ms. Sally Leppard
Leppard and Associates
208 Bloor Street West
Suite 805
Toronto, Ontario
M5S 1T8

Dear Sally:

I have had an opportunity to briefly review the proposed new Pits and Quarries Control Act. I have a few preliminary comments and would appreciate the opportunity to discuss the position FAS arrives at and how we might get together to do everything we can to improve the legislation.

Most importantly, it appears to me that the Ministry has either abandoned or disguised its intention to impose aggregate quotas on municipalities and force them to allow aggregate extraction. It would seem to me important to ascertain whether the Ministry has abandoned this intention or intends to implement this policy through regulations, which, of course are not subject to scrutiny by the Legislature. The Act appears to confer on the Ministry the power to do this. This is the power in section 62 of the Cabinet to make regulations (a) respecting the management of the aggregate and Crown aggregate resources of Ontario. Of course, the Ontario Municipal Board has an obligation to follow provincial policy and if the province adopts this as a policy, this is another way that it can force municipalities to comply without going through the Legislature. One solution, and one which we advocate for virtually all Ontario legislation, is that any proposed regulations be published in the Ontario Gazette and notice given to the public of a right to make submission to the Minister and that the regulations do not come into effect for 60 days after publication in the Gazette. This kind of provision has proven very effective in stopping government industry from colluding in the past in the United States and under the Canadian federal Clean Air Act.

In general, my concerns are the same ones usually expressed by CELA about Ontario government legislation: too much government discretion, broad powers conferred upon government without concomitant duties, the legislation being a mere skeleton to be fleshed out by regulations not subject to legislative scrutiny, too little public participation, and too little attention to environmental concerns.

Section 8. I do not understand why there is no mention of grades as there is in the former Act. Moreover, I do not understand why an applicant for a Class B license should provide less information than an applicant for a Class A license. It would seem to me for example that regardless of the amount to be excavated yearly there is nothing to prevent an applicant for a Class B license from digging as deeply into the ground as an applicant for a Class A license, and therefore if it is relevant to know the watertable, the location of water wells, and the maximum of excavation, and whether it is intended to excavate below the water table for a Class A applicant, why is this information not relevant with respect to a Class B applicant.

It would seem to me that the potential for pollution and other forms of environmental degradation can be just as great with regard to a Class B application as a Class A application, and therefore I cannot see why subsection (3) shouldnot apply equally to a Class B applicant.

Section 9. This section requires the applicant for a Class A license to provide information describing the location and size of existing and proposed stockpiles of aggregate, topsoil and subsoil, as well as other matters. First, I cannot see any good reason why an applicant for a Class B license should not have to provide the same information. Moreover, although there is an obligation to describe the size of stockpiles of topsoil and subsoil, nowhere in the Act can I find any obligation to stockpile topsoil and subsoil. While loss of topsoil is not at present a serious problem in Ontario, it is potentially a problem and it would appear to me that there should be an explicit obligation on all operators of pits and quarries to stockpile topsoil and possibly also subsoil in some circumstances.

Section 11 represents a very serious erosion of provincial responsibility for environmental protection. Formerly, the Act provided that the Minister in considering an application for a license had to have regard to the preservation of the character of the environment and the availability of natural environment for the enjoyment of the public. No longer does the Minister have any obligation to take into account any significant natural features of or around the site or any aspect of the natural environment.

Nor does the Minister have to take into account the financial responsibility of the operator beyond whatever funds are provided for from the regulations. The public should have the right to bring to the attention of the Minister and the Minister should have the duty to consider any evidence that the operator is financially incapable of carrying out his obligations. It is very well to say that a license can always be taken away, but in practice it is next to impossible to take away a license once it has been given.

Section 12. The provisions for public participation in the licensing process continue to be inadequate. Formerly, the Act required an applicant to give public notice of his application by putting an advertisement in

two successive issues of at least one daily or weekly newspaper having general circulation in the area. However, there was no requirement that neighbouring residents or others affected by the proposal be notified directly (for example, by mail). There is still the requirement to advertise, but there is still no requirement to notify interested or affected members of the public directly.

The right to file a written objection with the Minister for his consideration has been broadened. Formerly, only the municipal council, a public authority having an interest (such as the local conservation authority), or a person "directly affected" by the issuance of a licence had the right to write to the Minister. This was a very limited class. The Minister would have been entitled to refuse to receive virtually any objection made by an individual citizen unless that citizen could show a potential economic [illegible] or a direct effect on his property. In practice, however the Minister did not limit the scope of objections, or refuse to receive objections on the basis that the objector did not have a sufficient interest.

Under the proposed amendments, any person, including any municipality, has an absolute right to submit a written objection.

More importantly, however, the right to a hearing before the Ontario Municipal Board has not been substantially broadened, and may even be curtailed under the new legislation. Under the old Act, anyone directly affected could also require an OMB hearing. Those who could fulfill the requirement of being directly affected were a rather narrow class, but at least the decision as to whether someone was directly affected would be made by someone other than the same Minister who was responsible for reviewing the recommendations of the OMB if a hearing were held. Under the proposed legislation, anyone with a sufficiently substantial interest to warrant a hearing is entitled to one; however, it is up to the Minister to decide such an interest. Thus, the Minister has wide sweeping powers to decide whether a hearing will be held at all and, if he does allow a hearing, has no obligation to follow the recommendations of the Board. There is virtually no opportunity for judicial review of the Minister's decision not to recognize the interest of a neighbour of a proposed sand or gravel operation and his refusal to accede to the neighbour's request for a hearing.

