CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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March 5, 2007

Project Manager
Strategic Policy Branch
Ministry of the Environment
135 St. Clair Avenue West, 11th Floor
Toronto, Ontario
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RE: PROPOSED EA CHANGES FOR ONTARIO'S WASTE SECTOR
EBR REGISTRY NO. RA06E0018

These are the comments of Sierra Legal, Northwatch, Great Lakes United, and Canadian Environmental Law Association in relation to proposed changes to Ontario's environmental assessment ("EA") process for the waste sector.

This submission is being provided to the Ministry of the Environment ("MOE") in accordance with the above-noted Registry Notice for this proposal.

PART I – GENERAL COMMENTS

(a) Overview

Our organizations have been extensively involved in individual EA and Class EA procedures under Ontario's *Environmental Assessment Act* ("EA Act") for a wide variety of undertakings and projects across northern and southern Ontario. We have also participated in EA planning processes for numerous waste management facilities (i.e. landfills, incinerators, EFWs, etc.) that have been proposed by public and private proponents for the disposal of hazardous and non-hazardous wastes. In addition, we have been engaged in the various EA reform initiatives undertaken by the province over the years, including the 2004-2005 EA Advisory Panel proceedings.

In light of our lengthy EA experience and history of public interest interventions, we have carefully considered the MOE's proposed changes to the EA process for the waste sector. In particular, we have reviewed the draft *Guide to Environmental Assessment Requirements for Waste Management Projects* ("the Guide") dated November 28, 2006, and the accompanying draft regulation. In addition, we have compared the content of these documents to the recommendations contained within the two-volume report of the EA Advisory Panel released in March 2005.
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For the reasons outlined below, we do not support the current draft of the Guide and regulation. In summary, it is our view that the proposed EA reforms:

- do not achieve greater certainty, clarity, effectiveness, or efficiency in terms of environmental planning, public consultation, or documentation requirements for waste management projects;

- are premised upon a faulty assumption that waste management projects cannot get approved under the current EA regime;

- do not designate waste management projects into appropriate categories for EA planning purposes;

- confer preferential treatment for energy-from-waste ("EFW") projects and small landfills in a manner that is retrogressive, unwarranted and environmentally inappropriate; and

- establish a questionable Environmental Screening process that leaves much to be desired, particularly in terms of public involvement, monitoring/reporting, and resolution of "elevation requests".

Accordingly, we hereby make the following recommendations in the event that the Ministry intends to proceed with this dubious initiative:

RECOMMENDATION #1: Before the Ontario Government proceeds any further with EA regulatory changes for the waste sector, the Government must immediately develop and adopt, with meaningful stakeholder input, a prescriptive and environmentally appropriate waste management policy for Ontario. Among other things, this provincial policy should entrench:

(a) measurable and aggressive diversion goals with short, clear deadlines;

(b) preference for projects that reduce, reuse, recycle/compost resources over projects that dispose of waste, with or without energy recovery;

(c) locational standards to guide the siting of waste management projects; and

(d) opportunities for meaningful participation by individuals, communities and First Nations in the planning, review and approval of waste management projects.

RECOMMENDATION #2: The Government of Ontario should immediately enact the selective statutory amendments to the EA Act recommended by the EA Advisory Panel Executive Group. In particular, the Government should amend the Act in relation to:

(a) expansion of regulation-making authority;

(b) issuance of binding policy guidelines under section 27.1 of the Act;

(c) imposition of EA application fees; and

(d) strengthening inspection, monitoring and enforcement.

RECOMMENDATION #3: EFWs and small landfills should remain subject to the individual EA process, as should large landfills and all forms of "thermal degradation" (with or without energy recovery). The MOE should establish a small sectoral working group of representative stakeholders to discuss and provide advice on the appropriate classification for all other types of waste management projects.

RECOMMENDATION #4: The Ontario Government should immediately repeal O.Reg. 206/97 under the EPA, and should amend or eliminate the "EA exception" to public participation currently entrenched within section 32 of the *Environmental Bill of Rights.*

RECOMMENDATION #5: The current Guide and draft regulation should be withdrawn, and the MOE should redraft these documents, with meaningful public input, to ensure consistency with the EA Advisory Panel's recommendations regarding the need for prescriptive rules on EA content and procedure for the waste sector.

RECOMMENDATION #6: The MOE must significantly strengthen its ability to undertake monitoring, inspection and enforcement activities under the EA program, particularly in relation to the proposed Environmental Screening process.

RECOMMENDATION #7: The Guide and draft regulation must be revised to ensure that there is full and timely stakeholder access to all detailed reports and supporting documents generated at every stage of the Environmental Screening process.

RECOMMENDATION #8: If Ontario intends to proceed with the Environmental Screening process for certain types of waste management projects, then the Guide and regulation need to be amended to establish a formal adjudicative process, administered by the Environmental Review Tribunal, to expeditiously hear and decide "elevation requests."

(b) Questionable Rationale for Proposed EA Reforms

At the outset, we must strongly question the apparent rationale for proposing these specific EA reforms at the present time. For the reasons set out below, it is our view that Ontario does not currently suffer from a waste disposal crisis that warrants drastic EA changes; instead, Ontario is suffering from a waste generation crisis that urgently requires timely and concerted action by the Ontario government in conjunction with all interested stakeholders.

