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HAZARDOUS WASTE SITING REQUIREMENTS: WHAT ROLE SHOULD BE ASSUMED BY INTERVENORS

BY JOE CASTRILLI
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TORONTO

1. OVERVIEW

My comments will be directed to both the intervenor/industry and intervenor/government relationship during public hearings. I'll close with some views on policy, legislative reform and related matters.

I begin with an assumption: that members of the public, despite the lack of sufficient funding, play an increasingly important role in testing both 1) the adequacy of industry plans for hazardous wastes disposal and 2) the quality of government control.

I further assume that without active intervenors hearings would be very different. One commentator has analogized hearings without active intervenors to a hockey game with only one side on the ice, with the referee standing by while the players keep scoring goals into the empty net on the other side. Such hearings could well be categorized as "nasty, brutish and short" as the English philosopher Thomas Hobbes might have said if he'd been poor and lived near a dump.

My submission is that unless there are broadly representative intervenors before a tribunal in hearings where questions important to the public interest are decided, an important aspect of the public interest may be lost.

Moreover, those who believe that hazardous waste siting hearings have mainly been forums for public emotionalism, should review the record. While the issue is certainly an emotional one, recent industry proposals in Ontario have been rejected because they were found wanting on technical grounds - not emotional grounds.

II INTERVENORS AND INDUSTRY HAZARDOUS WASTE PROPOSALS

Intervenors should have the opportunity to make submissions on the technical aspects of an industrial proposal. That does not necessarily mean that, as one commentator has put it, they should receive every detail, every nut and bolt that is to go into a facility proposal. Rather it refers to the opportunity to 1) assess and test the basic scientific information to allow for a full evaluation of a proposal and 2) review whether that proposal is suited to the particular site chosen.

If these are legitimate intervenor objectives at the hearing stage, then it is incombent on the project proponent to have done his technical homework such that he can provide the scientific information and the results of site/field work by the time of hearing. If the proponent has not done this by the time of hearing, it is submitted that the hearing is premature and prejudicial to

the interests of active intervenors and to the public interest.

Now I emphasize that project proponents should do their technical homework by the time of hearing, not only because of statutory requirements to that effect, especially prospectively The Environmental Assessment Act, the most advanced piece of unused environmental legislation in the free world, but also because the industry has itself insisted that its proposals should be reviewed on their technical merits; that industry has both the technological capacity to 1) plan, design, operate, maintain and de-commission hazardous waste facilities and 2) protect the environment.

Having said this let's briefly review what the actual experience has been with recent industry hazardous waste proposals in Ontario and the role of intervenors in testing such proposals.

NANTICOKE: What Information?

If any hearing in the memory of vertebrates has raised more questions as to what technical information should be provided to a tribunal prior to government approval, it would have to be Nanticoke. This recent Environmental Assessment Board hearing was held under the terms of The Environmental Protection Act and The Ontario Water Resources Act on an application to establish a waste disposal site-treatment complex for liquid industrial wastes.

Practically every major participant had his or her own idea of what essential scientific information should have been before the Board.

A consensus, at least among the intervenors, was that the applicant should provide the Board with at least the following basic information:

- watertable definition
- watertable fluctuation
- groundwater flow in clays and bedrock
- gradients
- soils permeability
- bedrock permeability
- clay moisture content
- water quality
- water use
- leachate impact
- velocity and directional flow of groundwater
- contingency plans
- fisheries impacts
- alternative sites/technologies

This was some of the scientific information that intervenors argued the applicant had an obligation to provide in order to permit a full evaluation of the proposal, both by intervenors, and the Board. After almost 5000 pages of testimony and 160 exhibits many of the above matters remained shrouded in question marks.

Lest you think that anything intervenors believe is critical, everyone else can dismiss as a hoax, the following are the findings of the Environmental Approvals Director, MOE in rejecting the application on the recommendations of the Environmental Assessment Board:

1. The hydrogeology of the proposed site is critical, not only to the successful operation of the project and the protection of the environment, but also to the conceptual approach for and the detailed development of a design for the facility. The hydrogeological information presented with respect to the proposed site is insufficient, and in some respects, of doubtful validity.

2. Satisfactory provision has not been made for handling leachate from the landfill site in the longer term after expected deterioration of the plastic liner.

3. Satisfactory provision has not been made with respect to monitoring and site management during the full span of time when leachate of a potentially harmful character may be generated from the landfill site.

4. As the groundwater in the area is already of borderline quality, further deterioration is unacceptable. The proposed landfill site has a potential to cause such degradation. The

information provided as to management of the site in the longer term and as to the manner of dealing with contingencies is not sufficient. ...

5. Because of the variation in both the seasonal and yearly flows of Nanticoke Creek, it is not certain that the creek will maintain the necessary flow requirements for dilution purposes during those periods when the sewage treatment works in discharging effluent to it.

6. It has not been satisfactorily demonstrated that the effluent from the proposed sewage treatment works would be of acceptable quality.

7. Satisfactory provision has not been made for dealing with contingencies.

8. The plans for the operation and management of this project are sufficiently lacking in foresight that it is not possible to evaluate the potential for eventual adverse effects upon the local citizens resulting from pollution of the natural environment caused by this project.

