276

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

THE ENVIRONMENTAL IMPLICATIONS OF

BILL 26

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Prepared by

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TABLE OF CONTENTS

PART I INTRODUCTION

1.0 Background

On November 29, 1995 the government introduced Bill 26, *An Act to achieve Fiscal Savings and to Promote Economic Prosperity, Public Service Restructuring, Streamlining and Efficiency and to implement other aspects of the Government's Economic Agenda.*

The Bill, which makes sweeping changes to numerous provincial statutes was introduced without any public input. Consequently the Canadian Environmental Law Association (CELA), like many other organizations, has had very little time to review and analyze the changes proposed by the Bill. This brief is therefore only a preliminary assessment of the environmental implications of Bill 26. On December 18, 1995, CELA provided a summary of the brief by way of oral submissions to the Standing Committee on General Government.

PART II - THE ENVIRONMENTAL IMPLICATIONS OF THE AMENDMENTS

1.0 Non-Compliance with the Environmental Bill of Rights, 1993

On the day that the government introduced Bill 26, it also filed Regulation 482/95 exempting bills that would result in the elimination, reduction or realignment of an expenditure of the provincial government from section 15 of the *Environmental Bill of Rights, 1993* (EBR).

Section 15 of the EBR, places a duty on a Minister to place all proposed polices and acts which could have significant impact on the environment on the EBR Registry for public comment at

least thirty days before implementation. As a result of Regulation 482/95, the government managed to avoid compliance with section 15 of the EBR.

It is evident, even on a cursory reading of Bill 26, that it extends beyond the ambit of merely attempting to achieve fiscal savings. Numerous amendments to at least seven provincial statutes have been identified, which will result in a significant detrimental impact on the environment. By circumventing the requirements of the EBR the government has blatantly undermined the integrity of the EBR and accountability in the government decision-making process.

2.0 Schedule K - Freedom of Information and Protection of Privacy Act

2.1 The Purpose of the Freedom of Information and Protection of Privacy Act

The *Freedom of Information and Protection of Privacy Act* (F.O.I. Act) came into force on January 1, 1988. The Municipal *Freedom of Information and Protection of Privacy Act,* which came into effect on January 1, 1991, extended the principles of the provincial Act to all municipalities and local boards in Ontario.

The purposes of the F.O.I. Act are as follows:

a) to provide a right of access to information under the control of institutions in accordance with the principles that,

- information held by institutions should be made available to the public;

- necessary exemptions from this general right of access should be limited and specific (emphasis added); and
- decisions on the disclosure of government information should be reviewed independently; and

b) to protect the privacy of individuals with respect to personal information about themselves held by institutions, and to provide the individuals with a right of access to that information.[1]

2.2 The Amendments to the Freedom of Information and Protection of Privacy Act

Bill 26 proposes the following changes to the F.O.I. Act:

1. A new section is created to give the head of a government institution the power to deny a request on the ground that it is frivolous or vexatious [Schedule K, p.1, section 10(1)(b)] .

2. A new section is added to give the Information and Privacy Commissioner the right to dismiss an appeal if the notice of appeal does not present a "reasonable basis" for concluding that a record exists [Schedule K, p.7, section 20(2.1)].

3. A person who seeks access to a record or personal information is required to pay a fee prescribed by the regulation [Schedule K, p.3, section 24(1)(c)].

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[1] *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, Chap. F.31, section 1.

* Note: Under the current Act, subsection 57(2) states that a head shall not require a person to pay a fee for access to his or her own personal information. This section will be repealed [Schedule K, p.4, section 57(1)].

4. A person who makes an appeal to the Information and Privacy Commissioner is required to pay a fee [Schedule K, p.3, section 50(1.1)].

5. A person who requests access to a record is required to pay the fee prescribed by regulation for any other costs incurred in responding to the request [Schedule K, p.4, section 57(1)].

2.3 The Environmental Implications of the Amendments

(a) Frivolous and Vexatious

Section 10(1)(b) is at odds with one of the fundamental purposes of the F.O.I. Act which is to ensure that all exemptions are limited and specific in nature. The amendment vests the heads of institutions with extremely broad discretionary powers to deny access to information. Furthermore, if a request is deemed to be frivolous or vexatious, the institution does not have to provide assistance in reformulating the request as currently required under section 24(2) of the F.O.I. Act [Schedule K, p.2, section 24 (1.1)].

(b) No Reasonable Basis for Concluding Record Exits

The proposed section 50(2.1) provides a convenient mechanism to summarily dismiss appeals by members of the public. The section also creates an undue burden by placing the onus of demonstrating the existence of a record on the appellant in his or her notice of appeal, an obligation which can rarely be fulfilled.

