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April 9, 1997 **BY FAX**

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VF:
CANADIAN ENVIRONMENTAL LAW ASSOCIATION.
CELA Brief No. 316; Re: Draft regulations and standar...RN22699

Dear Mr. Pichette:

RE: DRAFT REGULATIONS AND STANDARDS UNDER BILL 52

These are the written comments of the Canadian Environmental Law Association (CELA); Coalition on the Niagara Escarpment (CONE); Federation of Ontario Naturalists (FON); Save the Ganaraska Again (SAGA); Save the Oak Ridges Moraine (STORM); and Uxbridge Conservation Association (UCA) in relation to the draft regulations and standards under the ARA.

These comments have been submitted to you in accordance with the Environmental Bill of Rights (EBR) Registry Notice for this proposal.

As you know, the six above-noted groups jointly submitted a detailed written critique of the previous version of the draft standards proposed by the Ministry of Natural Resources (MNR).[1] It appears that very few of the groups' concerns have been reflected in the latest version of the proposed standards and regulations. Indeed, most of the textual changes in the revised standards are largely minor or inconsequential, although several changes (i.e. reducing the watertable separation distances for pits and quarries above groundwater) can only be regarded as significant rollbacks.

Accordingly, many of the groups' comments and recommendations remain valid and relevant, and we have found it necessary to re-submit our original critique for your consideration (attached).

In general, the groups' concerns about the latest version of the draft regulations and standards

[1] Submissions to the MNR Regarding Proposed Provincial Standards under Bill 52 (Aggregate Resources Act) (February 14, 1997).

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may be summarized as follows:

1. The composition of the MNR's "Review Committee" was unrepresentative and virtually ensured that environmental concerns would not be properly incorporated into the regulations and standards.

It is our understanding that the public submissions on the original proposed standards were reviewed by an MNR-appointed committee, which made various recommendations for finalizing the proposed standards. It is our further understanding that the review committee consisted of representatives from the MNR, Ministry of Transportation of Ontario (MTO), a private consultant, and, significantly, the Aggregate Producers Association of Ontario (APAO).

Despite the existence of several significant hydrogeological issues (i.e. prescribed content of hydrogeological reports), it appears that no representative of the Ministry of Environment and Energy (MOEE) participated as a member of the review committee. The exclusion of the MOEE (and inclusion of MTO) is unfortunate since several submissions on the proposed standards raised serious hydrogeological issues. Moreover, it appears that the review committee made some significant decisions (i.e. 50% reduction in watertable separation distance in Category 4) without the benefit of MOEE expertise or representation. Similarly, it appears that municipalities or other non-governmental organizations were not represented on the review committee.

Given the obvious imbalance of the review committee -- and the MNR's deliberate exclusion of key agencies and stakeholders -- it comes as little surprise to us that the draft standards and regulations remain inadequate and incomplete from an environmental perspective. The highly selective and unrepresentative nature of the review committee is offensive and provides further support for the widely held view that the MNR prefers to pander to aggregate interests. We therefore request that the review committee membership be extended to include representatives from the MOEE, municipalities and conservation groups in order to fairly and properly evaluate the current round of public submissions on the standards and regulations.

2. The draft regulation's attempt to merely "adopt" the standards by cross-reference is unacceptable.

In your cover letter that accompanied the original proposed standards, you indicated that "when adopted by regulation, these standards will have the force of law."[2] The ambiguity of the MNR's intentions prompted the groups to comment in our previous submission as follows:

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[2] Pers. comm., January 7, 1997.

Presumably, all of the proposed standards will be contained in a regulation under the Aggregate Resources Act (ARA). If not, then they are not binding "standards" at all, and are, in essence, unenforceable guidelines or policies. Significantly, the introduction of the MNR document explains the intended purpose of the standards, but makes no reference to the passage of regulations under the ARA. If the object of this exercise is to produce rigorous and enforceable standards, then the standards must be contained in a regulation under the ARA.

RECOMMENDATION #1: **Once finalized, the standards must be contained in a regulation under the ARA.**[3]

In response to this issue, the MNR's draft regulation simply provides that licence and permit applications, as well as the operation of pits and quarries, shall be in accordance with standards published by the MNR under the ARA.[4] In our opinion, this simple cross-reference to the standards is an inefficient and inoperable mechanism. In order to maximize the enforceability of the standards, the procedural and substantive requirements should be entrenched in regulatory form. Otherwise, the precise legal status of the requirements remains murky at best, particularly since keeping the "standards" in a separate, non-regulatory format means that the MNR enjoys considerably more freedom to amend the so-called "requirements" at will. In comparison, if the requirements were contained in a regulation, the MNR would have to provide mandatory public notice and comment opportunities (and perhaps a Regulatory Impact Statement) under the EBR before changes are made.[5]

