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MEETING THE ENERGY AND RESOURCE CHALLENGE AT THE EXPENSE OF THE ENVIRONMENT?!

or

A CALL FOR MEANINGFUL ONTARIO ENVIRONMENTAL IMPACT PROCEDURES

Adapted from the forthcoming book, Environment on Trial: A Citizen's Guide to Ontario Environmental Law, to be published in October, 1973.

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INTRODUCTION: ENVIRONMENTAL PLANNING AND CONTROL MECHANISMS

The legal system in Ontario and Canada generally should today provide for intelligent planning methods in the energy and resources area, so that activities and projects having an adverse environmental impact will be scrutinized and subjected to intelligent criticism before irreversible steps, committing project planners to disastrous undertakings, are commenced.

This tool has been recognized at the municipal level for a considerable period of time. The Planning Act and the Municipal Act, for example, impose a duty on planning boards and municipal councils to plan for the health and welfare of their constituents.

But in Canada at the present time, we look in vain for plans dealing with the use and conservation of our natural resources, including energy, air, and water. We have set up administrative agencies to licence industries and municipalities to use and dispose of our natural resources; but, incredibly, we have not adopted legal limits on the extent of depletion we will allow.

The closest we have come to planning for the future in Ontario are policies developed within a branch of the Ministry of the Environment for various provincial

"watersheds". But before having completed such water studies, and without having developed any policies for the extraction of non-renewable resources or for dealing with the right to pollute the air, bureaucrats grant permits every day to industries and municipalities to remove and contaminate these resources.

Without such comprehensive and legally binding plans, licencing of private polluters is hardly one step beyond unrestricted development.

What seems acceptable today may not be five years from now. Without plans, government licencing agencies have no criteria with which to reject developments today, or to weigh their merits against future needs.

One important planning tool is the environmental impact study. Yet, in only one federal statute[1], and in no provincial statutes[2], can one find a requirement for the preparation of such a study, or a duty to act on it, when major public or private projects which may have environmentally damaging effects are being licenced.

The necessity for a project, its environmental impact, and alternatives to it are essential planning guideposts which are totally ignored by our current laws.

At the time of writing, it appears that the new Minister and Deputy Minister of the Environment in Ontario have appreciated the long-term problems that follow from licencing procedures that do not consider environmental impact. Amendments to the Environmental Protection Act to be made in the fall of 1973 would provide for an environmental impact assessment procedure with the potential

of application to both private and governmental projects. It is understood that project proponents would be required to submit project plans and an environmental impact statement to the Ministry at a stage no later than completion of feasibility studies. Notice of the application would be given in the locality of the project, as well as an opportunity for objections to be heard at public hearings. Licencing decisions would still remain with the Minister of the Environment, with a possible appeal to the Cabinet. While project proponents could simultaneously obtain approvals of various types (for example, rezoning), none of these would become final unless and until the Environment Ministry approved the project.

The Environmental Impact Study

Man's role in changing the face of the earth ranges from the obvious, damming a great river, to the subtle, the effects of DDT on the reproduction of hawks and pelicans. This is often referred to by ecologists as environmental impact.

We have blindly incorporated into our daily lives practices with potentially earth-shattering environmental impact - from the ingestion of thalidomide, pesticide residues and mercury-laden fish to the planning of cities around the automobile. Because it would interfere with profits and short-term convenience we have not looked too closely at the hidden costs of our decisions. In the Gulf of St. Lawrence man has exerted unusual and dangerous control over nature by the growing number of hydro-electric power dams he has commissioned and built. Hans New, an

engineer-scientist with the Redford Institute near Halifax, has stated that by holding back the natural spring time flow of river water the mixture of fresh and salt water in the Gulf has been altered. Nutrients have been reduced; the water temperature, marine life and climate changed. Although spring run off is vital, such run off is now largely regulated for power purposes. As well, while DOFASCO and STELCO may benefit the Hamilton area by employing many people, what about the social costs of the increased rate of cancer and respiratory disease in that city? Who pays the cost of increased medical care? What price have we paid in so polluting Burlington Bay that it can never be clean again? Now, at the eleventh hour, we are just beginning to consider the cost-benefit analyses which take into account environmental and social damage. Yet we have no recognized right in Ontario to ensure that this cost-benefit analysis takes place. We have no mechanisms whereby both industry and government can be forced to scrutinize their plans and made to consider alternatives less costly socially and environmentally.