The combination of new sections 10(1)(b) and 50(2.1) will also limit the media's access to information. As a result a journalist's ability to scrutinize the functioning of government and to fulfil the media's role as a watchdog of democracy will be severely impaired. These changes draw a cloak of secrecy over information within government, which is precisely what the F.O.I. Act was intended to prevent.

(c) Fees

The mandatory fee requirements when requesting personal information, the requirement to file fees for appeals to the Information and Privacy Commissioner, and "any other costs for responding to a request" will serve to discourage public access to information from government institutions. People with low incomes may well find the costs too prohibitive to make requests.

3.0 Schedule M - Amendments to the Municipal Act and various other Statutes Related to Municipalities, Conservation Authorities and Transportation.

3.1 The Purpose of the Municipal Act

The *Municipal Act* provides for the formation, erection, alteration of boundaries and dissolution of municipalities and also provides a detailed set of rules for governing municipal activities. Municipalities incorporated under the Act are responsible for local self-government and adminstration responsive to the health, safety and orderly government of residents.[2]

3.2 The Amendments to the Municipal Act

Schedule M of Bill 26 proposes amendments to the *Municipal Act,* the *Municipal Franchises Act*, the *Ontario Unconditional Grants Act*, the *Public Utilities Act*, the *Regional Municipalities Act*, various regional statutes, the *Public Transportation and Highway Improvement Act*, the *Conservation Authorities Act* and the *Local Roads and Boards Act.*

Bill 26 proposes the following changes:

1. A new section is created to facilitate municipal restructuring. The first method is via a voluntary approach [Schedule M pp.2-4, sections 25.2(2) - (13)], and the second is through a commission established by the Minister [Schedule M, pp.4-6, section 25.3] .

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[2] I.M. Rogers, The Law of Canadian Municipal Corporations (Scarborough, Carswell, 1995).

* Note: Restructuring is broadly defined and includes municipal annexation, amalgamation, separation, joining to a county, dissolving all or part of a municipality or incorporating new municipalities.

2. The power for municipalities to pass by-laws regulating and governing the business of dry cleaning will be repealed [Schedule M, p.7, section 207(26)].

3. The ability that upper-tier municipalities now have to assume waste management powers from local municipalities is to be expanded to include "any local power" to provide a prescribed service [Schedule M, pp.7-12, sections 209.1 - 209.7].

4. A new section is created which would allow municipalities to pass by-laws to dissolve any local board, which is defined to include "any body performing any public function prescribed by regulations." The power to dissolve local boards will not come into effect until regulations are promulgated [Schedule M, pp.13 - 14, section 210.4].

5. A new section is created giving any municipality the right to charge user fees to any class of person for:

(a) services or activities provided or done by or on behalf of the municipality;

(b) costs payable by it for services or activities provided by another municipality; and

(c) using municipal property [Schedule M, p.15, section 220.1(2)].

3.3 The Environmental Implications of the Amendments

(a) Restructuring Options

There are two restructuring options provided in the Bill. The first is a voluntary approach whereby municipalities can make a restructuring proposal to the Minister of Municipal Affairs and Housing. The proposal must be contained in a restructuring report and contain a description of the proposal and proof "in the form satisfactory to the Minister" that the proposal has the "prescribed degree of support of the prescribed municipalities" which was determined in the "prescribed manner" with the "prescribed criteria." The manner in which the restructuring option will be carried out will depend on the prescribing regulations.

A provision in Bill 26 [Schedule M, p.4, section 25.2 (13)] states that when a municipal council, in the process of voluntarily restructuring a municipality, contravenes any of the yet to be drafted regulations, and adversely affects the successor municipality financially, the councillors who voted in favour of the enabling act will be held personally liable for the amount of the adverse financial effect. This provision will likely deter councillors from choosing the apparently 'voluntary' option to restructure.

The second option for restructuring is for the Minister to establish a commission, including its composition, by regulation. The regulation can direct the commission to develop restructuring proposals which can implemented by a Minister's order.

The yet to be promulgated regulations will assign sweeping powers to the Minister to determine all aspects of restructuring. This includes the development of any restructuring option by a commission that will be set up and directed by the Minister. The proposed amendments give the Minister the final say on approval of a broad range of restructuring options without any legislative change and without any provision for public involvement.

The proposed amendments also have significant environmental and land use implications. The restructuring options will simplify and facilitate the process of annexing more land to municipalities and will encourage more urban sprawl. The servicing costs of the increase in urban sprawl will likely be passed along in higher taxes and user fees [Schedule M, p.15, section 220.1(2)].

