278.

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

16 February 1996

**Publication #278**
**ISBN# 978-1-77189-449-4**

The Honourable Brenda Elliott
Minister of Environment & Energy
135 St. Clair Avenue West
Toronto, Ontario
M4V 1P5

Dear Minister:

**RE: AMENDMENTS TO THE WASTE APPROVALS PROCESS**

We are writing to express our concerns regarding your Ministry's proposals to amend the existing approvals process for waste management undertakings.

CELA objects to these proposals for four general reasons:

1. There is insufficient justification for the proposed changes;

2. The specific options for reform are fundamentally flawed and contrary to the public interest;

3. The proposed reforms are contrary to long-standing government policy, and contrary to positions previously advocated by representatives of the Progressive Conservative party; and

4. The proposed reforms have been developed without meaningful public consultation.

Each of these reasons are described below in more detail.

## 1. THE PROPOSED CHANGES ARE UNJUSTIFIABLE

As described in a Ministry document obtained by The Globe & Mail, it appears that your Ministry remains convinced that it is necessary to either exempt the waste management sector from the Environmental Assessment Act (EAA)(Option 1), or to keep the waste management sector under the EAA but substantially gut the requirements of s.5(3) of the Act (Option 2). In reaching this conclusion, it appears that your Ministry has acceded to the self-serving views of disgruntled proponents, rather than accept the undisputed fact that waste management facilities -- even controversial landfills and incinerators -- can be and have been approved under the EAA.

When pressed to justify the proposed reforms, you and various Ministry officials repeatedly state that the EAA process is "broken" and needs to be "fixed" or "streamlined". As evidence supporting this opinion, reference is often made to proponents who spend considerable money before being denied EAA approval. For example, yesterday in The Toronto Star,[1] you reportedly stated that the experience of such proponents "tells us that the process is fundamentally flawed and needs to be reviewed".

In our opinion, this experience tells us more about the unacceptable nature of the specific projects, or the incomplete or unpersuasive supporting documentation, being put forward by the relatively few proponents who have not been successful under the EAA process. Indeed, the experience of these unsuccessful proponents tells us that the EAA process, in fact, is working to weed out and reject environmentally undesirable undertakings.

It is noteworthy that within recent years, numerous waste management facilities have been approved under the EAA without hearings; indeed, the relatively few facilities that get referred for EAA hearings tend to be the problematic undertakings that are already subject to considerable controversy and environmental concern. These problems are often recognized in your Ministry's "government review" documents that accompany these environmental assessments. Since the Board is called upon to deal with the "problem" cases that could not be resolved without a hearing, it should come as no surprise that some undertakings are ultimately approved and others are rejected by the Board, and that not all parties will be pleased with the results. In CELA's view, this track record demonstrates that the EAA process is working, and that the EAA process is well-suited for assessing the full range of environmental impacts associated with waste management undertakings.

While the EAA is fundamentally sound, CELA also recognizes that there are various legislative, administrative, and policy improvements that can make the EAA process more efficient, effective, and equitable. In response to various EAA reform initiatives conducted by previous governments and the late Environmental Assessment Advisory Committee, CELA and many other stakeholders submitted many workable proposals to improve the process, most of which have not yet been acted upon. It is also noteworthy that the EA Board has also developed and implemented various reforms to scope issues, mediate disputes, and shorten hearings.

Accordingly, it is clear that the EAA process is working but could be improved, particularly in the pre-hearing process. In our opinion, however, your Ministry's proposal to amend s.5(3) of the EAA, or to exempt the waste management sector, does not constitute "fixing", "streamlining", or "improving" the EAA process. Instead, these proposals represent an unjustifiable attempt to gut the EAA process and to undermine the environmental safeguards under the EAA for the benefit of a few private and municipal proponents.

## 2. THE REFORMS ARE FLAWED AND CONTRARY TO THE PUBLIC INTEREST

In CELA's view, the two options for reform outlined above are equally objectionable and must not be implemented. CELA's initial concerns about Options 1 and 2 fall into several categories,

---

[1] "Dump site selection plan to be streamlined", The Toronto Star (February 15, 1996), p.A16.

as described below. It should be noted that the MOEE document obtained by The Globe & Mail has not been provided to CELA by your Ministry, and CELA has filed a FOI request to obtain disclosure of this report and related documentation. Accordingly, CELA's comments below must be regarded as preliminary in nature, and as more information is made available to CELA about these options, additional concerns will undoubtedly arise.

