

Background Notes for Guest Lecture
November 2, 1999
Diploma Program in Environmental Health
McMaster Institute of Environment & Health
Health Sciences Centre, Room 3N5B (1 - 5 p.m.)

**Environmental Impact Assessment
The Provincial Experience
The Role of Environmental Health in Ontario's Environmental Assessment Process**

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The course outline is quite correct in noting that environmental health usually plays a minimal role in Ontario's provincial environmental assessment process.

I should start by outlining for you three major routes, among others, whereby environmental impact assessment occurs in Ontario in environmental approvals processes.

These notes are for background. I will touch on them, but will primarily be addressing specific case examples and case experience in my comments on November 2, 1999. I would also be happy to clarify any of the following information.

Environmental Impact Assessment in Environmental Emissions Permits

Environmental impact assessment should occur where a company or business requires a permit to emit some sort of contaminants to air, land or water. This can be required under the *Environmental Protection Act* or under the *Ontario Water Resources Act* as the two main statutes in question. There is also the *Pesticides Act* and others. The approval agencies must conduct a review of the environmental impacts of issuing the approval in question. These statutes can lead to hearings before the Environmental Assessment Board, for example for landfill approvals. Even where there is no actual hearing, there is often an opportunity for public input to the decision.

The EPA definition of environment is only for "natural environment" and means the "air, land and water or any combination or part thereof, of the Province of Ontario." However, human health impacts remain quite relevant under the EPA through the definition of "adverse effect" which in that statute means,

"Impairment of the quality of the natural environment for any use that can be made of it,
Injury or damage to property or to plant or animal life,
Harm or material discomfort to any person,

An adverse effect on the health of any person,
 Impairment of the safety of any person,
 Rendering any property or plant or animal life unfit for human use,
 Loss of enjoyment of normal use of property,
 Interference with the normal conduct of business”.

As you can see, health impacts are relevant to almost every aspect of that definition.

They are brought into play in the statute by way of the broad prohibition under the EPA which states that no-one may discharge into the natural environment any “contaminant” in an amount in excess of that stated by the regulations. Contaminant in turn means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of them resulting directly or indirectly from human activities *that may cause an adverse effect*.

Therefore, the main provision of the statute prohibiting discharge of any “contaminant” into the “natural environment” means that no-one may discharge substances, directly or indirectly that could adversely affect any person’s health, cause anyone harm or material discomfort, impair their safety, render any plant or animal life unfit for human use (such as consumption) or cause them to use normal use of property.

I spend some time on this point because I think that it is often over-looked that one of Ontario’s main environmental approval statutes is very much concerned with human health impact assessment.

You will obviously appreciate that the broad prohibition on discharging contaminants into the natural environment, with all of the implications and protections for human health is not the end of the story – businesses do emit such contaminants all of the time (Ontario is the second worst emitter in total in North America). They do so, of course, by way of certificates of approval that the EPA, OWRA and other statutes provide for.

However, the Director, in issuing certificates of approval, is supposed to do so only on such terms and conditions as the Director considers necessary to ensure compliance with the Act, or to prevent or alleviate an adverse effect. (I would venture to say that there are many, many approvals issued the Director that do cause an adverse effect.)

The main point for today’s purpose is that you may be involved in input to an approval agency in Ontario, whether on behalf of a public health body, or on behalf of clients, and you need to know that the human health impacts of that approval ARE relevant. Your comments about the health impacts of air emissions from an industry; or of water emissions from a plant would make a difference as to whether that approval was issued or not, or whether the applicant was required to put on additional controls or take other measures such as treatment to eliminate or reduce the health adverse emissions.