The restructuring option should be viewed in conjunction with Bill 20 which proposes changes to the *Planning Act*. Bill 20 effectively removes the tools for municipalities to encourage and require more efficient and cost-effective compact development and intensification in urban planning. One of the stated purposes of Bill 26 is to achieve fiscal savings. However, a draft study prepared for the Golden Task Force and headed by Dr. Pamela Blais (*The Economics of Urban Form*) conservatively estimates that one billion dollars a year could be saved in the

Greater Toronto Area alone by implementing a traditional compact development pattern found in the older neighbourhoods of virtually all of Ontario's towns and cities. The planning reform proposed by Bill 20 will encourage the continued development of "cookie cutter" subdivisions, urban sprawl and the continued waste of billions of taxpayer dollars to service such developments.

(b) Dry Cleaners

With the repeal of section 207(26) municipalities will be unable to encourage dry cleaning facilities to use more environmentally benign alternatives in their production process. This will lead to continued use of perchloroethylene, a chlorine-based toxic substance traditionally used by dry cleaning facilities and targeted for phase-out as part of the U.S - Canada pollution prevention campaign. It seems odd that among the vast multitude of areas for which municipalities are empowered to pass by-laws, Bill 26 singles out the regulation of dry cleaners as a vehicle to achieve unsubstantiated fiscal savings. The anticipated net result of the repeal of section 207(26) will be to discourage the establishment of dry cleaning facilities using alternatives to perchloroethylene.

(c) Transfer of Power to Upper-Tier Municipalities

The ability of upper-tier municipalities to assume waste management powers from local municipalities is to be expanded to include any local power to provide " a prescribed service or facility." The environmental implications of this transfer of power remain uncertain. However, the assumption of power by the upper-tier municipality seems to be a companion to the broad

restructuring options for the dissolution of municipalities and a mechanism to facilitate the transfer of powers between tiers of municipal government.

(d) User Fees

The broad range of powers to charge user fees will be yet another subsidy to support urban sprawl. Instead of exerting planning controls to facilitate more cost-effective development at higher densities, municipalities will simply pass along the expense of urban sprawl to the public in the form of a wide range of user fees. In addition, the proposed amendment must be viewed in conjunction with Bill 20 which proposes changes to the *Development Charges Act*, whereby municipalities will be constrained in the amount of money they can charge developers for new developments. Bill 26 and Bill 20 work in tandem to ensure that the costs of inefficient development patterns can be readily shifted to the public in the form of user fees.

4.0 Conservation Authorities Act

4.1 The Purpose of the Conservation Authorities Act

Conservation Authorities, for the purposes of accomplishing their objectives under the *Conservation Authorities Act*, have the power:

(a) to study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed;

(b) for any purpose necessary for any project under consideration or undertaken by the authority, to enter into and upon any land and survey and take levels of it and make such borings or sink such trial pits as the authority considers necessary;

(c) to acquire by purchase, lease or otherwise and to expropriate any land that it may require, and subject to the approval of the Lieutenant Governor in Council, to sell, lease, or otherwise dispose of land so acquired;

(d) to lease for a term of one year or less, without the approval of the Lieutenant Governor in Council, land acquired by the authority;

(e) to purchase or acquire any personal property that it may require and sell or otherwise deal therewith;

(f) to enter into agreements for the purchase of materials, employment of labour and other purposes as may be necessary for the due carrying out of any project;

(g) to enter into agreements with owners of private lands to facilitate the due carrying out of any project;

(h) to determine the proportion of the total benefit afforded to all the participating municipalities that is afforded to each of them;

(i) to erect works and structures and create reservoirs by the construction of dams or otherwise;

(j) to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof;

(k) to alter the course of any river, canal, brook, stream or watercourse, and divert or alter, temporarily as well as permanently, the course of any river, stream, road,

street or way, or raise or sink its level in order to carry it over, or under, on the level of, or by the side of any work built or to be built by the authority, and to divert or alter the position of any water-pipe, gas-pipe, sewer, drain or any telegraph, telephone or electric wire or pole;

(l) to use lands that are owned or controlled by the authority for purposes, not inconsistent with its objects, as it considers proper;

(m) to use lands owned or controlled by the authority for park or other recreational purposes, and to erect, or permit to be erected, buildings, booths and facilities for such purposes and to make charges for admission thereto and the use thereof;

(n) to collaborate and enter into agreements with ministries and agencies of government, municipal councils and local boards and other organizations;

(o) to plant and produce trees on Crown lands with the consent of the Minister, and on other lands with the consent of the owner, for any purpose;

(p) to cause research to be done;

(q) generally to do all such acts as are necessary for the due carrying out of any project. R.S.O. 1980, c.85, s.21.[3]

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[3] *Conservation Authorities Act*, R.S.O. 1990, Chap. c.27, section 21.

