IMPROVING ENVIRONMENTAL ASSESSMENT IN ONTARIO: A FRAMEWORK FOR REFORM

VOLUME I

A Report Prepared by the Minister's Environmental Assessment Advisory Panel – Executive Group

March 2005

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EXECUTIVE SUMMARY

The Executive Group has concluded that Ontario's *Environmental Assessment Act* (EA Act) is fundamentally sound. All Sector Tables and all stakeholders share this view. Significantly, the Executive Group did not receive any input suggesting that the EA Act should be repealed.

At the same time, the Executive Group has identified a significant "disconnect" between the provisions of the EA Act (especially the statement of purpose), and the actual "on the ground" delivery of Ontario's EA program. In particular, the Executive Group has concluded that there are significant policy gaps, procedural inconsistencies, and administrative shortcomings that must be addressed as soon as possible. Accordingly, the bulk of the Executive Group's recommendations involve regulatory, policy and administrative reforms that are necessary to ensure that the EA program remains viable and relevant as Ontarians face the challenges and opportunities of the 21st century.

The Executive Group's suggested reforms are responsive to the Minister's request that the EA Advisory Panel develop recommendations that would 'revitalize, rebalance and refocus' Ontario's EA planning and decision-making process, while also ensuring the timely approval of undertakings which provide positive contributions to Ontarians' quality of life. However, in attempting to fulfill these goals, the Executive Group quickly realized that its recommendations would have to resolve competing considerations and dynamic tensions within Ontario's EA program.

On the one hand, there is a need for an EA program that is expeditious and efficient, and that does not unduly delay necessary undertakings. On the other hand, the EA program must be robust and consultative in nature, and should facilitate undertakings that provide environmental benefits, mitigate or avoid negative biophysical and socio-economic impacts, and support livable communities and a strong provincial economy. Accordingly, after carefully considering the Sectoral Tables' reports and comments, input from MOE staff, and submissions from members of the public regarding EA reform, the Executive Group developed a series of key recommendations, each of which we believe strikes an appropriate balance between a "fast" EA process and a "rigorous" EA process. A key mechanism for ensuring this balance is the application of clear, consistent and transparent rules.

The Executive Group's principal recommendations may be summarized as follows:

- The MOE should develop guiding EA principles that are entrenched in a policy guideline issued under the EA Act. We suggest that, within these principles, the following goals, objectives and values be included:

    - sustainability benefits;
    - clear, consistent, predictable and timely;
    - transparent;
    - public participation;
    - one project, one integrated process;
    - the precautionary principle;

- the ecosystem approach;
- based on good data, good science and sound engineering;
- environmental protection; and
- ‘avoidance first’.

- The MOE should establish sector-specific working groups to develop sectoral policies that identify and prioritize “green projects”, and to develop sectoral EA procedures that are clear, consistent, predictable and timely. The planning, consultation and documentation requirements should reflect the environmental benefits and risks associated with each project;

- The MOE should establish EA application fees, and should direct such revenue to prescribed EA activities;

- The Ontario government should establish a high-level office that is expressly mandated to help facilitate “green projects” within the EA process and other statutory approval regimes;

- The Ontario government should develop appropriate protocols and procedures that more effectively involve First Nations and aboriginal communities in the EA process;

- The MOE should establish an independent provincial advisory body in order to provide expert advice and solicit public views on various EA matters, such as community acceptance of proposed undertakings, and effects/effectiveness monitoring;

- The MOE should ensure greater use of alternative dispute resolution (ADR) techniques throughout the EA process, and should refer certain undertakings to the ERT for public hearings that are consolidated with other hearing requirements where applicable;

- The MOE should amend Class EA procedures and the Electricity Projects Regulation (O.Reg.116/01 and Guide) to create opportunities to seek summary rulings from the ERT on contentious matters such as bump up/elevation requests;

- The MOE should establish an enhanced EA website or online registry to facilitate proponent and public access to EA documents and project status information; and

- The MOE should expand its EA monitoring, inspection and training activities to ensure compliance with the EA Act, regulations, or terms and conditions within approvals.

The cornerstone of the Executive Group’s vision for EA reform, and the central innovation of this Report, is the first five recommendations proposed in this Report and their link to all subsequent recommendations. These primary recommendations articulate the need for: 1) overarching general EA principles; 2) sector-specific EA policies; and, 3) sectoral EA procedures which are predicated upon the nature and extent of the anticipated benefits and negative impacts of the undertakings in each sector, and which prescribe an appropriate EA planning and decision-making process in order to evaluate the significance of those outcomes.

Our proposed procedures create rules that permit the interests of all major stakeholders to be respected. Proponents get expeditious timelines and increased efficiency; members of the public get more notice and resources and thus increased effectiveness. Proponents get focus and predictability; members of the public get increased rigour. For government, the procedures represent a shift from broad discretion to clear rules. Where implemented, these rules will increase and improve implementation of provincial policy. Less discretion and more rules will provide more timely decision-making and thus greater efficiency of human resources. Less discretion and more rules will also provide increased transparency. Put more colloquially, the proposed reforms deliver to government more steering and less rowing. The Executive Group concludes that the first five interrelated recommendations form the critical foundation upon which all other EA reforms must be built.

Since Ontario's EA program began in the mid-1970s, there has existed considerable debate and controversy surrounding various legislative, regulatory and administrative issues under the EA Act. As a result of our deliberations, the Executive Group can report that this debate still exists among some proponents and EA stakeholders at the present time. Nonetheless, there appears to be strong support for the general package of recommendations being proposed by the Executive Group, as discussed above. It should be further noted that this reform package represents a carefully crafted set of integrated recommendations, rather than a "wish list" of unrelated, stand-alone suggestions that can be selectively or independently pursued.

For example, recognizing the limited availability of provincial revenue to fund the proposed provincial advisory body, the Executive Group has identified the need to introduce a system of EA fees to generate revenue that can be specifically directed to EA activities undertaken by the advisory body, Environmental Assessment and Approvals Branch (EAAB), Environmental Review Tribunal (ERT), or other persons or agencies. Furthermore, while some of our recommendations will require more resources than are currently applied to EA, several other recommendations will save considerable resources and time for all participants in the process. In general, increasing the clarity of relevant policies, and enhancing the transparency and predictability of the process, will save the Ministry, proponents and other participants both money and time currently spent navigating an often confusing and unpredictable set of procedures under the existing EA program. In other words, the cost of doing nothing or maintaining the status quo will not only cost time and money, but also will inhibit investment and preclude the many ancillary benefits associated with an improved EA process especially for green projects.