Until Ontarians have a legal right to environmental impact studies, government and industry will, in most instances, continue to employ a narrow cost-benefit analysis which, for example, as was the case with the B.C. Hydro-Bennett Dam Project, leaves out the cost of damage by hydro-electric power dams to valleys and forests from flooding and gradual accumulations of silt as well as

changes in climate, water temperature and outbreaks of epidemics by pest organisms due to alterations in the water table, and looks only at the benefit of increased availability of electric power for export and domestic use.

The environmental consequences of building more and more hydroelectric power generation facilities as well as nuclear power plants - with their concomitant dangers of thermal and radiation pollution - demands a broader, more comprehensive and diversified assessment of goals and values at the initial stages of planning.

Before such projects as Ontario Hydro's recently proposed 2,000,000-kilowatt generating station for one of five sites in Northeastern Ontario should be approved - one proposed site near Sudbury would necessitate the building of a nuclear power plant because of the already heavy demands put on air quality in that area - a cross-sectioned evaluation of the proposal's environmental impact must be made, before such a project can be deemed to be truly in the public interest.

The National Environmental Policy Act (NEPA)

In 1969 the United States Congress passed the National Environmental Policy Act (NEPA). Its purpose is "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment." Its cornerstone is the environmental impact study.

Supporters of NEPA in its formative stages remembered a disastrous oil blowout in early 1969 from offshore wells operating under Interior Department leases in the Santa

Barbara Channel in California. Remembering the assurances given by the federal government before the blowout, that environmental factors had been considered and precautions taken, they demanded some "action-forcing mechanism" within the Act, to ensure that the government agencies would not ignore the Act's high-sounding purposes. The "action-forcing" mechanism they agreed upon was the environmental impact study. Section 102(2)(c) provides that any agency of the United States federal government proposing legislation or planning to undertake an action "significantly affecting the quality of the human environment" must file an impact statement with the Council on Environmental Quality.

The agency must:

> . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In addition, copies of the statement and the comments and views of appropriate federal and state agencies and officials must be made available to the public, as provided

by statute.

The overall effect of the Act is to require federal agencies to consider environmental factors at the earliest possible stage and to mould their actions to improve the environmental effects, or to refrain from action when the balance of the information available indicates that the action is not in the public interest. The impact study is the means of getting all this information together, so that it will be available to the public and officialdom alike.

The impact studies have had a profound effect on agency policies on a number of levels.

The information they have revealed has caused the abandonment or modification of many projects discovered to be inadequate when held up to the light of day. For instance, when the two California communities of Bolinas and Stinson applied to the Environmental Protection Agency (EPA) for a joint sewage system, the EPA's study indicated that the proposal would allow immediate urbanization of a rural area over the protests of a majority of the residents, would cause financial hardship to area property owners, and might harm the ecology of the most significant shale reef on the West Coast.

An alternative more compatible with the local environment was formulated.

In addition, this process, requiring a public explanation of the environmental consequences of proposed

government actions, has compelled many agencies to adjust substantially the ways they do business. The Atomic Energy Commission, for instance, which previously considered only the radiological health and safety effects of nuclear power plants, now must consider all other significant environmental effects as well, such as the rise in water temperatures caused by thermal discharges from plants.

In the United States, the environmental impact study has opened many government activities to public scrutiny and participation for the first time, has forced agencies to broaden their narrow focus, has provided a systematic way for the government to deal with complex problems that cut across the responsibilities of several agencies, and has opened the way to judicial review of administrative agencies' decisions.