It is also questionable whether the MNR has proper legal authority for promulgating the requirements as "standards" as opposed to "regulations". On this point, we note that section 67 of the ARA, as amended by Bill 52, expressly permits the Lieutenant Governor in Council to make regulations respecting applications, site plans, reports, notification and consultation, prescribed conditions, and fees. No provision is made in section 67 for the development of "standards" respecting these matters. Indeed, it is noteworthy that the MNR has taken no jurisdictional chances regarding fees and has included fee-related provisions directly into the draft regulation.[6] However, when it comes to the most important matters -- i.e. procedural and operational requirements -- the MNR is content to simply cross-reference documents that have no formal regulatory status. This inconsistency and legal uncertainty may prove to be fertile ground for future judicial review applications, which could be easily avoided by entrenching the essential requirements into a regulation (or set of regulations).

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[3] Supra, note 1, page 2.

[4] See sections 6 and 7 of the draft ARA regulation.

[5] See sections 16 and 27(4) and (5) of the EBR, and section 3 of O.Reg.73/94.

[6] See sections 1, 2 and 3 of the draft regulation.

Significantly, when Bill 52 itself was passed, numerous conservation groups opposed the deletion of key operational and approval details from the body of the ARA. The government response was that it would be preferable to place these detailed requirements in a regulation for the purposes of greater flexibility. It now appears that the requirements will not even be entrenched in a regulation, and instead will exist only in a companion document that can be changed at will from time to time, likely without public notice or comment. Accordingly, it appears that the public has been seriously misled as to precisely how and where these "standards" would exist in law.

3. The format and organization of the proposed standards is still inadequate.

As noted in the group's previous submission, it is doubtful whether the MNR's objective of providing "more concise, user friendly and understandable requirements" is achieved by delineating 15 different licence and permit categories with considerable overlap and repetition.[7]

Under the revised draft standards, 15 licence and permit categories have still been delineated by the MNR, and there appears to be no appreciable reduction in the overall length of the document. We note, however, that the "Operational Standards" and "Annual Compliance Report" requirements have now been consolidated into a central location at the end of the proposed standards. This is a commendable attempt at reducing the sheer bulk of the standards, and we encourage the MNR to explore other opportunities to consolidate other common requirements (i.e. notification and consultation requirements for Class 1 to 8). We also submit that consideration should be given to reducing the number of licence and permit categories to avoid undue length, confusion and complexity.

4. All standards should apply to new and existing licences and permits.

We note that the introduction of the revised standards still indicates that the standards will, in general, only apply to sites that go through the licencing and permitting process subsequent to the proclamation of Bill 52. For the reasons stated in our previous critique, the groups submit that the finalized standards should apply to new and existing licences and permits.[8]

5. The site plan standards require further revision and expansion.

While some extremely modest improvements to the site plan standards have been proposed (i.e. specified map scales in section 1.1.4), few if any of the groups' previous

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[7] Supra, note 1, page 3.

[8] Supra, note 1, page 4.

recommendations regarding site plan standards have been accepted or acted upon by the MNR.

For example, the revised standards still appear to unjustifiably reduce or eliminate documentation requirements between Class A and B licences as well as aggregate permits. Moreover, section 1.1.27 still fails to separate man-made and natural features, fails to define "significant" or related natural heritage terms, and fails to provide sufficient guidance on the types of natural features that should be mapped. The groups' concerns and recommendations regarding these shortcomings have been outlined in our previous submission and need not be repeated here.[9]

Of particular interest to the groups is the MNR's apparent intransigence on the issue of establishing the watertable elevation. As drafted, section 1.1.19 still only requires applicants to describe "the elevation of the groundwater table on site". No reference is made in the site plan standards (or report standards) to the need to ensure that applicants reliably establish the watertable elevation by determining the seasonal high and low elevations.[10] This is a major oversight that must be corrected prior to the finalization of the standards.

The groups are also concerned that for above-groundwater operations, the separation distance to the watertable has actually been significantly reduced in several categories. For example, the separation distance in Category 3 has been reduced from 2 metres to 1.5 metres. In Category 4, the separation distance has been reduced from 4 metres to 2 metres. In Category 14, the separation distance has been reduced from 2 metres to 1.5 metres. The groups are unaware of any empirical evidence that demonstrates that these critical distances can be "shaved" in this fashion without increasing the risk of unanticipated groundwater interference (or groundwater contamination from after-uses). In addition, we note that the separation distances have not been expressed as X metres above the seasonal high of the watertable. Without such a restriction, excavation in above-groundwater operations could actually be occurring near, at or below the de facto watertable in wet spring or fall conditions.