As these and other examples illustrate, the Executive Group's recommendations are carefully tied together as an integrated reform package which should not be implemented in a piecemeal or disjointed manner. The Executive Group firmly advises the Minister to adopt these recommendations. We are confident that the Minister shares our interest in and commitment to improving and strengthening the EA program, and the members of the Executive Group look forward to assisting the Minister in the further refinement and implementation of the reforms outlined in this Report.

EXECUTIVE GROUP MEMBERS

David Estrin

David Estrin has for over 30 years specialized in environmental law as an advocate, author of authoritative environmental law texts, and professor (part time) in law and environmental studies faculties. In his practice as a senior partner with Gowlings, a national law firm, Mr. Estrin has advised and acted as counsel for development proponents, municipalities, crown corporations, financial institutions, aboriginal people and environmental groups. He has assisted in policy development and drafting of key environmental assessment and environmental protection laws in Ontario, Alberta and for the UN. He has been counsel in many precedent setting cases. Mr. Estrin was a founder and first general counsel for the Canadian Environmental Law Association (CELA).

Alan Levy

Alan D. Levy graduated from the Faculty of Law (University of Toronto) in 1970 and began practice in 1972 in Toronto, primarily in the area of civil and family litigation. He was among the founding members at the Canadian Environmental Law Association (CELA) in 1970. He is currently the Chair of its Board of Directors and Director of its Environmental Assessment Project. During the period 1990-1998, he served as a Vice-Chair of the Ontario Environmental Assessment Board and member of the Environmental Appeal Board (now combined and called the Environmental Review Tribunal), and Hearing Officer in the Niagara Escarpment Hearing Office. Since 1998 he has resumed private practice with a focus on dispute resolution (mediation, negotiation and arbitration) and environmental law. He has served as Chair of the Environment Section of the ADR Institute of Ontario and since 2000 has been Director of the Environmental Law Practicum program at the Faculty of Law (University of Toronto).

Richard Lindgren

Mr. Lindgren is a staff lawyer with the Canadian Environmental Law Association (CELA), and has represented individuals and citizens' groups in the courts and before tribunals on various environmental assessment matters. He has written extensively on federal and provincial environmental assessment, and is an editor of the *Canadian Environmental Law Reports*. Mr. Lindgren has been a member of the Attorney General's Advisory Committee on Class Action Reform, the Environment Minister's Task Force on the Environmental Bill of Rights, and the Environmental Review Tribunal's Advisory Committee. He teaches environmental law at Queen's University Faculty of Law and at Trent University.

Rod Northey

Mr. Northey is a partner in Birchall Northey, an environmental law firm that provides litigation, legal and public policy advice to clients across Canada. Mr. Northey practices environmental law exclusively, with particular emphasis on administrative law before the courts and environmental and planning tribunals. Mr. Northey is author of an annotation on federal environmental assessment law and has taught courses on environmental law, advocacy and

assessment at the Faculty of Law at the University of Toronto, Osgoode Hall Law School and Ryerson Polytechnic University. Mr. Northey was a member of the 2004 Greenbelt Task Force is also a past president of the Canadian Environmental Defence Fund (now, Environmental Defence Canada).

Dr. Beth Savan (Chair)

Dr. Savan, an environmental scientist, has extensive experience in government, the media, and in academia. For seven years, Dr. Savan directed the Environmental Studies Programs at Innis College, University of Toronto, where she teaches senior level courses. She has just been appointed as the inaugural Sustainability Director at the university and has a cross-appointment as an adjunct Professor in the Geography Department and in the Masters in Planning Program, where she teaches environmental planning. Her recent research and publication activities focus on the topics of community based research, environmental monitoring, citizen science, and community sustainability.

SUMMARY OF RECOMMENDATIONS

(* = recommendation that will save resources for many parties; and, ** = recommendation with direct revenue generation. Page numbers indicate where the recommendation is located in the Report, along with a detailed issue statement and discussion).

KEY RECOMMENDATIONS		
Recommendation 1: ***General Need for Principles, Policies and Procedures***	**Issue:** Need for EA to better address green projects in the waste, energy and transportation sectors	The *Environmental Assessment Act* (EA Act) should deliver major improvements across three sectors – waste, energy, transportation – by immediate attention to three topics set out in detail below: (1) general EA principles within MOE policy guidelines on how to interpret and apply the purpose of the Act to specific undertakings; (2) provincial policies for each sector on what factors contribute to "green" undertakings and thereby merit priority compared to other undertakings in the sector; and (3) prescriptive sector-specific procedures which correlate EA requirements with the degree of societal benefits and environmental risks associated with an undertaking. Page 28.
Recommendation 2: ***EA Act Principles***	**Issue**: Need for guidance on how to interpret and apply the purpose of the EA Act.	In order to ensure that all EA participants – proponents, the public and decision-makers – have a common framework to assess specific undertakings and assign preferences among alternatives, it is essential that more attention be devoted to the purpose of the EA Act. The purpose seeks the "betterment of the people" of Ontario and requires "the protection, conservation and wise management in Ontario of the environment". Based on this broad purpose, a set of general EA principles should be articulated in EA Act policy guidelines for specific application to all decisions made under the EA Act. Page 29.
Recommendation 3: ***Sector-specific Policy*** *	**Issue**: Need for provincial policy which prioritizes "green" undertakings, and	The Government of Ontario should develop sector-specific policies which must be followed under the EA Act, just as the Provincial Policy Statement is issued and applied under the *Planning Act*. These sectoral policies should include a hierarchy of preferences based on degree of benefit and risk

