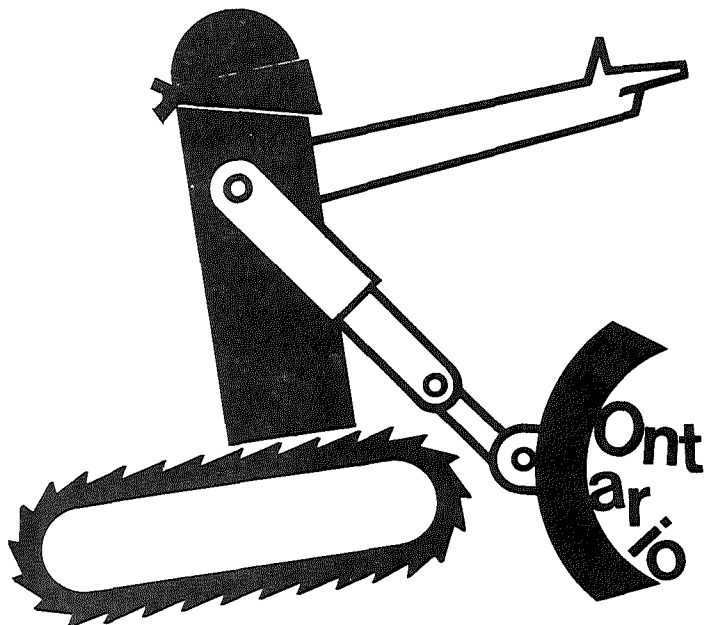


mad enough?



Oops, sorry about that!

* SPECIAL *
* ENVIRONMENTAL *
* IMPACT *
* ASSESSMENT *
* ISSUE *

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Canadian Environmental Law News

The Retail Sales Tax Act

Date

Professor
Director, Audit Section
Toronto, Ontario
Retail, Ontario Tax Branch

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February - March 1975

CANADIAN ENVIRONMENTAL LAW NEWS

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* SPECIAL ENVIRONMENTAL IMPACT ASSESSMENT ISSUE *

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*of the Ontario Bar

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ADDRESS

EDITORIAL:

THE ENVIRONMENTAL ASSESSMENT ACT (BILL 14) - ONLY THE TITLE IS RIGHT

The Ontario government's long-awaited bill on environmental impact assessment was finally tabled in the legislature on March 24th, and it is everything we expected it to be - unfortunately.

Environment Minister William Newman called the bill "one of the most important pieces of legislation ever introduced in this province."

Maybe so - eventually. But in its present form, Bill 14 is merely one of the most over-rated pieces of legislation ever introduced in this province.

In this bill, the government bestows upon itself wide powers to protect the environment by requiring environmental assessments of major project before they are allowed to be built. But there is no corresponding duty to use those powers, and we have no reason to believe that they would in fact be used when the government finds it inconvenient, administratively or politically, to use them.

The procedures contained in Bill 14 are completely within the discretion of the Minister of the Environment. He decides which projects should be assessed and which can be exempted, whether an assessment is adequate, whether to hold a public hearing, and whether an on what conditions to allow a project to go ahead. The project proponent can appeal some of these decisions; the public cannot.

Moreover, the bill's provisions are to be implemented by regulations - which are made by governmental fiat, without public input or scrutiny.

The Environmental Assessment Board, which would oversee the assessment process, would be entirely appointed by the government and would have no legal powers - it could only make recommendations which the Minister could ignore if he chose.

Provisions for public involvement in the assessment process - public notice of proposed projects, access to all relevant information, and funding for people and groups making submissions in the public interest - are completely lacking.

A comparison with CELA's proposed legislation, summarized at 3 CELN 181, will show how inadequate Bill 14 is to provide real protection to the environment (and people) of Ontario. In fact, it would add little or nothing to the environmental assessment procedures that the Ministry is already implementing without benefit of legislative sanction.

CELA's law reform team has been campaigning across Ontario for meaningful, substantial environmental assessment legislation. We are asking for these amendments to Bill 14:

1. The Environment Minister's decision not to require an environmental assessment of a project that may have major environmental impact must be reviewable by an independent Board or by the courts.
2. The public must be given notice that the project is being considered by the Ministry, adequate notice of any public hearing, and access to all relevant information, except information which would reveal trade secrets.
3. The public must have the power to appeal the Minister's decision to accept an assessment to the courts or to an independent Board.
4. The public must have the power to require a public hearing by an independent Board.
5. The Environmental Assessment Board should be totally independent of government interference, and its decisions should be binding upon the government unless overruled by a vote of the legislature - not a secret decision in Cabinet.
6. The bill must apply to all major private projects, as well as to government projects.
7. Citizens opposed to a project on the grounds that its environmental damage will outweigh its benefits must have access to financial and legal assistance and expertise, to enable them to participate knowledgeably and intelligently in evaluating the project.
8. The regulations should be proclaimed very soon after the Act comes into force, so that environmentally damaging projects cannot be rushed through before it takes effect.

We have called upon other organizations and their members for support - not only conservation and environmental groups, but labour, teachers, consumers, and professional organizations. Now we are calling on our own members.

Write or phone Premier Davis, Environment Minister Newman, and your own MPP, asking for environmental assessment legislation with teeth in it. Our campaign is already beginning to show results - the government is getting the message. If we keep the pressure on, we will get an environmental assessment bill that is more than a bill of goods.

E.B.

ONTARIO APPEAL COURT UPHOLDS MUNICIPAL RIGHT TO REGULATE EXTENSIONS
TO PITS AND QUARRIES; NON-CONFORMING USE DOCTRINE DOES NOT APPLY

CORPORATION OF THE TOWNSHIP OF UXBRIDGE [Appellant] V. TIMBER
BROTHERS SAND & GRAVEL LIMITED [Respondent]

[Supreme Court of Ontario] Appeal heard: November 21 & 22, 1974
Decision released: January 27, 1975

Evans, Brooke and Martin, JJ.A.

(This is the unabridged text of the written decision of the Court of Appeal. The trial judgment was reported at 2 CELN 44.)

The Township of Uxbridge appeals from the judgment of the Honourable Mr. Justice Haines dismissing its application for an injunction restraining the defendant from contravening by-law 1517, being a restricted area by-law of the Township, and by-law 1590, the purpose of which was to regulate the operation of pits and quarries in the Township. The defendant cross-appeals and asks that the judgment on the defendant's counterclaim be varied so as to quash by-law 1590.

The trial Judge held section 19(2)(c) of by-law 1517 to be in conflict with the regulations made under The Pits and Quarries Act, S.O. 1971, Vol. 2, Chap. 96 and sections 7.5, 18.2, 18.3, and 18.4 of by-law 1590 to be licensing provisions for which the Township had no statutory authority. He accordingly declared those particular provisions of the by-laws to be invalid but refused to quash the two by-laws as he considered the particular sections to be severable from the remainders of the by-laws.

By-law 1517 is a restricted area and zoning by-law passed on October 21, 1968 and approved by the Municipal Board on March 24, 1970. It derives its legislative power from The Planning Act and is described as a by-law to regulate the use of lands and the character, location and use of buildings and structures in the Township. Section 19 establishes a Quarry Industrial Zone (M3) and sets out the uses permitted therein, which include a gravel pit, as well as the zone provisions which require a setback of 100 feet from any Residential, Commercial or Industrial Zones, and a setback of 70 feet from any street line.

By-law 1590 was passed on April 12, 1971 pursuant to The Municipal Act and purports to regulate the carrying on and operation of pits and quarries, including setback requirements, safety regulations and rehabilitative procedures.