The waste management industry and municipalities often say that there is a waste disposal crisis in Ontario, which threatens to result in solid non-hazardous waste from the municipal, commercial, industrial, and institutional sectors piling up with nowhere to go. These proponents

blame this disposal crisis on an EA process that they claim is "too difficult" for proponents to be willing to go through it.

This so-called disposal crisis is a false alarm. The record amply demonstrates that the EA process has not proven to be a barrier to increasing disposal capacity within Ontario. In the past ten years, for example, nineteen new landfills for solid non-hazardous waste have been approved in Ontario under the EA Act. EA Act approvals have also been granted for thirteen expansions of waste disposal sites, including increasing the capacity for one EFW incinerator.[1] Virtually all of these approvals have been granted by the Minister without public EA hearings before the Environmental Review Tribunal.

In contrast to this steady stream of EA approvals, proposed landfills or expansions were rejected under the EA Act in only two cases (i.e. South Simcoe's proposed landfill in Adjala-Tosorontio, and the proposed Richmond Landfill expansion), both of which were properly refused by the MOE for site-specific environmental reasons concerning the design, operation and location of the proposed facilities.

The size of these new or expanded disposal facilities approved under the EA Act varies substantially. Many serve relatively small communities and, thus, are relatively small in capacity. Some EA Act approvals have been granted for huge disposal capacity and large service areas. For example:

- Adams Mine – 20 million tonnes;[2]
- Warwick Landfill, Waste Management – 18 million tonnes;
- BFI Ridge Landfill – 13.6 million tonnes;
- Walker Landfill, Niagara Falls – 17 million tonnes; and
- Green Lane Landfill, St. Thomas – 10 million tonnes.

Three of these gigantic sites were approved in the past six months.

In our view, the real crisis in solid non-hazardous waste management in Ontario is around waste generation and diversion. The latest survey by Statistics Canada, reflecting the situation in 2004, paints a dismal picture:[3]

- In 2004, Ontario's diversion rate for non-hazardous solid waste from residential, institutional, commercial, and industrial sources was a mere 22.5 percent. This was lower than the diversion rates in Nova Scotia, Prince Edward Island, British Columbia, Quebec, and New Brunswick;

[1] MOE, "Environmental Assessment Activities", www.ene.gov.on.ca/envision/env_reg/ea.
[2] Although the Adams Mine proposal received conditional approval under the EA Act, the approval was subsequently revoked by special legislation enacted by the Ontario Government.
[3] Statistics Canada, *Waste Management Industry Survey: Business and Government Sectors 2004*, February 2007.

- In 2004, almost 13 million tonnes of solid non-hazardous waste were generated in Ontario. This was an *increase* of one million tonnes over 2002;

- In 2004, 1043 tonnes of waste were generated in Ontario per capita. This was an *increase* of 60 tonnes for each person over 2002;

- Because of this increased waste generation, despite increased quantities of waste diverted from disposal between 2002 and 2004 (an increase of 640,000 tonnes), waste disposal continued to rise (400,000 tonnes); and

- 60 percent of waste generated in Ontario in 2004 was from the non-residential sectors. The institutional, commercial and industrial sectors recycled only 17.7 percent of the waste they generated, whereas 29.3 percent of residential waste was recycled.

Clearly, Ontario has failed to effectively deal with this waste generation and diversion crisis:

- The Province held a consultation in June 2004 on a strategy for achieving 60 percent waste diversion by 2008. Almost three years later, such a strategy has not been approved or implemented, and the province is far from achieving the modest 60 percent target; and

- Ontario still has only one stewardship program in place (the Blue Box program) under the *Waste Diversion Act*. No additional programs have been put in place in the three years since February 2003.

As this assessment of the state of non-hazardous waste in Ontario has shown, the crisis in Ontario is not the claimed difficulty of finding disposal capacity. Instead, the crisis is the result of the failure of successive provincial governments to put in place legislation, regulations, and programs that would result in the reduction of waste generation, increase diversion rates, and decrease the volume of waste disposal capacity needed for residuals.

(c) Absence of Provincial Waste Management Policy

We further note that the MOE's proposed EA regulatory reforms appear to be proceeding in the absence of a finalized and comprehensive provincial policy that drives waste management planning across Ontario and that clearly favours the 3Rs and diversion initiatives over various forms of disposal (including thermal degradation with or without energy recovery). On this point, we note that the need for a robust provincial waste management policy was endorsed by both the EA Advisory Panel Executive Group (Recommendations 3 to 5) and the sectoral Waste Management Table (Recommendation 2).

Accordingly, we submit that it is premature and counterproductive for Ontario to be crafting EA regulatory changes for the waste sector unless and until the overarching provincial policy framework has been finalized. It is noteworthy that the EA Advisory Panel specifically recommended the expeditious development of such policy through a small sectoral working group that is representative of waste management stakeholders (Recommendation 4). Moreover,

in order to kickstart these sectoral deliberations, the EA Advisory Panel provided a draft set of waste-related policies and priorities (Volume II, pages 22 to 23).

Unfortunately, although the Panel's recommendations were made two years ago, it appears that the Ontario Government has declined to act on developing detailed policy, and has instead trotted out an ill-advised set of EA regulatory reforms that, in many aspects, are contrary to environmental protection and resource conservation imperatives. In addition, the current policy vacuum has left the door open for MOE to misclassify certain waste management projects into inappropriate categories under the Guide and draft regulation (i.e. by proposing to exempt EFWs from the individual EA process). In our view, the Ministry's approach is tantamount to putting the cart before the horse – an appropriate and environmentally sound provincial policy must be in place before it is possible to designate and/or exempt specific waste management projects in a reasoned and principled manner. In our submission, the promulgation of waste management policy is the condition precedent for any further regulatory EA reforms regarding the waste sector.

