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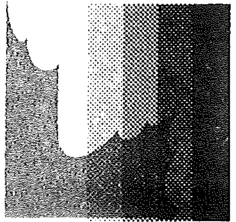

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THE GREEN PAPER FROM THE MINISTRY OF THE ENVIRONMENT

Comments on the Paper by Joe Castrilli

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Delivered at the Forum on the Green Paper

sponsored by

The Conservation Council of Ontario

O.I.S.E. Room N-204 October 24, 1973 1:00 p.m.

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To listen to governmental pronouncements about the need for public involvement in the environmental impact assessment process, one would think that the government was putting itself on the very cutting edge of social change.

There are a number of lofty governmental sentiments and statements to choose from in this regard:

Minister Auld (September 27, 1973) stated, for example:

> "We want the people of Ontario involved in environmental assessment from its very beginnings,"

and

> "Citizens are entitled to participate in decisions to ensure that the effects of development are beneficial."

The Green Paper itself states:

> "Direct public involvement should be a basic feature of whatever environmental assessment system is developed."

On their surface, such remarks are encouraging, almost euphoric. However, what the government gives with its left hand it may still be retrieving with its right.

For example, the Green Paper also states:

> "The public should not demand the right to be meaningfully involved without accepting the obligation to participate in a responsible way. Decision-makers may wish to screen the inputs received from the public involvement process."

Frankly, I'm not quite sure why that statement was included in the Green Paper. It's an ominously patronizing remark that trails off into obscurity, leaving practically the entire question of public involvement -- and the government's conception of it -- in a big question mark.

Therefore, because the issue of public involvement in this process is of vital concern (it is after all the public's air, land and water) I should like to test a few propositions in the Green Paper to see exactly what the government is -- at least -- hinting at when one juxtaposes public involvement with some of the institutional mechanisms that the government is apparently intent on or is leaning towards adopting.

Because of time limitations I'll be focusing on two areas: (I don't want you to think that I think that there are only two things wrong with the Green Paper; however, I do think these are two of the more important items which need discussion and a thorough airing.).

1) The Green Paper's so-called discretionary screening mechanism for determining which projects need an Environmental Assessment.

2) The Green Paper's conception of who makes the final decision in the process.

After some preliminary discussion of these two items, I'll discuss CELA's summary of recommendations on environmental assessment, and particularly four factors that, in CELA's estimation, inevitably effect the quality of public involvement in environmental assessment.

a) costs in preparation for hearings
b) access to information in preparation for hearings
c) notice of hearings
d) standing (i.e., who can sue or, in the environmental assessment context, who can object)

A number of these factors will, of course, be alluded to at the outset in conjunction with the above two main issues.

1) At page 10 of the Green Paper, a discussion begins on the "discretionary screening mechanism". The Green Paper suggests that between the obvious extremes of projects that would certainly need an environmental assessment and those that certainly would not, there is "a large gray area

comprised of projects which have significant impact in some circumstances and not in others".

Now in this "large gray area", the power to decide whether a proposed project needs an environmental assessment is apparently going to remain with a regulatory body or agency. In many instances, regulations will automatically exempt a project from environmental assessment requirements; in other circumstances the regulatory body or agency will examine the project itself before making the determination of the necessity of an environmental assessment.

In no instance from pages 10-12 (i.e., the pages that encompass the discussion of the screening mechanism) is there so much as an allusion to public involvement in this process.

That is to say, in this very fundamental area of which projects will require an environmental assessment before go-ahead, no discussion is made of the possibilities of the public onstructively intervening in the matter when a regulatory decision not to make an environmental assessment is made.

(At page 32, the Green Paper says that the Hearing Board could delegate its power to decide whether an environmental assessment is necessary. If that is so, then public involvement is needed.)

I don't have to tell this group how unavailable and inaccessible regulatory bodies are to public overview. Regulations and administrative procedures are the government talking to itself. They are antithetical to public involvement.

Now, while regulations are probably necessary in many instances, two things should be said in this regard.

mechanism without a meaningful procedure for appeal by the public. Such an attitude is bound, in the long run, unless the public can be locked into the process, to result in the ignoring of the cumulative effect of many smaller projects.

To paraphrase a quote 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?

In summary, the public must have the right to challenge, before the Commission or Board, screening mechanisms designed to exempt projects from environmental assessment. The public interest, as some have said, must not be left to hired hands.

I have already referred to the question of who makes the final decision as to (a) the necessity of an environmental assessment and (b) the necessity of the project itself. So at this point I think that a short discussion of the implications of the Green Paper's treatment of this matter in relation to the issue of public involvement is in order.