4.2 The Amendments to the Conservation Authorities Act

Bill 26 proposes the following changes to the *Conservation Authorities Act:*

1. A new section is created to allow municipalities to dissolve Conservation Authorities [Schedule M, pp.28 -29, section 13.1 (1) - (5)].

2. Section 14.6 of the Act is repealed, thus removing the ability of the Province to appoint members to the boards of Conservation Authorities [Schedule M, p.29, section 14(6)].

3. A new section is created ensuring that if the Minister has made a grant to a Conservation Authority in respect of land, the Conservation Authority shall not sell, lease or otherwise dispose of the land without the Minister's approval [Schedule M, p.29, section 21(2)].

4. A new section is created whereby terms and conditions may be imposed on the approval granted under the new section 21(2) including a condition that the authority pay a specified share of the proceeds to the Minister [Schedule M, p.29, section 21(3)].

5. Section 23 of the current Act is replaced with a new provision which broadens the Minister's power to require flood control activities to be

undertaken by Conservation Authorities, and gives the Minister new power to require the same range of flood control activities be undertaken by a Conservation Authority on lands beyond its jurisdiction [Schedule M, pp.29-30, section 23].

6. Section 27 of the current Act which allows a Conservation Authority to impose a levy on municipalities for maintenance and adminstration costs is amended. A Conservation Authority's power to levy maintenance costs and adminstration costs on member municipalities is to be subject to regulations which have yet to be drafted [Schedule M, p.30-31, sections 27(2), 27(3) and 27(4)].

7. An additional new subsection has been added giving municipalities the right to appeal a Conservation Authority's levy to the Mining and Lands Commissioner [Schedule M, p.31, Sections 27(8)-(16)].

8. The definition of "adminstration costs" under the current act will be repealed. The new powers to impose levies will be restricted to "the maintenance costs of flood control" [Schedule M. p.32, section 27(5)(a), 27(5)(b); (1), (2) and (3)].

In addition to these amendments, the Economic Statement that accompanied Bill 26 states that the Province will cut funding to Conservation Authorities by seventy percent. From these changes, it is evident that the government wants to limit its financial involvement in Conservation Authorities to flood control and payment of property taxes on provincially significant lands. The government has also made it clear that the designation of lands as "provincially significant" will be unlikely in future. Although the full range of changes to the previous government's planning reform package are not yet public, it is evident that the planning controls to designate natural heritage lands as "provincially significant" will be considerably weakened.

4.3 The Environmental Implications of the Amendments

(a) Power to Dissolve Conservation Authorities

Bill 26 adds a new provision to the *Conservation Authorities Act* to allow municipalities to dissolve Conservation Authorities. The decision to hold a meeting to discuss dissolution must be agreed to by the councils of two or more member municipalities. A quorum at the meeting to discuss dissolution need only include a two-thirds majority of municipal appointees. Provincial appointees are not entitled to vote on the matter. If a majority of the municipal appointees at the meeting resolve to dissolve the Conservation Authority, and if the Minister of Natural Resources is satisfied that acceptable provision has been made for future flood control, and the disposition of all assets and liabilities of the Conservation Authority, the Lieutenant Governor in Council has the authority to dissolve the Authority. There is no opportunity for public input in the decision-making process.

(b) No more Provincial Appointees

Bill 26 removes the ability of the Province to appoint members to the Board of Conservation Authorities. This move flies in the face of the need and value of provincial appointees acting on behalf of the broad provincial and public interest.

(c) Sale of Lands

Bill 26 also gives municipalities the power to sell off lands acquired by Conservation Authorities [Schedule M, p. 29, section 21(c)]. Furthermore, new sections 21(2) and 21(3) require that the proceeds of such land sales must go to the Province if lands sold were partially purchased with provincial monies. It should be noted that Conservation Authorities acquired lands with the help of donations from numerous parties, including individual donors, the Nature Conservancy of Canada, and a host of local service clubs (e.g., Lions Club, Rotary Club, etc.) on the clear understanding the lands would be held in perpetuity for conservation purposes. Bill 26 does not provide for any public input on decisions regarding the sale of lands nor does it provide for any safeguards to ensure the lands remain protected for conservation purposes. At the very least, Bill 26 should be amended to build in safeguards for lands going into private hands, such as the requirement for conservation easements on lands of significant ecological value.