RECOMMENDATION #1: Before the Ontario Government proceeds any further with EA regulatory changes for the waste sector, the Government must immediately develop and adopt, with meaningful stakeholder input, a prescriptive and environmentally appropriate waste management policy for Ontario. Among other things, this provincial policy should entrench:

(a) measurable and aggressive diversion goals with short, clear deadlines;

(b) preference for projects that reduce, reuse, recycle/compost resources over projects that dispose of waste, with or without energy recovery;

(c) locational standards to guide the siting of waste management projects; and

(d) opportunities for meaningful participation by individuals, communities and First Nations in the planning, review and approval of waste management projects.

(d) Absence of Statutory Reform

We note that none of the proposed EA reforms are premised upon amendments to the EA Act itself. Instead, it appears that the MOE is attempting to forcefit these changes through the existing (and limited) regulation-making authority under the Act. Indeed, we have been advised by MOE staff that legislative reforms will not be pursued at this time.

This apparent refusal by the MOE to seriously consider some focused statutory amendments is problematic and inconsistent with the recommendations of the EA Advisory Panel Executive Group. For example, the EA Advisory Panel Executive Group found that as a whole, the EA Act was fundamentally sound, but concluded that certain legislative finetuning was necessary to more fully and effectively implement overdue EA reforms (i.e. improving monitoring/enforcement, issuance of binding EA policies under the Act, etc.).

In our view, the efficacy and enforceability of sectoral EA reforms would be significantly enhanced by the timely passage of key legislative amendments identified by the EA Advisory Panel Executive Group. Accordingly, we call upon the Ontario Government to enact these amendments if it intends to proceed with waste-related changes to the EA process.

RECOMMENDATION #2: The Government of Ontario should immediately enact the selective statutory amendments to the EA Act recommended by the EA Advisory Panel Executive Group. In particular, the Government should amend the Act in relation to:

(a) expansion of regulation-making authority;

(b) issuance of binding policy guidelines under section 27.1 of the Act;

(c) imposition of EA application fees; and

(d) strengthening inspection, monitoring and enforcement.

PART II – SPECIFIC COMMENTS

In addition to the foregoing general comments on the MOE's proposed EA reforms, we also have a number of specific legal, technical, policy and implementation concerns about the scope and content of the proposed Guide and draft regulation, as described below.

(a) Public vs. Private Proponents

Both the Guide and the draft regulation attempt to apply the EA requirements equally to public and private proponents. We strongly commend the MOE for commiting to utilize environmental significance – rather than proponency – for the purposes of delineating EA obligations.

However, although public and private proponents will be treated alike under the MOE's proposed EA reforms, it appears that certain waste disposal projects will receive preferential treatment as compared to substantially similar projects that pose virtually identical environmental risks, impacts and concerns. Under the MOE's proposal, for example, thermal degradation facilities with energy recovery components will be exempt from EA requirements, but thermal degradation facilities without energy recovery components remain subject to EA requirements.

As discussed below, from an energy input and resource conservation perspective, there is no compelling environmental rationale to support the MOE's curious attempt to favour or promote EFWs in this manner. Similarly, we are unaware of any persuasive environmental evidence that suggests that EFWs are environmentally superior to large landfills, which will correctly remain subject to EA requirements under the MOE proposals. Furthermore, promotion of EFWs is inconsistent with other energy policies of the Ontario government. Incineration of waste is more greenhouse gas intensive than burning coal. Thus, phasing out coal while encouraging EFW facilities is counterintuitive.

Accordingly, in order to ensure that there is consistent and equitable treatment within and among classes of waste management projects (and to more judiciously utilize environmental significance as the paramount criterion for delineating EA obligations), it will be necessary to revisit the MOE's proposed project classification scheme, as described below.

(b) Three-Tiered Approach to Waste Management Projects

In principle, we do not necessarily object to the MOE's proposal to create three different categories of environmental review (i.e. EA; Environmental Screening; EA exemption). We further recognize that specific projects within each category must still comply with statutory and regulatory requirements under the *Environmental Protection Act* ("EPA") and other applicable laws. In general terms, then, the MOE's proposed three-tiered approach is somewhat consistent with the EA Advisory Panel's recommendations to create standardized types of planning/review procedures that correspond to the environmental significance of different categories of waste management projects.

In practice, however, a number of intractable problems arise from the MOE's proposed candidates for these different categories of environmental review: see Figure 1 of the Guide. For example, a close reading of the EA Advisory Panel's report reveals that nowhere did the Panel recommend that EFWs or small landfills should be wholly exempted from the EA process. Thus, the MOE's proposal to apply the relatively weak Environmental Screening process to these environmentally significant projects did not originate with the EA Advisory Panel. Instead, it appears to have originated from MOE bureaucrats with an unduly optimistic (or completely unrealistic) view of the environmental impacts and risks associated with EFWs and small landfills. Moreover, by any objective standard, this MOE proposal can only be characterized as a retrogressive rollback from the current EA regime.