	which addresses need and alternatives.	of impact (e.g. policy preference for renewable energy, public transit, and waste diversion). As an immediate measure the Province should ensure that EA decisions are consistent with PPS provisions respecting renewable energy systems, transit, and waste reduction, reuse and recycling. Page 39.
Recommendation 4: ***Establishment of Sector working groups*** *	**Issue**: Need to establish working groups to develop sectoral policy	The MOE should immediately establish small sectoral working groups for Energy, Transportation and Waste sectors. Members should be experienced in EA to expeditiously develop each sectoral policy, which can be forwarded to the Minister for review and adoption under the EA Act. Page 39.
Recommendation 5: ***EA Procedures***	**Issue:** Need for EA procedures which correlate assessment requirements to the degree of benefit and risk associated with an undertaking.	a) A procedural framework should be developed such that the nature and extent of EA documentation, notification, and planning depend on the environmental benefits and risks associated with a particular undertaking. Undertakings that pose benefits without corresponding risks should be given priority under the EA Act in the sense that their process and approval standards are easier to meet than undertakings that create risks and produce few or no benefits. For each sector, existing Class EA and regulatory instruments should be adapted accordingly. b) Guided by the procedural charts in Chapter 3 and the principle that sector rules should be consistent across sectors, the Minister should ask the proposed working groups to recommend binding rules for EA triggers and processes for each sector. Thus, the procedural charts should be adopted as a future regulation, as amended by working group recommendations that treat similar projects within all sectors consistently. In particular, as suggested by the Waste Sector Table, the waste sector working group should consider the following issues: i. designate certain waste management facilities (e.g. all landfills and incinerators accepting municipal and IC&I waste) as being subject to the EA Act, regardless of proponency; ii. exempt certain facility-related proposals from EA obligations (e.g. Category 1 projects); iii. establish an appropriate EA process for small-scale or less environmentally significant projects within prescribed thresholds or categories; iv. ensure that individual EAs are conducted for large-scale or environmentally significant waste management undertakings; v. provide prescriptive details on undertakings that require the highest level of assessment(e.g., TOR content or category 5 projects); and, vi. compile and update a comprehensive provincial database on waste management. c) Pending the completion of the revised sectoral procedures, as an interim measure the MOE should immediately revise the draft TOR guideline to ensure consistency with this Report (especially in relation to "need" and "alternatives to"), and should post the

		revised TOR guideline on the EBR Registry for public review and comment prior to finalization. Page 42-43.
Recommendation 6: ***Provincial Advisory Body*** *	**Issue**: Need for impartial expert advice on a broad range of EA related matters.	The Minister should establish an independent advisory body to provide advice to the provincial government and solicit public input in relation to EA matters as may be warranted. Page 66.
Recommendation 7: ***Funding for Advisory Body*** **	**Issue**: Financial support for advisory body.	Funding for the advisory body should be drawn, at least in part, from revenues generated from EA application fees (as described below in Recommendation 23). Page 66.
Recommendation 8: ***Public participation***	**Issue**: Finalizing MOE consultation guideline.	The MOE should revise the draft consultation guideline to reflect the recommendations in this report, paying particular attention to the following issues: a) identification of "interested persons" within the meaning of the EA Act; b) provision of timely and effective public notices; c) ensuring public access to relevant documents and information; d) provision of adequate comment periods; e) effective methods and techniques for soliciting public input (including using municipal council proceedings where applicable); f) provision of adequate resources to members of the public to participate meaningfully in the EA process; and g) methods for accommodating public concerns and resolving issues in dispute. Following this revision the MOE should consult widely on their guideline before finalizing. Page 69.
Recommendation 9: ***Public participation***	**Issue**: Public participation rights and responsibilities under the EA Act.	Once the consultation guideline has been finalized, the MOE should organize workshops and undertake other measures to ensure that proponents, participants and agencies understand public participation rights and responsibilities under the EA Act. Page 69.
Recommendation 10: ***Public participation***	**Issue**: First Nations and aboriginal community participation in EA planning and decision-making.	The Ontario government should develop, with First Nations and aboriginal community input, appropriate protocols, procedures and collaborative agreements to facilitate meaningful participation by First Nations and aboriginal communities in the EA planning and decision-making process, particularly in relation to: a) improving notice requirements; b) enhancing comment opportunities; c) resolving funding issues; and d) involving First Nations and aboriginal communities as part of the government review team where appropriate under the EA Act. Page 69-70.

Recommendation 11: ***Public participation***	**Issue**: Review options for obtaining or confirming community acceptance (e.g., willing host) for undertakings.	The Minister should request that the advisory body review and report upon options for obtaining or confirming community acceptance (e.g., willing host) of undertakings proposed under individual EAs and Class EAs. At a minimum, the advisory body should be asked to consider whether there is a need for: a) inclusive, resourced local bodies to negotiate, monitor and revise agreements; b) explicit local benefits targeted towards closest neighbours to the site; c) comprehensive efforts to identify and engage diverse groups within the local community at the earliest planning stages; and d) an option to site elsewhere if negotiation efforts fail. Page 70.
Recommendation 12: ***Green project facilitator*** *	**Issue**: Need for high-level facilitation of 'green projects' through EA process.	The Ontario government should create the office of a provincial process facilitator for green projects. This office will facilitate approval of green projects by: 1) expediting EA and other provincial requirements; and 2) resolving cross-jurisdictional or interministerial issues. Page 78.
Recommendation 13: ***Hearings, ADR, mediation***	**Issue:** Finalize MOE draft mediation guideline.	The MOE should revise the draft mediation guideline, and should specifically consider circumstances or criteria when it may be appropriate for the Minister to refer matters to ADR and mediation under the EA Act. One recommended issue to consider is the role of ADR when there is continuing public concern about a project. A one-day mandatory mediation could be considered for use at the end of contentious phases of an EA project before the proponent advances to the next stage or any public right of review (e.g., Part II Order or elevation request) can be exercised. Following the revision the MOE should consult widely on the guideline before finalizing. Page 79-80.
Recommendation 14: ***Hearings, ADR, mediation***	**Issue:** Referral of certain individual EA applications to the ERT.	Pending the completion of the sectoral procedural framework, as an interim measure the Minister should ensure that there are public hearings before the ERT on individual EA applications where: a) ADR and mediation efforts have been employed; and, b) there is significant unresolved public controversy about substantive and procedural issues arising from the proposed undertaking. Page 80.
Recommendation 15: ***Integration***	**Issue**: Need to integrate PPS and EA.	The Minister should, as soon as reasonably possible, ensure the EA Act: a) adopts by cross-reference the *Provincial Policy Statement* ("PPS") that is issued by Cabinet under section 3 of the *Planning Act*; b) specifies that all statutory decisions under the EA Act shall be consistent with the PPS, as may be amended from time to time; and c) provides that, in cases of conflict between the PPS and EA policies, the latter shall prevail. Page 84.
Recommendation 16: ***Integration*** *	**Issue**: Need for guidelines on harmonization of CEAA and EA Act.	The MOE should develop, with proponent and EA participant input, clear and concise guidelines that explain when and how the EA Act will be harmonized with CEAA in relation to undertakings that are potentially subject to both statutes. Page 85.

