SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING REGARDING PROPOSED CHANGES TO SEPTIC STANDARDS ENFORCEMENT

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by Kathleen Cooper[1]

Contents

I. Introduction

The Canadian Environmental Law Association (CELA) is a non-profit public interest organization specializing in environmental law and policy. CELA has been extensively involved in matters related to land use planning since its inception in 1970. In particular, CELA has frequently represented residents and citizens' groups in numerous land use planning disputes, and CELA has been particularly involved in various law reform initiatives regarding land use planning issues.

We recognize that efforts by the Ministry of Municipal Affairs and Housing (MMA&H) to streamline Septic Standards Enforcement are motivated by a worthwhile desire to save time and money. We also recognize and applaud the decision to put in place, for the first time, a certification system for septic installation and inspections. However, we have a number of concerns with the proposals which may be summarized as follows:

1. In the explanatory materials accompanying the "Proposed Changes to Septic Standards Enforcement" there is little or no recognition of the significant environmental and public

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[1] Researcher, Canadian Environmental Law Association, with research assistance from Paul McCulloch, Student-at-Law, Canadian Environmental Law Association.

Enforcement" there is little or no recognition of the significant environmental and public health problems that exist in Ontario due to poorly operating or failed septic systems.

2. The "Proposed Changes to Septic Standards Enforcement" need to more fully incorporate the extensive work conducted on the issue of septic systems by the Commission on Planning and Development Reform particularly the details necessary to address the management and use of *existing* septic systems.

3. The "Proposed Changes to Septic Standards Enforcement", combined with changes to planning law and policy, have the potential to increase the environmental and social costs of urban sprawl and scattered rural development.

4. Assurances that environmental and public health protection will be maintained and strengthened are dubious at best given the current government's environmental record and nevertheless impossible to judge without seeing the relevant regulations (including the currently proposed revisions to the *Environmental Protection Act* (EPA) Sewage Systems Regulation and the proposed regulation to govern the certification of inspectors and installers of septic systems).

5. The increase in potential liability for municipalities from these changes is not addressed.

6. The Building Code Commission lacks the expertise to properly evaluate the environmental and public health issues arising from septic systems appeals.

Each of these six matters is discussed in turn. However, it must be noted that we are hampered in our ability to respond to these proposed changes without also being able to review the implementing regulations. We will respond to these latter changes as they become available.

II. Septic Systems in Ontario: the so-called "Sleeping Giant"

Contamination of groundwater by septic systems is an insidious problem that has been well documented for decades. A review of the MMA&H "background information"[3] on these proposed changes and the related "Who Does What" correspondence[4] provide an incomplete picture of the

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[3] Ministry of Municipal Affairs and Housing, "Backgrounder, Septics (On-Site Sewage Systems)" (August 21, 1997); and Ministry of Municipal Affairs and Housing, "Background Information - The Services Improvement Act, 1997, Amendments to the Building Code Act, 1992, the Environmental Protection Act and the Ontario Water Resources Act Respecting Septics Standards, (1997).

[4] Correspondence to Al Leach, Minister of Municipal Affairs and Housing from David Crombie, Chair, *Who Does What Panel* and William F.Bell, Chair, Transportation and Utilities Sub-panel, (August 14, 1996).

environmental and public health dimensions of the septic system issue in Ontario. These materials include almost cheerful assurances that Ontarians will continue to be served by tough rules for septic system installation and operation. Nowhere is there any reference to the well documented evidence of widespread problems with septic systems in Ontario.

The scale of this problem with respect to septic systems is significant. The precise number of EPA Part VIII septic systems across Ontario is not known, but it has been estimated that there may be over one million such systems located throughout the province[5] with approximately 22,000 new systems approved each year.[6] The Commission on Planning and Development Reform in Ontario found that there "is increasing evidence of contamination of both ground and surface water" from septic systems. The Commission also referred to regional Ministry of Environment and Energy (MOEE) studies that showed one-third of septic systems were designed below standards, and one-third were classifiable as a public health nuisance.[7]

When these MOEE data were raised in discussions with MMA&H staff, the response was that the information was hard to believe.[8] It would seem necessary that during this transfer of responsibility for on-site septic systems from the MOEE to the MMA&H and thence to municipalities, that MOEE studies and data on septic system malfunctioning need to be carefully considered by MMA&H and municipal staff. MMA&H staff could start by looking at Chapter 10 of the Final Report of the Commission on Planning and Development Reform, a body that was, after all, commissioned by the Ministry of Municipal Affairs (see Section Three below for further discussion of the Commission's treatment of this issue).

All septic systems have a limited life span; some more limited than should be the case due to problems with installation and/or maintenance. Estimates range but typical systems last between 15 and 30 years. It is not surprising therefore that complaints about pollution from these systems are common. In a thorough review of this issue John Swaigen notes:

> The results of septic system failure can be exposure of humans to bacteria, and possibly to viruses, that can cause severe stomach and digestive tract illnesses, as well as other diseases. Moreover, even a properly functioning septic system will not adequately treat nitrates, phosphorus, and other materials found in effluent, such as some pesticides, solvents, cleansers, degreasers, paint, oil, and unwanted medicines and drugs.

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[5] See D. Estrin and J. Swaigen (eds.), *Environment on Trial*, (Emond Montgomery , 1993), p. 533.

[6] Correspondence to Al Leach from David Crombie and William Bell, *op cit.*

[7] Commission on Planning and Development Reform in Ontario, *Final Report* (1993), p.124.

[8] Personal Communication, Rob Dowler, Manager, Development and Building Policy Section, MMA&H, (September 17, 1997).

> Nitrates are of particular concern because they are thought to be a cause of cyanosis or "blue baby" syndrome, a disease caused by oxygen deficiencies in the blood. Nitrates will accumulate in the soil at a faster rate than they break down, and will eventually migrate through the soil to surface or ground waters.[9]

Swaigen further documents the decades-worth of information about the health and environmental impacts of leaking septic systems including the fact that some government officials have been warning for almost 30 years that the problems we are now facing would materialize. And it is not antiquated systems that are failing. Swaigen cites numerous examples, as did the Commission on Planning and Development Reform, of septic systems malfunctioning or failing that were installed in the 1980s and early 1990s. The substantial economic impacts of septic system malfunction or failure include huge remedial costs (as much as 4 to 7 times more than the original cost of the system) and very large sums associated with consumer liability and related lawsuits. As well, there can be the enormous and wasteful expense of having to replace either one or both of private wells and septic systems with municipal piped water supplies and central sewage systems in sprawling rural subdivisions or strip developments.

Given these inherent limitations in septic system design and use and the evidence of widespread problems with existing systems in Ontario including huge costs for remediation and related liability, it is inappropriate for the MMA&H to simply ignore these facts in providing background information and a rationale for proposed changes to the enforcement of septic standards.

Recommendation No. 1: That the Ministry of Municipal Affairs and Housing explicitly recognize the well-documented problem of widespread septic system malfunction and failure in Ontario and provide a detailed rationale for how the "Proposed Changes in Septic Standards Enforcement" will address this problem.