In Ontario, the citizenry, whose interests might be broader than the narrow costs and benefits weighed by agency and industry personnel, are still locked out of the decision-making process. They do not even have a right to know the impact of a project, much less to assess or reject it. If we were to obtain a legal right for any citizen to invoke a procedure that forces government and industry to evaluate openly and accept responsibility for the trade-offs, we will have accomplished a great deal.

Proposed Ontario Impact Procedures

The Ontario Environment Ministry seems to be

moving in this direction in 1973. In the spring of this year, the government promised to introduce amendments to the EPA that would require environmental impact statements coupled with public hearings for major public and private projects. Unfortunately, the Ministry's proposals (forthcoming in the fall of 1973), as understood at the time of writing, give cause for misgiving.

First, regulations will allow any activity or project to be exempted from the impact procedures. This is certainly open to abuse; it could well be that activities with the greatest environmental impact will be exempted through regulations. The amendments when made should clearly state that any project, whether private or governmental, with "significant environmental impact" must comply with the procedures. This would not be inconsistent with a timetable providing for a phase-in of the application of the impact procedure to different types of projects. For example, procedures applicable to governmental projects might be phased in before procedures for private projects, with dates for such a timetable to be determined at public hearings. Should the government fail to apply the procedures within a reasonable time provisions should be made for judicial review. It should be open to a court in such a situation to decide when a project entails significant environmental impact such that it necessitates compliance with the required assessment procedures.

Presently almost all provincial and federal statutes

in Canada, including Ontario's environmental laws, contain clauses giving the government agency which administers them unfettered discretion to make major decisions based on the agency's view of the public interest, rather than on the basis of any written guidelines. This, apparently, is the policy the government proposes to adopt with respect to when an environmental impact assessment will be required. "Major decisions" can include, of course, a decision to do nothing.

This type of discretion ensures that the courts have no power to review the wisdom, adequacy and often the fairness of the civil servants' decisions.

Courts in the U.S. have recently begun to deal with the problem of administrative discretion in environmental matters particularly when government agencies act informally, that is without a public hearing. The primary concern that has been exhibited by the judiciary in this regard has been the desire to improve the exercise of discretion and prevent arbitrary administrative action. For example, in Environmental Defense Fund, Inc. v. EPA[3] the court remanded a case involving an environmental group's application for the summary suspension of the federal registration of DDT to the EPA Administrator because of his failure to provide an adequate statement of reasons. The court regarded the interests at stake in the case as "too important to permit the decision to be sustained on the basis

of speculative inference as to what the Administrator's findings and conclusions might have been."[4]

Indeed, as Professor A. R. Lucas, of the University of British Columbia's Faculty of Law has noted, administrative agencies everywhere, including Ontario, display "disturbing tendences". For example:

- They tend as a result of prolonged contacts through the secret, cosy, regulatory process, to adopt the values and biases of the industry to be regulated. An accord may then be reached and maintained through agency officials moving to the industry side.

This propensity is also underscored in the U.S. in regard to industry assessments of energy needs. For example, in mid-1970 the Federal Power Commission predicted that the country would suffer an oil and gas shortage that winter. How did it know? Oil and gas trade associations must have told it so, since the FPC lacks the independent capabilities to measure existing energy capacity.[5]

It is thus essential that the Ontario government's proposed legislation regarding impact procedures recognize the necessity of submitting projects to strict public scrutiny as well as leaving open the possibility of judicial review of administrative decisions.