(d) Greater Ministerial powers to require Flood control by Conservation Authorities

The proposed changes to section 23 of the current Act broadens the Minister's power to require flood control activities to be undertaken by Conservation Authorities, and gives the Minister new powers to require the same range of flood control activities be undertaken by Conservation

Authorities on lands beyond its jurisdiction. There is a strong implication that, as a result of this amendment and others to the *Conservation Authorities Act*, the future role of Conservation Authorities will dwindle from the broad functions they currently exercise to one of solely restricting flood control.

(e) Loss of Power to Impose Levies

The current Act provides Conservation Authorities with the power to impose levies on member municipalities to recoup maintenance and adminstration costs. Bill 26 proposes to restrict this power by making it subject to regulations that have yet to be drafted. Conservation Authorities are immediately hamstrung in their ability to recover their costs. Without reviewing the regulations it is difficult to ascertain exactly how the power to impose levies will be further restricted. It is clear that the government will use these amendments and the financial cuts to restrict the role of Conservation Authorities to exclusively flood control issues.

Under the current Act, levies are not appealable. However, once the new regulations are drafted subsections will come into force giving municipalities the right to appeal a Conservation Authority's levy to the Mining and Lands Commissioner. The Commissioner determines whether the levies comply with the new regulations or whether they are otherwise appropriate. The Commissioner can confirm, rescind or vary the levy and may order the authority or the municipality to pay any amount owing as a result. No right of appeal is available from the Commissioner's decision.

The new regulations will govern the nature and amount of the levies imposed by the Conservation Authorities under this section, including regulations that restrict or prohibit levies described in the regulations. Bill 26 also provides for the repeal of charges for adminstration costs from section 1 of the current Act, in addition to the repeal and replacement of the power to impose levies. The new power to impose levies will be restricted to the "maintenance costs of flood control".

The changes proposed by Bill 26 and the deep funding cuts will undoubtedly result in the dissolution of entire Conservation Authorities and/or the sale of vast tracts of conservation areas. It is likely that these lands will be developed as choice real estate for residential subdivisions. Public lands therefore, could readily turn into sprawling subdivisions that will be expensive to service. Since such developments will likely be on very large lots remote from existing sewage and water infrastructure, private wells and/or large septic systems will have to service these homes, potentially resulting in groundwater contamination.

In addition to the environmental concerns, Bill 26 also has social equity implications. Conservation areas provide a public recreational destination for millions of people in Ontario. According to the Federation of Ontario Cottagers Association, approximately five hundred thousand properties in Ontario are classified as recreational or vacation properties. Of those, two hundred and fifty thousand are waterfront cottages. It is obvious that private ownership of property does not provide for anything close to the recreational demand of Ontario's residents.

If conservation areas are privatized as seems highly likely, an already woefully inadequate supply of public recreational lands will be even further eroded.

5.0 Schedule N - Amendments to Certain Acts Administered by the Ministry of Natural Resources

5.1 The Purpose of the Game and Fish Act

The purpose of the *Game and Fish Act* is to provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters.[4]

5.2 The Amendments to the Game and Fish Act

Bill 26 proposes the following amendments to the *Game and Fish Act*:

1. A new section is created providing that all fees collected under the Act are to be held in a separate account of the Consolidated Revenue Fund for purposes of fish/wildlife/ecosystem management or human activities related to fish and wildlife or for the refund of fees as authorized by various other sections under the Act. An advisory committee will be established regarding the account, and an annual report on its financial affairs and

[4] *Game and Fish Act,* R.S.O. 1990, Chap. G.1, section 3.

advice from the committee will be tabled in the Legislature [Schedule N, p.2 sections 5(1), 5(2), 5(3), 5(4) and 5(5)].

5.3 The Environmental Implications of the Amendments

(a) Dedicated Fees

The request to have fees under this Act dedicated to wildlife management has been a long-standing demand from nature groups and from the Ontario Federation of Anglers and Hunters.

However, previous provincial finance ministers have been loath to dedicate funds for any specific purpose. For example, under the previous government, a subcommittee of the Fair Tax Commission recommended dedication of environmental taxes or administrative penalties to environmental protection purposes, but no such dedication ever occurred. It is therefore remarkable to see this provision in Bill 26.

The provision is of concern because the monies can be paid to "any persons," and thereby opens the door to the privatization of wildlife management in the province. Although the Act refers consistently to "game and fish", the proposed amendments in Bill 26 use the term "wildlife or fish", which is consistent with a plan for privatizing more than "game" management.

The December 5, 1995 statement by Minister Hodgson indicates that the advisory committee will include "people with an interest in the commercial and recreational use of fish and wildlife resources." However, the advisory committee for management of the fund should be more

extensive and represent the full range of groups with concerns and expertise regarding biodiversity and ecosystem management and wildlife use in the province, including aboriginals, environmentalists, consumptive and non-consumptive tourism interests and sportsmen.