It is submitted that these conclusions were not reached lightly and that intervenors - in probing the technical aspects of the proposal - made a substantial contribution to the decision-making process.

III INTERVENORS AND GOVERNMENT AGENCY CONTROLS

Now while it is not always immediately evident in such a hearing, it is, however, frequently the case that the performance of the government agency is also at issue. Here, as well, intervenors can play an important part in getting an agency to explain the details of its policies of approval, monitoring, investigation and enforcement. The experience can sometimes be revealing - if not cathartic - and a stimulus to reform of agency practice and procedure.

NIAGARA SLUDGE HEARING: Inspection and Monitoring

Take, for example, this exchange between a local resident and a MOE officer in a 1976 sludge transfer station hearing respecting inspection and monitoring:

Resident: The MOE is supposed to keep detailed records of where the sludge is spread and how much land conditions at the time, etc. Has your office been doing any of this?

MOE Officer: Not as much in Niagara because one of the problems is the new (sewage sludge) guidelines and in order to get under way in licensing we have taken the attitude of using our Ministry (treatment) plants. That is, where we own and operate the land, so we tend to work in the Haldimand-Norfolk area far more than in

Niagara in order to get the program under way. With our plant we can give and take with them.

Resident: The (Niagara) Region is operating more or less without being under control?

MOE Officer: Compared to Haldimand-Norfolk it is.

YORK SANITATION WASTE DISPOSAL HEARING: Enforcement

Or this exchange between counsel for a local municipality and a MOE officer in a 1974 waste disposal site hearing respecting enforcement:

Counsel for the town: So then what is the procedure that you follow when you see a violation on a landfill site, do you then take steps to institute a prosecution or to institute a control or stop order?

MOE officer: It is just not that cut and dried. The policy of the Ministry has been to work with the operator to upgrade the site and that is particularly true for operations that have been in existence prior to the Act (EPA) ...

Counsel for the town: But that is not how the Act and regulations are drafted.

A Royal Commission Inquiry into this hearing application and related matters concluded in 1978 that "unless a statute provides that no prosecution shall be brought for infraction of its provisions...

without leave of the Attorney General, no public official is entitled to decline or delay prosecution as a matter of policy."

NANTICOKE: Leaving it all to Government experts

The Nanticoke hearing itself raised important questions as to the wisdom of leaving it all to the government experts. Intervenors pointed out, for example, that 1) the MOE often accepted data and figures from the applicant without inquiring into their validity; 2) that despite its support for the use of plastic liners, MOE in fact had neither the experience nor the expertise with them; and 3) that although normal MOE responsibilities include thorough investigation of proposals before recommending them for hearing, it was only during the hearings themselves that MOE admitted that if it had known about a local community water intake pipe it would not have recommended Nanticoke Creek as a discharge point.

IV CONCLUSIONS: FUTURE ROLES FOR INTERVENORS

What of the future role of intervenors, both in siting hearings and other forums? I see at least three functions of intervenors in future:

1. To provide increasingly more sophisticated hearing interventions in the search for environmentally sound

sites with an additional benefit being that resource recovery and waste reduction opportunities will be enhanced because cheap, inadequate disposal options will no longer be available. Much of this is contingent on intervenors having adequate funding. My earlier comments notwithstanding, public hearings are frequently David and Goliath situations. I understand that the Maple dump hearings lasted 80 days, during which it was estimated that the applicant companies spent approximately $1 million. Intervenors spent nowhere near that amount. Unless adequate funding is provided, frequently proper interventions will simply not be possible. It is submitted that the public interest will be the loser where that is the case. A statutory scheme for a public hearing participation fund is past due in Ontario.

2. To act as catalysts for policy and legislative reforms. Frankly, if governments want to regain the confidence of the public, then they ought to begin by bringing Canadian hazardous wastes law and policy into the twentieth century. This would include mandatory provisions for reclamation, re-use and recovery of such substances to the maximum extent feasible in conjunction with controls directed to better waste tracking and reduction. The industry has been telling government for years that the economics of hazardous wastes still favour disposal

over recovery. But as was indicated by the Ministry of the Environment during the Nanticoke hearings, from a technical point of view there are scientific and technical processes available to recover almost anything in the chemical sense. Intervenors will increasingly challenge government to change the economics and the law to favour recovery.

3. To guard the guards

While we can all agree that, at least in the short term, there is a pressing need to find acceptable sites, there is no reason to confuse the merit of the need with the merit of a particular site. They are not necessarily synonymous. In our urge to repair the mistakes of decades ago, we should not rush to cut corners now. Cutting corners can include calling a disposal site for PCB's or other hazardous wastes a storage site. That semantic twist can arguably result in no required public hearing under the EPA. One can only speculate why government or industry would not want a public hearing. But as somebody once said "to glorify democracy and silence people is a farce."

J.F. Castrilli is a researcher, writer and consultant in environmental policy and law, a staff member of the Canadian Environmental Law Association and an associate editor of the Canadian Environmental Law Reports. Mr. Castrilli has most recently completed a major study on legislative and administrative controls on land-based sources of Great Lakes water pollution for the International Joint Commission and the federal Department of Fisheries and the Environment as part of the requirements of the 1972 Canada-U.S. Great Lakes Water Quality Agreement.