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THE CONSERVATION COUNCIL OF ONTARIO

6th Floor, 45 Charles Street East, Toronto M4Y 1S2 - Telephone: 961-6830

BRIEF TO THE PREMIER OF ONTARIO
ON EXEMPTIONS TO
THE ENVIRONMENTAL ASSESSMENT ACT

INTRODUCTION

As an organization which has for many years supported the full application of the Environmental Assessment Act in Ontario, The Conservation Council of Ontario would like to take this opportunity to present its views on a major threat to the integrity of the Act. Recent decisions by the Provincial Government to exempt the South Cayuga facility from the Act and to renew the interim exemption for crown land forest management have caused considerable concern among members of the Council. It is apparent to the Council as a whole that these decisions, as others before them, have undermined this pioneering legislation to the point that its detractors have come to refer to it as the Environmental Exemptions Act.

In the Council's opinion, if the Act is to fulfill its potential as a comprehensive environmental planning tool, the process of approving exemptions warrants greater definition and public input. Decisions to exempt projects should also be tied more closely to the purpose of the Act. Substantial improvements in both areas will not require an overhaul of the legislation or Ministry administration. The issue is primarily one of political will and with a majority of government in place there should be little difficulty in exercising the necessary commitment.

For its part, the Council wishes to point out what are seen as major weaknesses of the exemption process brought to light by recent approvals and to recommend measures which it believes will increase both the effectiveness and credibility of the Act.

MAJOR PROBLEMS

1. The exemption powers are open to abuse

Section 30 of the Act provides the Environment Minister with broad powers to exempt undertakings on a temporary or permanent basis without a hearing or any other forum of public input and without any public accounting for the decision-making process. Section 41(F) also provides an exemption-making power to Cabinet. Exercise of these powers has consistently failed to support the objective of this Council to see the legislation fully applied so as to entrench impact assessment as a basic element of all environmental management decisions.

The Council supports the exemption as opposed to the designation approach for phasing in the application of the Act. However, it is not clear that the public interest is well served by the hundreds of pages of regulations shelving objective study of whether the environment may be injured by all varieties of public projects including some of the largest and most controversial undertakings carried out by the Government. Taken as a whole, these exemptions raise questions about how willing the Government itself is to be bound by the Act, even though Section 4 of the Act makes it clear that the Act does apply to the Crown. They also, by the same token, allow the Government to base decisions on traditional client group pressure and political expedience - criteria which the Act is supposed to replace.

An example of the extent to which the Crown considers itself bound by the Act is the recent exemption of preparatory work in advance of constructing the Detour Lake Access Road. While the Government has claimed this exemption does not prejudice the final outcome of the assessment process, the Council does not accept this position. It views this segmentation as precluding the full consideration of alternatives to the undertaking. This certainly cannot be considered as allowing citizen involvement in a long range planning process.

Bound up with the Government's excessive reliance on Section 30 is the issue of the procedure by which individual exemption decisions are arrived at. Both the Act and the Ministry of Environment have been silent on this matter. Lacking any legislative requirements or administrative commitment to a consistent screening process, the public is severely hampered in its ability to monitor decisions while the Minister's discretion is correspondingly maximized.

In addition to giving intervenors little recourse other than to question decisions by way of political pressure, this situation usually sees government and intervenors alike in the unfortunate position of having to deal with any exemption controversy after the fact - when Orders-in-Council have already been approved. This is precisely the situation in which the Council currently finds itself regarding the recently approved exemption for forest management and which we are certain provides an effective deterrent to greater public attention to most exemption decisions. This situation must be improved.

Given the widespread public dissatisfaction with the Government's handling of exemptions, a strong case can be made for attempting to solve the problem by amending the legislation. It is the opinion of the Council, however, that the necessary changes to the screening process can be dealt with as an administrative issue and may well provide the Government with the most effective means for demonstrating a commitment to upholding the spirit of the legislation. Furthermore, the Council sees the use of Section 30 as basically an interim measure and does not propose to enshrine the exemption process to the point where sight is lost of the Act's main function.

Fundamentally what the Council seeks from an altered screening process is insurance that the intent of the Act to increase public participation in decision-making is reflected throughout the implementation of all its provisions, including those relating to exemption decisions. Broad exemptions which effectively take undertakings out of the purview of the Act create a situation less satisfac-

tory than if the Act did not exist. By resorting to these broad undertakings the Minister is legally sanctioning a decision-making process which specifically denies the right to public participation in long range Government planning.

The two basic components of an acceptable screening process have already been developed: the Environmental Assessment Steering Committee and a Ministry draft document setting out for project proponents the steps in pursuing an exemption order.

With the alterations recommended below, they can serve the Council's objectives.

2. The scope of class assessments should be restricted

In a number of cases, including forestry and parks programs, exemptions are interim measures tied to the anticipated preparation of "Class Environmental Assessments". Interim exemptions pose the greatest need for an effective screening process for a number of reasons. First, they are often renewed. Secondly, they can involve conditions for the proponent to comply with. Thirdly, their proponents have often succeeded in lumping an enormous range of projects under one exemption for which only one Class Assessment is to be prepared.

There are very real problems raised by the latter point which the Forest Management Exemption Order illustrates. First and foremost is the fact that Class Assessments as defined by the Ministry are to cover projects which are "relatively small in scale, are similar in nature, have predictable effects, and occur frequently". They are also expected to cause relatively minor effects in most cases. Without question the entire spectrum of forestry operations on crown land in Ontario far exceeds the scope of this definition and in fact contains many classes of undertakings related to the harvesting and regeneration of forest stands.