Let's look for a moment at the "model systems" proposed or suggested by the Green Paper. Where, in reality, does the final decision about a project lie?

System A - final decision by Cabinet
System C - final decision by Cabinet
System D - final decision by Cabinet

Oh, yes - System B, an independent review board with no Cabinet appeal somewhat approximates the one supported by CELA, but one should note that, at his press conference last month, Minister Auld virtually rejected

this model. The Minister admitted that the concept of an independent committee or board had been included among the options in the Green Paper because it was felt that otherwise, environmentalists would complain [!] .

So, in reality, we are left with the other three.

Now, what do these three models have in common?

No public involvement beyond the board stage, which means, in effect, that the public is locked out of the right to affect and be alerted to what's going on at one of the most important stages of the whole process.

Now let me backtrack a bit. The reasoning that pervades much of the Green Paper's treatment of this area, and its apparent rejection of System B (p.45) is that

> an independent committee or board established outside of existing governmental structures with the power to make a final decision is inconsistent with one of the fundamental principles of the parliamentary system, i.e. accountability of decision-makers to the Legislature."

However, what the Green Paper substitutes for the right of the board to make a decision in a legal context, is the right of the Cabinet to make this decision.

Now I ask you how the Cabinet has the audacity to posit its particular governmental policy as legislative will, or, more importantly, as the final arbitor of law.

Many of you will answer, "Why, of course, the Cabinet, being the embodiment of the majority party in the legislature, is in effect the legislature."

Our response to that, while it is true that the Cabinet is the majority party, it is not the whole legislature. Moreover, in more than one place the Green Paper slips up and says "government policy", not "legislative policy", is in danger of being misinterpreted and altered over

time by the independent board.

Now I think you'll all agree that in a court of law, as well as in a tribunal, there is only one standard, a legal standard, that is applicable. This country is governed by laws - not by the whim of the particular party that happens to be in power. Events in the U.S. notwithstanding.

The Board, in our estimation, must be the final arbiter on matters of law, subject to judicial appeal.

Now, many of you may say, "Well, what about those instances where we have vague and conflicting statutory standards involving substantive legislative policy. Should we still leave the decision up to the board?

We say no. Send the matter to the Legislature. If there are conflicting policies here, let the full legislature hammer it out, and hammer it out before an alerted public. Such a method is more in tune with the Green Paper's concern for public involvement than a decision by the Cabinet.

If public involvement really means anything to this government, then the Legislature is the best place for the public to see exactly what environmental trade-offs are being made in its name. Final appeal to the Cabinet locks the public out, and makes the concept of an alerted, active public a sham.

Let us also remember that this will not mean that other legislative work will come to a standstill. We're talking about only a few proposed projects a year going to the Legislature for full discussion. Obviously this is what the Cabinet had in mind too, for otherwise it too would be swamped wih environmental impact proposal appeals, to the exclusion of its other governmental duties.

So don't be fooled by the suggestion that what we're proposing is administratively unworkable. The government obviously feels the Cabinet can handle it. We feel that the Legislature can do the job just as competently and legally as the Cabinet. More importantly, it will be done in the public eye.

To conclude, I should like to read to you the main recommendations which CELA makes in its brief to the Ontario Ministry of the Environment, and the conclusion of that brief.

CONCLUSION

The Environmental Impact Assessment Process, viewed from the perspective of those jurisdictions who will follow Ontario's lead, should be seen to be legislation that an enlightened government, attuned to the public interest, would adopt.

The assurance that responsible public participation will not only be tolerated, but encouraged, and regarded as a right and not merely a dispensation of government, would be the most positive expression of an enlightened approach. If a government is serious in encouraging such an approach, then it cannot fail to make public involvement a central feature in the decision-making process.

Moreover, the government should not fail to ensure that the public will be continuously informed of those factors which it finds to be influencing its preferences as to the nature of the forthcoming legislation. Proposed legislation should not be a public surprise.

In keeping with this spirit, the government should publish a list of those individuals, groups, corporations, industries, agencies and ministries which make submissions in response to the Green Paper.

It might also be appropriate for the government to prepare a graph showing the number of times a particular point is reiterated, and from which category of responder the point originated.

The government might even provide a public forum to facilitate a better understanding and clarification of issues and suggestions, problems and remedies.

In any event, public input and other suggestions made in this paper can, we hope, contribute to a final end to the vulgarization of the environment.