**(a) The Options Eliminate the Current Requirement to Assess "Need", "Alternative Sites", and "Alternatives To".**

Under Options 1 and 2, proponents would no longer be required to demonstrate "need" for their proposed undertakings, nor evaluate alternative sites that may be more suitable, nor consider the alternatives to their undertakings -- such as waste reduction, reuse or recycling. This amounts to an unprecedented rollback in environmental assessment law and policy. Moreover, it is clearly contrary to the public interest to, in effect, "fast-track" approvals for waste management facilities for which there is no demonstrable need, or for which there may be environmentally preferable alternatives.

In many MOEE documents, s.5(3) of the EAA, particularly the requirement to analyze alternatives, is regarded as the centrepiece of the EAA. Indeed, the MOEE has recognized that analyzing alternatives is an essential mechanism to help identify and refine an environmentally preferable undertaking that is consistent with the broad public interest, as reflected in s.2 of the EAA:

> The EA Act is intended to ensure that this purpose [s.2] is addressed as an integral part of decision-making processes, through which choices are made to what undertakings should be carried out and how they should proceed. Likely environmental effects are to be anticipated and considered as alternative undertakings and alternative ways of carrying them out are identified, examined, and compared and as choices are made from amongst the alternatives.[2]

In CELA's view, exempting waste management proponents from the requirement of considering alternatives is counterproductive and not in the public interest. The public interest should be the paramount consideration in waste management planning, and with the removal of the s.5(3) requirements (and the exemption from the s.2 public interest test), a proponent's narrow interests (i.e. fiscal gain or corporate priorities) will become the predominant factor in the facility siting decision. If proponents are simply allowed to pick and defend a single site under the Environmental Protection Act (EPA) only, the public will have no assurance that an environmentally preferable (or "best") site has been selected, or that the site is consistent with the broad public interest.

**(b) Option 1 Excessively Narrows the Scope of Environmental Analysis.**

As we understand Option 1, waste management would be exempted under the EAA but would remain subject to the EPA, and possibly the Planning Act, as described below. This is a significant rollback because the term "environment" is much narrower under the EPA than the EAA. For example, if waste management is exempted from the EAA, proponents will no longer

---

[2] "Planning and Approvals Guide for Individual Environmental Assessment Projects" (MOEE EA Branch, 1995).

be required to identify, assess, or mitigate the social, economic, or cultural effects of their /undertakings, as is currently required by s.5(3) of the EAA. In our opinion, this is an undesirable rollback because waste management facilities -- especially large landfills and incinerators -- can result in adverse socio-economic or cultural impacts upon nearby residents or local communities. In other words, waste disposal sites do more than simply cause adverse impacts on air, land, and water; they can also result in property value depreciation, social dislocation, community discord, and cultural impacts. However, under your Ministry's proposals, it appears that proponents will be required to examine only the biophysical impacts of the proposed undertaking. Thus, it appears that many of the significant non-biophysical effects caused by waste management facilities will largely go unaddressed under your Ministry's proposals.

**(c) Compensation Guidelines are an Inadequate Substitute for Full Environmental Assessment.**

It is our understanding that your Ministry has also proposed to establish a small advisory committee to produce "guidelines" for compensation packages to offset negative socio-economic or environmental impacts that cannot be mitigated. It is also our understanding that only the Association of Municipalities of Ontario (AMO) and the Ontario Waste Management Association (OWMA) will be invited to participate in the drafting of these guidelines. While it may be appropriate for these proponent interests to be represented on the advisory committee, it is equally appropriate, if not imperative, to include other people who may be interested in, or impacted by, compensation packages.

In our view, the scope and content of the compensation guidelines cannot be simply dictated by proponent interests -- representatives of other interests (i.e. local residents, ratepayers groups, public interest groups, First Nations) should also have a meaningful role in the development of the guidelines. We also assume that the draft guidelines will be subject to wider public review and comment through notice on the Environmental Bill of Rights (EBR) Registry and other appropriate means.

