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

SUBMISSIONS
TO THE
STANDING COMMITTEE
ON GENERAL GOVERNMENT
ON THE
AGGREGATE RESOURCES ACT

SUBMITTED
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I. INTRODUCTION

The Canadian Environmental Law Association ("CELA") is filing the following comments with the Standing Committee on General Government with respect to the Committee's review of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8 ("*ARA*").[1] After a brief introduction to CELA and a review of the nature of the environmental, social, and economic problems posed by aggregate extraction in Ontario, our comments will focus on just a few key legal and policy aspects of the *ARA* reflected in the Committee's terms of reference, including the:

- impact of the 2005 Provincial Policy Statement ("PPS") on the siting and approval process under the *ARA*;
- adequacy of compliance and enforcement under the *ARA*; and
- the slow rate of rehabilitation of abandoned pits and quarries in the province.

Our submissions end with a brief set of conclusions and recommendations.

II. CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as an Ontario Legal Aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before administrative tribunals on a wide variety of environmental matters. As a legal aid clinic, CELA also engages in various law reform, public education, and community outreach initiatives. CELA has a long history of involvement in, and expertise in respect of, laws and policies regarding aggregate extraction, having frequently appeared before the courts, tribunals, legislative committees, and municipal bodies, as well as having written extensively, on the subject.

III. THE NATURE OF THE PROBLEMS POSED BY AGGREGATE EXTRACTION

The nature of the environmental, social, and economic problems posed by aggregate extraction will be well-known to Committee members. Depending on the geographic circumstances, these problems may include, but are not limited to, the following:

- Removal of prime agricultural land from production;

[1] The Committee's terms of reference include, but are not limited to, the following areas: (1) the Act's consultation process; (2) how siting, operations, and rehabilitation are addressed in the Act; (3) best practices and new developments in the industry; (4) fees and royalties; and (5) aggregate resource development and protection, including conservation and recycling.

- Harm to the quality and quantity of surface water and groundwater;
- Detrimental effects on fish spawning in water bodies;
- Interference with threatened or endangered species or their habitat otherwise meant to be protected under federal or provincial laws;
- Disruption of the continuous natural environment linkages certain areas of the province enjoy under the Niagara Escarpment Plan (a UNESCO World Biosphere Reserve), or the Oak Ridges Moraine Conservation Plan or, in certain circumstances, both;
- Creation of road congestion, safety concerns, and increases in greenhouse gas emissions due to truck traffic on local and regional road systems;
- Undermining of tourism in certain areas with resulting adverse impacts on local and regional economy, jobs, recreation, and culture;
- Creation of excessive levels of noise, dust, and nuisance in otherwise quiet rural environments;
- Physical damage to local roads; and
- Diminution in property values.

The experience in Ontario clearly indicates that aggregate extraction is an environmentally intrusive activity that has the potential to cause long-term adverse impacts on a wide range of publicly important resources. In this regard, a 2011 report prepared by our sister organization, the Canadian Institute for Environmental Law and Policy, documents in detail many of the landscape, agricultural land loss, water quality and water quantity, social, economic, health, and cumulative environmental impacts of aggregate activity.[2] Aggregate extraction, therefore, is an industrial activity that clearly warrants legislative and regulatory control and reform. CELA has selected three issues to illustrate problems with the existing legislative and regulatory control regime respecting this industrial sector.

IV. THE 2005 PROVINCIAL POLICY STATEMENT AND THE SITING AND LICENSING OF AGGREGATE OPERATIONS

A major area of concern with aggregate extraction relates as much to the 2005 Provincial Policy Statement ("PPS") produced under the authority of the *Planning Act*,[3] as to the *ARA* itself. Indeed, it is likely that in the absence of reform to the 2005 PPS, any reform to the *ARA* will fail to achieve proper control of aggregate extraction activities in the province. As the Environmental Commissioner for Ontario ("ECO") has noted, one of the most intractable and contentious issues has been the siting of aggregate operations.