Game and fish management must be part of the overall policy of management of habitat and species populations for conservation of biodiversity. There should be no undue emphasis on production of sport game and fish, which can be detrimental to ecosystems and indigenous species. For example, there is evidence that sport fish stocking programs in some areas may lead to a decline in indigenous fish species, to the detriment of the ecosystem and non-sport human users of fish, including aboriginal peoples. The amendments appear to downgrade wildlife management in Ontario from conservation of biodiversity to production of game species.

6.0 Lakes and Rivers Improvement Act

6.1 The Purpose of the Lakes and Rivers Improvement Act

The purpose of the *Lakes and Rivers Improvement Act* is to provide for the use of waters of the lakes and rivers of Ontario and regulate improvement in them and to provide for,

(a) the preservation and equitable exercise of public rights in or over such waters;

(b) the protection of the interests of the riparian owners;

(c) the use, management and perpetuation of the fish, wildlife and other natural resources dependent on such waters;

(d) the preservation of the natural amenities of such waters and on the shores and banks thereof; and

(e) ensuring the suitability of the location and nature of improvement in such waters, including their efficient and safe maintenance and operation and, having regard to matters referred to in clauses (a), (b), (c) and (d), their operation in a safe and reasonable manner.[5]

6.2 The Amendments to the Lakes and Rivers Improvement Act

Bill 26 proposes the following changes to the Act:

1. Section 3(1) of the current Act will be amended to give the government the power to make regulations prescribing circumstances in which approval is required:

   (a) to construct a dam on any lake or river under section 14(1); or

   (b) for improvements to any existing dam in section 16(1).

2. Section 14 of the Act will be reworded to state "No person shall construct a dam on any lake or river in circumstances prescribed by the regulations . . . [Schedule N, p. 4, section 14(1)] (emphasis added).

3. Section 16 of the Act will be reworded to state "Where a dam has heretofore been . . . and it is proposed to make improvements to the dam

[5] *Lakes and Rivers Improvement Act,* R.S.O. 1990, Chap. L.3, section 2.

in the circumstances prescribed by the regulation . . . [Schedule N, p. 4, section 16] (emphasis added).

4. Section 43 of the Act, which requires a company to obtain an approval to get a charter for the purpose of operating a works on the river, has been amended to state "any necessary approval" [Schedule N, p. 4, section 43].

6.3 The Environmental Implications of the Amendments

(a) Potential to relax or eliminate the Approval Process

It is premature to ascertain the full environmental implications of the proposed amendments without reviewing the yet to be drafted regulations. However, the proposed amendments could enable the government to streamline the approval process to allow permit by rule. In other words there is a strong implication that the intent of these proposed amendments is to relax the approval regime or eliminate the need for approvals in certain circumstances. For example, the regulations could state that dams of a certain size do not need an approval if certain conditions are met or if it is constructed in a certain manner. Under these conditions there could be an class exemption for certain types of dams.

(b) Potential to undermine environmental safeguards

The current approval system provides a important environmental safeguard since it is the only mechanism for provincial control over dams, including small hydro generation stations which have the potential to disrupt fish and fish habitat and cause other detrimental environmental

impacts. Moreover, downstream interests may be also be affected by these changes as a result of fluctuations in water levels of lakes and rivers, impacts to water quantity and quality, and impacts on provincial wetlands.

7.0 The Public Lands Act

7.1 The Purpose of the Public Lands Act

The Minister under the *Public Lands Act* has charge of the management, sale and disposition of the public lands and forests.[6]

7.2 The Amendment to the Public Lands Act

Bill 26 proposes the following amendment to the *Public Lands Act*:

1. The removal of the statutory list of activities on public lands and shore lands for which permits are required. Permits will only be required for activities specified by regulation [Schedule N, p.4, section 14].

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[6] *Public Lands Act,* R.S.O. 1990, Chap. P.43, section 2.

7.3 The Environmental Implications of the Amendment

(a) Removal of Permit Requirement

In future permits will only be required for activities specified by regulations. This is a very significant rollback of environmental law, since activities which currently require permits under section 14 of the Public Lands Act include:

(a) logging, mineral explorations or industrial operation on public lands;

(b) construction or placing any building, structure or thing on public lands;

(c) clearing any public lands;

(d) dredging of shore lands; and

(e) filling of shore lands.

Unless regulations requiring permits for the above activities are promulgated, it will mean "open season" on the vast public lands, rivers and lakes in the Province. This will likely result in serious and widespread negative environmental impacts.