The state of Michigan has had the courage to subject its government agencies to scrutiny, and this government should no less in the name of enhancing the environment and preserving natural resources. As Professor Joseph L. Sax of the University of Michigan Law School has stated:

> Previously these agencies had been given a sweeping mandate to enforce environmental standards as they thought best, and their decisions were subject to judicial review only for arbitrary and abusive use of their authority or for violation of explicit statutory language. Now these agencies must be prepared to defend themselves against charges that their decisions fail to protect natural resources from pollution, impairment, or destruction.[6]

Secondly, while it is understood that neither present members of the Ontario government nor civil servants will be appointed to the proposed environmental hearing tribunal, there is no guarantee that the tribunal members will be anything but supporters of the party in power and representatives of the business community. Provision should be made to ensure that a variety of interests will be represented. One way to achieve this would be for each political party to name equal numbers of tribunal members. Guaranteed tenure and salary would also be desirable.

Thirdly, the proposed public hearing procedure for assessing the environmental impact of a proposed project will surely be tokenism and is likely to provide for nothing more than ventilation of emotional viewpoints, unless criticisms of the impact statements or project opposition are based upon solid information. To ensure meaningful procedures, the citizens opposing or criticizing such schemes must have access to environmental experts and lawyers to adequately represent them at the hearing tribunal. The legislation, when introduced, must reform present laws to achieve guaranteed public access to governmental information and expertise.

In Ontario all information held by the government, no matter how innocuous, may only be released with the permission of the Minister responsible for the particular Ministry or agency. In practice this discretion is at the whim of civil servants who maintain a rigid policy of releasing as little information as possible. There is no established public procedure whereby the citizen can take any action to obtain a report or document.[7] In fact, the government does not even tell the citizen what information it has. Countless anonymous bureaucrats sit stamping "secret", "confidential", "restricted" and other designations on virtually every piece of paper and document that goes across their desk. The politician and bureaucrat alike are vitally aware of the fact that information is power and they guard this tradition of secrecy.

Problems of this nature that have arisen in the past are exemplified by the fact that a citizen in an urban area, who wishes to take legal action against a polluter, must prove that the contaminants are emanating from the alleged polluter's operation and from no other source. This can be done only with a high degree of technical expertise, testing facilities and manpower. Both the information and expertise are controlled by bureaucrats reluctant to aid the individual citizen.

Two sections of the Ontario Environmental Protection

Act deal with disclosure of information to some degree. One, Section 19(4), requires the Ministry to advise an inquirer whether somebody is under a ministerial order to reduce pollution and if so, to permit the inquirer to inspect the order. The unfortunate attitude of the Ontario Environment Ministry in this regard is revealed by its policy of not providing photo copies of such orders. You can inspect an order, but to get a copy you must sit and write it out by hand.[8] Further, the Ministry has adopted the policy that orders no longer in effect revert to "secret" status. The other, Section 81, begins with the premise that all information is secret except "information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment." Unfortunately, in practice, it seems that the Ministry has interpreted this section to mean that information that is not secret is not necessarily public. Requests for this information by public environmental groups have always been denied (except when pressure was placed on either the Environment Minister himself or the Premier of Ontario, and not always even then).

In the United States the Freedom of Information Act[9] gives citizens certain rights to obtain information in the possession of United States government agencies and departments. Each agency or department has regulations that set forth the procedure for requesting information from that particular agency or department. Usually the procedure is to write to the information section requesting the information

sought. The agency or department are obligated to reply, either granting access or denying it. If the request is denied the applicant may appeal to a higher official of the agency or department. If the request is again denied the applicant may take the matter to court under established procedures.

Many states have some legislation which defines the citizen's right to government information. The most common provisions include:

1. A statutory right of every citizen to inspect and copy public records.
2. The type of information which must be furnished (exemptions are also specified).
3. Procedures for obtaining information (set forth in the statute or by agency rule).
4. Statutory penalties for the public official who refuses information.
5. Enforcement by the courts of the right to access, under general legal principles.

The preamble of the California Inspection of Public Records Act sets out the doctrine of public access to information as follows:

> . . . the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

These information Acts by no means assure the citizen timely access to the government information he needs.

There can be delays in answering the original request and the formal legal procedures are time-consuming. It would seem that often the information may be denied long enough to diminish its value to the seeker. But at least these Acts provide some framework for the citizen to work under. In Ontario and in Ottawa there are no such legal procedures.