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[2] Canadian Institute for Environmental Law and Policy, "Aggregate Extraction in Ontario: A Strategy for the Future" (Toronto: CIELAP, March 2011) at 9-18. As CIELAP has recently wound up its operations, its portfolio of reports and studies are now housed at, and available from, CELA's Resource Library for the Environment and the Law at < www.cela.org >

[3] R.S.O. 1990, c. P.13, ss. 2-3. Ontario Ministry of Municipal Affairs and Housing, *Provincial Policy Statement*, (Toronto: Queen's Printer for Ontario, 2005).

The *Planning Act* requires that a decision of municipal bodies and the Ontario Municipal Board ("OMB") that affects a planning matter must be consistent with policy statements issued by provincial ministries under the Act.[4] The provisions on mineral aggregates in the 2005 PPS are overwhelmingly weighted in favour of protection of aggregate extraction at the expense of other provincial interests such as protection of water quality and quantity, natural heritage, and agricultural land preservation. The high priority afforded to aggregate extraction is further re-enforced under the *ARA* by the statute's failure to require licence applicants to demonstrate need for mineral aggregate.[5] Under the 2005 PPS, municipalities and the OMB are required to allow aggregate operations to locate as close to markets as possible without consideration of need:

> "2.5.2.1 As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible.
>
> Demonstration of need for mineral aggregate resources, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of mineral aggregate resources locally or elsewhere."

This is a common theme raised in OMB decisions.[6] The exemption from having to demonstrate need for mineral aggregate, including any supply/demand analysis, means that aggregate extraction effectively trumps other interests. The ECO has commented that this has allowed aggregate extraction to take place in Ontario at the expense of other land uses.[7] The ECO notes that municipalities have argued that they would not approve any other land use without full and open justification of need.[8] In its 2011 report, CIELAP noted that the Niagara Escarpment Commission has argued that the lack of requirements to include an analysis of supply and demand constitutes a barrier to undertaking comprehensive planning that would ensure establishment of new pits and quarries is justified.[9] Amending the 2005 PPS to require consideration of need for aggregate would be a logical first step leading to sounder siting and licensing decisions under the *ARA* itself.

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[4] R.S.O. 1990, c. P.13, s. 3(5).

[5] R.S.O. 1990, c. A.8, s. 12 (absence of requirement to consider need in respect of licence matters to be considered by Minister under *ARA*).

[6] See, e.g. *Capital Paving Inc.* v. *Wellington (County*), [2010] O.M.B.D. No. 9 (O.M.B.), at para. 14 ("Aggregate resources are given a privileged position in the PPS section 2.5.2…Aggregate extraction is the only use in the wide ranging PPS where need is not specifically required"). See also *Jennison Construction Ltd.* v. *Ashfield-Colborne-Wawanosh (Township)*, [2011] O.M.B.D. No. 969 (O.M.B.) at paras. 118-119 ("One of the issues raised by the parties revolved around the question of need for the gravel pit particularly when two existing gravel pits exist in the immediate area. The Board would note that the PPS policy specifically prescribes that need is not to be a determining factor in the consideration of the approval of an ARA licence….The Board is satisfied that there is no need to establish the quantum of need in this case").

[7] Environmental Commissioner of Ontario, "The Swiss Cheese Syndrome: Pits and Quarries Come in Clusters," in *Building Resilience, ECO Annual Report, 2008-2009* (Toronto: ECO, 2009) at 29-32.

[8] Environmental Commissioner of Ontario, "Preserving Natural Areas, or Extracting Aggregates Wherever They Lay?", in *Reconciling Our Priorities, ECO Annual Report, 2006-2007* (Toronto: ECO, 2007) at 44-49.

[9] Canadian Institute for Environmental Law and Policy, "Aggregate Extraction in Ontario: A Strategy for the Future" (Toronto: CIELAP, March 2011) at 21.