6. The report standards still require revision and expansion.

While Class A licence applicants must submit a "summary statement" on natural environment impacts, Class B applicants are still not required to do so under the revised standards (see Categories 5 to 8). This requirement is also still absent from the various aggregate permit categories. As described in the groups' previous submission, there is no environmental rationale for using the 20,000 tonne threshold as the dividing line for determining which

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[9] Supra, note 1, pages 4-7.

[10] Ibid., pages 7-8.

applicants should produce summary statements on natural environmental impacts.[11] In our view, all categories of licences and permits should require the submission of summary statements on natural environment impacts. Where relevant, the summary statements should make reference to groundwater issues and socio-cultural impacts.

With respect to technical reports, it is still unclear who is entitled to prepare and submit such reports. For example, at the end of the report standards, it is stipulated that the technical reports "must" be prepared by a duly qualified person. However, with respect to hydrogeology, section 2.2.2 states that the technical report "should" be prepared by a duly qualified person. The groups submit that given the importance of groundwater protection, the word "should" has to be replaced by the much more prescriptive word "must" in section 2.2.2.

The groups have no objection to the new "tiered" approach to hydrogeological reports (i.e. Level 1 and Level 2). The concern, of course, is that relatively few sites will actually be subjected to Level 2 scrutiny since aggregate operators are generally unwilling to concede that their operations may potentially cause off-site impacts.

With respect to natural environment reports (sections 2.2.3 and 2.2.4), the revised standards still do not define "significant", nor do they define the types of natural features that are to be studied. As described in the groups' previous submission, this problem can be easily rectified by adopting or cross-referencing the relevant definitions from the Provincial Policy Statement under the Planning Act.[12] In addition, the list of natural features to be studied should be expanded to include: habitat of endangered, threatened, vulnerable and rare species; designated environmentally sensitive areas identified in official plans; and significant or rare vegetation types (i.e. alvars).

The groups further note that the revised report standards delete the reference to "adjacent lands", although the term could easily have been defined in the same flexible manner as the Provincial Policy Statement. Instead, the revised standards limit the natural environment reporting obligation to the site itself and to the area within 120 metres of the site. In the groups' previous submission, we recommended that 120 metres be used as the minimum distance in order to retain flexibility to examine larger areas where necessary. However, the revised standards inappropriately use 120 metres as the maximum distance for off-site reporting obligations, and makes no provision for studying larger areas where appropriate. The use of this fixed boundary will likely give rise to serious implementation problems. For example, we have reviewed Table 2.1 in the MNR's Natural Heritage Training Manual for Policy 2.3 of the Provincial Policy Statement (February 1997), which lists a number of "recommended adjacent land widths" for various natural features such as fish habitat (30 metres) and significant wetlands (120 metres). Significantly, this MNR manual specifically

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[11] Supra, note 1, page 8.

[12] Ibid., page 10.

contemplates that where appropriate, municipalities may adopt alternative (i.e. wider) widths than those recommended by the province (page 10). What would be the outcome if a municipality adopts a width of 500 metres for significant wetlands, but the revised standards only prescribe a 120 metre study limit? If a municipal planning approval is required for a new aggregate operation proposed near a significant wetland, does the municipality's 500 metre width prevail over the provincial 120 metre width under the ARA standards? In the groups' view, consistency, certainty and predictability are highly desirable from both the public's and proponent's perspective. Accordingly, the revised standards must be further revised to make allowance for greater study widths where warranted.

Even the revised standards themselves are internally inconsistent with respect to off-site reporting obligations. For example, we note that in the "Existing Features" section of Category 13, applicants are to identify "significant natural or man-made features within 0.5 km [i.e. 500 metres] of the proposed extraction area". Why is 500 metres appropriate in this category, but only 120 metres is appropriate in other categories?

More generally, we note that section 2.2.4 still fails to give applicants any meaningful guidance in terms of preparing a Level 2 natural environment report. At most, this section only indicates the circumstances when a Level 2 report must be undertaken by the applicant, and specifies that the report must propose preventative, mitigative or remedial measures. This paucity of detail is to be contrasted with section 6 of the MNR's Natural Heritage Training Manual, supra, which is entitled "Guidelines for Preparing Impact Assessments" and provides 36 pages of guidance regarding natural environment impact assessments. In our view, aggregate approvals under the ARA are as potentially significant as development approvals under the Planning Act. Aggregate operators should therefore be required to submit the same level of detail as developers when preparing a natural environment impact assessment.

