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ARE ONTARIO'S PROPOSALS FOR ENVIRONMENTAL ASSESSMENT ADEQUATE?

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to the

Committee on Public Works

City of Toronto

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written by

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Canada's first step to environmental assessment was made on September 27th when Ontario Minister of the Environment James Auld introduced his Ministry's "Green Paper on Environmental Assessment".

The Green Paper outlines several courses of action which the provincial Ministry is considering pursuing in the quest for workable assessment procedures.

The paper presents a number of approaches to the vital problems of determining: Who prepares an assessment statement? What are its contents? Who reviews the statement? and, most importantly, Who makes the decisions in the Environmental Assessment Process? The Green Paper, in order to bring some order out of what could be almost a myriad of permutations of the proposed system, has developed four alternate methods which combine elements from all the potential answers to the above questions.

Public involvement in the environmental assessment process is given a great deal of attention in the Green Paper. This is the area with which most environmentalists are particularly concerned, for it is only with adequate provision for this kind of participation that there can be any assurance that the proposed new procedures will not fall into an administrative mass of mediocrity, subject to the whims of political

expediency.

Desmond Connor, a consulting sociologist, commenting on this point, said: "While recognizing some realities and failing to mention others, the Green Paper proposes no specific set of general steps toward a comprehensive public involvement program. This leaves us with a statement of its importance in principle which is undercut by having nothing specific in the way of procedures for operational application."

Three of the four methods (A, C, and D) unfortunately do not reflect this basic concern for public involvement throughout the assessment process.

System B allows for the establishment of an independent environmental assessment commission, a review of the document by the commission, public hearings to be held at the discretion of the commission and the final decision to be made by the commission with no appeal to the Cabinet or other body. This method can, in fact, be considered the only one worthy of attention by concerned citizens who believe there should be maximum public involvement in the assessment process.

Our Association, in a brief to the Ontario Ministry of the Environment, outlined some of the various factors in the assessment process that needed further elaboration or which were not given the kind of attention they deserved in the Ministry's Green Paper.

WHAT PROJECTS SHOULD BE SUBJECT TO ENVIRONMENTAL ASSESSMENT?

First among these points is a prerequisite: all projects that will have significant environmental impact must be subject to the assessment procedure. "Significant environmental impact" should be construed to mean a significant direct or indirect effect on the human environment. This could mean, then, environmental assessments for projects that may have a significant secondary environmental effect, even though they have little or no primary effect. For example, in one American case, an environmental impact assessment was deemed necessary for the tearing up of some railway track. While this superficially may seem environmentally innocuous, the court ruled that the resulting increase in truck traffic on local roads would have a severe impact on local residents.

It is recognized that thresholds must be established to prevent an absurd application of the assessment requirement.

The Green Paper's contention that initial emphasis should be placed on projects causing direct physical change only is not satisfactory. There is no need for this provision when indices are available for judging secondary impacts. For example, the Ontario Energy Board is presently reviewing Ontario Hydro's five year plan for expansion of facilities. Yet, the Board specifically precluded from consideration the environmental effects that this program would generate and stated that these environmental considerations would be taken into account at a later date.

Another major item of concern raised by the Green Paper has to do with projects that are already "in the pipe". The Minister, at the press conference where he presented the Green Paper, said that many projects would not be covered by the regulations. Subsequent questioning of the Minister revealed that one government project, although only announced, would not be subject to assessment.

A project begun before the implementation date of the environmental assessment amendment should be subject to the assessment requirement unless it has reached such a stage of completion that there can be no doubt that the cost of altering or abandoning the project would outweigh whatever benefits might accrue from compliance with the procedure.

A test for this determination would be a comparison of all steps taken toward completion of the project with those steps yet to be taken. The amount of work yet to be done (measured in planning, time, resources, expenditures, construction, etc.) should be weighed against the work already done, measured by the same considerations.

The cumulative effect of numerous small projects which, if examined one by one, may seem insignificant, must also be considered for assessment. To paraphrase a quotation from Professor Elder of the Faculty of Law, University of Western Ontario:

> What is the use of cutting environmental deterioration from large projects by 90% if the exponential growth of smaller ones results in ten times as many sources of degradation?

WHAT SHOULD THE ENVIRONMENTAL ASSESSMENT DOCUMENT CONTAIN?

The document must contain all responsible contentions of interested and affected persons, outside experts, organizations and governmental agencies on the possible environmental and social impacts of a proposed project.

It should be clearly stated in any amendments that evaluation must extend beyond solely physical consequences, so as to require interdisciplinary approaches utilizing the natural and social sciences.

In soliciting and recording outside comments, the proponent should respond to such comments in the body of the assessment document. If it is charged that a certain environmental damage is threatened by a given project, the document must either explain why the proponent discounts the threat, or why the benefits of the proposed project are likely to outweigh the dangers.

WHO PREPARES AND REVIEWS THE ENVIRONMENTAL ASSESSMENT DOCUMENT?

The originator or proponent of an undertaking should prepare and pay for its assessment. An independent review board, working with the Ministry of the Environment staff, should assure that all stages of the assessment process follow proper procedures. The advantage of requiring the proponent to do the assessment is basic to the whole theory underlying the need for environmental assessment -- to ensure that environmental considerations will be taken into account at the

earliest planning stages of a project. Out of this should emerge an institutional viewpoint more sympathetic to environmental values.

After an assessment document has been completed according to Ministry of the Environment guidelines, and provisions have been made for public input, the statement would then come before the independent review board, along with written criticisms and comments from the Ministry of the Environment. The Board can accept or reject the adequacy of the statement; if it is deficient, the hearing can be postponed until a proper assessment is submitted.

WHO MAKES THE DECISION?

