ARE ONTARIO'S PROPOSALS FOR ENVIRONMENTAL IMPACT ADEQUATE?

by John Low

Canada's first tentative approach to controlling the growth of the industrial wasteland 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, not to be confused with a white paper on the government's intentions, 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 (or lip service?) 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, unfortunately, do not reflect this basic concern for public involvement throughout the assessment process. The fourth method was virtually rejected by the Minister in a subsequent press interview, as something that was included by the Ministry only to satisfy the hardline environmentalists.

This latter approach 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 environmentalists who don't want the final decisions on environmental projects to be worked out in the smoky back rooms of a government caucus session.

But where do we start from in the quest for a workable procedure? We all know that we want environmental impact assessment; many of us know what should be in the assessment document; but not so many know their way through the bureaucratic procedural jungle well enough to formulate a practicable, workable method of adjudicating environmental assessment, fair

both to the proponent of a project and to those who will be affected by it. In such an instance it would not be difficult for a government bent on preserving the traditional framework for resolving environmental disputes, i.e. cabinet or Ministry fiat, to implement a system which would provide a public relations dressing, rather than a real attempt to tackle the uncomfortable issues of environmental degradation head on.

The Canadian Environmental Law Association, in a recent 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.

Similarly, government contracting and procurement policy could be scrutinized for potential environmental impact. A decision, for example, by government agencies to buy strip mine coal could be subject to review. 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.

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 (the new GO urban transit system for Toronto), 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 Prof. 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 requireing 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

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

ing proceedings. One possible way of cutting citizen consts 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 instutute 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.

In conclusion, many of the factors outlined in the CELA brief were touched on in the Green Paper. Unfortunately, the nebulous quality of a green paper makes it difficult to pinpoint the actual system that the Ministry is considering and wishes to implement.

It is known that the Green Paper went through eight drafts, which were critically examined by several concerned government Ministries, principally the ones who would be most likely to be affected by its provisions.

Early in October, the Minister announced the reorganization of the Ministry to include a new branch responsible for environmental assessment and planning. If the Minister is truly concerned to ensure that public consultation will take place before the procedure for environmental assessment is determined, this step seems premature, and may in fact be an omen that the procedure has already been decided.

The date for acceptance of submissions to the Green Paper has been extended from the original one-month deadline of November 1 to January 1; however, it is expected that the Minister will accept them after this date.

When one views the Ontario assessment procedures as the first for Canada, a lead which will set a precedent that other jurisdictions may follow, it is difficult to overstress the need for a system which will be satisfactory from its inception. It is up to everyone to let the Minister know that we wish a system which incorporates meaningful public involvement, and not one which will simply be a public relations patch on the status quo.