ONTARIO'S PROPOSED AGGREGATES ACT

by John Swaigen
General Counsel
Canadian Environmental Law Association

Extraction of mineral aggregates is one of the most vexing sources of conflict between ratepayers and their municipal councils and between municipalities and the provincial government, which is responsible for licencing and overseeing gravel pits and sand quarries. Pits and quarries generate noise and dust which affect neighbouring residents. Excavation and blasting may damage water tables and wells in the area, and truck traffic may affect people over a much wider area. Abandoned pits and quarries are a safety hazard and a blight on the landscape. Moreover, sand and gravel deposits are often found under prime agricultural land or sensitive natural areas.

Nevertheless, a reliable, steady supply of aggregates is necessary to the provincial economy, and pits and quarries must continue to be opened and operated to meet the need. In June, the provincial government, to provide for the management of Ontario's aggregate resources, introduced Bill 127, The Aggregates Act. The Bill contains a number of positive provisions: a fund to pay for rehabilitation of abandoned pits and quarries, progressive rehabilitation incentives, greater involvement by regional government, increased inspection, more thorough and regular review of operations, more stringent site plan requirements, and higher fines for offences.

Unfortunately, it is difficult to evaluate Bill 127 by itself. The Bill is a mere skeleton, to be fleshed out by policies which are vague and ambiguous

and by regulations which will be made privately by Cabinet, perhaps in consultation with the aggregate industry, but without any scrutiny by the Legislature, municipal councils, or the general public. The proposed Act will probably concentrate tremendous powers in the provincial government while reducing its need to take into account environmental concerns and the objections of ratepayers' groups and municipal councils to establishment of pits and quarries at inappropriate locations.

There are indications that the new Act will suffer from the same deficiencies as the present <u>Pits and Quarries Control Act</u>. That Act was passed in November of 1971 with the intention of providing rules and regulations which would accelerate rehabilitation and minimize the environmental impact of pits and quarries while still ensuring a steady supply of aggregates. Five years later, a provincially-appointed committee, the Ontario Mineral Aggregate Working Party, concluded that a confrontation situation existed between residents of extractive areas and the aggregate industry and that the problems were "little improved".[1] Lacking definitive statistics, the Working Party concluded that effective rehabilitation had not occurred over most of the disturbed area. A study by landscape architect William Coates later confirmed this.[2] The Working Party, made up of representatives of the provincial government, municipal councils, aggregate industry representatives and environmental groups,accused the provincial government of lacking credibility because of its failure to enforce the Act, weaknesses in the Act and lack of rehabilitation. They pointed out that rehabilitation requirements were not adequately identified in site plans and that the establishment of what was acceptable or essential in the location or operation of pits and quarries was not specified in the Act itself but buried in regulations or a matter of discretion

or interpretation by officials of the Ministry of Natural Resources, which administers the Act. There was also too little involvement of the people affected in making licencing, operating and rehabilitation decisions.

The Working Party could have been describing the proposed Aggregates Act, which repeats the pattern of vagueness, ambiguity, lack of public participation and unfettered provincial government discretion established by the Pits and Quarries Control Act. The new Act will be administered by the same provincial agency which lacked credibility because of its failure to enforce the existing legislation. The Act appears to contemplate no role in assessment of site locations or enforcement for the Ministry of the Environment, the provincial department responsible for environmental protection. The Natural Resources ministry has responsibilities for promoting aggregate extraction and for control of operations which are difficult to reconcile. Its past performance provides little reason to believe any future conflicts will be resolved in favour of protection of social and environmental amenities. Moreover, the Ministry's failure to enforce the Pits and Quarries Control Act has been blamed on insufficient staff, but there is no provision in the new Act or the budget suggested by the Working Party for an expanded field staff.[3]

The crowning irony is that under this Act the same government agency which lacks credibility because of its failure to enforce the Pits and Quarries Control Act for the past seven years would be given a monopoly over law enforcement, taking away the centuries-old common law right of private prosecution.