III. Incorporating the results of extensive consultation conducted by the Sewell Commission

We can say from dozens of years of collective experience at CELA with federal and provincial consultations that the Commission on Planning and Development Reform (the Sewell Commission) conducted one of the most extensive and effective public consultations that has ever occurred in Ontario on a particularly controversial and highly polarized range of issues; and it came in $1 million under budget and on time. It was an impressive achievement for which the MMA&H should take a great deal of credit. The complete lack of reference to this work in the "Proposed Changes to Septic Standards Enforcement" is frankly, bizarre and not a little insulting to the literally thousands of people that participated in the Sewell Commission consultations.

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[9] Swaigen, John, *Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks,* (Emond Montgomery, 1995), Chapter 9, " Septic Systems: The Sleeping Giant".

Of the diverse matters investigated, septics were addressed early and often and not without extensive controversy. In addition to the matters raised elsewhere in this submission (i.e., extent of the problem, costs of remediation, etc.), the Commission's Final Report noted that it received many suggestions from the public and other stakeholders concerning the management and use of septic systems.[10]

These suggestions included the need to educate owners of existing systems about proper use and potential problems and to ensure systems are properly maintained; inspections and pump-outs should occur regularly; inspections should be mandatory when houses with septics are sold; and use permits should be time-limited, based on the life-expectancy of the system. The Commission also reiterated public input by recommending that regular inspection of private and communal systems, after installation, should be required. Such regular inspections should be done for three purposes: to determine the physical soundness of the system; to ascertain that the system meets current standards for use; and to determine whether or not there is a need for a pump-out.[11]

Given the extent of the problem and the age of many systems, the Commission also recommended that these new requirements for inspections of existing systems be phased in with the first priority being systems installed before 1975. Once these older systems are inspected and remedial measures taken as necessary, there should be a requirement that all other septic systems be inspected at least once every five years.

It is not apparent from the materials released for consultation on "Proposed Changes for Septic Standards Enforcement" that the MMA&H is considering any of these recommendations except, perhaps the prohibition of sewage systems that are not operating in accordance with the Building Code Act or Ontario Building Code. This prohibition is welcome but it must be enforced. The Sewell Commission recommendations were more specific in terms of ensuring that such a provision would be enforced (through the requirement of regular inspections) and enforceable (via training and certification programs, educational assistance to septic system owners, and an eye to fairness during the transition to the new system).

The Sewell Commission recommendations neglected to account for the fact that a requirement for inspections of *existing* systems could create significant financial hardship to some owners of older, malfunctioning systems. We would therefore add to the Commissions recommendations that, in implementing such an inspection process, MMA&H, in cooperation with municipalities, investigate means of assisting low income homeowners with, for example, long term, low interest loans or other such financing arrangements to alleviate the financial hardship of replacing malfunctioning septic systems.

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[10] Commission on Planning and Development Reform in Ontario, *Final Report* (1993), *op. cit.*

[11] *Ibid*, p. 124-125.

A related recommendation by the Commission on Planning and Development Reform is the need for regions and counties to provide adequate facilities for septage disposal.

Recommendation No. 2: That the Ministry of Municipal Affairs and Housing expand the "Proposed Changes to Septic Standards Enforcement" to include the recommendations of the Commission on Planning and Development Reform concerning inspection requirements for *existing* septic systems, the need for septage disposal facilities, and educational programs for owners of septic systems.

Recommendation No 3: That the Ministry of Municipal Affairs, to accompany the prohibition on septics operating out of accordance with the BCA or OBC, investigate with municipalities, means of assisting low income homeowners with, for example, long term, low interest loans or other such financing arrangements to alleviate the financial hardship of replacing malfunctioning septic systems.

IV. Land Use Planning Context

The rationale that is provided to justify the "Proposed Changes to Septic Standards Enforcement" is the desire to "improve the building regulatory process" and provide the so-called "one-window" approach to obtaining permits, consulting codes, appealing decisions and dealing with the provincial government. We agree with the goal of streamlining approvals in order to save everyone time and money. However, the related assurance that there will "continue to be tough rules for septic system installation and operation" ignores the reality of the many septic system problems that have occurred under those so-called "tough rules".

Nor can we review these proposed changes in isolation from the government's decision to severely weaken environmental controls in the land use planning regime in Ontario. The reversal of key policy and legislative reforms enacted by the previous government will enable municipalities to continue to allow urban sprawl and scattered rural development without due regard for the protection of groundwater resources and headwater areas.

There are many examples of poor land use planning across Ontario where groundwater and surface water contamination has resulted from inappropriate development. Under the recently revised land use planning regime, these problems are likely to continue[11]. With the transfer of responsibility for septic system enforcement from the MOEE to MMA&H and thence to municipalities, it is unclear how the MOEE will be able to ensure that the public interest in protecting surface and groundwater

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[11] See examples cited in Canadian Environmental Law Association, "Submissions to the Standing Committee on Resources Development Regarding Bill 20", (February 20, 1996); "Septic Issue a Sleeping Giant", New Planning News, Vol.1, No.3 (December, 1991) and Swaigen, John, *op. cit.*

will be served. The MOEE is apparently undertaking an integrated strategy for the management and protection of groundwater, in conjunction with other ministries. This strategy is nowhere mentioned in the materials concerning the "Proposed Changes to Septic Standards Enforcement" and it is unclear whether the Ministry of Municipal Affairs and Housing is participating in this review strategy. We support the recommendations made by the Environmental Commissioner for Ontario in this regard in her 1996 Annual Report.[13] The Environmental Commissioner recommends that a comprehensive groundwater strategy for Ontario should include:

- Economic assessment of the value of our groundwater resource, including current and replacement value.
- Strong emphasis on preventing contamination.
- Assistance to regional or municipal governments to develop controls to restrict activities that may contaminate groundwater.
- Focus on priority candidate regions.
- A publicly accessible inventory of groundwater resources.
- A long-term monitoring network of water levels for major aquifer systems.
- An inventory of current and past sources of contamination and evaluation of their potential effect on health and ecosystems.
- A program to control the effects of contaminated sites.
- A focus on the cumulative effects of agriculture, septic systems, lawn chemicals and municipal systems on groundwater.
- A publicly accessible data management system, including water-well records, monitoring information, complaints, inspections and enforcement, and information about contamination and remediation.[14]

The Environmental Commissioner further recommended that provincial ministries need to cooperate to review and upgrade Ontario's groundwater management framework. The Ministries noted include Environment and Energy, Natural Resources, Consumer and Commercial Relations, Agriculture,

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[13] Environmental Commissioner for Ontario, *Keep the Doors Open to Better Environmental Decision Making, 1996 Annual Report,* (1997), Pages 44, 76, and 84.

[14] *Ibid,* p.44.

Food and Rural Affairs, and Transportation. This recommendation was written before the decision was made to transfer responsibility for septic system enforcement from legislation administered by MOEE to that administered by MMA&H. It is only logical for the MMA&H now to participate in the development of this integrated provincial strategy for groundwater protection.

To conclude, we recognize the value of an integrated, "one-window" approach and the incorporation of septic system approvals with building approvals. We also recognize the unfairness and hassle that has often occurred when landowners have had septic applications refused despite having already received planning approvals on, for example, a rezoning, a severance or a building permit. Instead of going through the expense (or being unable to afford the expense) of appealing these planning decisions to the Ontario Municipal Board, Directors responsible for EPA Part VIII approvals have often disallowed septic approvals despite the existence of prior land use planning approvals. Such situations have often caused landowners to then appeal the septic refusal to the Environmental Appeal Board. In many cases, the Board has supported the decision of the Director. (See section 7 for a further discussion of this issue.) The obvious conclusion is that the prior planning approval should never have been granted.