The defendant carries on business as a gravel pit operator on a property which is zoned in part M3 and the balance A3 pursuant to by-law 1517. A permitted use in an M3 zone

under section 19(1)(c) includes a gravel pit operation. The defendant admittedly carried on operations within the setback limits proscribed by both by-laws.

In May, 1969, the defendant purchased the property from B.K.M. Developments Limited which had commenced gravel pit operations on the property in 1966. The trial Judge found as a fact that gravel pit operations had been carried on within the setback areas prior to the passing of the by-laws, and that while there had been a temporary discontinuance of the gravel pit operation in 1968 such interruption was caused by lack of demand for gravel, rather than an abandonment of the operation and concluded that there was no discontinuance of what he held to be a pre-existing non-conforming use. Having so decided he held that the defendant had the right to continue the non-conforming use, not only within the areas restricted by the setback distances, but throughout the whole area by virtue of section 6(5)(a) (referred to in error as section 6(3)(b)) of by-law 1517, which permits extensions of non-conforming uses.

I accept, without question, the factual findings of the trial Judge that a gravel pit operation was being conducted prior to the passing of the by-laws and that it extended into areas now prohibited by them. I do not agree that this pre-existing non-conforming operation, which consists of the digging and removal of gravel, is a "use" of land within the meaning of section 35 of The Planning Act, R.S.O., 1970, Chap. 349.

In Pickering Township v. Godfrey, (1958) O.R. 429, (which apparently was not brought to the attention of the trial Judge) an injunction was sought by the Township to restrain Godfrey from carrying on a similar operation. The question for determination in that case was the meaning of the words "use of land" in section 390(1)1. of The Municipal Act, R.S.O., 1950, Chap. 243. That section is in the identical language of section 35(1)1. of the present Planning Act which reads as follows:

"35.-(1)...

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway."

Morden, J.A. in a carefully reasoned judgment concluded that the making of pits and quarries was not a "use of land" within the meaning of section 390(1)1. of The Municipal Act and that a by-law passed under it could not prevent a land owner from digging and removing gravel or other substances from his land. I am unable to distinguish the Pickering v. Godfrey case from the present factual situation and adopt the reasoning of the main judgment therein. The result is therefore that by-law 1517 in its

attempt to prohibit the use of the defendant's lands is ineffective to prevent the operation being carried on by the defendant. The doctrine of non-conforming use accordingly has no application. It is not a "use of land" within the meaning of The Planning Act and accordingly the doctrine of lawful non-conforming use and The Planning Act have no application to the operations of the defendant. In arriving at this conclusion I have considered Re Township of Caledon v. The Queen in the Right of Ontario, et al., (1973) 1 O.R. 623, in which Arnup, J.A., in an oral judgment on behalf of the Court, spoke of a lawful non-conforming use in relation to a gravel pit. In that case it was common ground that the use of the lands in question for a gravel pit was a lawful non-conforming use under by-law 1330 of the Township of Caledon. The narrow issue for determination in the latter case was whether a licence issued under The Pits and Quarries Act to "open, establish or operate a pit" was null and void on the ground that the location of the pit described in the licence was in contravention of the official plan of the Township and accordingly prohibited by section 6(2) of that statute. In view of the position taken by counsel on the above appeal Pickering v. Godfrey was not referred to and the Court was not required to consider the scope of the words "use of land" in relation to a gravel pit. Counsel on this appeal did not refer to the Township of Caledon case and it may be that they considered it to be a decision based upon an agreed position which limits its application. In my opinion it does not detract from the earlier decision which I consider binding upon me.

The Township contends that The Planning Act gives municipalities the power to legislate specifically with respect to pits and quarries under sections 35(1)6. and 35(2) which provide:

"35.(1) By-laws may be passed by the councils of municipalities:.....

6. For prohibiting the making or establishment of pits and quarries within the municipality or within any defined area or areas thereof."

35(2) Any by-law passed under this section may prohibit or regulate all or any of the matters mentioned in subsection 1."

which provides:

"35(1)1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway."

Section 35(1)6. gives the power to prohibit, but not to

regulate, pits and quarries within the municipality or within any defined area thereof, and refers to the "making or establishing" of pits and quarries which clearly refers to pits and quarries not in existence as such at the time the by-law passed. The result is, therefore, that while the zoning by-law is a valid by-law with respect to prohibiting new pits and quarries it does not affect the existing pit operated by the defendant. The power to regulate in section 35(2) cannot assist the Township if I am correct in my interpretation of section 35(1)6. It gives validity to the regulating powers in the by-law relating to new pits and quarries only and does not affect existing quarry operations. The defendant's pit was established several years prior to the passing of the by-law and the regulatory power conferred therein cannot be invoked.

Having concluded that the doctrine of non-conforming use has no application, and that by-law 1517 does not prohibit or regulate the operation of an existing quarry, then the question arises whether by-law 1590 passed by the Township pursuant to section 354(1) of The Municipal Act can validly regulate the operation of an existing pit. Section 354(1)122 gives a limited power of prohibition and does not appear applicable to the present factual situation while section 354(1)123. gives the power to regulate the "operation of pits and quarries within the municipality". The latter provision applies to all pits whenever made or established and a by-law passed thereunder is valid unless it can be successfully attacked on the ground that it is discriminatory, prohibitory or in some other respect beyond the legislative competence of the Municipal Council.

The defendant challenges the validity of by-law 1590 on the following grounds:

1. The setback provisions and particularly sections 7, 8 and 18 are prohibitory, rather than regulatory. There is no power in The Municipal Act to require a gravel pit operator with a non-conforming use to comply with the setback provisions in a zoning by-law.
2. Section 13 which deals with the operation of combustion engines in a quarry is vague and therefore invalid.
3. Section 15 and section 16 deal with rehabilitation of quarries rather than their regulation and constitutes an invasion into the field already pre-empted by Provincial Legislation, i.e. The Pits and Quarries Control Act, S.O. 1971, Vol. 2, Chap. 96 and The Mining Act, R.S.O. 1970, Chap. 274.
4. Sections 18.2, 18.3 and 18.4 are licencing provisions and so found by the trial Judge.
5. Section 19 is discriminatory in that it requires

the gravel pit operators to enter into individual agreements with the Township and reserves to the Township the right to impose such further and other terms as the Council believes the circumstances to require and in addition requires the posting of a bond. The defendant argues that these provisions are not of universal application and permit the Township to discriminate among operators by imposing terms and conditions on some and not on others.

To the extent that the Province of Ontario in The Pits and Quarries Control Act has legislated the minimum setback requirements then any attempt by the Township to set lesser minimum standards is invalid. The trial Judge found that section 19(2)(c) of by-law 1517 and section 7.5 of by-law 1590 were in conflict with setback provisions in the Regulations made under The Pits and Quarries Control Act, and I agree that they cannot prevail. Dryer, J. in R. v. Morin (1965), 53 W.W.R. 234 deals rather extensively with cases involving the paramountcy of provincial legislation over municipal by-laws and restates the applicable principles. In addition section 17(2) of the Act provides that in the event of any conflict between any provision in the Act and any municipal by-law the Act prevails. The trial Judge held that the above sections as well as sections 18.2, 18.3 and 18.4 which he held to be invalid as licencing provisions, were severable from the remainders of the by-laws and did not taint them to the degree that they should be quashed. I agree with his findings with respect to these particular sections and adopt the reasons he gave for holding them to be severable. I wish to add that the valid provisions i.e. section 21(7) of by-law 1517 and section 21 of by-law 1590 clearly demonstrate that the Municipal Council would have passed the by-laws with the invalid provisions deleted.