We would also point out serious practical and legal problems associated with the simplistic notion that providing monetary compensation to nearby landowners will lessen the opposition to landfills. Firstly, having represented many individuals and groups in landfill proceedings, it is CELA's experience that public opposition to landfills is rarely based exclusively or even largely on economic self-interest. Instead, public concern is typically premised on environmental concerns (i.e. will the site cause groundwater contamination? are there safer sites available?), policy considerations (i.e. will the site undermine 3R's activities? should the service area be large or small?), and macroeconomic or communal concerns (i.e. does the site make economic sense, having regard for full cost accounting principles?). Viewed in this light, the allure of compensation packages will do little to lessen the legitimate concerns of public-minded opponents. Clearly, the landfill siting process will be no less acrimonious simply because of the promise of compensatory funds.

Secondly, if the Ministry proceeds with Option 1 and leaves waste subject only to the EPA (and possibly the Planning Act, as described below), then the jurisdiction under the EPA to require compensation is non-existent. In the recent Guelph decision, the Ontario Divisional Court has clearly ruled that landowner compensation is outside the scope of the EPA, and that compensation

packages cannot be incorporated into conditions of approval under the EPA.[3] It may be argued that the Guelph ruling does not prevent proponents from voluntarily agreeing to provide compensation outside of conditions of approval. However, the efficacy and enforceability of such voluntary commitments leave much to be desired, and there are few citizens or groups who would be willing to rely upon such commitments.

**(d) Provincial EPA Standards are an Inadequate Substitute for Full Environmental Assessment and Site-Specific Conditions of Approval.**

In addition to developing compensation guidelines, it is our understanding that your Ministry has proposed to promulgate provincial standards under the EPA in order to limit debate to technical, site-specific issues. We note that the Ministry has provided no particulars on the content of the proposed standards, nor has the Ministry commited to undertake meaningful public consultation on such standards. It is also unclear whether the promulgation of these standards is a prelude to a "permit-by-rule" regime where proponents would not even have to submit applications for approval, provided that their undertakings are established and operated in compliance with provincial standards.

In any event, we would point out that for years, Ontario has had provincial standards for various waste management facilities under Regulation 347 under the EPA. The problem with these standards is that they are quite general in nature, and they overlook the fact that landfills and similar facilities tend to produce their own site-specific problems and impacts. Accordingly, Ontario's existing provincial standards have been largely superseded by much more comprehensive, site-specific conditions imposed by the Director or the EA Board. CELA does not necessarily oppose overhauling the existing standards to provide more prescriptive or substantive detail on the design and operation of waste management facilities. However, CELA strongly objects to any attempt to gut the EAA process on the pretext that better provincial standards make the EAA process redundant. Provincial standards are not an acceptable substitute for full environmental assessment and comprehensive, site-specific conditions of approval under the EAA and related legislation.

**(e) The Reforms Fail to Ensure the Continuation of Intervenor Funding.**

Both options are completely silent on the need to ensure the continuation of intervenor funding in Ontario. As you know, the Intervenor Funding Project Act (IFPA) is scheduled to expire on April 1, 1996, and your Ministry has steadfastly refused to commit to the extension of the IFPA or the enactment of new permanent legislation.

In our view, the failure to ensure intervenor funding is another major deficiency in your Ministry's plans to overhaul the waste approvals process. It is not necessary here to review the widely recognized value and benefit of intervenor funding (which is paid by proponents, not the Ontario government at large). Suffice it to say that if there are any public hearings under your Ministry's proposals, individuals and public interest groups will be unlikely to fully participate due to the unavailability of intervenor funding. Accordingly, the hearing panels will be deprived of key evidence, opinions, or perspectives from parties representing the public interest. The result

---

[3] Re City of Guelph (1995), 15 C.E.L.R. (N.S.) 241.

will be one-sided hearings dominated by proponents, and the legitimate environmental concerns of individuals and public interest groups may go unheard or overlooked.

**(f) Waste Management is not merely a Local Zoning or Planning Matter.**

It is our understanding that an underlying rationale for your Ministry's proposals (particularly Option 1) is a desire to "return" waste management planning to local municipalities, which are presumably closer to the action and more sensitive to local needs. We further understand that your Ministry intends to limit its role to technical EPA issues, while the Ministry of Municipal Affairs and Housing will provide direction through the Provincial Policy Statement to guide municipalities.