Recommendation 17: ***Integration***	**Issue**: Need to amend section 32 of the EBR.	The MOE should amend the general "EA exception" in section 32 of the *Environmental Bill of Rights* ("EBR") to ensure that: a) public notice is provided under the EBR in relation to prescribed instruments that are proposed to implement environmentally significant projects or undertakings which have been approved or exempted under the EA Act; and, b) residents may seek leave to appeal such instruments under the EBR only where the environmentally significant project or undertaking has been approved or exempted under the EA Act without a public hearing. Page 85.
Recommendation 18: ***Class Environmental Assessment***	**Issue:** Need for mechanism to resolve issues during project planning under Class EAs or Electricity Projects Regulation.	As an interim measure while considering the recommended procedural reforms, the MOE should create an opportunity for the proponent and public, as well as the Minister, to make summary applications for interim directions (which could include mediation or rulings) from the Environmental Review Tribunal during the preparation of a project-specific Class EA/ESR or screening/review under Electricity Projects Regulation 116/01. Page 90-91.
Recommendation 19: ***Class environmental assessment***	**Issue:** Need for procedures to address 'bump-up' (Part II orders) and elevation requests.	The government should create a formal adjudicative process, administered by the ERT, to expeditiously hear and decide applications for 'bump-ups' and elevation requests. Page 91.
Recommendation 20: ***Timelines***	**Issue**: Adequacy and enforcement of current timeframes and deadlines under certain regulations.	The MOE should review, with proponent and stakeholder input, the adequacy and enforcement of the current timeframes and deadlines within the Deadlines Regulation (O.Reg. 616/98), approved Class EAs, and the Electricity Projects Regulation (O.Reg. 116/01) and Guide. Page 99.
Recommendation 21: ***Timelines***	**Issue**: Amendment to extend prescribed deadlines where warranted.	The MOE should develop, with proponent and stakeholder input, regulatory amendments that authorize the EAAB Director to extend prescribed deadlines where warranted, provided that: a) written notice of the extension, with reasons, is provided to the proponent and stakeholders; and b) the extension notice identifies a new final deadline for the making of the EA decision under consideration. Page 99-100.
Recommendation 22: ***EA Website*** *	**Issue**: Transparency, clarity and timely access to information.	The MOE should establish a new EA website to include means to enable proponents and stakeholders to electronically track the status of the matter under consideration (i.e. government review, bump-up request, etc.) and to access information or supporting documentation about the matter, and other documentation relating to Ontario's EA program. Page 100.
Recommendation 23: ***Fees*** **	**Issue**: Need for fees to support EA program delivery and efficiency.	The EA Act should be amended to authorize the making of regulations that prescribe fees (or the method for calculating fees) for certain matters under the Act. Fee revenue should be directed towards EA program delivery and efficiency. Page 104.
Recommendation 24: ***Fees***	**Issue**: Development of fee	Once authorized to impose fees under the EA Act, the MOE should develop, with proponent and stakeholder input, a

	schedule.	regulation that establishes an appropriate fee schedule for EA actions including hearings. Such regulation should also govern the use, retention, payment or refund of prescribed fees. Page 104.
Recommendation 25: ***Fees***	**Issue**: Need for dedicated EA funding.	Application fees collected under the EA Act should be used to fund or undertake specified EA-related activities. Page 104.
Recommendation 26: ***Monitoring and reporting***	**Issue**: Improving effects/effectiveness monitoring and reporting.	The MOE should, with public input, revise its draft EA compliance strategy, especially in relation to cumulative impacts. Among other things, the revisions should consider the following tools: a) third party audits; b) third party notification; c) electronic access to monitoring reports on proponent websites (or a new EA registry to be established by MOE: see Recommendation 22); d) "model" monitoring/reporting provisions that can be imposed as conditions for approval in the context of individual EAs, Class EAs, declaration (exemption) orders, and other EA decisions; e) periodic review and/or revision of terms and conditions in instruments issued under the EA Act to ensure they remain current, effective and enforceable. Page 106.
Recommendation 27: ***Monitoring and reporting*** **	**Issue**: Amendments to EA Act re: powers and roles of provincial officers.	The MOE should, with public input, develop amendments to the EA Act that: a) provide provincial officers with inspection and enforcement powers that are currently available under other environmental laws; b) increase fines to make them consistent with fine levels that are currently available under other environmental laws; c) empower the courts to impose innovative sentencing orders that are currently available under other environmental laws; d) impose a "reasonable care" duty upon corporate officers and directors to ensure compliance with the Act, regulations, or terms and conditions in EA approvals; and e) prescribe a two-year limitation period for the prosecution of offences under the EA Act. Page 106.
Recommendation 28: ***Monitoring and reporting***	**Issue**: Development of EA compliance programs and procedures.	The MOE should, with public input, develop EA compliance programs and procedures that include substantive guidance on: a) voluntary abatement and other measures to address relatively minor problems where the non-compliance poses no direct risk to the environment; b) mandatory abatement and other measures to address all other instances of non-compliance with the Act, regulations or terms and conditions in EA approvals; c) prosecutions to enforce EA obligations imposed by law; and, d) inspection protocols (i.e. frequency, follow up measures, MOE record-keeping, announced vs.