The Provincial Legislation does no more than set the minimum setback requirements or standards and in no way attempts to restrict the right of a municipality to enhance those standards. This the municipality may do provided it acts within its delegated legislative powers and does not enact provisions in by-laws which are inconsistent with statutory provisions.

The fact that the Township requires a pit operator to enter into an agreement when the latter seeks an extension of his operations, which in turn would require an amendment to by-law 1517, is regulatory and not discriminatory. It has for its purpose a controlled development scheme which would occasion minimum inconvenience to other ratepayers and at the same time provide maximum restorative and rehabilitative procedures which would not adversely effect values of neighbouring properties. These matters came before this Court in Re Township of Pelham, an unreported case decided on March 5, 1970, by way of a stated case from the Ontario Municipal Board. The Court held that the particular by-laws

and agreements set out in the stated case fell within the Legislative competence of the Municipality. Whether an agreement is discriminatory depends upon the terms contained in the agreement and the good faith or bad faith of the municipality.

The appeal is allowed. The plaintiff is entitled to the injunctive relief sought in the statement of claim, provided however that the minimum setback provisions which have been found to be in conflict with the setback provisions in The Pits and Quarries Control Act shall have no application. The cross-appeal is dismissed.

Paragraph 1 of the judgment below is set aside and judgment will be granted to the plaintiff in conformity with the above direction.

Paragraph 2 will be amended to provide that the several sections of the two by-laws referred to therein are invalid but severable from the respective by-laws of which they form part.

There will be no costs, either of the trial or the appeal.

Note: The parties are seeking leave to appeal to the Supreme Court of Canada.

COMMISSIONER BERGER ESTABLISHES CRITERIA FOR FUNDING INTERVENORS AT MACKENZIE VALLEY PIPELINE INQUIRY

Yellowknife, N.W.T.
Ottawa, Ont.

August 14, 1974
October 29, 1974

Mr. Justice Thomas Berger, Mackenzie Valley Pipeline Inquiry Commissioner, recently established criteria upon which environmental and other intervenors will receive financial assistance to prepare their cases on the Arctic Gas Pipeline application.

These criteria are:

1. There should be a clearly ascertainable interest that ought to be represented at the Inquiry.
2. It should be clear that separate and adequate representations of that interest will make a necessary and substantial contribution to the Inquiry.
3. Those seeking funds should have an established record of concern for, and should have demonstrated their own commitment to, the interest they seek to represent.
4. It should be shown that those seeking funds do not have sufficient financial resources to enable them adequately to represent that interest, and will require funds to do so.

5. Those seeking funds should have a clear proposal as to the use they intend to make of the funds, and should be sufficiently well organized to account for the funds.

At the conclusion of the preliminary hearings, Mr. Justice Berger felt that only the native organizations and the environmental organizations had met these criteria.

Environmental groups have consolidated for the purpose of preparing and presenting their case into an umbrella group - the Northern Assessment Group (NAG).^{*} NAG has received \$200,000 from the federal government through the Inquiry, with the possibility of further funding should the Inquiry last longer than anticipated.

For the purpose of establishing their land claims before the Inquiry, native groups have received \$400,000.

The North West Territories Association of Municipalities received \$80,000 to put forward their case on the effects of northern development on municipalities.

Arctic Gas, which is apparently well-funded, did not request funds. Since Arctic Gas will present the case in support of the pipeline, Mr. Justice Berger, using these criteria, did not recommend public funds for anyone else who merely seeks to demonstrate the case for construction of the pipeline.

Mr. Justice Berger has also taken the view that under the order-in-council establishing the Inquiry, he may commission special studies if he feels they are required to ensure a full and fair examination of all the issues. Provision has been made in the Inquiry's budget for such studies.

Mr. Justice Berger stated also that he was prepared to commission and fund any necessary studies not already undertaken. He instructed the Inquiry staff to pull all existing studies together, so that in deciding on requests for funding for further studies, he can be sure that no studies are funded which will duplicate existing studies.

He set out the following criteria for deciding on proposals for funding of further studies:

Proposals may be made by any person opposed, in favour of or neutral towards the pipeline. If the proposed study is not already being undertaken by the federal government, the territorial government, a university, Arctic Gas, or by some other party to the Inquiry, Mr. Justice Berger will give the proposal serious consideration. If he decides the proposal should be acted upon, he will commission the study. The study may be carried out by the person or organization seeking funds for this purpose if they are sufficiently well organized to carry it out themselves; if they are not, others will be engaged to carry out the study.

^{*} The members of NAG include Canadian Arctic Resources Committee, Canadian Nature Federation, Federation of Ontario Naturalists, CELA, Pollution Probe, SPEC.

COMMENT

Numerous groups had made submissions to Commissioner Berger in April and May 1974 on the necessity of some form of funding mechanism for the Inquiry. The Inquiry decision to provide funding to otherwise impecunious intervenors underlines an obvious reality. Resources are often likely to be unevenly distributed among affected individuals and organizations. Such disparity in resources was certainly at the Pickering Airport Inquiry. The Ministry of Transport had essentially unlimited public funds to put forward a pro-airport position, while citizen's groups were severely handicapped financially to effectively criticize the proposal.

The Ontario Municipal Board has awarded costs to public interest groups participating in hearings before it. However, if such groups lack funds to begin with they may present cases inadequate for a discretionary costs award. Moreover, the uncertainty as to whether they will be awarded costs at the conclusion of a hearing will often act as a silent deterrent to involvement at all.

The Berger Commission Inquiry's pronouncements on funding impecunious intervenors before not after hearings, serve to illustrate one avenue to more effective public participation in decision making. It speaks to the fact that without public funding to impecunious intervenors the relationship of Arctic Gas to its opponents at the hearings, and opponents to proponents generally, would be similar to the relationship of lions to Christians in the Roman coliseum, as one author put it.*

J.F.C.

* LSUC Sp. Lectures 1974, Jeffrey Sack, "Acting for Ratepayers."

Note: See page 29 for recent developments in respect to funding of citizen groups before the Berger Commission.

GEOGRAPHERS STUDY LAKE ERIE FLOODS AND CALL FOR ENVIRONMENTAL IMPACT ASSESSMENTS

A research group at the University of Western Ontario studying the 1972 Lake Erie floods has recommended review of procedures and plans for flood control management and urges the requirement of environmental impact studies before such plans are implemented.

The group headed by Dr. J. G. Nelson of the Western Geography Department made the following findings as a result of

a 2-year study of the Fall 1972 floods in the Rondeau-Erieau and Pelee East marsh areas on the north coast of Lake Erie:

Findings

1. That significant ecological elements and processes associated with flooding are not well understood by resource managers and the public.
2. That a relatively narrow range of expensive engineering (structural) adjustments has been used in attempts to control flooding and related ecological elements and processes.
3. That such adjustments have generally been introduced in a crisis atmosphere, during periods of high water level on Lake Erie.
4. That financial and institutional arrangements have been developed to support perpetuation of engineering adjustments, notably by spreading their cost among increasing numbers of Canadian taxpayers.
5. That no detailed evaluation of the economic, social, or biophysical (environmental) benefits and costs of these adjustments has been undertaken by any government agency associated with their use.
6. That engineering adjustments generally appear to be justified on the grounds that they promote food and agricultural production, but without adequate evaluation of:
1) returns which could be derived from comparable public investment elsewhere (opportunity costs); 2) the discriminatory character of the investments, or the "technological fix"; 4) alternative adjustments, including land use controls.