Even if many forest operations take the same form in all parts of the Province, it is the nature of the impact which is of ultimate importance. This will clearly vary from location to location and the significance of the variation may be impossible to predict until a full individual assessment has been conducted. Furthermore, to deal with erosion and sedimentation following cutting operations, for example, it is necessary to have specific information on soil types, rainfall, and other site characteristics, all of which will not be provided in a Class Assessment.

Procedural safeguards and participation built into the Act may be circumvented by these global Class Assessments, in particular since there is to be no Environmental Assessment Board hearing or other form of public examination for the host of individual projects covered and since the guideline for implementing the individual projects will be extremely general, masking controversial issues.

Despite these criticisms, the Council is quite prepared to accept the responsible use of Class Assessments. What we want to see is provision in the exemption process for arranging individual assessment of activities which are commonly recognized as significant in terms of impact or public controversy for example. The activities permitted by the Forest Management Agreements (FMAs) currently being developed in camera by the Ministry of Natural Resources and forest products companies are a case-in-point. Subjecting FMAs to a Class Assessment on their own is

called for since they constitute the first stage in a planning process and represent a significant shift in forest management policy which will no doubt distinguish industry operations in Agreement areas as a "class" apart from others in the Province. More importantly, however, the Government has pinned its hopes for a secure wood supply (and hence the future of many northern communities and their environment) on the success of the FMAs. Yet the public is largely ignorant of the terms of these Agreements or the significance of the land allocation process which underlies them. The Council strongly supports the Government's commitment to address the regeneration problem but is convinced that the costs and benefits of the mechanism selected for this purpose, namely the FMAs, should be aired along with alternative approaches, if there are any, before more long-term commitments are made. Given the central importance to the issue of caring for a renewable resource base, we believe the appropriate framework for such a public accounting is that of an environmental assessment.

While FMAs clearly stand apart from routine forest management plans or activities, it is not always possible to draw a distinction so easily. Even if a standard can be devised for limiting the scope of Class Assessments, its application will require some monitoring. This is a matter which should be addressed by the Environmental Assessment Steering Committee.

3. The future of the Environmental Assessment Steering Committee is unclear

When originally appointed, the Steering Committee was charged with supervising the regulations implementing the Act. The Council understands that, in response to public pressure for a watchdog body on screening decisions, the Committee was also directed on an interim basis to advise the Premier about the exemption or designation of undertakings on which the Government might later be required to make a decision. In such a capacity it was to receive and review citizen requests for the designation of exempted projects.

More recently, this advisory function was reassigned to the former Committee Chairman alone since there appeared to be a potential conflict of interest situation facing other Committee members due to their position on the Environmental Assessment Board. In the current absence of a Chairman, the Committee has presumably been unable to carry out this function at any rate, rendering, in the Council's opinion, the decision exempting forest management all the more disturbing.

The Council understands the limitations of the Steering Committee's authority and composition. It is also aware of the possibility for creating another Advisory Committee under Section 33(G) of the Act which could assume the necessary watchdog role. However, before further judgment is passed on the Steering Committee it should be given the opportunity to function effectively in this role with a new Chairman and at least two representatives from public interest groups and with a revised screening process.

RECOMMENDATIONS

1. The draft version of the Environment Ministry's project screening document should be tabled for discussion by a Standing Committee of the Legislature. Opportunity for interested parties to submit briefs should be provided and a report issued summarizing the proceedings.

2. Guidelines for limiting the scope of Class Assessments should be developed within the Ministry of the Environment and incorporated within the screening process document.
3. Public notice should be provided by the Ministry of any application for an exemption from the Act within ten days of its submission to the Ministry of the Environment and copies of the application should be available for public viewing at Ministry offices.
4. At least 30 days should elapse between the date an application is publicized and the recommendation of the Minister of the Environment to Cabinet.
5. In making a recommendation the Minister should provide detailed reasons for the decision in terms of the Purpose of the Act and the screening criteria.
6. The Steering Committee should have the opportunity to review and make recommendations to the Premier on all submissions received regarding the exemption application prior to any decision by the Cabinet.
7. All exemption orders for Class Assessments should specify a process whereby particular projects will be bumped-up for individual assessment.
8. The proponent of an exempted project should be responsible for producing periodic status reports on the environment affected by the project during the exemption period. Notice of the availability of these reports should be made public through various means, including EA Update.
9. The Steering Committee should receive requests for review of an exemption application from interested parties directly and act on them if the Committee feels that they have merit. Receipt of such requests should be acknowledged.
10. The Committee should report in writing to the party making the request, advising him or her of the action taken by the Committee, the Committee's recommendations to the Government, and the reasons for any action taken or recommendations made.
11. The terms of reference and operating procedures for the Steering Committee should be clarified and published in various places including EA Update.
12. A new Chairman and at least two representatives from public interest groups should be appointed to the Committee as soon as possible and no further exemptions should be approved until a reasonable time after those appointments are made.
13. The reinstated and restructured Steering Committee should have the right to review and comment on any exemption decisions that have been taken in the present absence of a Chairman.
14. Future exemption orders should specify the relevant Government policies which will cover the planning and implementation of the undertaking throughout the exemption period and which are available for public examination.

15. If an undertaking is exempt on the basis of safeguards available in existing legislation, then those safeguards should be spelled out in the exemption order with reference to the corresponding legislative provisions.

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