(c) Unjustified EA Exemption for EFWs

For various reasons, we particularly object to the MOE's ill-conceived proposal to exempt EFWs from individual EA requirements. First, by simply permitting EFWs to track through the Environmental Screening process, the province is conferring cost and timing advantages to EFWs over projects that remain subject to EA requirements. However, to our knowledge, there is no persuasive public policy reason or empirical evidence to suggest that EFWs are less environmentally harmful than non-EFW incinerators or landfills.

Second, from an energy input/output perspective, it is well-documented that EFWs are net consumers – not producers – of energy, as compared to recycling.[4] Therefore, the claimed energy "benefits" of EFWs cannot serve as proper justification for taking such projects out of the EA process and subjecting them to the ill-defined Environmental Screening process.

[4] See, for example, Jeffrey Morris, "Comparative Life Cycle Assessments for Curbside Recycling Versus Either Landfilling or Incineration with Energy Recovery", Int. J.LCA 2004; Sound Resources Management Group Inc., *Comparison of Environmental Burdens: Recycling, Disposal with Energy Recovery from Landfill Gases, and Disposal via Hypothetical Waste to Energy Incineration* (2004).

Third, we remain highly concerned that fast-tracking EFWs under the Environmental Screening process ignores the fact that EFWs will likely be competing for waste stream components that should otherwise be diverted through reuse or recycling programs. In our view, the direct, indirect and cumulative impacts of EFWs upon public and private 3Rs programs, both in the short- and long-term, are extremely important considerations regarding the viability or acceptability of EFW proposals. However, it does not appear that such considerations must be addressed under the Environmental Screening process.

In summary, we strongly suspect that the proposed treatment of EFWs under the MOE's new regime is premised, at least in part, on various myths being spun by EFW proponents and industry apologists (i.e., that modern incineration technology is economical and "clean", that toxic air emissions are no longer an issue, that fly ash/bottom ash disposal is not a problem, that EFWs do not compete with 3Rs, etc.). In our view, these kinds of subjective claims and debatable opinions are precisely what should be put to the test in the EA process whenever proponents put forward site-specific applications to construct and operate EFWs in Ontario. Accordingly, we strongly urge the Ontario government to ensure that EFWs remain subject to individual EA requirements.

(d) Unjustified EA Exemption for Small Landfills

We are also troubled by the MOE's proposal to exempt "small" landfills from individual EA. First, we are concerned that this preferential treatment will likely lead to a proliferation of small landfills blighting the rural landscape of Ontario. From an environmental impact perspective, we are unaware of any compelling evidence demonstrating that small landfills are preferable to large landfills. Indeed, the converse seems to be true, in that an increased number of smaller landfills scattered across the province has greater cumulative potential to affect more persons, more airsheds, and more water resources across a greater swath of Ontario. In addition, smaller landfills generally tend not to have sophisticated design features that prevent or eliminate adverse environmental impacts.

Second, we are concerned that by allowing "small" landfills to evade EA scrutiny, proponents of new or expanded landfills will piecemeal their proposals into a series of smaller projects that just fall within the Environmental Screening threshold. These kinds of incremental landfill expansions should not be permitted to proceed in the absence of a rigorous EA process that properly examines need and alternatives (especially since landfills should be sized only to accept limited amounts of residual waste that cannot otherwise be reduced, reused, recycled or composted).

The bottom line is that regardless of whether landfills are large or small, they constitute a form of final disposal with serious public health, environmental protection, and resource conservation implications. For these reasons, landfills must generally remain subject to individual EA requirements. If the province is truly serious about improving its diversion track record (and about protecting public health and the environment), then proposed landfills should continue to receive scrutiny under the individual EA process. Where there is a demonstrable need for local capacity to dispose of locally generated residuals, then it may be appropriate to consider scoping the resulting EA in an appropriate manner to examine the issues in dispute (if any). As a general

principle, however, public and private proposals to establish or expand landfills should not receive a free pass under the EA Act.

(e) Need to Review and Revise Project Classification Scheme

We note that the MOE has declined to release a public discussion paper that attempts to explain its proposed candidates (or thresholds) in Figure 1 of the Guide for the different types of environmental review in the waste sector. In the absence of such a discussion document, we can only conclude that the MOE's proposed project classification is arbitrary. This is unacceptable. Accordingly, we recommend that the MOE should immediately establish a small sectoral working group of representative stakeholders to reconsider and provide advice to the MOE on its proposed project classification scheme.

However, the starting point for these deliberations should be that all new or expanded landfills and incinerators (including EFWs) are subject to individual EA, while the appropriate classification for all other waste management projects (i.e. transfer stations) remains open to further discussion. Ideally, the sectoral working group should be able to develop some consensus-based advice to MOE on project classification. If disagreement arises on specific project types, then, at the very least, the MOE will have the benefit of the competing viewpoints before deciding upon project classification (as opposed to unilaterally trying to decide these issues behind closed doors without meaningful stakeholder input).

We are aware that some proponents of EFWs and small landfills may argue that keeping their projects subject to EA (rather than Environmental Screening) will pose barriers to the timely approval of such projects. However, the EA track record does not substantiate such concerns. Over the years, for example, almost all non-hazardous waste disposal sites have succeeded in obtaining approval under the EA Act, and most of these approvals have been issued without EA or EPA hearings. In addition, the Minister enjoys considerable discretion to tailor Terms of Reference to ensure that waste disposal EA's are focused on the real issues in dispute. Indeed, at the present time, the vast majority of waste management EA's have proceeded under "scoped" rather than "full" EAs.