A number of recommendations are made as a result of their research:

1. Impending large scale dyking and other engineering projects on the north Erie shore, Lake St. Clair, and the Lower Thames should not go forward until detailed benefit-cost and environmental impact studies are carried out and further careful consideration has been given to hazard insurance, land use controls, and other alternative adjustments.
2. The results of the aforementioned studies should be circulated to interested individuals, groups, and agencies, and fully discussed at public hearings before decisions are made.
3. No large scale drainage, flood, or erosion control schemes should be undertaken in Ontario in future without evaluating a wide range of alternative adjustments and their economic, social, and environmental benefits and costs in a manner like that just described.

4. A detailed review of policy, legislation, and institutional arrangements relating to drainage, flood, erosion, and other adjustments should be initiated in the near future, notably with respect to coastal lands. In this review, especially careful consideration should be given to: 1) reducing the proportion of senior government financial subsidy for structural and other hazard adjustments; 2) introducing guidelines for use of senior government hazard funds at the municipal level.

5. Consideration should also be given to other policy and institutional changes, including: 1) public purchase or land use control of coastal lands identified as very susceptible to flooding, erosion, and marsh conditions; 2) introduction of new co-ordinating legislation, for example, a Coastal Land Use Act; 3) establishment of an Ontario Hazards Commission to develop consistent policies, guidelines, and procedures for senior government involvement in selecting, financing, and introducing hazard adjustments.

The study group acknowledges the support in principle given for environmental impact studies on drainage projects in the affected areas by the 1974 Ontario Select Committee on Land Drainage, but notes the following problems with the Select Committee's proposals:

- 1) It fails to include a member of the Ministry of Environment on the body that would prepare an assessment.
- 2) No funds are contemplated for staff and consultants to assist such a body.
- 3) No requirements are contemplated for the holding of public hearings on proposed major projects which would allow a wide range of interested individuals and citizen groups to bring their own perceptions, values and learning to bear on proposed land use changes.
- 4) The Select Committee does not really appear to take its own environmental impact statement recommendation seriously.

The study group's unpublished report is entitled "The Fall 1972 Lake Erie Floods and Their Significance to Resources Management".

COMMENT

The study group notes: "Studies upon which the statement would be based seem to be envisioned as proceeding along with the project, with little or no anticipation that difficulties could arise. The idea that a pre-project study might stall or prevent a project, or that problems encountered in construc-

tion or operation might result in project cancellation, is conspicuous by its absence from the Select Committee report."

In this regard the Select Committee's views on environmental studies proceeding concurrently with construction are no different from the discredited Quebec and Federal governments' position regarding the James Bay Project and the Alberta and Federal governments' regarding the Syncrude project.

Environmental studies are tools to tell decision makers of proposed courses of action and their alternatives as they may affect the social and physical environment before they are implemented. Their value is lost if they must compete with bulldozers to see who finishes first.

J.F.C.

GOVERNMENT EXPERT AND CUSEC REAFFIRM VALUE OF U.S. ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

Washington, D.C. --

The Canada-United States Environmental Council (CUSEC) was told in March by an official of the U.S. Council for Environmental Quality that the National Environmental Policy Act (NEPA) had proven its worth in protecting the American environment.

Malcolm Baldwin, a lawyer with CEQ, the section of the federal government's executive branch which overviews the effectiveness of the impact statement process, told the environmental groups that over 5,000 environmental impact statements had been prepared since the passage of NEPA in 1969. He said that litigation had pushed federal agencies preparing the statements to "make them meaningful". Litigation is used to enforce the CEQ guidelines for administering NEPA when necessary, and the Council's guidelines "are given great weight in the courts".

Despite this, however, there are still some problems with NEPA, he said; among them, the fact that some agencies prepare better statements than others; that statements are not scientific source documents as often as they might be; and that too little attention is given to alternatives and their impacts, and to secondary impacts such as sociological effects.

Mr. Baldwin criticized the lack of integration of the impact statement into the decision-making process. Although the statements are prepared, there is sometimes difficulty in ensuring that government agencies will implement their findings.

He suggested that the public be involved in the actual

making of an impact statement. "The public now comes into the process late, at the point of criticizing, rather than formulating the impact statement. Without early public input "whether the person who writes it is in favour of the project or against it may affect its accuracy and value."

The American members of CUSEC reaffirmed that the NEPA environmental assessment process is working effectively in the United States to prevent many environmental problems. They stressed, however, that NEPA needs strengthening and extension to provide greater uniformity of quality in impact statements, greater public participation, and legislation at the State level.

They expressed opposition to the abridgement of NEPA, and particularly opposed bills recently introduced into the U.S. Congress to exempt energy facilities, highways and public works from impact assessment.

Editor's Note

The shortcomings in NEPA recognized in Mr. Baldwin's speech have been taken into account in the drafting of CELA's model environmental impact assessment legislation. We have attempted to avoid the mistakes made by our U.S. neighbours in their pioneering efforts.

J.S.

INTERNATIONAL COUNCIL ENDORSES CANADA-WIDE ENVIRONMENTAL IMPACT ASSESSMENT

Washington, D.C. --

At an international meeting of Canadian and U.S. environmental activist groups, on March 5th, eight major Canadian environmental organizations called for environmental impact assessment laws in each of the provinces and at the federal level.

At the second meeting of the Canada-United States Environmental Council (CUSEC), a newly formed consortium of environmental groups, in Washington D.C., Canadian delegates today unanimously agreed to support the principles of environmental impact assessment recommended by the Canadian Environmental Law Association to the Ontario Government in October, 1974.

The Canadian Nature Federation, Federation of Ontario Naturalists, Sierra Club, Western Canada Chapter, Pollution Probe at the University of Toronto, Canadian Arctic Resources Committee, Sierra Club (International Committee), and the Prairie Environmental Defence League supported the following

resolution:

The Canadian member groups of CUSEC support the approach of the Canadian Environmental Law Association to environmental impact assessment legislation by the government of Canada and by the governments of each of the provinces of Canada.

The principles adopted by the Canadian groups include -

- (1) All projects, policies, programs and long-range plans having significant environmental impact must be assessed;
- (2) A powerful, independent, non-partisan environmental review board to implement the assessment process;
- (3) Every citizen must have standing to appear before the board and make submissions to it and to initiate review and appeals of any environmental decision in the courts;
- (4) Everyone likely to be affected by a project, program, policy or planning must be given notice early enough to have effective input into the planning process;
- (5) Full disclosure of all relevant information and protection of civil servants who testify to disclose information from repercussions;
- (6) Funding for objectors acting in the public interest;
- (7) Removal of the threat of costs to objectors before the board or in the courts;
- (8) Public involvement in the making of environmental regulations and in setting pollutant emission levels and other environmental standards;
- (9) The Government may overrule any decision of the courts only by statute passed in the legislature or Parliament and not by Cabinet decision.

John Swaigen, counsel to the Canadian Environmental Law Association, expressed pleasure at the unanticipated groundswell of opinion in favour of Canada-wide impact assessment. "This process would enable Canadians to look before they leap into projects whose environmental and social costs may by far exceed any benefits. Environmental impact assessment will alleviate the frustration felt by native peoples, neighbourhood groups, communities, farmers and others whose lifestyle and livelihoods are threatened by inadequately planned development," Mr. Swaigen said.