8.0 Schedule O - The Mining Act

8.1 The Purpose of the Mining Act

The purpose of the *Mining Act* is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize adverse effects on the environment through the rehabilitation of mining lands in Ontario. (emphasis added)[7]

8.2 The Amendments to the Mining Act

Bill 26 proposes the following amendments to the *Mining Act*:

1. A new section is created to give mining companies engaged in advanced exploration or mine production the option to file a closure plan with the Director of Mine Rehabilitation, certifying that the plan complies with the prescribed requirements [Schedule O, p.11, section 140(1)(c) and p.12, section 141(1)(c)]. In contrast to the current *Mining Act*, the Director is not required to approve the closure plan, but is instead simply required to acknowledge receipt in writing of the closure plan [Schedule O, p.12, section 141(3)].

2. Mining companies may, for a fee to be determined by the Director obtain the Director's approval of a closure plan as opposed to filing the plan [Schedule O, p.13, sections 142(1) and 142(4)].

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[7] *Mining Act*, R.S.O., 1990 Chap. M.14, section 2.

3. The requirement to file annual reports under section 144(3) of the *Mining Act* is repealed.

4. A new section is created providing confidentiality to mining corporations with respect to forms of financial assurance and all financial and commercial information relating to the establishment of the financial assurance [Schedule O, p.17, section 145(10)].

5. A new section is created permitting compliance with a corporate financial test in the prescribed manner, as an optional form for providing financial assurance [Schedule 0, p.15, section 145(1)5].

6. A new section is created providing mining companies with the option of surrendering a lease to the Crown within twelve months of the section coming into force, provided the company did not cause a mine hazard, i.e. any feature of a mine or any disturbance of the ground that has not been rehabilitated to the prescribed standard [Schedule O, p.23, section 150].

7. A new section is created providing mining corporations with the option of surrendering mining lands or mining rights, and avoiding any liability under the *Environmental Protection Act* provided rehabilitation has been done to the satisfaction of the Minister [Schedule O, pp.22, section 149].

8. A Crown immunity clause has been included to prevent actions against the Crown or its agents for acts and omissions relating to the filing, approval review or acceptance of a closure plan or amendments to a closure plan [Schedule O, p.26, section 153.1].

8.3 The Environmental Implications of the Amendments

(a) Closure Plans

Closure plans provide a key proactive mechanism to ensure mining companies take appropriate measures to minimize and ameliorate the adverse effects to the natural environment resulting from mining operations.

It is through rigorous environmental standards incorporated in closure plans that environmental catastrophes such as the 1990 tailings spill can be averted. The spill which occurred at the Matachewan Consolidated Mines Limited, mine site cost the provincial government approximately over two million dollars for clean-up as of 1992. The final cost has yet to be tabulated. In addition, the spill impaired the drinking water quality for three communities and resulted in the evacuation of residents.

The year following the tailings spill the government passed Bill 71 requiring closure plans for the rehabilitation of mines sites. The closure plan requirements and the imposition of financial requirements reflect the "polluter pays" principle. The move towards self regulation for mining

companies is therefore a matter of serious environmental concern and reopens the issue of who should bear the cost of pollution.

The proposed amendments permit mining corporations to file a closure plan as opposed to obtaining the Director's approval. The Ministry of Northern Development and Mines (MNDM) will no longer be required to review closure plans with a view to assessing the adequacy of environmental protection provided by them. Moreover, once a closure plan has been prepared and filed, mining companies no longer have any annual reporting obligation to advise MNDM of the steps taken to satisfactorily fulfil the rehabilitation requirements.

Although mining corporations will have the option of obtaining the Director's approval for a closure plan, they must pay a fee to be determined by the Director in advance of submitting the plan. Corporations wanting to reduce liability may choose this route, however, there will also be fly-by night operators who opt for the more expeditious process of filing a closure plan.

The move towards self-regulation must be viewed in conjunction with the cutbacks to MNDM's inspection staff. The number of inspectors at MNDM has been reduced from six to two. Consequently, MNDM's ability to verify compliance after a plan has been filed has also been significantly reduced. As a result of these changes the government will be faced with the prospect of reacting to environmental problems caused by mining operations, as opposed to ensuring preventative measures. Furthermore, the amendments could very likely increase regulatory negligence claims against the Crown. This would explain the need for section 153

which provides broad immunity to the Crown for acts or omissions relating to closure plans. The inclusion of section 153 is a clear indication the government is concerned about regulatory negligence actions arising out of the amendments to the *Mining Act.*

(b) Annual reports

Under the current Act, once a closure plan is accepted, an annual report is required to provide a description of the rehabilitation work actually carried out, its results and the work remaining to meet the closure objective. This provision provided the government with some measure of guarantee that it would be notified and updated on rehabilitation measures. The requirement to file annual reports is repealed by Bill 26.