In the past, CELA has recommended that applicants for aggregate licences should be required to demonstrate the need for aggregate extraction in a particular area. In addition, the Ministry of Natural Resources ("MNR") should develop and maintain an up-to-date publicly available assessment of current aggregate demand and supply and provide projections of future needs, including analysis of opportunities for conservation and reduction of the demand for aggregates.

Accordingly, we recommend to the Committee that:

Recommendation # 1: (a) notwithstanding the 2005 PPS, applicants for aggregate licences under the *ARA* should be required to demonstrate need for aggregate extraction in a particular area;

(b) the 2005 PPS should be modified to be consistent with the above recommendation; and

(c) the MNR should develop and maintain an up-to-date publicly available assessment of current aggregate demand and supply and provide projections of future needs, including analysis of opportunities for conservation and reduction of the demand for aggregates.

V. COMPLIANCE AND ENFORCEMENT

A further area of concern is the breakdown of compliance and enforcement under the *ARA*. The ECO has frequently reported key shortcomings in the regulatory framework for pits and quarries including "erratic compliance" and "poor enforcement". As the ECO put it in a 2005/2006 Annual Report:

> "Following regulatory reforms in the late 1990s, aggregate operators became responsible for assessing their own compliance with site plans, while [the Ministry of Natural Resources] committed to field auditing 20 per cent of sites each year. But this arrangement has many weaknesses. MNR's own evaluation in 2002 found that some industry operators were submitting reports deficient in important information such as excavation depth or rehabilitation information (see 2003/2004 ECO annual report, page 62). MNR began to target operators who submitted late or poor quality reports in 2002/2003. Due to a shortage of inspectors, MNR has never been able to meet its own target of field auditing 20 per cent of sites; actual field audit rates hovered between 10 and 14 per cent between 2002-2004. This means that some sites are operating without independent site audits for seven years or longer, with increased risks that past or ongoing contraventions of the *ARA* are not detected or prosecuted. In 2005, MNR hired three additional inspectors, but it is doubtful that this will resolve all

> the problems. The ECO continues to hear complaints about aggregate operations from members of the public".[10]

In addition, in a Special Report to the Legislature in 2007, the ECO noted the lack of staff at MNR, acknowledged by the ministry itself, which has resulted in an increase in illegal aggregate operations and complaints.[11] Moreover, the ECO notes in his latest annual report that MNR continues to operate on fewer dollars today than in fiscal year 1992/1993.[12] Under such circumstances, the ability of the MNR to ensure compliance with the requirements of the *ARA* is severely undermined. Indeed, lack of confidence in MNR's ability to monitor compliance with licence requirements was a factor in a 2010 decision of the OMB not to grant an aggregate licence to a company.[13]

In its 2011 report, CIELAP recommended that the Ontario government should make funding available to restore the number of aggregate field inspectors to a level that will enable more frequent and thorough monitoring of a greater number of pits and quarries in the province. CIELAP had observed that additional revenue could be raised through a cost recovery regime by increasing the current per tonne licence fees and royalties charged on extraction of aggregates to a level sufficient to continue to fund staff capacity within MNR.[14]

We submit that this position is still warranted. Accordingly, CELA recommends that:

Recommendation # 2: (a) funding should be made available to restore the number of aggregate field inspectors to a level that will enable more frequent and thorough monitoring of a greater number of pits and quarries in the province; and

(b) MNR should increase the current per tonne licence fees and royalties charged on extraction of aggregates to a level sufficient to continue to fund staff capacity within MNR.

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[10] Environmental Commissioner of Ontario, "Ontario's Sand and Gravel Extraction Policy: Overdue for Review" in *Neglecting Our Obligations, ECO Annual Report, 2005-2006* (Toronto: ECO, 2009) at 39-40.