The majority of Canadian and U.S. members of the group also supported resolutions to:

- stop the Garrison River Diversion
- stop the inhumane killing of North Pacific fur seals and endangered whale species
- reform the international law of the sea to protect the natural values and resources of the oceans
- oppose any encroachment of a gas line on existing and proposed wildlife ranges in the Northern United States and Canada
- oppose any regulation of water levels of Lake Champlain and the Richelieu River without thorough studies of the environmental impact
- that the United States and Canada should ensure that tankers entering their ports and navigable waters are designed and constructed with the best available pollution-control technology
- deplore the Canadian government's announced decision to sell CANDU reactors and nuclear fuel abroad

CELA APPEARS BEFORE ENVIRONMENTAL HEARING BOARD ON "ENVIRONMENTAL FEASIBILITY STUDY" OF PRIVATE PROJECT

Sudbury --

On March 20, 1975, CELA presented its brief on "Report on Environmental Implications, Fisher Harbour Development" to the Environmental Hearing Board in Sudbury. The report dealt with the environmental impact of a proposed deep water port and limestone quarry on Little La Cloche Island in the North Georgian Bay Recreational Reserve.

After considerable pressure by environmentalists, the Ontario Government ordered a halt to all construction activities, suspended the application for a water lot lease and ordered that an environmental feasibility study be made before a water lot lease could be granted.

Environmentalists had raised concerns about the effects of limestone blasting, traffic of large Great Lakes and ocean freighters, and dock unloading of coal, iron ore pellets, containers, and paper and pulp would have on the scenic recreational area, not far from Killarney Provincial Park.

At the time the Government ordered Alexander Centre Industries Limited of Sudbury to prepare the environmental study, there was no indication that public participation would be encouraged or required (CELN Vol.II, No.4, 121). Thus CELA and other interested groups and individuals were taken by surprise when they learned in late February that the Environmental Hearing Board would hold public hearings in Sudbury, beginning on March 11.

No one was satisfied with the Environmental Hearing Board's proceedings. Among the criticisms levelled were the following:

- lack of notice to concerned groups
- limited availability of the environmental study
- the high cost of the report: \$75.00 as compared to \$8.00 for the study on lead pollution near certain smelters in Toronto
- the timing of the hearings, held in winter, when cottagers opposed to the development and other users of the Recreational Reserve are not in the area.

The Manitoulin Expositor, a local newspaper, stated in a February issue, that only three copies of the environmental study would be available in northern Ontario before the hearings. Under the headline "Fisher Harbour Environment Study: Buck Passed on Report's Distribution," the paper noted:

"The Expositor has contacted some persons who in the past have objected to the Fisher Harbour development. Everyone contacted expressed dissatisfaction with the availability of the report. No one felt a report 'on view' in a clerk's office could be examined closely enough for proper study. It was felt those who might wish to file objections with the board will be at a disadvantage during the hearings because of this lack of information."

In a letter to the Hearing Board, CELA counsel John Swaigen also criticized the lack of adequate notice and unavailability of the environmental study.

"I am amazed that our Association, which was on record ... since at least August of 1972... was given no direct notice of this hearing. As a result, we have been caught by surprise and cannot possibly do a thorough job of evaluating the impact study in time for this hearing."

Clifford Fielding, president of Alexander Centre Industries Ltd. was no happier with the hearing than were the environmentalists, although for entirely different reasons. His consultants from Pollutech did not fare well under the ten hours of cross-examination by Toronto lawyer Robert Macaulay who represented a coalition of environmental groups at the hearings. Fielding refused to be cross-examined, saying "I have no intention of subjecting myself to the kind of courtroom circus that has preceded me." Thus, opponents of the development had no opportunity to have their lawyer question the key figure in development plans.

CELA's brief was delivered in Sudbury by field worker Linda Cardini, and focussed on the procedures followed in this set of public hearings because it was felt that:

"the proceedings of this case are likely to set the

tone for environmental analysis and/or assessment proceedings in the future. It is therefore essential that one analyze these proceedings and recommend improvements so that future proceedings of this type will be of equal benefit to all parties concerned and will achieve the fullest degree of environmental protection."*

Drawing heavily on CELA's model environmental impact assessment legislation, the brief pointed out areas in both the environmental study and in the hearing procedures which could be strengthened if such legislation were in effect. For example, the brief discussed the limited terms of reference of the environmental study, suggesting that in the future, such studies be ordered early in the planning stages of any project, before decisions are made to go ahead with them. In the Fisher Harbour case, the basic dock facilities of the deep water port were already installed by the time the environmental study was ordered.

The public was thus confronted with at least a partial fait accompli: the environmental study could do little more than discuss how to mitigate environmental effects already incurred by construction and those expected from operation of the development.

Ordered at such a late stage in the project's development, the study could not address what CELA calls the fundamental issues: whether the need for regional economic development (which the project would allegedly create) can be reconciled with the need to preserve a significant natural area, and if not, which need should be favoured.

The brief concluded that CELA could not support the project because the procedures followed prevented full public participation and failed to provide a complete assessment of the environmental, social and economic costs to the region and to the province. CELA argued that the unique scenic, natural and recreational values of the area which the province acknowledged by establishing a Recreational Reserve would be irretrievably lost if the government were to approve the Fisher Harbour development.

*"Submissions of the CELA to the Public Hearings on Report on Environmental Implications, Fisher Harbour Development" by L.P. Cardini, March 20, 1975.

COMMENT

The interest in this hearing revolves around more than the destruction of an area of province-wide recreational and environmental significance.

This is one of the few times the Ontario government has required a pri-

vate developer to conduct, at his own expense, an environmental analysis of a project to be built on privately owned land, and then to hold public hearings (which are usually held in the case of zoning, sewage treatment, and waste disposal matters).

This hearing is not part of the EHB's usual jurisdiction, but, like the hearings it is holding to look into lead in the environment in Toronto, it is being held under a special order-in-council.

If, as is rumoured, Chairman David S. Caverly and his EHB are being groomed to be the new Environmental Assessment Board to be set up under Bill 14, the proposed Ontario Environmental Assessment Act, the procedures used in this case may be used as precedents for future environmental impact assessment hearings and decisions.

Failures of the Board to utilize procedures which give the public an opportunity to participate on an equal footing with the proponent of the project will not be remedied by Bill 14, which provides for no notice to the public, limited access to impact statements, and no funding or access to experts, information outside the impact statement, or other resources.

CELA RECOMMENDS ENVIRONMENTAL ASSESSMENT OF SNOWMOBILING ON PUBLIC LANDS

In 1972, an Ontario Government Select Committee set up to examine the growing problems created by uncontrolled growth of recreational snowmobiling over several years heard considerable testimony about trespass by snowmobiles, vehicles for which few adequate facilities existed in the province.

One solution recommended by the Committee was a further assault on parkland and other Crown lands already besieged by developers and resource exploiters. The Committee recommended that public lands be opened to snowmobilers.

Among the responses to pressures from government and from snowmobile clubs to open up public lands was the announcement by the Halton Region Conservation Authority in the summer of 1974 of its intention to consider opening its lands to snowmobilers.

The following is a summary of "Motorized Snow Vehicles and All-Terrain Vehicles: Planning for their use on public lands", a brief submitted to the Conservation Authority by CELA in October, 1974.

I The Need for Planning

The present state of environmental degradation in Ontario is the result of our past lack of planning, combined with our tolerance of unrestrained growth. The snowmobile is a clear example.

First used for vital transportation and supplies in otherwise inaccessible areas of the north, the snowmobile appeared as a recreational vehicle in the prairies in the 1960's, and quickly entered Ontario's recreational scene. Its use was allowed to spread unrestricted, with no legislative concern for the safety of the users, licensed roadway users, private properties, or the environment.

The Ontario government did little to deal with the growing problem until public outcry resulted in a Select Committee on Motorized Snow Vehicles and All-Terrain Vehicles in the summer of 1972.

As always, this lack of planning and foresight makes its dent in the public purse. Snowmobilers reacting to resistance over the continued use of private lands are now asking that the public subsidize them by setting aside public lands for their use.