Therefore, the desire to integrate approvals and follow a "one-window" approach must be accompanied by appropriate safeguards. Such safeguards are obviously the specific details that will be in the revised regulation as well as the new certification system for installers and inspectors. However, in terms of integrating septic approvals with land use planning approvals, a crucial safeguard is to include a requirement that planning approvals, including building permits, rezonings, severances, etc. should not take effect unless and until a septic system approval has been granted. While some municipalities may agree with the logic of this approach and apply it, the opposite could just as easily occur. That is, the "Proposed Changes to Septic Standards Enforcement", combined with the weaker environmental controls in the *Planning Act*, will not prevent prior planning approvals being used to justify the inappropriate granting of septic system approvals by inspectors sympathetic to unfairly affected landowners.

Without such a safeguard, there is strong reason to expect that the approach of attempting to make "two wrongs into a right" will prevail. This is especially a concern where the responsibility for septic approvals will rest with Building Inspectors. The "Proposed Changes to Septic Standards Enforcement" potentially remove the check on inappropriate planning approvals that has been exercised by health units, the MOEE and the Environmental Appeal Board (more on the transfer of jurisdiction from this Board in Section Seven below). These bodies have some independence from municipal councils by being beholden to Boards of Health or to their respective environmental protection mandate. With the removal of this safeguard, Building Inspectors will be in the difficult position of being answerable to their municipal council for both planning approvals (which provide increased tax assessment) and septic approvals which may impose costs or limitations on development. A requirement to obtain a septic approval prior to obtaining planning approvals would help avoid both this conflict of interest and the environmental and public health problems of development on unsuitable lands.

Municipalities need only look to many examples across the Province to see the results of poor land use planning which can lead to the need to provide costly water and/or sewage infrastructure to far flung, sprawling development. Such poor planning decisions may also now result in increased municipal liability (see Section Six below).

Recommendation No. 4: That the Ministry of Municipal Affairs and Housing participate fully in the effort being coordinated in the Ministry of Environment and Energy to develop a comprehensive groundwater strategy for the Province.

Recommendation No. 5: That the Ministry of Municipal Affairs and Housing add to the "Proposed Changes to Septic Standards Enforcement" the requirement that septic system approvals be obtained *in advance* of planning approvals for developments via rezoning, severances, building permits or other approvals where a septic system will be required.

V. The Need to Maintain and Strengthen Environmental and Public Health Protection

The Ministry of Municipal Affairs and Housing Backgrounder regarding the Bill 152 changes to septics states that:

> The rules governing septics would be strengthened to protect public health and the environment. The province would continue to have tough rules for septic system installation and operation to protect the environment and public health.[15]

In previous years, this claim might have merited some credence. However, it is dubious at best given the wholesale dismantling of environmental laws undertaken in Ontario in the last two years, the substantial staff reductions and budget cutbacks experienced by the Ministry of Environment and Energy and the enormous increase in new responsibilities (and liabilities) for municipalities at the same time as their provincial transfer payments have been cut by up to 40% in some cases.[16] Not only is this claim dubious in this context, it is impossible to judge or respond to given the fact that the means by which this claim would be achieved is contained in yet-to-be published regulations. We look forward to the opportunity to review these regulations and reserve until then our comments on the claims made in the current consultation.

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[15] Ministry of Municipal Affairs and Housing, "Backgrounder, Septics (On-Site Sewage Systems)" (August 21, 1997), *op cit.*

[16] See for example, Canadian Environmental Law Association: thirty detailed briefs and submissions prepared for numerous Ontario Government officials from July, 1995 through to the present; Canadian Institute for Environmental Law and Policy, *Ontario's Environment and the "Common Sense Revolution"*, First and Second Year Reports (June 1996 and July 1997); and the Environmental Commissioner for Ontario, *1996 Annual Report*,(1997), *op. cit.*

We can however point out that the removal of the Ministry of the Environment and Energy from septic system approvals is cause for concern for the reasons cited in Section Four above.

In addition, as noted, we recognize and applaud the decision to put in place, for the first time, a certification program for those responsible for septic system installation and inspection. However, if the "Proposed Changes to Septic Standards Enforcement" are to be limited only to new systems, considerable environmental and public health problems arising for existing septic systems will continue. Moreover, the ability of municipalities to properly carry out these critically important new duties for the implementation and enforcement of standards may suffer under the vagaries of local municipal budgets, staffing, and priorities.

We recognize that the MOEE's enforcement of EPA Part VIII requirements has been sporadic at best over the years. We also acknowledge that in some areas, the MOEE has already designated municipal health officials as "Directors" for the purposes of Part VIII. While this arrangement has produced acceptable results in some jurisdictions, it has produced mixed results in others. We seriously question whether enforcement activities are going to materially improve under the new regime contemplated by the proposed changes. Rather, for the reasons noted in Section Four above, it is reasonable to anticipate significant problems with the removal of the MOEE (and the Environmental Appeal Board) or local Health Units as an environmental and public health check on inappropriate planning decisions.

VI. Municipal Liability

With the transfer of authority for septic system enforcement comes considerable legal liability if something goes wrong under the new municipal regime contemplated under the Ontario Building Code.

The MOEE has been successfully sued in civil cases where EPA Part VIII systems were negligently inspected or approved by MOEE staff.[17] Indeed, this type of liability may have been a motivating factor in the MOEE (and now the Province's) decision to off-load EPA Part VIII responsibilities to municipalities.[18] Presumably, this potential liability for "regulatory negligence" now rests with municipalities acting pursuant to the *Building Code Act* and the *Ontario Building Code*.

Accordingly, it would seem reasonable for "Background Materials" associated with these "Proposed

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[17] See, for example, Gauvin v. Ontario et al. (unreported, August 29, 1995, Ontario Court (General Division) per Chadwick J.).

[18] See, for example, "Ontario Prepares Negligence Defence: Environment Officials Fear Lawsuits", *The Globe and Mail*, February 18, 1997: "Other areas in which the [Ontario} ministry was developing regulatory negligence defences included septic tank rules..."

Changes to Septic Standards Enforcement" to include full disclosure by the Province of the potential liabilities incurred by municipalities with the addition of these new responsibilities. We trust that such information will at least be available as part of the consultation on the proposed regulation for certification of inspectors and installers of septic systems.

Recommendation No. 6: That the Ministry of Municipal Affairs and Housing provide full and detailed information to municipalities as to the potential liabilities incurred with the transfer of responsibility for the enforcement of septic standards.

VII. The Need for Expertise on the Building Code Commission

Currently, the Building Code Commission lacks the necessary expertise to evaluate the environmental and public health issues arising from septic system appeals. Apparently, the Province is considering cross-appointments from the Environmental Appeal Board to address this problem. Since the terms of many members of the Environmental Appeal Board are soon complete, it is unknown whether new appointees will have the necessary expertise either.

It should be recalled that the Environmental Appeal Board has had a long history with the issue of septic systems. Not only has the board gained valuable expertise, but it is fair to say that they have been the provincial watchdog in ensuring for the appropriate application and implementation of environmental principles and policies governing septic systems. Indeed, even a cursory review of the recent cases by the Board demonstrates the role of the board. Attachment I to this submission describes a number of cases which illustrate the role of the Board. Attachment II provides two examples of cases where the Board adjudicated upon applications for septic approvals.