The need for money to help defray the costs of obtaining adequate legal and scientific expertise in preparation for a hearing should be provided for in the proposed legislation by the Ontario government by a provision mandating funding by either the project proponent or a government fund (Legal Aid?). This would enable citizens appearing at environmental impact assessment hearings to place themselves on a footing more equal to project proponents, who in the case of major projects, may likely have expended hundreds of thousands, if not millions, of dollars in preparation for their environmental impact application.

A fourth deficiency in the present proposal is that there is no provision for giving citizens the right to ask a court to stop a project if the environmental impact procedural requirements are not fully complied with. Yet such suits, brought by conservation groups and interested private citizens, have become an important, if not vital, part of the procedures under NEPA; they have often halted or delayed projects subject to the requirements of impact statements. This has been one of the major strengths of NEPA.

The Ontario Environmental Protection Act however does not take into consideration the positive effects of direct citizen participation either in environmental planning

or through litigation to protect the public interest.

Unless the general public is specifically given the right to bring actions questioning the adequacy of impact statement requirements, the only persons who would be able to initiate legal action for this purpose would be those suffering economic losses greater than those endured by the community at large - a difficult standard to meet. Unless "standing" is conferred on the public as a whole, only a very few "affected persons" will be entitled to take action to enjoin any breaches of the law.

Litigation is an invaluable tool to stimulate a high public profile for otherwise reoutine governmental decisions, consequently ensuring a more comprehensive evaluation of all conflicting interests.

By failing to change archaic laws of "standing" (that is, who can sue), the government has stopped citizens from going to the civil courts and obtaining damages and injunctions to stop on-going pollution or prevent proposed activities which will almost certainly lead to environmental degradation.

Similarly, the problem of "standing" is a fundamental obstacle when citizens wish to obtain a court declaration that the government is breaking its own laws and/or an injunction to prevent such government illegality. The problem is that courts have characterized activities that affect the community at large as "public" nuisances and have held that private individuals cannot sue for a public nuisance

unless they suffer special damages of a different degree and kind from those suffered by other members of the community. Only the Attorney General is at present allowed to seek relief in the courts against public nuisance.

The State of Michigan, on the other hand, has passed an Environmental Protection Act[10] which has enlarged the role of the courts by permitting a plaintiff to sue for a violation of his right to environmental quality, in much the same way that one has always been able to claim that a property or contract right has been violated. The citizen's rights with respect to standing in environmental cases is clearly defined in the Act. Section 2(1) states:

> The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

This "right" of a citizen or group to "standing" in environmental cases is another basic right which must be part of an environmental Bill of Rights. That the Ontario government has failed to change the anachronistic rule of the common law is illogical, to say the least, when

one realizes that:

1. a private citizen can prosecute anyone for any breach of a provincial statute or criminal law - for example, you can lay a murder charge against your neighbour and hire a lawyer to prosecute the charge for you;
2. under the Municipal Act, any ratepayer can obtain an injunction in the civil courts to prevent breach of a municipal by-law;
3. under the Planning Act, any ratepayer can obtain an injunction to prevent the breach or apprehended breach of an official plan or zoning by-law.

Removing the barrier to sue for public nuisance would not, in the light of these provisions, be a radical move!

Nor would it submerge the court system in an uncontrollable deluge of litigation as opponents of the reform claim. The Michigan experience bears this out. Michigan environmental lawyers Joseph L. Sax and Roger L. Conner critically examined the first sixteen months of Michigan's EPA. They write that:

> Despite a much-invoked fear that enactment of the EPA would flood the courts with suits, only thirty-six cases have been filed in sixteen months, and they have been evenly distributed over that period, with two or three in each month. The modest number of cases filed is neither cause for joy nor for gloom. It implies that both the proponents and opponents of the Act were wrong; the statute is not as easily accessible a tool as its supporters had hoped or its opponents had feared.[11]

In fact, rather than an onslaught of citizens immobilizing processes of government, "public agencies have been plaintiffs under the Act more often than was anticipated. Government entities, including cities and counties, have been plaintiffs in about one-third of the cases filed."