In CELA's view, this abdication of provincial responsibility is objectionable and unreasonable. Offloading waste management planning responsibility to municipalities overlooks the fact that there is a clear provincial interest in waste management planning decisions. Waste management planning decisions are not merely local zoning matters -- decisions about landfill location, size, capacity, waste stream, and service area can have regional and provincial impacts well beyond the municipality's boundaries. Because of its profound environmental significance, an application for a waste disposal site is not analogous to an application for a minor variance or severance consent, and waste disposal sites should require than more than mere re-zoning or official plan amendments. In addition, it is not at all clear that smaller municipalities have the resources or expertise to assume waste management planning responsibilities.

Moreover, the Planning Act, whether by itself or in conjunction with the EPA, is not an acceptable vehicle for evaluating and approving waste management facilities. Under the Planning Act, a waste management proponent would not be not required to prepare environmental assessment documentation, nor would the proponent be required to rigorously examine the environmental impacts of the proposed undertaking or its alternatives. In short, the Planning Act is not as comprehensive nor as demanding as the EAA, and it is an inadequate mechanism for evaluating and approving waste management facilities.

The inadequacy of the Planning Act is compounded by the lack of comprehensive provincial planning policy under the Act regarding waste management. We have reviewed the draft Provincial Policy Statement (PPS) under Bill 20, and we are appalled at the vagueness and lack of content in the PPS's single sentence on waste management (section 1.3.4):

> Waste management systems need to be provided that are sufficiently large and of a type to accomodate present and future requirements, as identified by the municipality, and will be located and designed in accordance with provincial standards and legislation.

In CELA's view, this simplistic direction amounts to no policy at all. If this provision is intended to provide substantive direction to municipalities undertaking waste management planning responsibilities, then it falls woefully short of the mark. This is particularly true in light of the fact that under Bill 20, municipalities are not expressly bound by provincial policy; instead, municipalities are merely required to "have regard for" provincial policy. In our opinion, these interrelated problems -- offloading responsibility to municipalities, lack of firm provincial policy, and the "have regard for" legal standard -- essentially give municipalities carte blanche in waste management planning under the Planning Act, subject only to unspecified provincial standards

and laws of general application.

While some municipalities may attempt to exercise these new responsibilities reasonably, it has been CELA's experience that there are other less enlightened municipalities that will simply use the changes to ram through new municipal sites, or to cut lucrative deals (i.e. transfer payments based on annual waste tonnages) with private proponents. Simply put, municipalities are often too close to the action to be relied upon as independent or disinterested protectors of the public interest, particularly at the provincial level.

## 3. THE REFORMS ARE CONTRARY TO GOVERNMENT POLICY AND PROGRESSIVE CONSERVATIVE POLICY

Since the early 1980's, there has been a steady evolution in Ministry policy regarding waste management in Ontario. In particular, there has been an important shift in emphasis from simply disposing waste to reducing waste and diverting materials from the waste stream. The well-known 3R's hierarchy -- reduce, reuse, recycle -- has been entrenched in Ministry policy and EPA regulations, and Ontario has committed itself to achieving 50% waste diversion by 2000.

The net result of your Ministry's proposals is to make it quicker, easier and cheaper for private and public waste disposal sites to be approved. In CELA's view, these proposals are contrary to the 3R's policies and programs described above. Expediting landfill or incinerator approvals will negatively impact the establishment or expansion of 3R infrastructure and activities across Ontario. To remain viable, both landfills and incinerators require a constant flow of materials in sufficient quantities. Under the proposed changes, there will be a new generation of landfills and incinerators competing for materials that should otherwise be reduced, reused, recycled, diverted or composted. In short, the proposals will undermine 3R's activities in this province, particularly if landfilling is perceived as an easier and cheaper alternative to the 3R's (i.e. because tipping fees do not incorporate full cost accounting principles, and do not cover the true environmental, economic, and social costs of burying or burning resources). Indeed, there is no assurance the the current 3R's Regulations will survive your Ministry's ongoing regulatory review.