Also slated to change, at the level of appeals to a new Board and indeed, throughout the implementation of the revised system, is the exercise of discretion in decision making.

> ...the rules governing septics will be maintained, and where possible, strengthened to protect public health and the environment. This will be achieved through *less discretionary standards* for septic installation and operation to be included in the OBC... (emphasis added)[19]

This reduction in the exercise of discretion remains to be seen. Elsewhere in the proposed changes, Building Inspectors, the Building Materials Evaluation Commission, and the Building Code Commission will have discretionary powers to approve new or innovative septic systems. Once again, the level of expertise, particularly with respect to environmental protection and public health will be crucially important. Not only should the public be concerned that such expertise will not

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[19] Letter to Stakeholders, Re: Proposed Changes to Septic Standards Enforcement, (August 22, 1997).

always reside in these various decision makers, but there needs to be an explicit recognition of the limitations of our information base. As the Sewell Commission noted, and as anyone familiar with septic systems knows, there is much that is unknown about why some systems fail, and whether the new innovative systems are going to work. Another key recommendation made by the Sewell Commission was the need for Provincial funding to continue this important research on its own and in conjunction with universities, colleges, municipalities and the private sector.

Recommendation No. 7: That the Ministry of Municipal Affairs and Housing provide the public with a much greater assurance than currently exists that members of the Building Code Commission and the Building Materials Evaluation Commission will have the necessary expertise to evaluate the public health and environmental implications of both routine and innovative septic systems.

Recommendation No. 8: That the Provincial Government ensure funding and related collaboration with universities, colleges, municipalities and the private sector for continued research into the operation, maintenance and initial and routine inspections of existing and innovative septic systems.

VIII. Summary of Recommendations

Recommendation No. 1: That the Ministry of Municipal Affairs and Housing explicitly recognize the well-documented problem of widespread septic system malfunction and failure in Ontario and provide a detailed rationale for how the "Proposed Changes in Septic Standards Enforcement" will address this problem.

Recommendation No. 2: That the Ministry of Municipal Affairs and Housing expand the "Proposed Changes to Septic Standards Enforcement" to include the recommendations of the Commission on Planning and Development Reform concerning inspection requirements for *existing* septic systems, the need for septage disposal facilities, and educational programs for owners of septic systems.

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Recommendation No. 4: That the Ministry of Municipal Affairs and Housing participate fully in the effort being coordinated in the Ministry of Environment and Energy to develop a comprehensive groundwater strategy for the Province.

Recommendation No. 5: That the Ministry of Municipal Affairs and Housing add to the "Proposed Changes to Septic Standards Enforcement" the requirement that septic system approvals be obtained *in advance* of planning approvals for developments via rezoning, severances, building permits or other approvals where a septic system will be required.

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Attachment I

List of Ontario Environmental Appeal Board Decisions
Upholding Minister's Decision to Deny Septic Permits
1993-1997

(Note: this list is only a representative sample; it is not considered to be exhaustive)

Bolhuis v. Ontario (Ministry of Environment and Energy), [1996] O.E.A.B. No. 8, File No. 00512.A1.

-The Board denied permission for a Class 4F or Class 5 sewage system.

Broecheler v. Haldimand-Norfolk (Regional Municipality) Health Dept., [1997] O.E.A.B. No. 33, File No. 00613.A1.

-the Board upheld the Director's refusal to issue a Certificate of Approval for a Class 5 sewage system.

Merlo v. Upper Thames River Conservation Authority, [1997] O.E.A.B. No. 18, File No. 00616.A1.

-the Board denied an application for a holding tank

Abel v. Ontario (Ministry of Environment and Energy), [1996] O.E.A.B. No. 43, File Nos. 00564.A1, 00576.A1.

-The Board upheld the withdrawal of a certificate of approval of a class 6 sewage system by the Director

Martens v. Haldimand-Norfolk (Regional Municipality) Health Department, [1996] O.E.A.B. No. 11, File No. 00557.A1.

-application for a class 4 sewage system was denied

Paul v. Thunder Bay (District) Health Unit, [1996] O.E.A.B. No. 38, File No. 00552.A1.

-application for a class 5 sewage system denied

Guigue v. Kingston, Frontenac and Lennox and Addington (Counties) Health Unit, [1995] O.E.A.B. No. 27, File No. 00471.A1.

-application for a class 4F sewage system was denied

Nykamp v. Director, Wellington-Dufferin-Guelph Health Unit, [1993] O.E.A.B. No. 73, File No. 00322.A1.

-Board upheld order by Director removing a certificate of approval after the health inspector had erroneously approved the project

Prince v. Director, York Region Health Department, [1993] O.E.A.B. No. 88, File No. 00321.A1.

Attachment II

Cited as:
Guigue v. Kingston, Frontenac and Lennox and Addington (Counties) Health Unit

IN THE MATTER OF sections 137, 140 and 144 of the Environmental Protection Act, as amended, and
IN THE MATTER OF an application by William L. Guigue dated December 6, 1994, for a hearing before the Environmental Appeal Board with respect to the refusal of the Director, Kingston, Frontenac and Lennox and Addington Health Unit to issue a Certificate of Approval to install a Class 4 septic system for Part Lot 12, Block C, Plan 57, Township of Portland, County of Frontenac, Ontario

[1995] O.E.A.B. No. 27
File No. 00471.A1

Ontario Environmental Appeal Board
J. Swaigen, Chair
Heard at Kingston: April 5, 1995
Oral decision: April 5, 1995
Written reasons: April 13, 1995
(7 pp.)

For a list of witnesses and exhibits in this matter, please see the Appendix.

Appearances:
William Guigue, on his own behalf.
David Cooke, Director, on his own behalf.

MEMORANDUM OF ORAL DECISION

The applicant, Mr. William L. Guigue, owns a property in the Village of Harrowsmith, on which is located a house which he rents to tenants. This house, which is at least one hundred years old, does not have a septic system. While neighbouring properties are served by antiquated septic systems which would not meet today's standards, Mr. Guigue's property is served by a holding tank, or Class 5 sewage system, as it is called under Ontario Regulation 358, which governs private sewage systems. Previously, the property contained a smaller holding tank, but in the fall of 1994, Mr. Guigue obtained approval

for and installed a larger tank. This needs to be emptied less frequently, reducing the cost of operating this system. However, the cost of pumping out any holding tank is high. Therefore, Mr. Guigue applied for approval to replace his new holding tank with a septic system consisting of a tank and filter bed, known under the regulation as a Class 4F system.

The Director refused to approve this system and Mr. Guigue has appealed the refusal to the Board.

The Director refused to approve a Class 4F system because there is only .45 metres, or about 18 inches, of heavy clay soil overlying the bedrock, which is fissured limestone. This clay has too low a permeability to be a suitable medium for treating the effluent flowing through the tiles of the 4F system and is too close to the bedrock to be a suitable location for a tile field.

To provide a suitable filter medium and sufficient height of the filter bed above the bedrock to meet the criteria in the regulation would require the importation of fill and the construction of a filter bed the top of which would be 1.5 metres above the clay base. Under the regulation, such a raised bed system would require a mantle 15 metres (roughly 50 feet) from the filter bed in the direction of flow of the effluent through the system. Since the topography of the lot is relatively flat, the effluent may flow in all directions. Thus, the regulation would require a tile bed, or loading area, of 12 feet by 23 feet. The combined dimensions of this loading area and the surrounding extended contact area of 30 feet by 35 feet, surrounded by a 50 foot mantle in all directions. The regulation requires that all imported mantles must be fully contained within the lot on which the sewage system is placed.