The right of private prosecution is a basic protection against abuse or derogation of government responsibility. If the government establishes a policy of condoning law-breaking, any citizen can lay a charge and hire his own lawyer to prosecute it. The right has not generally been abused. J. Neil Mulvaney, Q.C., director of legal services for the Ministry of the Environment, has acknowledged publicly that private prosecutions under Ontario's Environmental Protection Act have been few and have usually been successful, and have not posed a problem for the Ministry. However, the Pits and Quarries Control Act and the new Aggregates Act both provide that the public can prosecute offences only with the consent of the very Minister whose own performance has been inadequate.

Like the present legislation, the proposed Act also leaves the most crucial decisions to regulations or provincial discretion. Without seeing the regulations, for example, it is impossible to tell whether the annual licence fees for operating pits and quarries will be adequate to fulfill their threefold purpose of providing revenue to the provincial government, compensating municipalities for the real costs of the extractive industry such as increased road construction and maintenance, and rehabilitation of abandoned pits and quarries. The Working Party suggested that the licence fee should be high enough to generate $300,000 a year for rehabilitation of abandoned pits and quarries. The Sierra Club of Ontario has estimated that at this rate it would take over six decades to rehabilitate existing disturbed land, a high percentage of which is abandoned sites.[4] The Foundation for Aggregate Studies, an independent research group, believes that costs of adequate rehabilitation are four times as high as The Working Party estimated.[5] At that rate, it would take 240 years

to rehabilitate existing abandoned pits. There is no indication in the Act of the amount of the licence fee or the percentage of it to be allocated to municipalities or to rehabilitation of abandoned sites.

Similarly, there is no indication in the Act of whether the rehabilitation security payments required of existing and future operators will be adequate. These too will be set by regulations, and there is no mechanism to ensure that the security deposits will reflect costs of rehabilitation. In March of 1978 the Minister of Natural Resources told the Ontario aggregate producers association that the government was considering raising the deposit from 2 cents a ton to 8 cents. One year later, despite inflation, the contemplated deposit has been reduced. In March of this year, the current Minister, James Auld, told the same group that the Government is considering a rehabilitation deposit of 8¢ per <u>metric</u> ton (a metric ton or tonne is 1.1. British tons). The Foundation for Aggregate Studies estimates that taking into account inflation, this is less than 3 cents a ton in 1971 dollars.

Perhaps most importantly, the proposed Act obscures the real planning process and the role of local involvement. These matters will be established largely by provincial policies and may not be debated when the Legislature considers this Bill. Nor does the mineral aggregate policy for southern Ontario proposed by the Ministry of Natural Resources give any assistance. It states merely that the Ministry will try to ensure an adequate supply of aggregate to meet future demands by "working with municipalities to identify, manage, conserve, and provide guidelines for the use of aggregates"[6]. To know how this policy will be implemented it

is necessary to look behind it to the Working Party Report, upon which the proposed Aggregates Act is based. While the Working Party paid lip service to local participation, it appears that the provincial government will identify sand and gravel deposits and force each municipality to accept its "fair share" of pits and quarries by refusing to approve official plans that do not designate these areas as "extractive". If this fails, the Minister of Natural Resources would have the power to order that a municipal official plan or by-law be amended to allow for aggregate extraction in municipalities which "refuse to accept responsibility for a reasonable output of aggregate".[7] Public participation would be curtailed so that the licencing process could be"streamlined" to reduce the cost of entry into the industry.[8] Hearings now available under The Planning Act could not be utilized nor would the Environmental Assessment Act apply to pits and quarries. The "local involvement" contemplated by the Working Party appears to be tokenism, effectively limited in most cases to deciding the order in which extractive areas would be developed. The Minister of Natural Resources continues to have the final say over whether a licence will be issued, and in many cases whether a public hearing will be held by the Ontario Municipal Board before licensing. In fact, the proposed Act increases the Minister's power to refuse a hearing. Under the Pits and Quarries Control Act, any person "directly affected" could require a hearing. Whether someone was directly affected could be determined by the courts if the Minister ruled he was not. Now, only those who in the Minister's opinion are substantially affected can require a hearing. If the Minister decides an adjoining landowner (who, incidentally, has no right to notice of a licencing application) does

not have a substantial interest in having a hearing before the licence is issued, his opinion would seldom be subject to any review.