Accordingly, proponents' complaints that the current EA process cannot be successfully navigated, or that the EA process gets bogged down by peripheral issues, are unfounded on the evidence and cannot be invoked as the rationale for subjecting EFWs and small landfills to Environmental Screening rather than individual EA.

RECOMMENDATION #3: EFWs and small landfills should remain subject to the individual EA process, as should large landfills and all forms of "thermal degradation" (with or without energy recovery). The MOE should establish a small sectoral working group of representative stakeholders to discuss and provide advice on the appropriate classification for all other types of waste management projects.

(f) The Need to Repeal O.Reg. 206/97 and Amend Section 32 of the EBR

In our view, the MOE's proposed project classification scheme also triggers the need to repeal O.Reg. 206/97 under the EPA.

O.Reg. 206/97 currently provides that any waste disposal site or waste management system that is subject to section 5 of the EA Act is automatically exempt from the public hearing requirements under sections 30 and 32 of the EPA. The EA Advisory Panel Executive Group specifically recommended that O.Reg.206/97 should be substantially overhauled (see Recommendation 35). However, the MOE has failed or refused to act on this recommendation to date.

Given the MOE's inaction on this matter, we remain gravely concerned about O.Reg.206/97 in light of the draft EA regulation's attempt to designate various waste management projects as being subject to the EA Act (but then, in many cases, conditionally exempting certain projects as long as the proponents comply with the Environmental Screening process). This cumbersome approach appears to significantly extend the coverage of O.Reg. 206/97, and, more importantly, it continues to nullify public hearing rights that are entrenched in law. Even for projects that remain subject to individual EA under the MOE proposal, O.Reg. 206/97 unjustifiably deprives Ontarians of public hearing rights.

As long as O.Reg.206/97 remains in force, the most controversial, risk-laden and problematic landfills or incinerators could be approved without public hearings under the EA Act or the EPA to evaluate the technical soundness and environmental acceptability of the proposed facilities. Accordingly, we hereby recommend that O.Reg.206/97 should be repealed forthwith.

We further note that the EA Advisory Panel further recommended the amendment of the "EA exception" to public participation currently entrenched within section 32 of the *Environmental Bill of Rights* (Recommendation 17). Similar recommendations have been made in recent years by the Environmental Commissioner of Ontario.[5] In effect, section 32 of the *Environmental Bill of Rights* ("EBR") provides that statutory instruments for projects that have been approved or exempted under the EA Act are not subject to: (a) mandatory public notice on the EBR Registry; (b) mandatory public comment opportunities under Part II of the EBR; and (c) the third-party appeal provisions of the EBR.

In the waste management context, section 32 of the EBR essentially means that there are no public notice/comment/appeal opportunities on the detailed EPA certificates of approval once waste disposal sites have been approved or exempted under the EA Act. As noted by the Environmental Commissioner, this section 32 exception has improperly shielded some environmentally significant projects from meaningful public scrutiny.[6]

Accordingly, we concur with the EA Advisory Panel's recommendation that the Ontario Government needs to review and revise section 32 of the EBR.

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[5] ECO, *Looking Forward: The Environmental Bill of Rights – Special Report to the Ontario Legislature* (March 1, 2005), Recommendation 9.

[6] ECO, *Choosing Our Legacy: 2003-2004 Annual Report* (October 2004), page 53.

RECOMMENDATION #4: The Ontario Government should immediately repeal O.Reg. 206/97 under the EPA, and should amend or eliminate the "EA exception" to public participation currently entrenched within section 32 of the *Environmental Bill of Rights.*

(g) Content of Part A of the Guide

Ironically, although the Guide purports to provide direction on EA requirements for waste management projects, the reality is that no such direction is actually provided in either the Guide or the draft regulation. Instead, the bulk of the Guide provides procedural details on the Environmental Screening process rather than EA. Legally speaking, Environmental Screening is not equivalent to an individual EA, particularly since Environmental Screening does not require consideration of need or alternatives. Therefore, in relation to projects still subject to EA, proponents, citizens and regulators can obtain little or no information in the Guide and draft regulation about the procedural and substantive requirements for preparing and submitting Terms of Reference/EAs in the waste sector. The result is that the MOE's current proposal contains no prescriptive details to govern the preparation, review and approval of waste management EAs.

We acknowledge that in 2006, the MOE released three draft Codes of Practice that outline the MOE's general "expectations" for EAs, and that provide "guidance" on the roles and responsibilities of EA participants. These three initial Codes addressed matters such as: Terms of Reference; public consultation; and mediation. It is our understanding that two additional Codes of Practice will be released shortly in relation to preparing individual EA and Class EAs.[7]

The basic problem, however, is that these Codes are not binding or enforceable in and of themselves, and they do not represent clear and unambiguous rules for EAs, either for undertakings in general or for the waste sector in particular. Thus, the EA process for waste management projects will continue to be plagued by uncertainty, controversy, and the "let's make a deal" approach of proponents and EA administrators (especially in relation to key EA planning considerations such as "need", "alternatives to", and alternative sites). In short, despite MOE promises to "clarify" and "streamline" the EA process for waste management projects, the current set of proposals does little to actually achieve this purpose. Instead, the MOE proposals are mostly notable for their objectionable attempts to take environmentally significant projects out of the EA process.