The creation of an independent, powerful, environmental review board is a prerequisite to public confidence in the new procedures.

This board should be an independent commission with the power to call hearings and have judicial or quasi-judicial powers.

The rationale for creating criminal and family courts is that criminal activity and family break-up are sufficiently disruptive of the social fabric as to require unique institutions with special sensitivity and expertise for dealing with these problems. Actions having significant effect on the quality of life can be considered to be in the same category.

A recent decision by the Ontario Environmental Appeal Board gives substance to this view:

> There is no doubt that the handling of the environment is going to require a great many more legal innovations to shape and integrate forums and regulatory bodies into our new found environmental concerns.*

In Sweden such a body already exists. It is the National Franchise Board for Environmental Protection, and it is similar in construction to a court of law. It deals with applications by industry and local authorities for permits under the Environmental Protection Act. The board consists of a president with legal training, a technical expert, a representative of conservation interests, and one member with either industrial or municipal experience depending on the case.

There is one major reason why none of the Green Paper's formulae are completely acceptable.

With the exception of one, which has been virtually rejected by the Minister, all the Green Paper's suggested courses of action make decisions by a possible review board appealable to the cabinet. Throughout the Green Paper there is a consistent bias shown against any body that is not accountable to the elected representatives. Unfortunately, "elected representatives" has been construed by the Ministry to mean the cabinet. The problem posed by appeal to cabinet can best be demon-

*RE: Rockcliffe Park Realty, II C.E.L.N. No. 4, pp. 79-83, August 1973

strated by the recent decision by the cabinet in the approval of the request to expand St. Jamestown in the face of objections by the city. The decision was made entirely in secret with no reasons given.

If there is a concern for public accountability, then the matter should be appealed to and adjudicated by the Legislature, not the cabinet.

The argument that suggests that the Legislature could not deal effectively with all the potential remands that might be received on environmental matters is equally applicable to the cabinet. Only decisions which involve a policy decision would be appealable to the Legislature, so it would be difficult to contend that it would be overburdened with appeals. An alternative to legislative appeal is to let the matter be decided by the Environmental Review Board alone. If it comes out with a bad decision the legislature may pass a law exempting that project. This has already been done in one pollution case in Ontario and in the Alaska Pipelines issue in the United States.

Such a mechanism would also be more in tune with the Green Paper's concern for public involvement; for legislative debate over a proposed project and the policies surrounding it would alert the public to what trade-offs might be made in its name.

Costs in preparation for hearings are a major point of concern for many opponents to large projects. Funds must be made available to allow citizens to be on a less unequal footing with project proponents at

hearing procedures. Our Association has recently presented a submission to the Task Force on Legal Aid asking that monies be made available to those contesting environmental assessments before the proposed Environmental Review Board. One possible way of cutting citizen costs would be to mandate that, since government experts are government employees, their knowledge is in the public domain and should be available to all without charge, e.g., as expert witnesses for opponents. The Legal Aid Act should be amended to allow assistance for those involved in public interest environmental situations, thus permitting them to be adequately represented before hearing boards.

Section 87 of the Environmental Protection Act should be amended so that it provides that, except as to information that regards an industry's trade secrets, every provincial officer shall make available to any interested person at any reasonable time any identified record in his possession. It is absolutely crucial to discover the reports, figures, inquiries, data, surveys, etc., which underly the conclusions in the environmental assessment document.

Any person should have the right to institute proceedings before the hearing board for the protection of air, land and water in the province from proposed projects that may cause pollution, impairment or destruction.

Elimination of the present standing requirement (i.e., who may sue, or

in the environmental assessment context, who may object), which allows only those more affected by the potential pollution than the general community to sue, must be changed, if public accessibility to the review process is to be assured.

Looking at System C, a review coordinated by the Ministry of the Environment could be applicable provided that adequate scope was provided for the Review Board, at an early stage, to review preliminary assessment documents. Ministry of the Environment staff could scrutinize the preliminary draft and would inform the proponent of its criticisms. At this level the proponent could modify the statement at its option. At this stage, the process might require preliminary hearings by a committee set up by the Board for one or two days a month to review preliminary assessments.

Involving the Board at this early stage would assure that proper notice of preliminary agency consideration of proposed projects would reach and alert interested and affected groups.

Hearings by the Environmental Review Board at the discretion of the Minister of the Environment cannot be considered to be an adequate remedy to problems arising in the environmental context. Such a process would be an elaboration of the present inadequate political avenues of redress and, as the Pickering airport issue has so well demonstrated, is a system in which objectors can have little confidence. Terms of reference drafted by a Minister of the Environment can so delimit the

confines of debate on environmental issues, that the whole process can in many instances be regarded merely as a public relations dressing on a predetermined cabinet decision.

Again, approvals by the Minister of the Environment cannot be considered a significant improvement over the present process. Only a relatively unbiased Environmental Review Board can render decisions in which environmental factors can be seen to have been given their due consideration.

In conclusion, there are several critical elements which must be present in any Environmental Assessment Procedure to ensure the achievement of its professed goal of protecting the environment:

(1) The creation of an independent, powerful, environmental review board is a prerequisite to public confidence in the new procedures.
(2) A policy that any person should be able to require the board to consider whether a proposed project needs an environmental assessment or (if an assessment has been filed) whether it adequately explains expected environmental effects.
(3) Public access to all information about proposed projects must be guaranteed.
(4) A firm timetable must be established for implementation of the legislation in both the public and private sectors.

(5) The environmental assessment document must contain all responsible contentions of interested or affected persons, outside experts, organizations and governmental agencies on the possible environmental and social impacts of a proposed project.

(6) Early notice of a proposed project must reach all those interested and likely to be affected.