		unannounced visits, integration with MOE district work plan inspections, etc). Page 106-107.
Recommendation 29: ***Monitoring and reporting***	**Issue**: Need for compliance training and education programs.	The MOE should ensure that the finalized EA compliance strategy is accompanied by appropriate training and educational programs for all MOE staff involved in EA monitoring, inspection and enforcement activities. Page 107.
Recommendation 30: ***Monitoring and reporting***	**Issue**: Review/revise MOE administrative practices.	The MOE's current administrative practices/procedures should be reviewed and/or revised to ensure that they adequately reflect or integrate the essential elements of the finalized EA compliance strategy. Page 107.
Recommendation 31: ***Monitoring and reporting***	**Issue**: Review/upgrade current EAIMS.	The MOE's current EAIMS (environmental assessment information management systems) should be reviewed and/or upgraded to ensure that it is electronically accessible by all MOE regional and district offices. Page 107.
Recommendation 32: ***Training*** **	**Issue**: Need for EA training and educational programs on cost-recovery basis.	The MOE should develop, with proponent and stakeholder input, appropriate EA training and educational programs under the EA Act, and should recover the cost of developing and delivering EA training and educational programs by charging appropriate fees to participants in such programs. The MOE should ensure that EA training and educational programs are available to all Ontario government staff (including but not limited to MOE EAAB, Regional Office, and District Office staff) involved in the delivery of the province's EA program**.** Page 114-115.
Recommendation 33: ***EA Review Protocols***	**Issue**: Need for cross-ministry/agency protocols.	The MOE should develop appropriate collaborative protocols with other provincial ministries and agencies in order to ensure that government reviews under the EA Act are undertaken by qualified persons in accordance with specified parameters and timeframes. Page 115.
Recommendation 34: ***Consolidated approvals*** *	**Issue:** Need to permit consolidated hearings of EA and other approvals.	The MOE should amend regulations under the *Consolidated Hearings Act* to facilitate one consolidated hearing for matters subject to EA and other approvals, (e.g., *Environmental Bill of Rights, Aggregate Resources Act, Ontario Water Resources Act*). Page 119.
Recommendation 35: ***Relationship between EPA and EA*** *	**Issue**: Need to permit consolidated hearings of EA and EPA approvals.	The MOE should amend O.Regs. 206/97 and 207/97 to remove the automatic prohibition on EPA and OWRA hearings to ensure that: (a) mandatory and/or discretionary hearings under the EPA and OWRA may be held in relation to waste disposal sites, waste management systems and sewage works which are subject to approval (or exempted) under the EA Act, depending upon the environmental significance (i.e. risks and benefits) posed by such facilities; and (b) joint board hearings under the EA Act, EPA and/or OWRA are available pursuant to the *Consolidated Hearings Act* where applicable. Page 119.
Recommendation 36: ***Refinements to the Electricity Projects Regulation and Guide***	**Issue**: Need to review and refine Electricity Projects Regulation and Guide.	The MOE should post a notice on the EBR Registry to solicit public comment on changes to the Electricity Projects Regulation and Guide proposed by Section 5 of the Energy Table Report. Page 122.

Recommendation 37: ***Refinement to Municipal Class EA***	**Issue:** Need to facilitate municipal transit projects.	In collaboration with the Municipal Engineers Association (MEA), the MOE should immediately initiate amendments to the MEA Class EA to include municipal transit projects. Page 122.
Recommendation 38: ***Research undertakings***	**Issue:** Need to review and revise research exemption category	The MOE should review and revise the "research" exemption under the EA Act to include emerging green technologies, and to clearly define appropriate parameters on "research" undertakings (i.e. temporal limits or operational capacity). Page 123.
RECOMMENDATIONS REQUIRING FURTHER CONSULTATION/REVIEW		
Recommendation 39: ***General Regulation***	**Issue:** Need to revise Regulation 334	The MOE should consider revising Regulation 334 in accordance with suggested changes found in Volume II. Page 124.
Recommendation 40: ***Municipal EA community/advisory liaison committees***	**Issue:** Potential role for municipal EA community advisory committees in EA process.	The MOE should request that the advisory body consider the option of creating local or regional standing EA advisory and/or liaison committees, with a role in the EA development and review process (for projects subject to Class EAs as well as for individual EAs) within delineated study areas. Page 125.
Recommendation 41: ***Incorporating master plans into EA process*** *	**Issue:** Need to review relationship between master plans and EA process.	The MOE should request the advisory body to review the relationship between infrastructure master plans (e.g., transportation) and the EA process. Page 126.

ACKNOWLEDGEMENTS

The Executive Group would like to express its sincere thanks to the many people who helped in the completion of this work. First, the Executive Group greatly appreciates the effort of the members of the three Sectoral Tables. Their effort to complete their reviews and reports, along with providing important and valuable recommendations for EA reform, were instrumental and informative.

The Executive Group would also like to express its sincere gratitude to Christopher Gore and Anne Wordsworth for their untiring efforts and stellar work in recording, deciphering and organizing the many comments and statements made by the Executive Group and Sectoral Tables to produce the interim, sectoral and final reports.

Throughout this effort, the Executive Group has also been greatly assisted by various Ministry staff. In particular, sincere appreciation goes to Blair Rohaly, Project Manager, who provided invaluable support to the Executive Group and Sectoral Tables throughout this process. Thanks also go to Ministry staff that on several occasions met with the Executive Group, attended Sectoral Table workshops, and otherwise provided important feedback, information and support. These include: Joan Andrew, Catherine Brown, Jim O'Mara, Myra Hewitt, Andj Dominski, Susan Morgan, and many other staff who provided comments and feedback. Thanks are also extended to Lois Corbett for ongoing assistance.

Lastly, much thanks to those students who volunteered their time to help with the Advisory Panel's work: Laura Burnham, Adam Fair, and Audrey Kapeleris.

CHAPTER 1: INTRODUCTION AND OUTREACH

In June 2004, the Provincial Government approved the creation of a Minister's Advisory Panel (consisting of an Executive Group and three Sectoral Tables) to provide recommendations on improving Ontario's environmental assessment (EA) program, particularly as it relates to three sectors: waste, energy and transit/transportation. The Advisory Panel was established under the authority of section 31 of the *Environmental Assessment Act* (EA Act). According to the Advisory Panel's Terms of Reference (see Progress Report, Volume II), the Advisory Panel's mission was to address the following goals:

a. **Revitalize** the EA program providing clear, prescriptive rules for appropriate environmental planning and decision-making.
b. **Rebalance** EA decision-making by setting out clear roles for all participants.
c. **Refocus** the EA process such that the level of assessment/review of proposed undertakings reflects the potential that proposals have to positively or negatively impact the environment as defined by the EA Act.

Beyond these general goals, the Minister also sought the Advisory Panel's advice on how to ensure that undertakings that provide positive contributions to Ontarians' quality of life (i.e. public transit or clean energy generation options) do not face major obstacles or delays in the existing EA program.[1] Related to this is the concern that the present EA program lacks focus on basic objectives: sustainability, predictability, clarity, fairness and consistency. To address such concerns, the Executive Group developed a "Challenge Statement" (see Volume II) to guide the Advisory Panel's deliberations regarding potential changes to Ontario's EA program.