7. The prescribed conditions are still of questionable utility.

The most apparent change to the prescribed conditions under the revised standards is the replacement of the word "control" with the word "mitigate" in several provisions. However, the word "mitigate" does little to improve the overall utility or effectiveness of the prescribed conditions, which will likely only serve as an educational tool for some aggregate operators.[13] Indeed, we would argue that "mitigate" contemplates a lower or less stringent standard than "control".

8. The notification and consultation standards still require revision and expansion.

The revised standards still set out notification and consultation requirements that are virtually

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[13] Supra, page 12.

identical for several categories (i.e. categories 1-8). Accordingly, we submit that further thought should be given to consolidating these generic standards into a single location.

With respect to the content of the notice and consultation requirements, the revised standards still only require written notice for landowners within 120 metres of the proposed site. The groups submit that this notice requirement is far too limited, particularly since the environmental and socio-cultural impacts of aggregate operations do not abruptly end at 120 metres from the site.[14] It is therefore submitted that written notice should be delivered personally or by registered mail to landowners and non-owner occupants within 300 metres of the proposed site boundary.

Furthermore, notice of applications for aggregate licences or permits should be posted on the EBR Registry. On this point, we note that the MNR's recently released draft "classification regulation" under the EBR indicates that a number of ARA licences, permits and approvals will be prescribed as either Class I or II instruments. Therefore, the EBR Registry requirements should be referenced in the revised standards respecting notification and consultation.

In addition, the revised standards (section 4.1.3) should be expanded to include all relevant federal and provincial agencies as may be appropriate, as well as representatives of First Nations communities where relevant. The only new "agency" that the revised standards add to the list is "utility corporations", although such entities are more properly characterized as interested stakeholders rather than as agencies per se.

Applicants should be required to file a statutory declaration certifying that they have complied with the public notice and consultation requirements. Where there has been significant non-compliance with these requirements, the Minister should be empowered to hold the application in abeyance (or to suspend approvals if already granted) until the applicant rectifies the non-compliance. If the MNR is going to rely upon the "honour system" for fulfillment of these requirements, then additional safeguards are required to ensure that all necessary and proper parties have been notified and consulted by the applicant.

With respect to consultation, the revised standards still fail to require pre-submission consultation on the application before it is submitted to the MNR for processing. Similarly, the revised standards still fail to expressly mandate full and timely public access to all relevant information and documentation regarding the proposed aggregate operations. In addition, the revised standards still do not contain criteria (or a presumption) that an application shall be referred to the Ontario Municipal Board for a hearing where there are significant unresolved objections from any agency or person. In our view, all three of these omissions must be corrected before the standards are finalized.

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[14] Ibid., pages 12-13.

9. The operational standards still require revision and expansion.

As noted above, the groups commend the decision to centralize the various operational standards for licences, aggregate permits, and wayside permits. However, contrary to the groups' previous recommendation, the standards do not increase the minimum excavation setback areas and on-site buffer distances.[15]

10. The annual compliance report standards still require revision and expansion.

It appears that while annual compliance report requirements have now been consolidated into a central location, there have been no substantive changes in the revised standards respecting compliance reports. Thus, the groups' previous recommendations concerning compliance reports remain valid:

- the standards should stipulate that completed compliance reports are in the public domain and shall be made available to any person upon request to the MNR or to local or regional municipalities possessing copies of the forms;

- the standards (and prescribed forms) should contain a provision stipulating that it is an offence to knowingly submit false or misleading information in compliance reports;

- the prescribed forms should be amended to require persons to provide a statutory declaration that the submitted information is correct, true and accurate to the best of their knowledge;

- the standards must stipulate that the report forms are to be completed only by duly qualified and experienced persons possessing sufficient knowledge of the aggregate operations and relevant regulatory requirements;

- the standards should require licencees and permittees to file not only completed checklists, but also semi-annual reports or summaries to provide greater public information about actual on-site conditions, operational constraints, environmental impacts, remedial actions, and compliance problems; and

- the standards should either increase the frequency of reporting requirements, or impose a positive duty on licencees and permittees to report significant non-compliance occurrences or adverse environmental effects forthwith to the MNR.[16]

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[15] Supra, note 1, page 17.

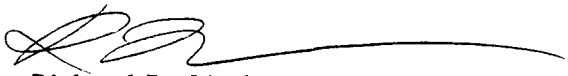
[16] Ibid., pages 18-21.

For the foregoing reasons, the groups can only conclude that the much-hyped "standards" and regulations are still inadequate, inoperable and incomplete. Accordingly, the groups submit that the adverse environmental impacts of aggregate operations will not be properly identified, evaluated and addressed under the Bill 52 regime.

Please feel free to contact the undersigned or any of the group representatives listed below if you have any questions or comments about this submission.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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