On this issue, we must point out that the EA Advisory Panel strongly recommended a fundamental paradigm shift from discretion-based EA to a rules-based regime. The EA Advisory Panel further recommended the development of a detailed sectoral regulation that clearly specified EA requirements for the waste sector (Recommendation 5). Unfortunately, it appears that neither the proposed Guide nor draft regulation is fully responsive to these recommendations. We therefore call upon the MOE to withdraw the proposed Guide and draft regulation, and to substantially redraft them, with meaningful stakeholder input, in a manner that is consistent with the EA Advisory Panel's recommendations regarding the need for prescriptive rules on EA content and procedure for the waste sector.

[7] Memorandum from Minister Broten to EA Practitioners dated October 31, 2006.

RECOMMENDATION #5: The current Guide and draft regulation should be withdrawn, and the MOE should redraft these documents, with meaningful public input, to ensure consistency with the EA Advisory Panel's recommendations regarding the need for prescriptive rules on EA content and procedure for the waste sector.

When re-drafting the Guide, the MOE should ensure that Part A includes an expanded discussion of the stated purpose of the EA Act ("betterment of Ontarians" by providing for the "protection, conservation, and wise management" of the environment). Inexplicably, the EA Act's purpose statement is virtually absent from Part A of the Guide, even though it is (or should be) the paramount consideration when deciding whether to approve, reject or exempt waste management projects under the Act.

In terms of revising the Guide's content, we would further suggest that the upfront EA Glossary could be re-located to the back of the Guide. However, for public/proponent education purposes, we would prefer to see the MOE separately publish an accurate and sufficiently detailed EA guide or manual. This publication should be posted or linked to the "EA Activities" component of the MOE's website.

In addition, we note that the introductory section of the Guide contains information on how to access the MOE's "EA Activities" website. While these directions are helpful, it is our view that the MOE's current website presence regarding EA (both general resources and project-specific information) is woefully inadequate and in dire need of substantial expansion and upgrading. As soon as possible, the MOE's website needs to provide full and timely access to all key EA program documentation (i.e., EA Act, regulations, policies, guidelines, Codes of Practice, etc), as well as project-specific information (i.e., proposed or approved Terms of Reference, public notices, status updates, elevation requests/decisions, proponent reports or studies [in pdf version], etc.). Aside from improving website content, steps should also be taken to deploy readily available internet technology to make the MOE's EA website more navigable, user-friendly, and interactive (i.e., by allowing public/agency reviewers to directly input comments on web-posted documents).

On this point, we note that the EA Advisory Panel recommended that the MOE substantially improve its EA-related website (Recommendation 22). To date, however, there appears to be little tangible progress by MOE in acting upon the Panel's recommendation in this regard. Thus, the MOE's existing EA website presence can be fairly described as "trailing edge", not cutting edge. More importantly, we submit that a well-designed and fully functional EA website will greatly assist in clarifying the EA process, and will significantly facilitate public participation under the EA Act.

In relation to "public consultation," we find that the Guide's discussion is too perfunctory and generally devoid of implementation details on how proponents can satisfy the EA Act's legal requirements for notifying and involving interested stakeholders and communities. Alarmingly, the Guide fails to discuss (or even mention) the need for proponents to provide monetary assistance (i.e., participant funding) so that interested persons can retain the legal, technical or scientific expertise that may be necessary for them to participate meaningfully in individual EAs or Environmental Screening processes. These and related omissions in the Guide are not cured

by the vacuous content of the draft Code of Practice on public consultation. Accordingly, as the Guide is re-drafted, it will be necessary for the Guide to be more reflective of the numerous reforms for public consultation recommended by the EA Advisory Panel (Recommendations 8 to 10).

Similarly, we find that the Guide's abbreviated discussion of "consultation with Aboriginal peoples" to be incomplete, contentious and erroneous in law. For example, the Guide concedes that the Crown's "duty to consult" may arise in certain circumstances, but the Guide never fully or properly describes the circumstances where the duty does arise in fact and in law. The absence of such guidance in the Guide is not helpful to proponents or representatives of First Nation and Aboriginal communities. In addition, while the Guide describes the Crown's obligation as a duty to "consult," the courts have been quite clear that this emerging doctrine also involves the duty to "accommodate" First Nation and Aboriginal concerns. Similarly, the Guide appears to be on questionable legal ground when it fails to adequately distinguish or explain the delegable and non-delegable aspects of the Crown's duty to consult and accommodate. For these reasons, we would suggest that the Guide be carefully rewritten and significantly expanded on this important topic.

In making this suggestion, we are aware that Part B of the Guide provides additional information on the First Nation/Aboriginal consultation within the Environmental Screening process. However, we are unaware of whether the MOE actually consulted First Nations and Aboriginal communities that have been involved in waste management undertakings under the EA Act to obtain their input on the proposed consultation measures. If the MOE has not already done so, we would strongly urge Ontario to specifically solicit such input to ensure that the resulting consultation procedures, protocols and arrangements are actually responsive to the needs and challenges facing First Nations and Aboriginal communities that are interested in, or affected by, waste management projects.