Section 14. I find it very strange that the licensee pays his license fee at the end of his operating for the previous year, rather than in advance for the coming year. Surely an applicant who does not have the financial resources to pay his license fee before he begins to operate is not the kind of person the public wants to operate a pit or quarry. Moreover, what is there to stop the operator from walking away from site when it is completely mined out and failing to pay the license fee for the final year of operation? There appears to be no provision for the Ministry to withdraw any of the operator's money from his rehabilitation

security account, and apply it to this debt. Of course, the government can sue, but wouldn't it be better to have cash in hand?

Moreover, these license fees are intended to serve three separate purposes: to provide a fund to rehabilitate abandoned pits and quarries, to provide revenue to the municipality, and to provide revenue to the provincial Treasury. This means that they must be substantial indeed to fulfill these roles; however, without seeing the regulations which will preseribe the fee levels, it is impossible to know whether this legislation is worth the paper it is written on.

Section 17. This section is a great improvement upon the previous Act. The Act stated that the Minister must review each licensed operation at least onee a year. But inspections by Ministry staff have tended to be perfunctory and less than through. Now, the Minister must inspect each site and must review each site plan and the conditions of each license at leastonce a year, and must request the regional municipality or county and the local municipality in which the pit or quarry is located to send him their comments on the operation every five years.

Sections 21-22. The lack of public participation in the decision-making process continues throughout the life of the operation. When the Minister issues a license, no one has the right to appeal this decision, and no one but the applicant has the right to appeal any terms and conditions imposed on the license. On the other hand, if the Minister refuses to issue a license, refuses to consent to the transfer of a license, revokes a license, requires the operator to amend the site plan, or later on adds a condition to a license, the operator has a right to a hearing before the Ontario Municipal Board, but neither the municipality, conservation authority, or any of his neighbours has the right to be a party to the hearing.

The proposed Act contains welcome provisions to provide greater certainty of more adequate rehabilitation of pits and quarries. The fund to ensure rehabilitation of abandoned pits and quarries is a particularly valuable innovation, provideddthat it contains sums sufficient to do the job. It is impossible to know to what extent the provisions in sections 46-54 providing for rehabilitation security payments by licensees will be adequate until the formula to be used in calculating those payments is revealed by the Government. The lack of rehabilitation has been one of the most serious problems with sand and gravel mining. In the past, operators left the landscape scarred with worked out pits, steep-sided and often full of water. They were ugly and dangerous, but the operators often did not drain, grade or fill them unless there was money to be made by filling them with garbage or selling them. A combination of relatively weak regulations made under the Act, insufficient detail in the site plans, and lackadaisical enforcement meant that many pits were not properly rehabilitated despite

the existence of the Act. The Ministry had acknowledged that the levels of security to be deposited with the Ministry under the present Act have been insufficient to cover the costs of a full rehabilitation. Accordingly, operators have chosen to forfeit the money deposited with the Government rather than restore the site.

Tougher site plan requirements combined with the Ministry's right to do rehabilitation itself and sue to recover any expenses in excess of what it can recover from the operator's rehabilitation security account seems to ensure improvement.

Unfortunately, the two funds available for rehabilitation of pits, cannot be applied to compensate victims of pollution emanating from pits and quarries. To some extent, if it is passed, Bill 24, Amendments to the Environmental Protection Act, now before the Legislature Standing Committee on Resource Development may help the victims of sudden and unexpected spills of contaminants, but they are unlikely to provide any relief from ongoing routine discharges. To be most effective, a fund should also be available to cover the cost of cleaning up the damage to neighbouring lands, restoring the environment on neighbouring lands, and compensating neighbours who are adversely affected by noise and dust which often emanates from pits and quarries.

Section 57. Once again, the Ontario Government proposes to remove the right of private prosecution which has existed at common law for centuries and is a basic protection for the average citizen against favouritism, corruption, or inaction by government. It is audacious of the Ministry to purport to disallow any prosecution for an offence without consent of the Minister given the criticism of the Ministry's failure to enforce its pits and quarries legislation levelled by the Mineral Aggregate Working Party in its report, upon which this legislation is based. It is even more astounding that the Government would take away this right in light of the implicit role conflict within the Ministry of Natural Resources, which is responsible both for ensuring a steady supply of aggregates and for protecting the environment during this process. Ministry has proven totally incapable in the past of reconciling those conflicting mandates.

The Ministry has claimed that it has insufficient staff to inspect as frequently as desireable, but is unwilling to encourage the public to supplement its personnel. Given inadequate resources, and the unlikelihood of any significant expansion of the civil service in the foreseeable future, Ministry should welcome self-help by the public. Experience has shown that the right of private prosecution has not been abused. Under the Environmental Protection Act, where private prosecutions are allowed, there have been perhaps two private prosecutions a year by private citizens and public interest groups. In every case of which we are aware, private

action was taken only after a long history of government inaction. Most private prosecutions have been taken by public and municipal officials rather than the "meddlers" the Ministry of Natural Resources appears to fear. It is important that the public be constantly vigilant to prevent the government from taking away rights they have had for centuries.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

John Swaigen
General Counsel

JS:afc
c.c. J. F. Castrilli