[11] Environmental Commissioner of Ontario, "Doing Less with Less: How Shortfalls in Budget, Staffing and In-House Expertise are Hampering the Effectiveness of MOE and MNR" in *Special Report to the Legislative Assembly of Ontario* (Toronto: ECO, 2007).

[12] Environmental Commissioner of Ontario, "Less and Less: Budgets for MOE and MNR Not Meeting Needs", in *Engaging Solutions, ECO Annual Report 2010-2011*(Toronto: ECO, 2011) at 83.

[13] See *James Dick Construction Ltd.* v. *Caledon (Town)*, [2010] O.M.B.D. No. 903 (O.M.B.) at paras. 268-270 ("Even if the Board accepted, which it does not, that MNR has the resources to fulfill the requirements of the [Adaptive Management Plan], the Board cannot leave the matter of protection of the natural environment to MNR staff who deal with aggregate applications…There was nothing in the evidence of [MNR witnesses] that gives the Board any certainty that even if it decided that it would be appropriate for MNR to take on the responsibilities assigned to it in the AMP, that MNR has the resources to deal adequately with those responsibilities…The Board will not approve an aggregate proposal which leaves an issue like the protection of the natural environment to be dealt with by a third party with demonstrably inadequate resources, like MNR").

[14] Canadian Institute for Environmental Law and Policy, "Aggregate Extraction in Ontario: A Strategy for the Future" (Toronto: CIELAP, March 2011) at 47-54.

VI. REHABILITATION OF ABANDONED PITS AND QUARRIES IS SLOW AND INADEQUATE

A final area of concern that CELA wishes to bring to the attention of the Committee relates to the issue of the slow and inadequate rehabilitation of abandoned pits and quarries under the *ARA*.

The purposes of the *ARA* include requiring rehabilitation of land from which aggregate has been excavated.[15] To assist in achieving this purpose, the *ARA* authorized the Minister of Natural Resources to establish an Aggregate Resources Trust ("Trust").[16] The Trust must provide for the following matters on such terms and conditions as the Minister may specify:

- Rehabilitation of abandoned pits and quarries, including surveys and studies respecting their location and condition; and

- Research on aggregate resource management, including rehabilitation.[17]

The Act defines "abandoned pits and quarries" to mean pits and quarries for which a licence or permit was never in force at any time after December 31, 1989. The Act also defines "rehabilitation" to mean the treatment of land from which aggregate has been excavated so that the use or condition of the land is:

- Restored to its former use or condition; or

- Changed to another use or condition that is or will be compatible with the use of adjacent land.[18]

Regulations under the *ARA* impose an annual 11.5 cent per tonne licensing fee for each tonne of aggregate removed from a site during the previous year.[19] Only one 23rd ($0.005/tonne) of this licensing fee must be provided to the Trust for purposes of abandoned pits and quarries rehabilitation and research set out above.[20]

Within the Trust there is a separate Management of Abandoned Aggregate Properties program ("MAAP"). Before 1997, MAAP was called the Abandoned Pits and Quarries Rehabilitation Fund and was administered by MNR. Since 1997, the Aggregate Producers Association of Ontario ("APAO"), now called the Ontario Stone, Sand & Gravel Association of Ontario, has administered the program for the provincial

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[15] R.S.O. 1990, c. A.8, s. 2(c).
[16] *Ibid.*, s. 6.1(1).
[17] *Ibid.*, s. 6.1(2)2-3.
[18] *Ibid.*, s. 1(1).
[19] *General Regulations*, O. Reg. 244/97, s. 2.
[20] *Ibid.*, s. 3.3. The remainder of the 11.5 cents per tonne of the fees paid go to municipal, county, or regional governments in which the site is located and the provincial Crown. *Ibid.*, s. 3.1, 3.2, 3.4.

government through a special corporate entity called the Ontario Aggregate Resource Corporation ("TOARC").

