



Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

**COMMENTARY ON PROPOSED REVISION OF
ONTARIO DRAINAGE LEGISLATION**

Prepared by:

Zen Makuch
Canadian Environmental
Law Association

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LETTER HEAD

Rita Burak
Deputy Minister
Ministry of Agriculture and Food
Office of the Deputy Minister
801 Bay St.
Toronto, Ontario
M7A 1A3

November 19, 1992

Dear Ms. Burak,

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. It is also a free legal advisory clinic for the public, and will act at board hearings and in the courts on behalf of citizens or citizens groups who are otherwise unable to afford legal assistance.

In your letter of June 15, 1992 to Kathy Cooper, our environmental researcher, you requested that we provide the Ministry of Agriculture and Food with our written remarks concerning the benefits, problems and conflicts raised by the Province's Drainage Program. What we are currently prepared to provide to you is our preliminary assessment of the current legislation and its administration with a view towards further participation in any future consultation set up to review the three

pieces of drainage legislation in question.

You will appreciate that, since the Ministry of Agriculture and Food is only now beginning to assess the scope of a review of agricultural drainage programs and legislation that we will not attempt an exhaustive analysis of our concerns until such scope is determined. At present, our staff resources are limited owing to the considerable number of law reform initiatives and client commitments that we are now handling. Hence, in this preliminary stage of consultation we can only offer you our general impressions of Ontario's existing agricultural drainage program.

Traditionally, our direct interest in drainage issues has stemmed from a continuing role in providing summary legal advice to citizens concerned about the drainage projects approvals process. As well, in our Ontario Municipal Board caseload we have had occasion to deal with drainage issues as they relate to development projects to be approved under the Planning Act. Finally, the issue of drainage approvals has come up time and again in our ongoing environmental law reform consultations and advocacy work related to the improvement of Ontario's environmental protection regimes.

The area in which we have most expertise is that related to drainage issues as they affect wetland protection, restoration and enhancement strategies.

Our perspective on drainage issues accepts the necessity of protecting agricultural land and enhancing Ontario's capacity to produce a diversity of agricultural products, on an environmentally sustainable basis, for consumption in this Province and abroad. In this respect we have advised clients in several cases on the means of protecting class one to three farmlands from the development proposals that are symptomatic of the provincial problem of urban sprawl.

We also recognize the importance of the infrastructural role played by drainage programs in promoting and enhancing agricultural production. However, we feel that greater scrutiny must be given to achieving sustainable agricultural production in a manner which does not destroy Ontario's significant natural features or result in groundwater contamination. In this regard, it is felt that the existing drainage approvals process fails to adequately consider such irreparable environmental losses.

We are mindful of the activities of the Sewell Commission and various progressive conservation authorities which have sought to resolve the potential conflicts between the protection of the Province's natural features and agricultural sector drainage activities by promoting the widespread use of watershed management plans as a means of wholly evaluating the environmental impacts of drainage projects before they are built.

We see the development of watershed plans as being of fundamental value vis-a-vis drainage activities for they allow the integration of environmental principles with the infrastructural approvals processes that are a critical part of land-use planning. If properly implemented, they will also serve an important role in ensuring ecosystem protection from the damaging effects of many types of development, including drainage activities. However, it is felt that the Sewell Commission should not be relied upon as a pretext for delaying the improvement of drainage legislation in this Province. The Sewell Commission will not be dealing with this issue in any comprehensive fashion and, therefore, we would recommend that you proceed right away.

Our next concern in relation to the Drainage Act and the Tile Drainage Act is that these statutes constitute a major threat to wetland protection owing to the wetland losses which occur at the hands of the agricultural sector in its drainage activities. The regulatory approvals and the financial assistance offered under these pieces of legislation in connection with the purchase and installation of drainage structures can only encourage further incursion into our remaining wetland areas.

In this regard, there is also the problem that the Province's Wetlands Policy Statement, passed in May of 1992 pursuant to an Order-in-Council under the Planning Act does little to curb further encroachments upon wetlands at the hands of agricultural

activities. It is true that drainage works are part of the Policy's definition of development and hence are prohibited in provincially significant wetlands in the Great Lakes-St. Lawrence Region. However, this does not account for drainage works presently in existence or their maintenance.

It is a further point that agricultural activities, including drainage activities, are permitted on adjacent lands to wetlands without the requirement that an Environmental Impact Study be filed. Hence, agricultural activities on adjacent lands will continue to be a threat to wetland conservation policy to the extent that they represent a loss of wetland functions. For these reasons our drainage legislation must be revised in order that wetlands and other important natural features are protected from further encroachment by drainage projects.

One means of solving these shortcomings with our current legislation is to raise the policy issue that agricultural drainage ought to be subject to the Environmental Assessment Act. While there is some allowance for the consideration of agricultural drainage projects under an environmental assessment process mandated by drainage legislation, at present, given the financial constraints on the drainage program, the number of times that such an EA review has taken place have been minimal.

In part, this is due to the problem that EA costs are to be

borne by the initiator, not the proponent of the drainage works, thus raising a further disincentive to requiring an EA.

The present process cries out for environmental reform. Our initial suggestion would be that a class environmental assessment be developed and used for reviewing potential drainage projects. Present problems with the class EA process include insufficient public participation, slow approval responses due to a lack of political will to resolve matters expeditiously, and further inefficiencies due to a lack of familiarity with EA processes at the municipal level.

It is hoped that when the class EA process is reformed by the Province, environmental assessment of drainage projects could take place in a timely, efficient, environmentally-sound manner. It is a further point that if watershed management plans encompass drainage infrastructural approvals then many of the objectives for individual EAs of drainage projects could already be met, hence, shortening the class EA process.

On the financial side, our concern is that subsidies for building and maintaining drains provide a significant expense to the Province. On this point, we believe that loans attached to drain projects must only be guaranteed if the project in question meets the environmental conditions which arise in the class EA process. Without such class EA approval a loan should not be

granted.

The size of the loan should also be directly related to the negative impacts on the natural areas which are affected by the project. Project funding should be diminished in direct proportion to the extent of the environmental loss. Recipients who breach any environmental requirements related to the project should be required to refund the loan, with interest. These requirements will force applicants for government assistance to tailor their projects to minimize natural area losses or losses of their functions.

As a further point it is recognised that the Drainage Act does allow for "environmental appraisals" and benefit-cost statements these mechanisms do not do enough to protect sensitive natural features. However, the Act does not even provide guidelines for either type of study. Such guidelines should be developed forthwith.

At a minimum, financial responsibility for the production of the necessary studies must switch from the party requesting the study to that party which is seeking its approval as is presently the case for most other forms of Environmental Impact Assessment. In other words, the onus should be on the proponent of the project to pay for an evaluation of the potential environmental losses related to the project.

In conclusion, our concern is that the drainage application and review process must be revised to ensure that the cumulative impacts of agricultural drainage do not unnecessarily result in a further loss of significant natural feature acreage or function. One means of rectifying this situation is through the development of a comprehensive environmental assessment process for drainage projects. We submit that this should be the starting point in reviewing our existing drainage legislation.

Sincerely yours,

Zen Makuch

Counsel