The Working Party recommended that the Environmental Assessment Act not apply to pits and quarries because it believed the new legislation it recommended would contain equivalent environmental requirements. In fact, the Minister's duty to consider environmental impacts has been expunged from the new Act. Under the existing Act the Minister has a duty to take into account the preservation of the character of the environment and the availability of natural environment for the enjoyment of the public. The only reference to environment in the proposed Act is a requirement that the applicant describe any significant natural features in his site plan. The Minister has no obligation to protect these significant areas or, indeed, even to have regard to the site plan before issuing a licence. Nor does the Act require that topsoil be preserved, as recommended by the Working Party.

The Act contains a number of perplexing anomalies and omissions. It is difficult to understand, for example, why an applicant for a licence to excavate less than 20,000 tonnes of aggregate a year should have to provide the Minister with less information about his operation than an application to extract larger quantities each year (but perhaps for fewer years). The former applicant for example, is not required to describe the water table, the location of wells in the vicinity, whether he intends to excavate below the water table or the maximum depth of excavation, even though he may ultimately dig as deeply as the latter applicant, who is required to provide this information. Moreover, the description of existing and final grades required by the existing Act does not appear to be contemplated by the new Act. The site plan of the latter applicant must

be certified by a professional such as an engineer or landscape architect, but not that of the former.

A small pit, or one which removes small quantities of aggregates each year for many years, may have just as much social and environmental impact as a larger one. The key factor is often location, not size. Surely a pit to be located near a public school, on a busy highway or in an endangered species habitat should have to provide just as much information and be planned by professionals just as qualified as a pit on marginal land remote from human habitation.

Nor does the Minister have to take into account the financial responsibility of the proposed operator. As long as the operator can pay his licence fees and security deposit, there may be no further inquiry about this before a licence is issued. Even then, the licence fees, which are intended to be substantial and a significant source of revenue, need not be paid until the end of the operating year, a very unusual arrangement. What is to stop the operator from walking away from the site when it is mined out without paying the licence fee for the final year of operation? Surely the operator who cannot afford to pay his licence fee in advance is not the kind of person the public wants to establish a pit or quarry.

The lack of public participation in decision-making continues throughout the life of the operation. It is a lopsided process. If the Minister issues or renews a licence, even without a public hearing, no one has the right to appeal this decision. However, if any decision is taken which adversely affects the operator, he has a right to appeal to the Ontario Municipal Board and no one - not the municipality, the local conservation authority, or any neighbour - has the right to participate in the hearing

unless granted standing by the Board.

Finally, it is unclear to what extent the new Act would apply to existing operations. One of the major defects of the Pits and Quarries Control Act was the exemption of ~~existing sites~~ areas of the province from ~~many of~~ its requirements. It appears from section ~~64(9)~~ 5(1) of the Aggregates Act that history may be repeating itself.

In Ontario, neither the public nor the Legislature has any right to review regulations or policies before they are made. In a case like the proposed Aggregates Act, which is virtually meaningless in the absence of the regulations and policies which will implement it, discussion is a sham without access to these instruments. Before this Bill receives second reading, the proposed regulations should be published in the Ontario Gazette and 60 days allowed for the public to comment. The Committee of the Legislature that considers this Bill should have this information and the public's reaction to it before debate continues.

Footnotes

1. Ontario Ministry of Natural Resources, A Policy for Mineral Aggregate Resource Management in Ontario,
   Report of the Mineral Aggregate Working Party, December 1976.

2. A Study of Pit and Quarry Rehabilitation in Southern Ontario, W.E. Coates and O.R. Scott, Ontario Geological Survey Miscellaneous Paper No. 83,1979.

3. Sierra Club of Ontario, Response to "A Policy for Mineral Aggregate Resource Management in Ontario" Submitted to the Minister of Natural Resources May 24, 1977, p.11

4. Ibid, p. 11

5. Ibid, p. 11

6. Proposed Policies: Coordinated Program Strategy for the Ministry of Natural Resources in Southern Ontario, April 1979.

7. Working Party Report, p.36

8. Ibid, p.28