In terms of the transitional provisions set out in the Guide, we strongly object to the ill-conceived proposal to allow certain proponents currently within the individual EA process to "opt out" by merely filing a notice with the Director. In our view, any "in the mill" applications (including the various regional EFW proposals now undergoing EA) must continue to be processed and reviewed in accordance with current EA requirements, rather than the new Environmental Screening requirements. Assuming (without deciding) that it is even lawful to give retroactive effect to this substantive change in the applicability of the EA Act, we are concerned that the "opt out" option provides an incentive to existing proponents to delay and obfuscate until the new waste regulation takes effect. Moreover, such maneuvers would be unfair to stakeholders who have participated in existing EA processes in good faith, and who have a reasonable expectation that EA requirements (including the possibility of EA hearings) will continue to apply to "in the mill" applications. In our view, only new projects that post-date the waste regulation should be able to take advantage of the Environmental Screening process.

We are also concerned about the Guide's lack of clarity regarding EFW projects that could trigger both the waste sector Screening process and the electricity sector Screening process (O.Reg. 116/01). First, we do not agree that EFWs should be subject to the screening process under the Guide, as described above. Second, while we agree with the principle of "one project,

one EA", the Guide does not provide sufficient information on how to integrate the overlapping sectoral EA requirements for the energy and waste sectors. Thus, we would suggest that this matter should be explained in more detail in the revised Guide.

(h) Environmental Screening Process: Part B of the Guide

Aside from the above-noted concerns about project classification and Guide content, we have several concerns about the Environmental Screening process described within Part B of the Guide.

In general terms, it appears to us that Environmental Screening is simply a glorified version of Part V of the EPA, which is largely an exercise in site-specific impact mitigation rather than comprehensive environmental planning aimed at achieving sustainability. Indeed, from the public interest perspective, we are unaware of any value-added benefits of applying the Environmental Screening process on top of the substantially similar certificate of approval process under Part V of the EPA.

For example, Part B of the Guide aptly describes Environmental Screening as a "proponent-driven, self-assessment" process. In our experience, this model tends to generate self-serving "self-assessments" by proponents, who generally tend to overstate the benefits of their projects and downplay (or ignore) the attendant risks and impacts. Moreover, given that the Environmental Screening process does not expressly require consideration of need and alternatives, it cannot be considered as being substantially equivalent to the individual EA process.

For these reasons, if the Environmental Screening process is going to be utilized within the waste sector, then it must be confined to environmentally benign projects (i.e., small-scale, sited in appropriate locations, consistent with provincial waste policy, environmental impacts that are relatively minor and readily mitigable). Thus, EFWs and small landfills should not be eligible for inclusion in the Environmental Screening process, as described above.

Part B of the Guide further indicates that if a proponent does not follow the prescribed requirements of the Environmental Screening process, then that proponent is in contravention of the EA Act. If this warning is intended to ensure compliance with the Screening process, it represents a hollow threat for various reasons. First, as noted by the EA Advisory Panel, it is questionable whether the EA and Approvals Branch has sufficient resources and institutional willingness to proactively monitor and systematically enforce compliance with the Environmental Screening process (or, for that matter, other mandatory components of Ontario's overall EA program). Second, as noted by the EA Advisory Panel, the EA Act currently lacks the inspection, enforcement, order-making and penalty provisions commonly found in other environmental statutes. Third, the textual description of the Environmental Screening process is rife with permissive language (i.e., "may", "expected", "encouraged" or "should") as opposed to more mandatory or prescriptive language (i.e., "shall" or "must"). Thus, it appears that proponents have considerable latitude and discretion in terms of how the Screening process is carried out (including how long it takes to complete, what constitutes a "significant modification" for addendum purposes, etc.). In our view, the proliferation of discretionary

"weasel words" within the Screening process significantly diminishes the efficacy and enforceability of the Screening process, except, perhaps, in rare situations where a proponent may be attempting to wholly evade its broadly worded obligations under the Screening process.

In our view, the Guide's stern admonition to proponents to comply with the Screening process is virtually meaningless unless and until the EA and Approvals Branch is adequately resourced, the Screening process is made more prescriptive in nature (including prescribed forms), and the Act is amended to entrench appropriate compliance mechanisms, as discussed above. Indeed, it is our opinion that enhanced monitoring/enforcement under the EA Act is the *quid pro quo* for establishing an Environmental Screening process. In short, if certain waste management proponents are going to be entrusted to comply with the Screening requirements (rather than undergo individual EA), then we recommend that the MOE establish a rigorous regime for timely and effective follow-up activities to ensure that proponents actually comply with these requirements (including commitments made, or conditions imposed, during the planning process).

RECOMMENDATION #6: The MOE must significantly strengthen its ability to undertake monitoring, inspection and enforcement activities under the EA program, particularly in relation to the proposed Environmental Screening process.

It further appears that the MOE is placing considerable reliance on proponents to accurately complete the "yes" and "no" boxes of the screening criteria checklist. In our view, this reliance is misplaced for several reasons. First, the checklist gets completed at a very preliminary stage of the process (i.e., before any environmental studies or reports have been conducted), which means that the proponent's answers are likely to be little more than speculation or conjecture at best. Indeed, given the early timing of the checklist completion, it seems advisable to create a third category of answer (i.e., "unknown") which, among other things, will assist the proponent in determining the appropriate scope and extent of the Environmental Screening Report. Second, as noted above, the checklist does not appear to require consideration of need, "alternatives to" and alternative sites, nor does it appear to require consideration of cumulative impacts from other sources of contamination in the vicinity of the proposed waste management project. We would, therefore, suggest that the checklist be revised to incorporate these important environmental planning considerations.