Both the ECO[21] and CIELAP[22] have documented problems with the rehabilitation of abandoned pits and quarries in Ontario. Such sites may pose safety hazards, act as conduits for contaminants (road salt, fuels, etc.) that threaten groundwater supplies, pockmark the landscape, cause erosion, and impede natural habitat regeneration. The problems stem from weak or vague legislative requirements for rehabilitation, inadequate rehabilitation fees under the regulations, and understaffing of inspectors at MNR. Table 1 illustrates the slow rate of rehabilitation of abandoned pits and quarries in Ontario.

Table 1: Number of Years Necessary to Rehabilitate 6,900 Abandoned Pits and Quarries in Ontario

Number of abandoned pit and quarry sites	6,900[23]
Average site size	1.69 hectares (ha)[24]
Number of hectares requiring rehabilitation	11,661 hectares (6,900 x 1.69)
Average cost of site rehabilitation per hectare	$11,500[25]
Funds available to spend on abandoned pit and quarry site rehabilitation per year	$400,000 - $600,000[26]
Number of hectares that can be rehabilitated per year	34.8 ha (based on $400,000 available per year/ $11,500 average cost per hectare) or 52.2 ha (based on $600,000 available per year/$11,500 average cost per hectare)
Number of years necessary to rehabilitate 6,900 abandoned pit and quarry sites in Ontario	**335 years** (11,661 number of hectares abandoned ÷ 34.8 hectares capable of being rehabilitated per year) or **223.4 years** (11,661 number of hectares abandoned ÷ 52.2 hectares capable of being rehabilitated per year)

Even if one were to use the estimate preferred by MNR as to the number of abandoned pits and quarries in Ontario that are candidate sites for restoration (2,700 sites), the number of years necessary for rehabilitation is still staggering, as suggested in Table 2.

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[21] Environmental Commissioner of Ontario, "Our Cratered Landscape: Can Pits and Quarries be Rehabilitated?", in *Reconciling Our Priorities, ECO Annual Report, 2006-2007* (Toronto: ECO, 2007) at 139-144.

[22] Canadian Institute for Environmental Law and Policy, "Aggregate Extraction in Ontario: A Strategy for the Future" (Toronto: CIELAP, March 2011) at 41-46.

[23] Environmental Commissioner of Ontario <http://www.ecoissues.ca/index.php/Category:Aggregate_Resources_Act> (rehabilitation of aggregate sites) (accessed May 7, 2012).

[24] The Ontario Aggregate Resources Corporation (TOARC): Management of Abandoned Aggregate Properties Program (MAAP) < http://www.toarc.com/maap-1/about-maap.html > (accessed May 7, 2012).

[25] *Ibid.*

[26] *Ibid.*

Table 2: Number of Years Necessary to Rehabilitate 2,700 Abandoned Pits and Quarries in Ontario

Number of abandoned pit and quarry sites	2,700[27]
Average site size	1.69 hectares (ha)[28]
Number of hectares requiring rehabilitation	4,563 hectares (2700 x 1.69)
Average cost of site rehabilitation per hectare	$11,500[29]
Funds available to spend on abandoned pit and quarry site rehabilitation per year	$400,000 - $600,000[30]
Number of hectares that can be rehabilitated per year	34.8 ha (based on $400,000 available per year/ $11,500 average cost per hectare) or 52.2 ha (based on $600,000 available per year/$11,500 average cost per hectare)
Number of years necessary to rehabilitate 2,700 abandoned pit and quarry sites in Ontario	**131 years** (4,563 number of hectares abandoned ÷ 34.8 hectares capable of being rehabilitated per year) or **87.4 years** (4,563 number of hectares abandoned ÷ 52.2 hectares capable of being rehabilitated per year)

By any benchmark a program, the potential success of which can only be measured in centuries is not a program the Ontario legislature, the public, the regulated community, or regulators can have confidence in. It should also be noted that the above could be under-estimates of the total number of years necessary to rehabilitate abandoned pits and quarries if more sites are added to the existing backlog, or if the amount spent per year falls below $400,000-$600,000. It should further be noted that MNR reported in 2006 that the MAAP program was rehabilitating 10-20 sites per year (16.9 ha to 33.8 ha per year based on an average site size of 1.69 ha), which would result in a longer period of time necessary to rehabilitate all sites than that identified in Table 2.