Instead, mining corporations will have to report, in the "prescribed form and manner" any material changes. Until regulations are enacted, it remains unclear exactly what constitutes a material change and how notification will be made.

(c) Financial Assurance

Mining companies which pass a corporate financial test will not be required to post cash up front to rehabilitate a site. The type of corporate financial test has yet to be established by regulation. Moreover, all information provided in the form financial assurance to the Director is subject to confidentiality and exempt from access under an F.O.I. request. Consequently, the public will be denied information about the adequacy of clean up funds.

(d) Exemption from Liability

Bill 26 also provides mining companies the option of surrendering their lease within twelve months of section 150 coming into force, and avoiding all future liability provided the company did not cause or aggravate the environmental problems at the site. In other words, liability will only attach to those who took active steps " to create a mine hazard or materially disturb or affect a mine hazard."

At first blush this provision may appear to have some element of fairness, however, it exempts potentially responsible parties from environmental liability. It is a well established principle of environmental law that liability should attach to those in a position of influence or control i.e those who had the power to prevent the environmental offence but failed to do so.[8] For example, Matachewan Consolidated Mines Limited was found liable under the *Ontario Water Resources Act* for permitting the spill because of its failure to take any steps to prevent the discharge through inspection of the tailings area.[9] By narrowing the scope of liability, section 150 provides a significant benefit to mining companies which are in a position to prevent a mine hazard but opt not to do so for financial reasons or otherwise. Neither fiscal savings nor environmental protection will be achieved by using the public purse to fund clean-ups on behalf of companies which have benefitted financially by failing to prevent the adverse effects caused by their operations.

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[8] *R. v. Sault Ste. Marie,* [1985] 1 S.C.R. 570.

[9] *R. v. Matachewan Consolidated Mines Ltd.* (1994), 13 C.E.L.R. (N.S.) 157 (Gen. Div.).

Section 149(4) creates an exemption from retrospective liability for mining corporations for environmental problems once they surrender their mining lands or mining rights. The Minister may refuse to accept a surrender if the proponent has failed to rehabilitate the site. However once a surrender has been made, mining corporations will not retain liability under the *Environmental Protection Act.*

Section 149 fails to take into account that many sites require post closure monitoring for adverse environmental impacts. For example, tailings impoundments require long term monitoring and maintenance and may not pose an environmental risk until some time in the future. As a result of the proposed amendment, however, the cost for any negative environmental impacts after a surrender will have to borne by the taxpayer. This result is undesirable in light of the large deficit currently faced by the provincial government.

PART III CONCLUSION

Bill 26 is a complex piece of legislation which seriously weakens a number of key provincial statutes which have served to ensure environmental protection within the Province. It is abundantly clear that the Bill has environmental significance and should have been placed on the EBR registry for public comment. If the Bill in enacted the following statutes will be detrimentally impacted:

Freedom of Information and Protection of Privacy Act - Government institutions are given broad discretionary powers to deny access to information. The costs of making a request from the government will also increase.

Municipal Act - Municipalities can be restructured more readily thereby facilitating the process of annexing land and encouraging urban sprawl. The servicing costs of the increased urban sprawl will likely be funded through higher taxes and user fees. The amendments in Bill 26 in tandem with Bill 20 annuls five years of province-wide work for progressive land use reform in Ontario.

Conservation Authorities Act - Municipalities will have the power to dissolve Conservation Authorities and sell off lands thereby opening the door to the privatization of public recreational lands.

Game and Fish Act - A new section is created providing that all fees collected under the Act will be held in a separate account of the Consolidated Revenue Fund for purposes of wildlife management. The monies can be paid to "any person" providing the potential for privatization of the wildlife in the province, and failing to manage for conservation of all biodiversity.

Lakes and Rivers Improvement Act - The current approval regime will likely be relaxed. Dams that meet certain specifications will likely be exempted as a class from the requirement to obtain a permit under the Act.

Public Lands Act - In future permits will only be required for activities specified by regulation. This could be a very significant rollback of environmental laws since there are a number of activities which cause adverse effects to the environment that may not be subject to regulations. Unless the government enacts regulations for these activities it will mean "open season" for the vast public lands, rivers and lakes in the Province.

Mining Act - Mining companies will no longer have to obtain the Director's approval of closure plans. Mining companies are exempted from liability for environmental problems under certain conditions. Companies which meet a corporate financial test will not be required to post cash up front for rehabilitation of the natural environment.