Another concern about the proposed Environmental Screening process relates to the opportunities for public access to, and comment upon, detailed technical reports generated within the process. On this matter, the Guide provides mixed if not inconsistent direction to proponents. For example, page 38 of the Guide directs proponents to make such reports available "if requested," while page 40 indicates that all supporting documents should be "available" with the Screening Report.

Based upon our experiences under other Class EAs and the electricity sector screening process, we see two fundamental problems with this approach. First, providing detailed reports and supporting documentation at or near the end of the Screening process deprives participants of the ability to provide timely input into the key decision points or milestones that occur earlier within the Screening process. Second, forcing people to file "requests" with the proponent for copies of

the reports or supporting documentation will inevitably chew up critical days in the time-limited public comment periods within the Screening process.

In our view, it would be far preferable and more efficient for the Guide and draft regulation to expressly require such reports and supporting documents to be automatically available to interested stakeholders (i.e., by mailouts to stakeholder lists, by posting to MOE EA website and/or a project-specific website maintained by the proponent, etc.). We would further suggest that it would be helpful for the Guide and draft regulation to require proponents to establish a centralized registry or database of persons wishing to be notified and to receive reports and supporting documents as they are produced within the Screening process. Otherwise, certain interested stakeholders (i.e., regional or provincial non-governmental organizations) may be "missed" by the proponent's local notification efforts (i.e., advertisements in local newspapers with limited circulation).

RECOMMENDATION #7: The Guide and draft regulation must be revised to ensure that there is full and timely stakeholder access to all detailed reports and supporting documents generated at every stage of the Environmental Screening process.

(i) Deciding "Elevation Requests"

Although the MOE proposes, for example, to take EFWs and small landfills out of the EA process, it remains theoretically possible for the Director to grant "elevation requests" to ensure that particularly significant projects undergo individual EA rather than the Environmentally Screening process. In theory, it also remains open to proponents to voluntarily leave the Environmental Screening process and to instead conduct an individual EA for specific projects.

However, the Ontario experience amply demonstrates that, subject to certain exceptions, virtually no proponents subject to Class EAs or Screening procedures routinely volunteer to conduct individual EAs. Thus, we derive no comfort from the MOE's proposed procedure for making and deciding elevation requests in relation to the waste sector.

First, the recent track record under the electricity sector regulation (O.Reg.116/01) and various Class EAs clearly demonstrates that elevation requests are rarely if ever granted, even for significant or controversial undertakings. Therefore, it is difficult to take seriously any suggestion that the Director will be ready and eager to swoop down upon recalcitrant proponents, and to "elevate" their project planning to individual EA (or, alternatively, to impose further and more stringent obligations on the proponent as a condition for not elevating the project to individual EA).

Second, the current MOE proposal indicates that it is the Director of the EA and Approvals Branch (rather than the Minister) who should decide elevation requests. While we support taking such requests out of the hands of the Minister, we do not see the Director as being sufficiently independent or impartial for the purposes of deciding such requests. As long as elevation requests get determined "in house" by Ministry officials (who often play a dual role as advisor to proponents and decision-maker on EA disputes), then "elevation requests" will remain as overpoliticized matters that may be (or are perceived to be) decided not on their merits, but on

the basis of other considerations. Simply put, a Director-controlled process for deciding "elevation requests" lacks sufficient transparency, credibility and predictability.

Third, we note that the EA Advisory Panel recommended that elevation requests (and bump up requests under Class EAs) should be decided by an independent adjudicator (i.e., the Environmental Review Tribunal), in writing, within tight timeframes (Recommendation 19). We commend this arrangement as a far preferable option than having the Director internally decide elevation requests, with or without conditions.

RECOMMENDATION #8: If Ontario intends to proceed with the Environmental Screening process for certain types of waste management projects, then the Guide and regulation need to be amended to establish a formal adjudicative process, administered by the Environmental Review Tribunal, to expeditiously hear and decide "elevation requests."

In the alternative, if elevation requests are going to be determined internally by an MOE official, then consideration should be given to establishing the provincial advisory body recommended by the EA Advisory Panel (Recommendation 6). Among other things, elevation requests could be referred to the Panel, which would review the matter, receive submissions from the parties, and provide independent expert advice to the Director on whether the request should be granted or rejected (with or without conditions). In our experience, the former EA Advisory Committee ("EAAC") performed this task fairly, effectively and efficiently, and the re-establishment of a similar body to review elevation requests would help allay some of our concerns about the Director's lack of independence and accountability.

PART III – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, we do not support the EA changes that the MOE has proposed for Ontario's waste sector. In summary, it is our view that these changes have not been sufficiently justified, and we submit that the changes represent an unwarranted rollback of current individual EA requirements in respect of certain types of waste disposal sites (i.e., EFWs). In addition, the proposed Environmental Screening process is weak and inadequate, and having the Director resolve elevation requests is completely unacceptable. Accordingly, we strongly recommend that the MOE halt or withdraw the current proposal, and commence framing a new proposal, with meaningful stakeholder involvement, that will actually achieve the public interest purpose of the EA Act.

We trust that these comments and recommendations will be taken into account as the MOE considers its next steps in relation to the proposed EA changes for the waste sector.

If requested, we would be pleased to meet with MOE staff to further elaborate on the issues and concerns raised in this submission.

Yours truly,

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