II Planning for the Snowmobile

Although the situation is the result of poor planning, the solution is neither to bar snowmobiles from public lands nor to welcome them regardless of the harm they cause to the environment. The solution is to begin the planning process now, to avoid future abuses.

Because CELA, as well as the Federation of Ontario Naturalists and the Select Committee itself, recognizes that many of the effects of snowmobiles are not yet known, it is imperative that we utilize environmental impact studies to assess future variables and to develop an equitable formula for balancing the costs to the environment against the benefits which may be gained by opening public lands to snowmobile use.

III The Environmental Impact Assessment

The social and environmental impact assessment is a study of all the implications of an action which is likely to significantly affect our physical and social environment. It is a preventive tool which allows us to put a dollar figure on many intangibles, such as the cumulative long-term advantages and disadvantages, and the broad costs and benefits of a policy or development. Thus, we can prevent future failures of planning - and of lack of planning.

An environmental impact assessment is essential both in deciding whether to open public lands to snowmobile use, and in assessing the suitability of any particular parcel of land for this use.

All the alternatives should be thoroughly studied. The range of alternatives to be discussed must include: no action at all; an equivalent action with few, if any, of the environmental side effects of the original proposal; modified action on a reduced scale that concomitantly reduces adverse impacts; and mitigation to reduce the proposal's impact.

It would be pointless for a Conservation Authority to make an irreversible commitment to snowmobile use, without first ascertaining

that the Authority has lands sufficiently immune to ecological damage that they will be suitable for such usage.

IV Some Guidelines for Environmental Impact Studies

Although such studies cannot adhere to a rigid formula, since each parcel of land and social situation is unique, we refer you to some useful guidelines culled from the experiences of CELA, the FON and the final report of the Select Committee:

An environmental impact assessment should be done whenever the following facts or circumstances are likely:

The proposed action may significantly

- (a) conflict with environmental goals, objectives, standards, criteria, or guidelines of protection and conservation of the natural environment;
- (b) have any effect on a unique, rare or endangered species or feature of the environment;
- (c) have any adverse effect on persons, property, or public lands;
- (d) result in any irreversible commitment of non-renewable resources;
- (e) result in any resource or energy utilization which will pre-empt the use, or potential use, of the resource or energy for other purposes;
- (f) cause any noise, hazardous or toxic substances, radiation, air, land, or water contamination, or waste products which require disposal;
- (g) have any adverse effect on health or safety in any factory, office or other workplace;
- (h) result in any costs or benefits to any persons, property, or ecological systems that the proponent may not have intended or anticipated to be affected by the action;
- (i) arouse public concern or controversy;
- (j) involve a new technology the effects of which have not been demonstrated to have no adverse environmental impact establish a precedent for further actions on a broader scale or represent a decision in principle about a future major course of activity, be the result of decisions about partial aspects of an activity with significant environmental impact by several proponents, or require the establishment of a pilot project;
- (k) create effects which may be individually limited but cumulatively considerable;
- (l) adversely affect low-income populations;
- (m) facilitate or make possible another action or actions which may have any of the results referred to in paragraphs (a) through (l).

An environmental impact statement should contain the following minimum contents:

- (a) A description of the need for the action, the persons it is likely to benefit, the persons it is likely to harm, and the period of time over which the impact is likely to occur;
- (b) A description of the proposed action adequate to permit a careful prediction of its environmental impact;

- (c) An account of any possible adverse environmental effects which cannot be avoided if the proposed action is implemented, including a discussion of their significance;
- (d) Measures available to minimize or mitigate the impact;
- (e) Alternatives to the proposed action, including the alternative of no action, and an evaluation of their advantages and disadvantages;
- (f) An account of any irreversible or irretrievable commitments of energy or resources which would likely be results of the action, including a discussion of the extent to which the action may curtail the range of beneficial uses of the environment;
- (g) A description of the energy requirements, the net energy output, and the energy use efficiency of the action;
- (h) An account of the relationship between short-term uses of the environment and the maintenance and enhancement of long-term uses of the environment;
- (i) The tendency of the proposed action to induce or encourage industrialization, commercialization, urbanization, population change, economic change and related kinds of growth;
- (j) A summary to the extent possible before a mandatory hearing of all existing opinions of interested or affected persons, independent experts and organizations and governmental ministries and agencies of the possible environmental and social impacts of the proposed action.

V Some Legal Implications of a Decision to Allow Snowmobiles on Public Lands

Under this heading the brief discussed several legal implications of allowing the use of snowmobiles on public lands without adequate liability.

The following questions were raised:

1. Whether the environmental assessment legislation promised by the Ontario government (and since then introduced as Bill 14; see the editorial) would require Conservation Authorities and other public agencies to prepare environmental impact studies before allowing snowmobile use.
2. CELA pointed out that any public authority which allows the use of snowmobiles and other off-road vehicles on its lands may have an occupier's liability for accidents resulting from poorly trained drivers operating poorly designed and inadequately maintained machines.
3. CELA suggested that since the primary object of any of Ontario's statutory Conservation Authorities, under their enabling legislation, appears to be conservation, the Authorities may be acting beyond their powers in allowing any snowmobile use which would conflict with conservation.

VI Conclusion

CELA is not opposed to the use of snowmobiles on public lands, but rather in favour of good land use planning. As a society, we are beginning to realize that we can no longer gratify our every desire without suffering ill effects in the future.

It is for this reason that CELA recommends that the Halton Region Conservation Authority use an independent, unbiased environmental impact procedure to study all the long-term costs and benefits to ascertain which of its lands, if any, are most suitable for snowmobile use.

New York Times, February 5, 1975

Five Years of N.E.P.A.

It is just over five years since Congress passed and former President Nixon signed the National Environmental Policy Act. While the law stirred hardly a ripple in bureaucratic circles at the time, it has turned out to be one of the most far-reaching measures for protecting this country's land, air and water that has ever been enacted.

The actual progress achieved so far in improving the environment may be debated, but not the change in governmental attitudes produced by the requirement that no Federal agency may undertake or approve a project without fully reporting its probable effect on the environment. In theory at least, decision-makers are now obliged to show as much concern for physical drain on the earth as they have always shown for economic drain on the budget.

It is commonly believed that Congress would never have launched N.E.P.A. if it had envisioned either the difficulty imposed on Government agencies by requiring environmental impact statements or the vigor with which the Federal judiciary would use the law to reduce threats to the environment.

But, in fact, the law was no fluke at all. The country was appalled at the time by the damage done by the Santa Barbara oil spill, the smog that was making Los Angeles intolerable, the reported "dying" of Lake Erie and such dramatic episodes as the fire that broke out on the polluted Cuyahoga River.

In passing the environmental act overwhelmingly, Congress reflected that widespread revulsion. It could hardly have been innocent of the possible consequences when it heard a conservative Ohio Representative warn—prophetically as it turned out—that the law would "involve every branch of government, every committee of Congress, every agency and every program of the nation." Indeed, ~~if the law had been as lightly conceived as its critics suggest, it is unlikely that 21 state legislatures—as well as Puerto Rico, a number of local governments including New York City, and several foreign countries—would have followed suit, adopting environmental impact statements on the N.E.P.A. model.~~

The air may be only measurably freer of noxious gases and particles than it was five years ago and the quality of the nation's water just about holding its own. But aside from the fact that progress in these areas is primarily a function of clean air and water legislation rather than of N.E.P.A., there is no doubt that without the checks provided by the impact statement requirements, air and water alike would be worse in proportion to the nation's growth over the last half-decade.