The Executive Group's work has been predicated on the Minister's clear commitment to EA, which we share. In our view, the current debate is not whether Ontario needs a statute-based EA program; instead, the question is how Ontario's EA program can be strengthened and improved in order to reflect the above-noted goals.

To assist the Executive Group with its work, the Minister also appointed individuals to three Sectoral Tables in relation to waste, energy and transit/transportation.[2]. The three Sectoral Tables have provided feedback and specific recommendations to the Executive Group, which have been carefully considered and discussed within this Report. The Sectoral Table Reports submitted to the Executive Group are attached to this Report. The appendices from the Sectoral Table Reports, along with the appendices to this Report, are presented in a second volume.

[1] For example, in the Ministry of Environment's April 5 2004 media release, the Ministry states that "The Ministry of the Environment will set up an advisory panel of expert practitioners to develop proposals on possible approaches to improving the EA process for waste management facilities, transit and transportation projects and clean energy facilities." Likewise, in a June 25 2004 media release, Minister Dombrowsky stated: "As part of our commitment to create clean, liveable communities, our government promised it would bring improvements to the province's environmental assessment process".

[2] Members of the Executive Group are identified in the Executive Summary of this Report. Members of the Sectoral Tables are identified in the Sectoral Panel Reports (Appendix 3). Together, the Executive Group and Sectoral Tables constitute the Advisory Panel. Advisory Panel membership reflected a range of stakeholder groups and perspectives including: the academic community; the legal community; the affected industries; urban and rural municipalities; the non-governmental environmental community; and the environmental consulting community.

EXECUTIVE GROUP PROCESS

The Executive Group convened an introductory session in July, but began its detailed work in August 2004. Since the middle of August, the Executive Group has met on a weekly and sometimes twice-weekly basis. Executive Group meetings have included regular contact with the Minister's office and Ministry of the Environment (MOE) staff, including representatives from Legal Services Branch, Strategic Policy Branch, and Environmental Assessment and Approvals Branch (EAAB).

On October 7, 2004, the Executive Group submitted a Progress Report to Minister Dombrowsky, describing the status of work to date and making initial observations on EA reform. In this Report, the Executive Group also forwarded two initial recommendations from the Transit/Transportation Table. A copy of the Progress Report is included in the second volume of this Report.

Sectoral Tables commenced their formal meetings and work at the end of September. One or two members of the Executive Group participated in Sectoral Table meetings whenever possible. Initially, the Sectoral Tables were asked to consider three central questions: 1) what concerns about EA affect your sector; 2) how can green projects or projects with the least environmental impact be facilitated through the EA process; and, 3) what policies and procedures should be created or changed to improve EA? Several other related issues followed from these questions, such as: criteria for assigning the appropriate level of assessment (e.g., thresholds and bump-ups); public participation; public versus private undertakings; timelines; and training. Sectoral Tables used these and other sector-specific issues as the basis for discussion at workshops held in early November, where various interested public and private stakeholders participated to express their views on EA reform.

The Waste Table held its workshop on Friday, November 5th, which was attended by 44 stakeholders. The Energy Table met on Monday, November 8th, with a number of stakeholders attending, and the Transit/Transportation meeting held on Wednesday, November 10th, was attended by 15 stakeholders. Issues discussed at the workshops were documented and used by Sectoral Tables to inform the content of their final reports to the Executive Group.

During this time, the Executive Group also received a number of submissions from individuals, groups, municipalities and other stakeholders in response to a notice posted on the *Environmental Bill of Rights* (EBR) Registry in order to solicit public input.

Drafts of this Report have been circulated to all members of the Sectoral Tables for review and feedback. The Executive Group wishes to assure Sectoral Table members and other participants in this review process that all of their comments and suggestions were carefully considered by the Executive Group, whether or not those comments and suggestions are specifically referenced in the body of this Report.

EXECUTIVE GROUP'S VISION FOR EA IN ONTARIO

In essence, EA is environmental planning and decision-making that is anticipatory, integrated, and iterative. As noted by Ontario's *Green Paper* that preceded the EA Act, environmental planning is aimed at identifying and evaluating environmental concerns at the earliest stages of the decision-making process:

> However, this [existing] legislation has not provided the means of ensuring that all environmental factors are considered in a comprehensive and coordinated fashion, including public input, before major projects and technological developments proceed. It is the intention of the Government to encourage the further development within its planning process, of an environmental conscience...
>
> A procedure should be developed to bring about an integrated consideration at an early stage of the entire complex of environmental effects which might be generated by a project…
>
> With these factors in mind, the Government has indicated its intention to establish a comprehensive system of assessment and evaluation of the environmental significance of activities within both the public and private sectors.[3]

In general terms, an EA program should systematically gather and evaluate information about a proposed undertaking and its alternatives so that an informed decision can be made,[4] in an open and consultative manner, as to whether the undertaking should be permitted to proceed, and whether terms and conditions are required to maximize public benefits and minimize (or avoid) adverse environmental impacts. To achieve this intent, an EA program should have a broad scope that encompasses pollution control,[5] resource management and land use planning considerations:

> Environmental assessment is unlike other environmental laws in the breadth of its procedural requirements. For example, it encompasses the control of pollutants, resource use, and approvals, as well as land-use planning laws. Environmental assessment also goes beyond discharge laws by making provision to examine more fully the effects of emissions, including social and cultural effects, and cumulative effects. In relation to land-use planning laws, EA includes consideration of zoning requirements, but also makes provision to examine alternative sites to determine a preferred location in light of

[3] MOE, *Green Paper on Environmental Assessment* (Sept. 1973), pages 1, 5.

[4] The Espoo Convention emphasized the important role of EA "as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made ..." Source: "Convention on Environmental Impact Assessment in a Transboundary Context" of UNECE, the United Nations Economic Commission for Europe (Espoo Finland – February 25, 1991), signed by Canada in 1991 and ratified in 1998.

[5] "Environmental assessment (EA) is one of the most important tools available for the prevention of environmental harm": source - "Access to Courts and Administrative Agencies in Transboundary Pollution Matters," *North American Environmental Law and Policy* (vol.4, 2000, NAFTA Commission for Environmental Cooperation) at p.265, section 3.2.1.

potential advantages and disadvantages. In short, EA is intended to be a thorough process to address all fundamental environmental issues.[6]

Weighed against these benchmarks, the Executive Group has concluded that Ontario's EA Act is fundamentally sound but requires minor legislative, regulatory and administrative fine-tuning in order to more fully achieve the *Green Paper*'s objective of establishing a "comprehensive system of assessment" and to revitalize, rebalance and refocus the EA process. Therefore, the Executive Group is not calling for the wholesale re-writing of the EA Act.