Since Mr. Guigue's lot is 174 feet deep, there is room for this system on the east-west axis. However, the lot is only 44.5 feet wide north-to-south. No tests have been done to determine the direction of flow of the groundwater. However, groundwater flow often flows the surface contours of the land, and in this vicinity the land generally slopes from north to south, although the subject property is relatively flat. Since the groundwater may flow north to south, this is potentially the more critical axis if there is any possibility

of infiltration of the bedrock by effluent.

To meet the regulation, the system, including mantle, would have to be 130 feet wide. Therefore, Mr. Guigue's lot is too small for a septic system that will comply with the requirements of the regulation.

This evidence is unchallenged by Mr. Guigue. However, he believes that the Director should exercise his discretion to permit the installation of a system that does not comply with the regulation.

Under section 77(3) of the Environmental Protection Act, the Director may approve a sewage system which does not comply with the regulation if he is of the opinion that the non-compliance is unavoidable, that the intent of the Act and regulations is not offended, and that the sewage system will not create a nuisance, will not be contrary to the public interest, will not result in a hazard to human health or safety, and will not result in impairment of the environment.

The Director testified that he is not willing to exercise his discretion to depart from the regulations to the extent required in this case for several reasons.

First, the soil in the area is fissured limestone, which can quickly carry any sewage system effluent that reaches it into the groundwater. The Director testified that a study conducted around 1984 revealed groundwater contamination consistent with septic system effluent beneath Harrowsmith, and at least one well, that of the Applicant's neighbour, Mrs. Clarke, is contaminated with nitrates, which is a contaminant found in septic system effluent. Although the Director did not produce the study itself, this evidence was uncontradicted, and the Board therefore accepts it. Because of this groundwater contamination in the area and the fissured limestone, through which effluent can easily migrate, the Director stated that he is reluctant to approve any new in-ground systems that do not meet the standards in the regulations.

Secondly,the Director stated that he feels he must apply the standards consistently and he expressed concern that if he approves a substandard system which later fails, the Health

Unit may be subject to a lawsuit for regulatory negligence. He testified that the Health Unit has been sued three times in the past five years as a result of sewage system failures. One of these suits resulted from the approval of a sewage system that did not meet the standards in the regulation.

The Director is also expressed concern that if he approves a substandard system on this lot, it will be difficult to not to approve other substandard systems. Many of the lots in Harrowsmith are too small to contain a system that will comply with the regulations. Some of these lots have antiquated systems which are thirty years old. They are reaching the end of their effective lifespan and will eventually have to be replaced. The Director believes that many of them are probably constructed in contact with the fissured limestone and may already be malfunctioning without anyone's knowledge. Thus, these systems may already be leaking into the groundwater through the fissured limestone. The Director expressed concern that if he permits Mr. Guigue's installation, he will face pressure to authorize replacement of these substandard systems with systems which are better than those they replace, but still substandard. The Ministry's policy appears to favour replacement of substandard septic systems with holding tanks, rather than with septic systems that do not meet current standards. (See Guideline F-9, "The Use of Holding Tanks in Sewage Systems Under Part VIII of the Environmental Protection Act", MOEE Manual of Guidelines and Procedures, formerly Policy 08-05 in the Manual of Policy, Procedures and Guidelines for Onsite Sewage Systems). This is the case notwithstanding the Ministry's general disapproval of holding tanks, because of the temptation to dispose of their contents illegally to avoid high pump-out costs, and because of the shortage of sites that will accept holding tank wastes.

Mr. Guigue, however, told the Board that the Director should make an exception in his case, for several reasons. First, he is not seeking to develop a vacant lot, but merely to improve the sewage system on a property that has been used as a residence for a hundred years or more. Secondly, he pointed out the exorbitant cost of operating a holding tank, as well as its disadvantages from an environmental standpoint, those which I mentioned above. Mr. Guigue testified that there is no evidence that surrounding substandard sewage systems are malfunctioning, and that in the past, the Director has

permitted the replacement of antiquated systems with systems that were improvements, but still did not meet the requirements of the regulation.

Moreover, he argued that if the system is constructed on tight clay above the rock, the effluent is unlikely to enter the groundwater. If the system malfunctions, the effluent is more likely to break out on the surface of the ground, where it can be observed. If this happens, he is prepared to replace the system. He points out that although his neighbours were served with notice of this hearing, none of them attended. He testified that they have told him they support his application, and that he interprets their failure to attend the hearing as support for his application.

Mr. Guigue called as a witness Mr. Jim Silver, an experienced septic system installer. Mr. Silver conceded that a raised bed system that complies fully with the regulations cannot be constructed on this site. However, he stated that he can construct a system that, while not complying fully with the regulations, will operate effectively.

Much of the testimony centred around whether this system was likely to contaminate the groundwater, and therefore, surrounding wells. Mr. Guigue pointed out that all the neighbouring wells were more than the distance from his proposed system required by the regulation. He also pointed out that there is no evidence that any of them are contaminated by the neighbouring septic systems, which are closer to the wells than his system. He also pointed out that since in each case, the existing septic system is between his proposed system and the well, those wells would be polluted by their own septic systems before his would affect them.

It would appear to me because of the heavy clay overlying the bedrock, if sufficient clay is kept in place, the chances of the effluent from the proposed septic system entering the groundwater and polluting neighbouring wells is less likely than surface ponding or lateral breakout of effluent. Preventing this is the purpose of installing such extensive mantles, and the uncontradicted evidence is that there is insufficient room on the property for such mantles.

In addition, the Director is entitled to be cautious about

allowing the installation of any septic system that does not comply with the regulation in an area of fissured limestone where the groundwater is already contaminated even if it is likely that there will be a substantial buffer between the filter bed and the bedrock.

In this case, the Director has acted within his jurisdiction, and has properly considered the factors listed in section 77(3) of the Environmental Protection Act in deciding whether to permit a deviance from the standards in the regulation. The Board does have the jurisdiction to overrule the Director and substitute its view for that of the Director even when the Director has made no error. However, this power should be exercised sparingly, and only in exceptional circumstances.

While the Director's decision not to depart from the standards imposes a substantial hardship on Mr. Guigue, a decision to depart from them would undermine the requirement of consistency and might result in approval of a system that will fail. Although it is quite possible that Mr. Silver is correct in his belief that he can design and install a system that will operate properly, the fact is that design and construction of septic systems is not a precise science. There are many uncertainties. Systems that, according to expert opinion, should fail sometimes function for decades, while other systems that supposedly were designed and constructed in compliance with the regulations fail within a few months. Accordingly, it would be inappropriate for the Board to override the Director's judgment in refusing to approve a substandard system in an area where the groundwater is already contaminated and which is susceptible to further pollution because of its fissured limestone subsurface.

Although Mr. Guigue would be willing to ensure that if sewage breakout occurred the problem would be remedied, he cannot speak for future owners of the property, and the Health Unit does not have the resources to closely monitor the performance of septic systems. Moreover, in an area with existing groundwater contamination, dense development, and antiquated systems, if further pollution occurs, it could be very difficult to pinpoint the source of that pollution, which must be done before remediation can be required.