Ontario experience would seem to indicate there would be no flood of litigation here either. There are very few known cases where individual ratepayers in Ontario have attempted to obtain injunctions for breach of the Municipal and Planning Acts, even though these Acts have been law for decades. And given the high court costs that an unsuccessful plaintiff would be subjected to should he lose such an action, it is highly unlikely that more than one or two persons in all of Ontario in any given year would seriously consider public interest civil litigation (if standing in civil action were widened to cover breaches of environmental statutes).

Even in private prosecutions where court costs are virtually non-existent, there has been no prosecution-happy citizenry at work. Since the EPA came into force in the summer of 1971, there has been only one private prosecution instituted by a citizen (successfully, against a charcoal company which was fined $500). And in the same period, there has been only one other private prosecution under the Ontario Water Resources Act (again successfully - the company and its manager were fined $1,000). Canadian Environmental Law Association records indicate there have

been about one or two private by-law prosecutions, mainly for noise, instituted in Metropolitan Toronto each year.

CONCLUSION

One of the fundamental questions in the area of energy and resources that must be asked by this society is: what things do we value most? If the answer is clean air, water and a measure of tranquility, then citizens must begin to question their consumptive demands for increased energy; if the answer is more "growth" then the present system needs only to be nurtured and supported and the inevitable pollution that results from power generation and use accepted as a part of that decision. Indeed, however, if the citizen's decision is the former, then his concerns must ultimately turn to an effective utilization of the courts and environmental planning tribunals. The effectiveness of such platforms for this purpose has been adumbrated by Professor Sax, of the University of Michigan Law School:

> Companies engaged in the production of electric power lament the constraints that judicial intervention has imposed upon their planning . On the other side many wonder how we can ever bring home to the public the true costs of ever increasing demands for electric power. The courts help to focus the issue. By imposing restraints on the construction of new facilities that inadequately compensate for losses in public amenities and natural habitats, they discourage to an extent the traditional search for ever more power. In so doing they encourage the search for less costly - that is, less harmful - solutions, and they have the power to transform the sense of urgency about the need for such solutions from rhetoric to reality.[12]

NOTES

1. The Northern Inland Waters Act, RS C 1970 C. 28 (1st Supp.), is the one federal statute that provides for environmental impact studies. It applies only to water use in the Northwest Territories and the Yukon.

2. As of May, 1973.

3. 465 F. 2d. 528 (D.C. Cir. 1972).

4. Ibid., at p. 539.

5. See, for example, Concentration by Competing Raw Fuel Industries in the Energy Market and Its Impact on Small Business, Hearings before the Sub-committee on Special Small Business Problems of the House Select Committee on Small Business, 92nd Congress, 1st Session, Vol. I, at 13 (1971). As reprinted in M. Green and R. Nader, "Economic Regulation vs. Competition: Uncle Sam the Monopoly Man", 82 Yale L.J. 871 875 1973.

6. "Michigan's Environmental Protection Act of 1970: A Progress Report", 70 Michigan Law Review 1003, 1005 (1972).

7. Except at the municipal level. See s. 216 of the Municipal Act RSO 1970 ch. 284.

8. This policy appears to be illegal. Under s. 33(1) and (2) of the Ontario Evidence Act, the Ministry would appear to be under a legal obligation to supply copies at no more than 10 cents per every 100 words. To date, there has been no reported attempt to use this heretofore rather obscure provision.

9. 5 U.S.C. 552.

10. Public Act No. 127 of 1970.

11. "Michigan's Environmental Protection Act of 1970: A Progress Report", supra, p. 1007.

12. Defending the Environment: A Strategy for Citizen Action, Alfred A. Knopf, Inc., New York, 1971.