I might also point out that professionals interested in environmental health issues should be paying attention to the *Environmental Bill of Rights* Registry which is where most of

these approval applications are posted. Most of them have a thirty day comment period although it may be less or more. In any event, you should check it frequently. The *EBR* is growing in importance and its untapped potential remains huge. For example, local health units could make a practice of checking the *EBR* so that they can comment where appropriate on environmental health aspects of approvals. Similarly, the professional consulting community could find additional clientele to assist with professional advice on these applications by assisting smaller town councils, municipal planners and others with interpreting the environmental health implications of MoE approvals that affect the locality. With reduced MoE staff, lack of resources on the part of most members of the public to obtain such advice, and municipal downloading, an environmental health perspective would be an important input to the approvals process.

However, you should also be aware that many approvals might not be posted on the *EBR*. This is happening in two ways. The first is that approval responsibility in some areas is being moved to local municipalities. When that happens, municipalities do not have to post the applications on the *EBR* since they are not subject to the *EBR*. The other way is that many kinds of approvals have been changed to "SARS" and that is "Standardized Approvals Regulations" which is a permit method which requires only confirmation by the applicant that they have fulfilled certain requirements and a permit is issued, without scrutiny by MoE professionals. Another recent approach sees no permit required for certain activities; the requirements are regulated and it is up to the proponent to follow them with the possibility of prosecution if the MoE discovers that they are breaching the regulated requirements. For those kinds of activities, it is the regulated standard itself that must be comprehensive enough and stringent enough to prevent environmental health impacts in all of the cases where the activity will occur.

Policy Making and Standard Setting

This brings me to another area that I want to highlight in terms of environmental impact assessment in Ontario that is also available for input through the *EBR*: standard setting and policy making. In looking at individual applications it is often not very feasible or efficient to do a thorough environmental health analysis. Even where it is done, if the result is inconsistent with a provincial guideline or regulation, then the approval Director is likely to follow the guideline or regulation and rarely asks for more stringent protection from the applicant or proponent. Therefore the place to make the most difference in terms of environmental health protection from emissions is by input into the standard setting process.

The *EBR* requires many of these proposed standards to be posted for public comment prior to final approval. If you can be involved even earlier in the process that is even better, because by the time the proposal is posted on the *EBR* there may have already been "multi stake holder" consultations, risk assessments etc. and it may be difficult to have a big impact on the standard at that point unless the issue becomes a political liability for the ministry. You would have an opportunity to see the risk assessment, cost benefit models, pathways analysis, choice of assumptions etc. as you have been studying

in this program all in action in the assessment process behind the development of the standard. CELA together with Canadian Family Physicians is in the process of completing a very interesting study into Canadian standard setting in terms of whether it takes into account children. It probably won't surprise you to learn that at many stages of the standard setting process, assumptions are made that are not reflective of children's exposures and health risks from the emissions as the study will detail.

Where you find that a standard or guideline appears to be inadequate for health protection of one or more populations, in addition to the normal approaches to politicians and civil servants that you might take, there is also a procedure under the EBR by which you can require the relevant Ministry to reevaluate the particular law, regulation, policy, standard or guideline. This is by way of a Request for Review of that particular policy etc.

Environmental Assessment Act

Another major route in Ontario for statutory environmental impact assessment is under the *Environmental Assessment Act*. I know that you have been reviewing that statute, which underwent radical revision in 1996. This statute too can lead to hearings before the Environmental Assessment Board.

Therefore, for example, you could have one project that needs both an *EAA* and an *EPA* approval, and two different Certificates of Approval issued under each of the relevant statutes. Where hearings into more than one approval statute are required, they may proceed under the *Consolidated Hearings Act*. This could also include land use planning matters under the jurisdiction of the Ontario Municipal Board.

Before continuing, it is important to note one major difference between the *EAA* and the *EPA* in their respective definitions of "environment." The *EPA* definition was only for "natural environment" as you saw earlier, although human health impacts are clearly relevant under that statute by way of the provisions dealing with "contaminant" and "adverse effect."

Health is clearly relevant under the *EAA*: the definition of "environment" itself expressly includes human life and includes the social, economic and cultural conditions that influence the life of humans or a community, as well as the interrelationships between any of those aspects of the definition.