I agree with the Director that the fact that there is no

observable odour or sewage breakout from surrounding septic systems, this does not mean that they are functioning properly. Given their age and likely proximity to the fissured bedrock, there is a substantial possibility that they are, in fact, discharging sewage into the groundwater. Therefore, the fact that there is no readily observable evidence of malfunction is not sufficient for the Board to conclude that neighbouring systems are functioning well, and therefore the Director need not be concerned about departing from the standards in the regulation. In addition, I accept the Director's evidence that although some substandard systems were approved around 1985 to upgrade systems that were malfunctioning, this practice was discontinued several years ago, and therefore the Director is not discriminating against Mr. Guigue, as he suggested.

Accordingly, the Director's decision is upheld and the appeal is dismissed.

APPENDIX

WITNESSES

Ms Pamela Landy	for the Director
Mr. David Cooke	Director
Mr. William L. Guigue	Applicant
Mr. Jim Silver	for the Applicant

EXHIBITS

1. Affidavit of Service of Notice of Hearing
2. Schematic of Applicant's lot and structures on it and mounted photographs of Applicant's property and neighbouring properties
3. Application for approval of Class 5 sewage system and certificate of approval of Class 5 system issued to Applicant in 1994
4. Notice of Reasons for refusal of Mr. Guigue's application for certificate of approval for Class 4F sewage system
5. Acetate overlay to exhibit 2 showing dimensions of components of septic system that would comply with the regulations

6. Mr. Guigue's notice of appeal and scale drawing showing location of structures, wells, and sewage systems on his property and adjacent properties.

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Cited as:
Nykamp v. Director, Wellington-Dufferin-Guelph Health Unit

IN THE MATTER OF Sections 137, 140 and 144 of the Environmental Protection Act as amended
AND IN THE MATTER OF an application by Dr. Hank Nykamp and Mrs. Beverley Nykamp dated July 8, 1993, for a hearing before the Environmental Appeal Board with respect to the revocation by the Director, Wellington-Dufferin-Guelph Health Unit, of Certificate of Approval No. 589/91 and Use Permit for a Class 4 sewage system to be located on Sub Lot Pt. Block A, Plan No. 373, Township of Puslinch, County of Wellington

[1993] O.E.A.B. No. 73
File No. 00322.A1

Ontario Environmental Appeal Board
Peter Kohl, Member, Knox M. Henry, Vice-Chair (Observer)
Heard at Aberfoyle: September 24, 1993
Decision: October 8, 1993
(10 pp.)

For a list of witnesses and exhibits in this matter, please see the Appendix.

Appearances:
Beverley Nykamp, on behalf of the applicants.
Robert C. Thompson, Director, Wellington-Dufferin-Guelph Health Unit.

BACKGROUND

In 1990, Dr. Hank Nykamp and Mrs. Beverley Nykamp ("the applicants") purchased Sub Lot Part Block A, Plan number 373, Township of Puslinch, County of Wellington, with frontage on Puslinch Lake ("the property"). At the time they intended to renovate the existing 3,200 square foot heated cottage and live in it twelve months of the year. When they subsequently found the existing sewage disposal system would have to be replaced and that renovations to the 54-year-old house would have to be extensive, they decided to build a new 2,100 square foot, three-bedroom year-round house with a new sewage disposal system.

On July 4, 1991, the applicants, Mr. Gary Wise, President of G.W. Wise Contracting Limited ("the installer") and Mr. Allan Haley, Public Health Inspector, Wellington-Dufferin-Guelph Health Unit ("the health inspector") met at the property to determine the best location for a new class 4 sewage disposal system. The installer dug a test hole which he testified indicated the groundwater flowed toward the lake and he located the proposed leaching field in the only location that would put the outer end of the distribution pipes at a distance of 15 metres (50 feet) from the well on the adjacent property of Leslie and Martha Danson. This location was more than fifty feet from the applicants' existing drilled well and the lakeshore. The application for a Certificate of Approval, which, among other things, specified a 1,200 gallon septic tank, was signed by the installer and approved by the health inspector on July 8, 1991.

On August 24, 1992, the installer asked the health inspector to inspect the completed Class 4 sewage system on the property. The health inspector found the system to be in accordance with the Certificate of Approval and signed the Use Permit. The following day, Mr. Robert Thompson, Director, Public Health Inspection, Wellington-Dufferin-Guelph Health Unit and designated as a Provincial Officer under Part VIII of the Environmental Protection Act ("the Director") received a call from Mr. Leslie Danson who told him the applicants' new system was less than the required distance of 30 metres (100 feet) from his (Mr. Danson's) shallow sand-point well.

On July 5, 1993, the Director revoked the applicants' Certificate of Approval and Use Permit on the grounds that the new sewage system was situated less than the required 30 metres from neighbour Dansons' shallow well. The applicants' new house was almost complete by then and on July 9, 1993, they appealed the revocations on the grounds that:

1. The Director does not have the power to revoke a Certificate or Permit under the terms of the Environmental Protection Act ("the Act") unless new evidence becomes available.

2. The revocation is very unfair to them as they had acted in good faith. If the problem requires correction, it should be at the expense of the Health Unit since the health inspector had made a mistake.

At the hearing, the applicant submitted that the new sewage disposal system represents an upgrade over the system it replaced and should be allowed as an exception to the Act and regulations, since the only alternatives are not as favourable to the interests of the environment.

GEOLOGICAL AND HYDROLOGICAL FACTORS

The health inspector told the Board the applicants' property is generally flat to the south-west toward Lake Road and across it to neighbour Dansons' property and to the north-east, the property slopes gently toward Puslinch Lake. The Certificate of Approval was not completed as to Groundwater Table Level and Depth of Impervious Strata but the health inspector informed the Board that Puslinch Township generally has a high groundwater table. In a letter to Mr. Danson, October 16, 1992, the health inspector referred to hydrogeological studies of the area which indicated groundwater flow to be in the direction of the lake. These studies were not introduced in evidence. The installer informed the Board that in his opinion the test hole he dug showed the groundwater on the applicants' property flowing toward the lake. The applicants did not present any additional evidence concerning water table levels or groundwater flows on the property.

HOW DID THE CONFUSION AS TO THE DANSON WELL TYPE OCCUR?

The health inspector informed the Board that, at the July 4, 1991 meeting on the property, he and the installer discussed the location of the Danson well located across Lake Road and that the installer left to speak to the Dansons. On his return the installer told him that it (the Danson well) was a drilled well, so a 50 foot clearance was alright. The health inspector advised the Board that he had not personally seen the Danson well and that the first time he became aware that it was a shallow sand-point well requiring a 100 foot clearance was when Mr. Danson called the Health Unit on August 25, 1992.

The installer told the Board that at the time of the July 4, 1991 meeting he probably thought neighbour Danson had a drilled well, that someone told him this but he could not swear to it. Because he believed the Dansons' to be a drilled well, he informed the Board, he laid out the applicant's new system so as to meet the 15 metre (50 foot) separation distance required by the

regulations. He emphasized to the Board that this was the first sand-point well he had encountered and that never before had he failed to meet the separation distances required by the regulations.