CELA notes that the legacy of abandoned pits and quarries will not only take a long time to clear up, but also will be costly due to decades of little or no action to rectify the problem. Table 3 below illustrates the potential costs, depending upon the number of sites requiring rehabilitation.

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[27] Ontario Ministry of Natural Resources, *Environmental Bill of Rights File No. R2003008 - Review of the Aggregate Resources Act - Rehabilitation of Land From Which Aggregate Has Been Extracted*, (Toronto: Queen's Printer for Ontario, 2006) at 30-32 (approximately 6,900 abandoned pit and quarry sites on private land within designated areas; 2,700 sites considered by MNR to be candidate sites for rehabilitation; 70 sites considered high priority).

[28] The Ontario Aggregate Resources Corporation (TOARC): Management of Abandoned Aggregate Properties Program (MAAP) < http://www.toarc.com/maap-1/about-maap.html > (accessed May 7, 2012).

[29] *Ibid.*

[30] *Ibid.*

Table 3: Potential Costs of Rehabilitating Abandoned Pits and Quarries in Ontario

Number of abandoned pit and quarry sites	Costs
6,900	**$134 million** (based on 11,661 ha requiring rehabilitation x $11,500 cost per ha)
2,700	**$52 million** (based on 4,563 ha requiring rehabilitation x $11,500 cost per ha)

Based on Table 3, the expected cost could be in the neighbourhood of $134 million for 6,900 sites, or $52 million for 2,700 sites.

In the circumstances, the place to start in crafting a solution to the problem is with a realistic re-evaluation of the adequacy of the legislative framework, fee limits contained in the regulations, and MNR staffing requirements for inspectors, coupled with a credible timeframe for clearing up the backlog of abandoned sites. The goal of such reforms should be to achieve the rehabilitation of abandoned pits and quarries in a few decades, not centuries.

Recommendation # 3: (a) the *ARA* should be amended to require by regulation the establishment of a schedule for the rehabilitation of all abandoned pits and quarries in Ontario; and

(b) the *ARA* regulations should be amended to increase the fees payable by licensees to the Trust so that the rehabilitation schedule established can be met.

VII. CONCLUSIONS AND RECOMMENDATIONS

CELA has provided the Committee with an overview of what, we submit, are three key problems with the legislative and regulatory framework in Ontario for addressing aggregate extraction activities (impact of the 2005 PPS on issues of need, siting, and licensing; compliance and enforcement; and rehabilitation of abandoned pits and quarries). The problems we have noted here are just a few of the issues that should be addressed under the *ARA*, and related legislation, regulations, and policies. The reports of the ECO and CIELAP are sources for identifying other problems with the *ARA*, as well as ideas for what should be done to resolve them. For the benefit of the Committee, CELA repeats its recommendations below:

Recommendation # 1: (a) notwithstanding the 2005 PPS, applicants for aggregate licences under the *ARA* should be required to demonstrate need for aggregate extraction in a particular area;

(b) the 2005 PPS should be modified to be consistent with the above recommendation; and

(c) the MNR should develop and maintain an up-to-date publicly available assessment of current aggregate demand and supply and provide projections of

future needs, including analysis of opportunities for conservation and reduction of the demand for aggregates.

Recommendation # 2: (a) funding should be made available to restore the number of aggregate field inspectors to a level that will enable more frequent and thorough monitoring of a greater number of pits and quarries in the province; and

(b) MNR should increase the current per tonne licence fees and royalties charged on extraction of aggregates to a level sufficient to continue to fund staff capacity within MNR.

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