Instead, the Executive Group has identified some relatively modest amendments to the EA Act (i.e. expansion of the Minister's authority to make regulations and policy guidelines) to more fully realize the Act's role as an environmental planning and decision-making regime. Since the Executive Group's recommendations do not necessitate a fundamental restructuring of the legislative framework, existing statutory stages under the EA Act (e.g. terms of reference, EA preparation, government review, and approval decisions) will remain generally intact for both individual EAs and parent Class EAs.

At the same time, however, the Executive Group has identified a significant "disconnect" between the provisions of the EA Act (especially the section 2 statement of purpose), and the actual "on the ground" delivery of Ontario's EA program. In particular, the Executive Group has concluded that there are significant policy gaps, procedural inconsistencies, and administrative shortcomings that must be addressed as soon as possible. Accordingly, the bulk of the Executive Group's recommendations involve regulatory, policy and administrative reforms that are necessary to ensure that EA program remains viable and relevant as Ontarians face the challenges and opportunities of the 21st century.

The Executive Group's suggested reforms are responsive to the Minister's request that the EA Advisory Panel develop recommendations that would 'revitalize, rebalance and refocus' Ontario's EA planning and decision-making process, while also ensuring the timely approval of undertakings which provide positive contributions to Ontarians' quality of life. However, in attempting to fulfill these goals, the Executive Group quickly realized that its recommendations would have to resolve competing considerations and dynamic tensions within Ontario's EA program.

On the one hand, there is a need for an EA program that is expeditious and efficient, and that does not unduly delay necessary undertakings. On the other hand, the EA program must be robust and consultative in nature, and should facilitate undertakings that provide environmental benefits, mitigate or avoid negative biophysical and socio-economic impacts, and support livable communities and a strong provincial economy. Accordingly, after carefully considering the Sectoral Tables' Reports (Appendices 2-4), input from MOE staff, and submissions from the public regarding EA reform, the Executive Group developed a series of key recommendations, each of which we believe strikes an appropriate balance between a "fast" EA process and a "rigorous" EA process. A key mechanism for ensuring this balance is the application of clear, consistent and transparent rules.

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[6] W. Tilleman, "Environmental Assessment", in Tilleman et al. (eds.), *Environmental Law and Policy* (3rd ed., 2003), at page 216.

It is important to note that the Executive Group's discussions and recommendations have benefited considerably from the intensive work that culminated in the Reports of the three Sectoral Tables – Waste, Energy and Transportation. Many of the recommendations from the Executive Group flow directly from, or were influenced by, the recommendations made by these Tables. In formulating the recommendations in this Report, the Executive Group has focused primarily on the broader EA issues and concentrated on the goal of reforming the overall effectiveness of the EA program and decision-making process. Consequently, the Executive Group was not able to thoroughly evaluate or include in this Report some sector-specific recommendations from the Tables that relate directly to EA processes for waste, energy and transportation projects. The Executive Group suggests that, in addition to the recommendations made in this Report, the sector-specific recommendations that have been made by the Sectoral Tables should be considered by the Minister, following further consultation.

The cornerstone of the Executive Group's vision for EA reform, and the central innovation of this Report, is the first five recommendations proposed in this Report and their link to all subsequent recommendations. These primary recommendations articulate the need for: 1) overarching general EA principles; 2) sector-specific EA policies; and, 3) sectoral EA procedures which are predicated upon the nature and extent of the anticipated benefits and negative impacts of the undertakings in each sector, and which prescribe an appropriate EA planning and decision-making process in order to evaluate the significance of those outcomes. Our proposed procedures create rules that permit the interests of all major stakeholders to be respected. Proponents get expeditious timelines and increased efficiency; members of the public get more notice and resources and thus increased effectiveness. Proponents get focus and predictability; members of the public get increased rigour. For government, the procedures represent a shift from broad discretion to clear rules. When implemented, these rules will increase and improve implementation of provincial policy. Less discretion and more rules will provide more timely decision-making and thus greater efficiency of human resources. Less discretion and more rules will also provide increased transparency. Put more colloquially, the proposed reforms deliver to government more steering and less rowing.

The Executive Group concludes that these first five interrelated recommendations form the critical foundation upon which all other EA reforms must be built.

Since Ontario's EA program began in the mid-1970s, there has existed considerable debate and controversy surrounding various legislative, regulatory and administrative issues under the EA Act. As a result of our deliberations, the Executive Group can report that this debate still exists among some proponents and EA stakeholders at the present time. Nonetheless, there appears to be strong support for the general package of recommendations being proposed by the Executive Group, as discussed below. It should be further noted that this reform package represents a carefully crafted set of integrated recommendations, rather than a "wish list" of unrelated, stand-alone suggestions that can be selectively or independently pursued.

For example, in making recommendations for sector-specific policy, the Executive Group recognizes that in order to achieve consistency across sectors and within the EA program at large (an issue still debated by some sectoral stakeholders), a set of general EA principles are needed upon which all new policy and procedural frameworks for each sector could be built. In other

words, overarching EA principles should set the general direction for the development of more detailed sector-specific policies and procedural frameworks, which the Executive Group recommends should be drafted at first instance by working groups consisting of proponents, interested stakeholders, and government representatives.

However, given the public importance of the foregoing issues, the Executive Group also recommends the creation of a provincial advisory body to assist in the development of EA reforms, as well as to address other broad EA-related matters at the request of the Minister.

Recognizing the limited availability of provincial revenue to fund the provincial advisory body, the Executive Group has identified the need to introduce a system of EA fees to generate revenue that can be specifically directed to EA activities undertaken by the advisory body, EAAB, Environmental Review Tribunal (ERT), or other persons or agencies. Furthermore, while some of our recommendations will require more resources than are currently applied to EA, several other recommendations will save considerable resources and time for all participants in the process. In general, increasing the clarity of relevant policies and the transparency and predictability of the process will save the Ministry, proponents and other participants both money and time currently spent navigating an often confusing and unpredictable set of procedures under the existing EA program. In other words, the cost of doing nothing or maintaining the status quo will not only cost time and money, but will inhibit investment and preclude the many ancillary benefits associated with an improved EA process (especially for green projects).