Mrs. Beverley Nykamp told the Board she had relied on the health inspector's knowing what type of well neighbour Danson had and the required clearances when he signed the Certificate of Approval and the Use Permit for the new sewage disposal system.

THE ISSUES BEFORE THE BOARD.

The issues to be decided by the Board are:

1. Did the Director have the authority to revoke the applicants' Certificate of Approval and Use Permit?

2. Should the applicants' Class 4 septic system as it exists be allowed as an exception to the Act and the policies and regulations of the Ministry of Environment and Energy ("the Ministry")?

3. If changes are required to the applicants' system, should the cost of these changes be borne by the Wellington-Dufferin-Guelph Health Unit ("the Health Unit")?

4. Did the Director examine the alternatives before revoking the applicants' Certificate and Permit?

5. Would it be inconsistent with the Board's mandate for it not to uphold the applicants' appeal?

1. Did the Director have the authority to revoke the applicants' Certificate of Approval and Use Permit?

Under Section 77(6) of the Act, the Director may revoke a Certificate of Approval as he considers necessary to ensure the replacement or construction of an inground sewage disposal system will result in compliance with the Act and regulations. Ministry Regulation 358/90, table 4, requires a separation distance of 30 metres (97.5 feet but in practice usually taken as being 100 feet) between a well other than a well with a watertight casing to a depth of 6 metres (19.5 feet), usually taken to mean a

drilled well, and the nearest leaching bed distribution pipe. For a drilled well, the required separation is 15 metres (50 feet).

The sand-point shallow well on the neighbouring Danson property is not a well with watertight casing to a depth of 6 metres and therefore the separation distance of 50 feet between it and the applicants' distribution pipe system is not in compliance with Ministry Regulation 358/90. The Board therefore finds the Director has the authority to revoke the applicants' Certificate of Approval. The Board finds further that, once the Certificate was revoked, the applicants' Use Permit was invalidated and thus subject to revocation.

2. Should the applicants' Class 4 septic system as it exists be allowed as an exception to the Act and Ministry policies and regulations?

The applicant expressed to the Board her opinion that it should allow the existing Class 4 system to be put into operation as-is as an exception to the Act and regulations for a number of reasons:

First: The new septic system represents a very substantial upgrade compared to the old system it replaced and, since there was no evidence that the old system had contaminated the Danson well, the new septic system was unlikely to.

Mrs. Martha Danson confirmed to the Board that the Danson well water was tested annually and had never shown to be contaminated. The Director informed the Board that he agreed that the new system was an improvement but that this did not bring it into compliance with the regulations.

Second: The groundwater flows from the new system toward the lake and away from neighbour Dansons' well so there is no risk to human health or to the environment.

The applicant did not present any new evidence to the Board to support this contention.

The Director expressed to the Board his opinion that there was insufficient groundwater flow data to support a definite

conclusion that there was no risk of contamination to the shallow well of neighbour Danson.

Third Had they simply decided to renovate the old cottage, the applicants could have continued to operate the old sewage system which could have caused adverse effects to health and to the environment.

The Director told the Board he did not disagree with the applicant but that this did not bring the new system into compliance. He added that, if a building permit had been sought for the applicants' renovations, the Health Unit would have condemned the old sewage system.

Fourth Other sewage systems in the area are in violation of the Act and regulations and are being tolerated by the Health Unit, so the applicants' new system should be tolerated too.

The applicant did not present evidence to the Board in support of this contention. However, the Director acknowledged that he is aware of a number of sewage systems in the area that are not in compliance with the Act and regulations . These, he emphasized to the Board, are old systems and the Health Unit would not give its approval for their continuance when, for example, the owner made application for a building permit. In his opinion, the Director told the Board, the regulations are being applied consistently.

Mr. Louis Richards, a neighbour on Lake Road, told the Board he supports the applicants' appeal because he and others in the area may want to upgrade or replace their buildings in the future and they would not want to be frustrated by the bureaucracies as the applicants are being.

Under Section 77(3) of the Act, a Director may issue a Certificate of Approval for a sewage system that does not comply in all respects with the Act and Ministry regulations in carefully defined circumstances, the most relevant to this appeal being that the Director believes the non-compliance is unavoidable or that the installation will not result in a hazard to health or in impairment of the quality of the natural environment.

The Director told the Board he sympathized with the applicants' predicament and that he had considered whether an exception could be made to allow operation of the applicants' new system despite it not meeting the required separation distances. He advised the Board that because of the high water table in the area, the lack of adequate data on groundwater movement specific to the applicants' property and the little gradient between the applicants' and neighbour Dansons' properties, he was concerned about the possible lateral movement of a contaminant from the applicants' septic system to the shallow Danson well. The Director informed the Board that, for these reasons and because there were other possible alternatives, in his opinion an exception should not be made.

The Board finds that the applicant has not proved on a balance of probabilities that its new Class 4 septic system, with less than the required clearance from a shallow well, will not result in a hazard to human health. The Board finds, therefore, that the system does not qualify for approval as a non-complying system under Section 77 (3) of the Act.

3. If changes are required to the applicants' system, should the cost of these changes be borne by the Health Unit?

The applicant told the Board that the applicants had followed all policies and regulations stipulated by the Health Unit and, on the strength of this, had installed the new septic system and had nearly completed their new house at very considerable cost. The revocation of the Certificate and Permit was very unfair to them, she emphasized to the Board, and, given the circumstances, the cost of any changes to the new septic system should be borne by the Health Unit.

The Board finds that the Board does not have the authority to order the Health Unit to bear the cost of these changes.

4. Did the Director examine the alternatives before revoking the applicants' Certificate and Permit?

The Board notes that the Ministry's Manual of Policy, Procedures and Guidelines for Onsite Sewage Systems provides that, `When an application (for a Certificate of Approval) cannot be approved, the Director should be satisfied that there is no apparent and acceptable alternate solution'. The Board takes this to apply

equally when a Certificate or Permit is about to be revoked by a Director.

The Director informed the Board that several alternatives had been considered before he revoked the applicants' Certificate and Permit. The first was to move the applicants' tile bed so as to meet the required separation distance from the Danson well, but this was not possible due to the configuration of the property.

The second alternative considered, the Director told the Board, was to substitute a Class 5 holding tank system for the Class 4 septic system. This, he informed the Board, would require an additional tank to bring the total holding tank capacity to the minimum of 9,000 litres required by Regulation 358/90 and, because of the configuration of the property and space taken up by the applicants' heat exchange system, the additional tank would have to be located above ground. The Director advised the Board that although there were licensed Class 7 sewage haulers in the area they were running out of places that would accept holding tank sewage. The Director added that some holding tank wastes were being accepted at the Cambridge sewage treatment plant and some were being spread on farmland. Because another and better alternative was being pursued, the Director told the Board, nothing definite had been done concerning the municipal guarantee and sewage haulage contract required by Ministry Policy 08-05.

The Director told the Board that, despite the general prohibition of new holding tank installations set out in Ministry Policy 08-05, `The Use of Holding Tanks in Sewage Systems...' in his opinion a holding tank installation on the applicants' property would constitute an upgrade of the old sewage system and as such could be approved under Section 4.0 b) of that Policy.

The applicant told the Board she was most reluctant to accept the alternative of a holding tank system because placing the additional tank above ground would spoil the appearance of the property.

The Board finds that, as no evidence was presented to it to demonstrate that the applicants' old sewage system was malfunctioning, it cannot conclude that the installation of a Class 5 holding tank system would constitute an upgrade possibly eligible for approval under Policy 08-05.