In practice the breadth of the statute has been severely curtailed by the 1996 amendments to the statutes. Three major reasons are (i) the process for developing and obtaining approval from the Minister for "terms of reference" for an environmental assessment before starting it, (ii) the fact that most Environmental Assessment Act applications in the last year or two are being approved without a hearing and (iii) that even where a matter is sent for a hearing under that Act, the Minister is entitled to "scope" the issues prior to sending it to the Environmental Assessment Board.

5

What this means is that the opportunity for reflection of environmental health concerns to be included in an EA approval are even more limited than they were before. The opportunities now are:

- (i) to seek to have the proponent include environmental health issues in the terms of reference when the proponent is carrying out its early public consultation;
- (ii) if the proponent does not include these issues adequately in the proposed terms of reference, to seek to have the Minister of the Environment amend the terms of reference before he approves them;
- (iii) to seek to have the proponent deal adequately in its environmental assessment process and documentation with the environmental health issues that the project raises;
- (iv) to seek to have MoE staff and the Minister include appropriate terms and conditions on the EA approval to deal with those environmental health concerns if the application is approved without a hearing;
- (v) to seek to have the Minister refer the matter for a hearing and in doing so, to seek to have the Minister NOT exercise his discretion to "scope out" the environmental health issues;
- (vi) if there is a hearing that includes the environmental health issues (a big if), then there is an opportunity to present evidence and argument about those issues before the Environmental Assessment Board or the Joint Board and to seek to have that Board include appropriate terms and conditions in the approval to deal with those environmental health issues (or to seek denial of the approval).

It is quite critical to appreciate the very different regime in which environmental assessment under Ontario legislation is presently operating compared to pre-1996. For all of the above reasons, there were far more environmental assessment hearings previously than there are now. Determination of the issues to be dealt with at the hearing was for the hearing panel to determine. Issues scoping occurred with parties identified, usually represented by counsel and often with extensive advice from expert advisors available to all of the parties. In the last few years before 1996, most hearings had settlement meetings or experts meetings and extensive disclosure before the parties were required to prepare issues lists. Therefore issues were identified based on a great deal of good information. None of this is true now for those few hearings that do occur. There is no opportunity for the parties to make representations as to what the issues should be. It is already determined in the Minister's hearing referral to the Board. Members of the public are often asked to identify issues before the proponent has even carried out any environmental assessment work and there is little to no professional reporting, review or documentation available to them. Members of the public now have no access to intervenor funding and so most cannot retain counsel or experts, or do not do so until very late in the process, long after the terms of reference have been finalized and the environmental assessment work done; and even after the matter has been referred to a panel for a hearing, the matter may be severely scoped without the benefit of public concerns adequately expressed.

Therefore, if you are involved in any capacity whatsoever, for a client, employer, a public

interest entity, or otherwise, in a matter that is subject to the provincial environmental assessment legislation, you should identify the need to consider health impacts right away, as early as possible in the process, and before the terms of reference are developed. Waiting for further steps to be taken could mean that health issues cannot be considered in the Environmental Assessment process because they have not been included in the approved terms of reference, or, later in the process, have been eliminated or excluded from the scope of issues referred to a mediator or hearing.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

The scope of CEAA is beyond what I am dealing with today, but you need to be aware of the federal legislation and the fact that it works quite differently than the provincial statute. If requested, I can describe the differences on November 2nd. The federal legislation has been the subject of several Federal Court cases in 1999, including the Federal Court of Appeal's just released decision in *Sunpine*. The approach under CEAA is being affected by these judicial interpretations of that legislation, and additional cases are following, so it is a very dynamic statute. You should also be aware of the Federal - Provincial Harmonization Accord, including the Sub-Agreement on Environmental Assessment, as well as aware of individual federal-provincial agreements on Environmental Assessment that may be entered into under the authority of CEAA and the provincial legislation, either province-wide, or project by project. Such Agreements will affect the practical manner in which the assessment will proceed in a particular matter. Finally, CEAA may be the subject of an imminent federal legislative review, and so amendments may be proposed in due course.