Given another five years, N.E.P.A. should be so deeply imbedded in the governmental process that future Americans will marvel that highways, power plants, oil rigs and the like could ever have been contemplated and built without a thought for what they might do to the environment.

How Much for Pollution?

If the United States were to address itself wholeheartedly to the task of improving the environment, one of the best of the side-effects would be a significant drop in the rolls of the unemployed.

Too often the regulations of such units as the Environmental Protection Agency are blamed for the loss of jobs; but the reverse is true—and could be truer if environmental projects were financed enough to let them stimulate the economy.

From the E.P.A. comes the timely information, for example, that the building of sewage-treatment works will provide some 70,000 additional jobs for the construction industry over the next three years. With the funds already appropriated for the purpose, the force of 55,000 skilled and unskilled workers now engaged in this activity will have swelled to 125,000 by the middle of 1977.

If these are small numbers in a total of over six million jobless Americans, they are not small for the particularly hard-hit construction industry. More important, they represent only the merest suggestion of what environmental improvement could do for the nation's economy as well as for its physical well-being. For what is true of the impact of water-treatment plants and sewers would be just as true of environmental equipment manufacturing, a greatly expanded mass transit program, the rehabilitation of parks and harbors and comparable environmental activity.

Ironically, instead of enjoying the support of labor in general and the construction unions in particular, the environmental movement has too often been their target. It is denounced when it opposes new and needless highways, misplaced power plants and other projects that might provide temporary employment for some at permanent cost to the public.

At the same time, the environmental effort has been slowed down by the contention of many industrialists that its programs are inflationary and non-productive, that they play in fact a significant part in the dangerous

rise in prices. But a study undertaken for the E.P.A. by Chase Econometrics Associates tells a very different story.

The role of anti-pollution programs in inflation has been negligible. They accounted for less than 0.5 per cent of the 17 per cent increase in the wholesale price index for the year ending March 1974. For the entire period from 1973 to 1978, they are expected to cause an annual inflation rate of no more than 0.3 per cent. According to Senator Gaylord Nelson of Wisconsin, even if conservation, preservation and recreational expenditures are all added to direct pollution control costs, the total would still be only 1.1 per cent of the expected national budget.

Offsetting even this minimal twist to the inflationary spiral is the fact that, unlike weaponry—wholly unproductive except in the ultimate exigency of war—environmental improvements will cost far less than the damage the United States will suffer in their absence. How much less, it is not possible to say. Potential losses in health, labor productivity and the physical yield of the country have been reliably estimated, and they make environmental programs a great bargain. They would be viewed as an even greater bargain if one could measure such dividends of a cleaned-up environment as esthetic satisfaction and pride in the land.

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January 28, 1975.

The need for an environmental bill of rights

THE GLOBE AND MAIL

FRIDAY, FEBRUARY 7, 1975

BY J. F. CASTRILLI
AND ELIZABETH BLOCK

*The authors are researchers at the
Canadian Environmental Law Association.*

FIRST IT WAS the environmental crisis. Now it is the combination of an energy crisis and an economic crisis—the threat of a depression—and concern for the environment seems like a fad compared to the prospect of not having enough oil for our furnaces.

But the link between these crises has been overlooked, for to solve one is to solve others. The best solution is conservation. The efficient use of energy would cut pollution and measures taken to reduce pollution would have the effect of conserving energy.

For example, smaller automobiles would use less gas, thus simultaneously saving energy and decreasing the emissions which account for more than half of all urban air-pollution. The use of rapid intercity trains would be a vastly more efficient use of energy than airplanes, would reduce air- and noise-pollution and would prevent the massive gobbling up of valuable farmland for new airports.

As for the economic crisis, few people realize the potential for stimulating economic growth and reducing the rolls of the unemployed which environmental protection can itself provide. Too often environmental concern is blamed for the loss of jobs. Frequently the reverse is true. The manufacture of pollution-control equipment, sewage-treatment plants, an expanded mass transit program, the rehabilitation of parks and harbors, to name a few activities, could themselves generate jobs.

Rush to bottom

One does not have to go in for predictions of catastrophe to be concerned at the way decisions are made

every day which continue the headlong rush to the bottom of the oil well, and which also have grave effects on the environment without any real effort to determine the effects of these policies and projects, or, when they are known, to take them into account.

We know that we must choose—we must balance the public benefits of urban and industrial growth against the public harm of yet greater deterioration of our natural and human environment. But in practice the choice is usually made by default, because all the hidden costs of a proposed development—consumption of energy, social and environmental consequences—are almost never made explicit and made public.

We have no planning mechanisms which would allow us to foresee and control the demands we make on the environment and on our resources of energy.

The Ontario Government, to its credit, is—or was—moving to create such a mechanism. It promised legislation nearly two years ago—the first government in Canada to do so—requiring environmental impact assessments of proposed projects expected to have a significant effect on the environment. But we are still waiting.

An environmental impact assessment is a study of a project's anticipated effects upon the natural and human environment, its use of energy and other resources and possible alternatives to it. It is a planning aid which measures the direct and indirect costs of a project in terms of environmental degradation, waste of energy, and social disruption.

These indirect or hidden costs have rarely received any consideration by the project developer and have usually

been left to be paid by the local community or future generations.

In the words of John Fraser, Progressive Conservative MP for Vancouver South and former environmental critic for the Conservative party, this "concept is so essentially sensible that the wonder ought to be that its proponents have had to fight so hard to gain acceptance for the proposition."

But if an assessment is just another formal requirement to be met before a project is approved—a piece of paper to be filed with a government department and forgotten—it will be useless. What we need is a public forum where we can get answers to such questions as where and how should this project be built so as to do the least damage to the environment and to make efficient use of energy and resources? Or, all things considered, should this project be built at all?

Embarrassing silence

Despite recent promises regarding environmental impact assessment legislation, the Ontario Government has of late fallen into an embarrassed silence on the subject.

Conversations with Environment Ministry officials suggest that the delayed legislation will be weak. The procedures it sets up will be discretionary, like much of our present environmental legislation. They would give the Government powers to use as and when it sees fit, but which it could not be called to account for failing to use or for misusing.

This results in certain deficiencies.

First, consider a project where no assessment is done—either because the Government decides the project is too small or for another reason.

For example, with the Pickering Airport, no federal studies were done to determine what the project's environmental effects and energy consumption would be, or to consider whether the cost of the airport—in loss of prime farmland, in the spread of urban sprawl, in disruption of local communities—would be worth it, or whether we should turn to other means of transportation.

There was no way for concerned citizens to force an environmental assessment to be done. The massive public pressure that was brought to bear against the airport did no more than bring about a "slow trial". Because the objectors did not have the necessary funds to properly present their case, because damaging information was kept secret and because the decision to build the airport had already been made, the hearing was a farce.

As a *Globe and Mail* editorial noted at the time, "When minds close, inquiry is futile."

Second, let us suppose that an assessment has been done, but it is inadequate. Such is the case right now with regard to offshore drilling in the Arctic. Studies have been done stressing the positive aspects—the economic benefits to accrue from the oil and gas, the safety precautions which the oil companies have promised to take—with only crude and limited consideration of environmental factors.

Yet we know that even if all existing safety measures were carried out carefully and consistently there may be an environmental disaster of gigantic proportions, such as an oil well blowout, whose consequences could extend to a change in the climate of North America.

Third, let us suppose that an assessment has been done and it is a good one as far as it goes. But it deals only with the particular project, not with the rationale behind the entire program of which the particular project is a part.

For example, the Ontario Government has committed itself to the increasing use of nuclear power. A second nuclear generating station has recently been approved for Pickering and at least nine other stations and plants are expected to be built by 1990.