The Director told the Board that the third alternative considered was the replacement of the Dansons' shallow well with a drilled well which would bring the applicants' new septic system into compliance with the 50 foot separation distance required by Regulation 358/90. The Director, while emphasizing that the Dansons could not be forced to drill a new well to solve a problem not of their making, informed the Board that negotiations to this end had been ongoing without success for the past eight months and this led to his revoking the applicants' Certificate and Permit on July 5, 1993. However, the Director informed the Board, he understood the applicants and the Dansons had reached an agreement that very morning.

The applicant and Mrs. Danson confirmed to the Board that they had reached agreement that morning for the drilling of a new well on the Danson property.

5. Would it be inconsistent with the Board's mandate for it not to uphold the applicants' appeal?

The Board's mandate is found in the relevant parts of three acts designed to protect the natural environment: the Ontario Water Resources Act, the Pesticides Act and the Environmental Protection Act, in particular Part XIII of the latter act. The Board may confirm, alter or revoke decisions made or actions taken by a Director under the provisions of these acts and may substitute its opinion for that of a Director. The Board functions as an independent, quasi-judicial tribunal subject to the rules of natural justice and the requirements of the Statutory Powers and Procedures Act.

The Board is of the opinion that, in exercising its mandate, it must act in the best interests of the natural environment, while, at the same time, ensuring that the relevant laws, policies and regulations are administered with fairness.

The Board considers there is a potential risk of injury to the natural environment should the applicants' new system be allowed in the circumstances and considers the relevant acts, laws and regulations to have been applied fairly in the circumstances.

FINDINGS

The Board finds:

1. That the Director had the authority to revoke the applicants' Certificate of Approval and Use Permit.

2. That the applicants' new class 4 septic system does not qualify for approval as a non-complying system under Section 77(3) of the Act. If, however, a new well is drilled on the Danson property which brings the applicants' new system into compliance with the required clearances, the Director will be in a position to approve the applicants' system without modification.

3. The Board does not have the authority to order the Health Unit to bear the cost of correcting the problem.

4. That the Director gave due consideration to alternative solutions before revoking the applicants' Certificate and Permit.

5. That it would not be inconsistent with its mandate for the Board to deny the applicants' appeal.

Knox M. Henry attended the hearing as an observer but took no part in the Board's deliberations or its decision.

DECISION

The applicants' appeal is denied.

PETER KOHL

APPENDIX

WITNESSES

For the Director

Allan Joseph Burke Haley	Public Health Inspector, Wellington-Dufferin-Guelph Health Unit
Gary Wise	President, G.W. Wise Contracting Limited
Marion Martha Danson	neighbour

For the applicant

Louis Henri Richard neighbour

EXHIBITS

1. Affidavit of service of Notice of Hearing, sworn September 9, 1993.
2. Memorandum from Mr. Allan Haley to Mr. Rob Thompson, May 17, 1993.

3A, 3B and 3C - colour photographs of the applicants' property.

4. Letter from Robert C. Thompson to Mr. L. Danson, October 16, 1992.

End of document.

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CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

November 5, 1997

Anne Borooah
Director
Housing Development and Buildings Branch
Ministry of Municipal Affairs and Housing
777 Bay Street, 2nd Floor
Toronto, Ontario
M5G 2E5

Dear Ms Borooah,

RE: Proposed Changes to Septic Standards Enforcement

Further to our submission regarding the above-noted proposals we want to clarify an important matter. In our submission we noted that, according to regional Ministry of Environment and Energy (MOEE) studies, there is a widespread problem of septic system malfunction and failure. These MOEE studies have found one-third of septic systems to be designed below standards and one third to be public health nuisances. These studies have been widely quoted and have been extrapolated to represent the situation across the Province. Apparently our submission was followed up by MOEE staff (Mr. Frank Wright) who conducted a detailed telephone survey of *Environmental Protection Act* (EPA) Part VIII inspectors across the Province. He found that, for systems that have obtained a Certificate of Approval and a Use Permit, these statistics are incorrect or at least cannot be verified in many areas, especially rural areas, of the Province.

Upon more careful review of the original sources of this information, it is clear that the regional MOEE studies have found a significant problem in cottage country, in particular in the Muskoka and Haliburton areas. It appears from Mr. Wright's informal survey that the Muskoka-Haliburton data should not be extrapolated to the rest of the Province.

We are not interested in perpetuating what appears to be a myth about widespread septic system malfunction and failure across the Province. Septic systems do appear to be the so-called "sleeping giant" in cottage country and this problem may increase as more cottages are converted to year-round residences and/or as owners increasingly choose to retire to these residences. The problem will also worsen if land use planning decisions do not more carefully account for lake carrying capacities. Lakes may well be overloaded if municipalities continue to intensify septic system-based development along shorelines both immediately adjacent to the shore and especially if the practice continues of allowing second and even third or fourth tiers of development along some shorelines.

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Despite the fact that Mr. Wright's review appears to show that the cottage country data are an anomaly, nevertheless our comments and recommendations concerning related land use planning matters remain valid. In particular, we recommended that the "Proposed Changes to Septic Standards Enforcement" need to incorporate the Sewell Commission recommendations regarding the management and use of *existing* septic systems. Obviously a high priority in cottage country, this recommendation (concerning inspection requirements, the need for septage disposal facilities, and educational programs for owners) is necessary across the Province. Mr. Wright's survey of Part VIII inspectors' views on septic failure rates is extremely useful and we look forward to seeing the results of this work. However, in detailed discussions with Mr. Wright on this matter, he has stated that the gaps in the knowledge base are significant, particularly in rural areas. It is possible that the rates of septic system failure and malfunctioning found in cottage country are as problematic in rural areas. The information appears to be unavailable. Hence the need for the Ministry of Municipal Affairs and Housing to participate with the MOEE in developing a comprehensive groundwater protection strategy for the Province.

With the significant weakening of land use planning controls, particularly the policy to protect groundwater and headwater areas, and the ability to ignore the policy in any event, there is a risk of future contamination of groundwater, and especially headwater areas, as a result of inappropriate development approvals in these areas (see for example, *Re McLean v. Sydenham (Township)* [1990] O.M.B.D. No. 1881, Oct. 19, 1990, D.H.McRobb and P.H. Howden). We predict that the provincial interest in protecting groundwater and headwater areas will be easily and regularly overlooked by municipalities that have been delegated approval powers for sub-divisions and consents and who no longer have to circulate such planning approvals to the MOEE for review and comment. We remain concerned about the ability of local building inspectors to take over EPA Part VIII requirements, and by extension, the MOEE's oversight function of protecting the provincial interest in groundwater protection. We therefore reiterate our recommendation that septic system approvals should be required to be obtained, in advance of planning approvals for developments via rezoning, severances, building permits or other approvals where a septic system will be required.

For the reasons noted above and further to the rationale provided in sections III through VII of our submission, we consider our recommendations #2 through #8 to remain valid. We would limit our first recommendation to cottage country areas, particularly the Muskoka and Haliburton regions. We regret the apparent error of having presumed, as others have, to extrapolate the Muskoka-Haliburton data to the Province as a whole.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Kathleen Cooper
Researcher
cc. Rob Dowler, MMA&H
Frank Wright, MOEE