Your Ministry's proposals are also contrary to the sound MOEE policy, established years ago, that all major waste disposal facilities -- whether private or public -- will be subject to the EAA. This policy was based on the clear recognition that waste disposal facilities are among the most environmentally significant undertakings occurring in Ontario, and they should therefore be subject to comprehensive review and approval under the EAA. Options 1 and 2 fly in the face of this policy, and they cannot be justified under any circumstances.

Your Ministry's proposals are also contrary to speeches and pronouncements by various Progressive Conservative M.P.P.'s during the lengthy and acrimonious debate on Bill 143, and during the subsequent debate regarding waste disposal sites for the Greater Toronto Area (GTA). Our review of Hansard reveals countless examples of members of your party railing against the EAA changes contained in Bill 143, and advocating the need for full environmental assessment on the GTA landfills. To say the least, your party's about-face on the EAA is incongruous if not puzzling: in opposition, your party appeared to be a staunch advocate of the EAA process and criticized Bill 143's partial relaxing of the EAA for the GTA sites. However, once in power,

your party has decried the EAA process and has proposed to exempt the entire waste management sector -- private and public -- across all of Ontario, not just the GTA. Optics aside, the rapidity of your party's reversal of position is astonishing and unjustifiable.

## 4. THE REFORMS HAVE LACKED MEANINGFUL PUBLIC CONSULTATION

Your Ministry's proposals appear to have been developed and refined over the past several months, but without the benefit of formal or meaningful public consultation. We acknowledge that CELA has met with you and your staff on two occasions regarding waste management issues; however, it must be noted that at these meetings, we did not receive any details or written information on your Ministry's proposals. In addition, it should be noted that our last meeting was not characterized by balanced representation from interested stakeholders; rather, the meeting was predominantly "stacked" with representatives of public and private proponents. While CELA appreciated the opportunity to meet with you on these occasions, there can be little doubt that the meetings did not represent meaningful and timely consultation with the public at large.

It appears to us that several months ago, you or your staff made a policy determination that the EAA process required a substantial overhaul in relation to waste management. The only question now is the means to implement the overhaul: through Option 1 or Option 2? Given that this matter is reportedly on the fast-track to Cabinet (and scheduled to be announced by you in early March), it seems that your Ministry's intentions have proceeded well beyond the "proposal" stage and are now in the implementation stage. In our view, adequate public notice and comment opportunities on this mega-rollback should have been provided by your Ministry long before now.

CELA remains concerned that there has been no notice on the EBR Registry, nor any other evidence that the notice-and-comment requirements under the EBR have been complied with by your Ministry. When pressed about the rollback, Ministry officials insist that no final decisions have been made; however, in our view, it is abundantly clear that your Ministry has decided to overhaul the approvals process, and the public has not had an adequate opportunity to debate this policy determination nor to challenge the assumptions underlying the Ministry's decision. It appears that the only question now open for debate is the means to implement the rollback.

It may well be that the necessary statutory or regulatory changes will someday show up on the EBR Registry, although we remain unclear whether your Ministry will invoke the broad exemption in Regulation 482/95 and evade the EBR entirely. In any event, providing Registry notice at this late stage on the technical means to implement the rollback is unacceptable and contrary to the spirit and intent of the EBR. We would encourage you to place the proposals on the Registry, but we suspect that given the Ministry's unmistakeable intention to proceed with the rollback, many stakeholders will understandably perceive that the Ministry is just going through the motions of soliciting public comment under the EBR.

***

For the foregoing reasons, CELA respectfully requests that:

1. This matter should be deferred and not proceed to Cabinet as scheduled unless and until meaningful public consultation has occurred; and

2. Full details and documentation describing the particulars of the Ministry's proposals should be immediately made available to the public to facilitate review and comment on this matter.

From an environmental law and policy perspective, there are numerous substantial flaws in the proposals as we understand them at this point, and the entire justification for the rollback is unpersuasive. Rather than preside over the systematic dismantling of the EAA process, we would encourage you and your staff to consider less drastic and more productive ways of improving the EAA process in relation to waste management facilities.

Please contact the undersigned if you have any questions or comments about this matter.

We look forward to your reply.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

Richard D. Lindgren
Counsel

cc. Ms. E. Ligeti, Environmental Commissioner
Ms. M. Churley, M.P.P.
Mr. D. McGuinty, M.P.P.