This commitment has been made in spite of serious risks: the danger of an accident discharging large quantities

of radiation; the cumulative effects of routine discharges of low-level radiation; the rising incidence of lung cancer in uranium miners; the yet-unresolved problem of how to dispose of highly radioactive wastes.

Under these circumstances, if environmental impact assessments are done for nuclear plants they are likely to deal only with the question, "Where should this particular plant be located?" By then it will be useless for them to try to deal with the really vital question, "Are the risks inherent in nuclear power too high to be acceptable?"

Could be undercut

The commitment to go nuclear will already have been made. Yet unless such questions as this are given serious consideration, early enough in the planning process for the answers to influence the decision, the whole process of environmental assessment will be undercut.

Environmental impact studies for such things as nuclear plants and drilling proposals must look at alternative, non-polluting sources of energy. At present, almost all of the research being done by both government and industry on energy is concentrated on the traditional expensive sources.

Finally, let us suppose that the assessment is well-researched and objective, but that the Government proceeds with the project despite the assessment's warnings of major environmental damage. With discretionary procedures there is no way for citizens to force the Government to heed the recommendations of its own report, nor even to force it to make the report public.

In short, discretionary environmental impact assessment procedures can be emasculated when it is administratively or politically convenient to do so. They are a wide-meshed net, from which it is far too easy for environmentally devastating projects to escape—by accident or design.

For example, in November, John Rhodes, Minister of Transport and Communications, announced a major extension of the Don Valley Parkway, without any prior debate or public consultation. One day earlier, the Canadian Environmental Law Association had received a letter from Mr. Rhodes regarding his ministry's position on environmental impact assessment. It stated in part:

"Since 1971 our ministry has been developing its own in-house methods, procedures, and staff towards the objective of fully integrating environmental assessment and public participation into each phase of project development from planning through to operation. We adopted this approach in a voluntary sense in that there were no legislated requirements at that time. In other words, this ministry has been evolving ways of meeting the intent of the Ontario legislation (on environmental assessment)."

Apt expression

Considering the secrecy surrounding the planned highway extension, Mr. Rhodes' choice of the word "evolution", to describe the change which in-house procedures have brought about in his ministry's decision-making process, was an apt one.

The change from business as usual is so slight as to be invisible to the naked eye, and so slow that the time that will have elapsed by the time Mr. Rhodes' stated objectives are reached will have to be measured on a geological time scale.

We need laws which do not merely give the Government the power to protect the environment—power which it may or may not choose to exercise. Environmental laws must be enforceable in the courts by citizens, if for one reason or another the Government does not act responsibly. Otherwise, they are of limited value.

Governments to date have tended to view environmental impact assessment as a management technique—management of the environment, management of natural resources and, not least, management of public opinion. Their provisions for public participation have accordingly been, by and large—as Richard Soberman, transportation consultant for Metro Toronto, said in reference to the Pickering Airport inquiry—"public manipulation",

This does nothing to enhance confidence in government. The suggestion that citizens wait until the next election is not good enough. In the intervening time, a destructive project can move ahead, doing irreversible damage to the environment.

An environmental impact assessment process, guaranteed by law, would be the intelligent translation of society's environmental values into action. A discretionary procedure would be an environmental bill of goods—no substitute for an environmental bill of rights.

RESOURCE PERSON FOR CITIZEN PARTICIPATION

Des Connor is a consulting sociologist (Ph.D., Cornell University) who has specialized in the design and management of citizen participation programs for the last five years. He teaches a graduate course in this subject at the University of Waterloo, offers public seminars at least once a year, and publishes a quarterly, Constructive Citizen Participation (\$10 per year for organizations, \$4 for students and volunteer leaders).

Citizens Participate: An Action Guide for Public Issues, a 64-page handbook which he published recently, was reviewed in 3 CELN 184. It is available for \$2 from Development Press, Box 1016, Oakville, Ont.

While he usually works with government agencies, he has developed a short course for citizen leaders. If interested, please contact D.M. Connor Development Services Ltd., 275 King Street, Oakville, Ontario L6J 1B8.

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BERGER INQUIRY LAWYER AFFIRMS NEED FOR PUBLIC FUNDING OF CITIZEN GROUPS

The counsel to the Berger Commission has suggested that where citizen groups are inadequately funded to present their case against environmentally damaging projects, the proper role of a Commission counsel is to present the citizens' side of the story.

Ian Scott, the lawyer for the Commission inquiring into the proposed Mackenzie Valley Pipeline, says it likely will have to be delayed or adjourned because of a government decision to cut off funds to the Northern Assessment Group.

In a statement of April 24th, Mr. Scott said, "In my opinion it is a grave misfortune that the environmental consortium, which has taken a strong and creative role at the Inquiry, should at this stage in the Inquiry's hearings be emasculated by the failure of the Department of Indian Affairs to continue the funding that was provided in 1974.

"Unless funds can be obtained to enable the Northern Assessment Group to continue the preparation and presentation of environmental research and analysis which it has already undertaken, I anticipate it will be necessary for the Inquiry counsel to do so. That course will be expensive, time-consuming and will likely lead to lengthy delays and adjournment of the hearing so that our preparation can be completed."

Although NAG was given \$200,000 last year, nothing was budgeted for it in 1975.

In the Commons, Northern Affairs Minister Judd Buchanan said he had asked the Commissioner, Mr. Justice Thomas Berger, to finance the group's activities from the Commission's one million dollar budget.

Mr. Scott said that the Minister "has overlooked the fact, well known within his department, that no such funds have been provided in the budget. In fact, the Inquiry was advised in February by the department that the Minister does not wish to support environmental organizations through the Inquiry operating budget.

"When the Inquiry was established, Mr. Justice Berger and the Inquiry staff were firmly of the view that a full and fair inquiry could only be obtained if the native people and the environmental group, known as the Northern Assessment Group, were funded to enable them to develop studies of the impact of the pipeline.

"Therefore, Mr. Justice Berger recommended to the then Minister of Indian Affairs that funds should be provided to the environmental coalition for this purpose."

During the same week in which Mr. Scott made his statement, groups also accused the federal government of reducing their 1975 funding in an attempt to "muzzle" them.

On the day of Mr. Scott's statement, questions were asked in Parliament:

Wally Firth (NDP, Northwest Territories):

...In view of the fact that the Northern Assessment Group has had its budget cut completely and in view of the fact that this group was charged with providing valuable technical support information to the native groups... would the minister reconsider the level of funding for this organization so that it may continue its essential role in the inquiry?

Indian Affairs and Northern Development Minister Judd Buchanan:

The Government has not funded the Northern Assessment Group; it was funded through Mr. Justice Berger's allocation last year...There are some ongoing discussions to see whether or not funds can be provided out of the commission \$1-million funding to assist the Northern Assessment Group.

HEATHER MITCHELL JOINS CELA STAFF

HEATHER MITCHELL has joined the legal staff of the Canadian Environmental Law Association.

Ms. Mitchell has worked extensively with the Government of Canada in Ottawa, and has acted as counsel to a small federation of independent film production companies at its head office in Toronto.

She has been editor of the Canadian Bar Journal and the Canadian Bar Bulletin. She is vice-chairperson of the Young Lawyers Conference of the Canadian Bar Association, and a member of the Ontario and National Councils of the CBA.

DAVID ESTRIN, former General Counsel of CELA, is in Montreal, where he has been retained by the Northern Quebec Innuit Association. He will spend the next year or more as part of a team negotiating a settlement arising out of the Agreement in Principle signed by the Innuit, the Cree Indians, the James Bay Development Corporation, the Quebec Government and other parties to legal proceedings over the James Bay hydro-electric power project.