As these and other examples illustrate, the Executive Group's recommendations are carefully tied together as an integrated reform package which should not be implemented in a piecemeal or disjointed manner.

In summary, the Executive Group has made a concerted effort to articulate and build a system of recommendations which fully achieve the important goals of the Minister, and which address the ongoing tension between different aspects of EA in Ontario. Hence, the Executive Group's vision for EA in Ontario is an environmental planning and decision-making system that is both timely and rigorous, driven by sound principles and policies, and includes consistent and predictable procedures to facilitate undertakings that contribute to the "betterment of the people of Ontario" by providing "protection, conservation and wise management of the environment" (see section 2 of the EA Act). The Executive Group believes that our recommendations, if implemented in their entirety, will help achieve this vision.

Transitional Considerations

The Executive Group's key recommendations will result in some significant changes in the content, structure and delivery of Ontario's EA program. The Executive Group also recognizes that the legislative, regulatory, policy and administrative reforms outlined in this Report will take time to properly develop and fully implement. These reforms also have resource, staffing and other institutional implications for the Ontario government, and raise issues about whether some of the changes (i.e. EA principles and sector-specific policies) can be retroactively applied to undertakings currently being processed under individual EA or Class EA requirements.

To ensure fair, orderly and timely implementation of the reforms, the Executive Group suggests that it may be necessary to phase-in the reforms in distinct stages or over reasonable timeframes. While the Executive Group believes that its recommended reforms can and should be implemented as expeditiously as possible, we also recognize that full transition to the improved EA regime cannot occur overnight.

For undertakings that are "in the mill" (i.e. proposed but not yet approved or commenced) when these reforms become operative, the general principle should be that procedural changes are immediately applicable (i.e. revised consultation requirements), while substantive changes are not (i.e. need for consistency with provincial policy). However, any undertakings proposed after the effective date of the changes should be fully subject to all new procedural and substantive reforms in place at that time.

The Executive Group suggests that there are a number of transitional tools that may be available to the Ontario government to ensure smooth and swift implementation of the recommended reforms. These tools include the following options:

- with respect to legislative amendments, it is possible to allow a reasonable period of time between Royal Assent and the actual proclamation into force;
- with respect to regulatory amendments, it is possible to quickly draft high-priority reforms (i.e. changes to O.Reg.116/01, O.Reg.206/97, or Regulation 334), but defer the effective date of such changes;[7] and
- with respect to amendments to existing instruments such as Class EAs, it is possible to pursue discrete changes forthwith (i.e. adding transit projects to the municipal Class EA), but defer other broader types of changes to when the Class EAs come up for periodic review or renewal.

The need for phased-in transition, in turn, requires accountability mechanisms to ensure that the suggested reforms are effectively and efficiently implemented. In this regard, the Executive Group anticipates that the proposed EA advisory body (see Recommendation 6) should play a key role in reviewing and assisting in the transition. We further anticipate that the Environmental Commissioner of Ontario will monitor and report upon progress in implementing EA reforms, especially since the Environmental Commissioner's annual reports have frequently identified the need for improvements to the EA program. The Executive Group also suggests that the Ontario government should establish an inter-ministerial implementation team (led by MOE) that is given specific responsibility to oversee and coordinate the implementation of the reforms set out in this report.

ORGANIZATION OF REPORT

This Report is organized into five chapters. Chapter 2 provides a brief overview of the EA program in Ontario, as well as a history of EA reform efforts. While some readers may be familiar with this material, the Executive Group felt it was important to include this overview in

[7] For example, the EA Act could be amended to expressly authorize regulations in relation to EA application fees, and an appropriate fee regulation could be drafted but not take effect until the legislative amendment is proclaimed into force: see section 5 of the *Interpretation Act*.

order to place this Report in its proper legislative and historical context. Chapter 2 ends by presenting a series of issues and questions relating to EA which have, in part, led to much of the work of the Advisory Panel.

Chapter 3 represents the most important part of this Report. Titled "Key Recommendations for Immediate Action", this chapter identifies the issues and recommendations which members of the Executive Group (and, to a large extent, the Sectoral Tables) believe are the most critical issues to be addressed in order to make fundamental improvements to EA in Ontario. More importantly, the Executive Group believes that if these recommendations are not prioritized and treated as a foundation upon which all other recommendations are based, then the fundamental improvements to EA being sought by the Minister and stakeholders *will not be achieved*.

Recommendations in Chapter 3 represent actions or measures that the Executive Group believes have general applicability to all three sectors under specific review in this Report, but also for EA in general. Hence, in many cases, the ideas and specific text from the Sectoral Table Reports were directly used in formulating individual recommendations. We make this point here in lieu of doing it for each recommendation. Chapter 3 is organized by issues framed as general topics or categories. For most issues, the subject is first briefly described, then followed by a listing of the specific recommendation(s) relating to the issue, followed by a more detailed textual discussion of the issue. The recommendations in Chapter 3 correspond to the recommendations presented in the Executive Summary.

In Chapter 4, we present recommendations which the Executive Group has identified as requiring 'further consultation or review'. These constitute issues which the Executive Group was not able to consider adequately given the time available, or which will require a good deal of further reflection and stakeholder input.

Chapter 5 concludes the Report, with subsequent appendices containing a glossary of EA terms, and copies of the core content of the Sectoral Table Reports.

In addition to this main Report, a second volume has been created. This volume contains several important additional materials, which include draft sectoral procedural charts and draft policy guidelines for each sector. The Executive Group believes these draft procedures and policies should serve as a very strong and important starting point for the work of sectoral working groups. As well, Volume II includes Sector Table responses to our Draft Final Report, submissions received from the public relating to EA review, the Executive Group's Interim Report (which also contains the Terms of Reference for the Advisory Panel), and appendices to Sector Table Reports.

CHAPTER 2: OVERVIEW OF EA AND HISTORY OF REFORM

OVERVIEW OF EA

Ontario's EA Act was enacted in 1975, and was proclaimed in force in 1976. The EA Act was widely regarded as a pioneering piece of Canadian legislation, based largely on the EA obligations set out in the United States' *National Environmental Policy Act* of 1969. Like NEPA, the focus of Ontario's EA Act has been on identifying and selecting a preferred alternative from among a range of reasonable alternatives, having regard for the environmental advantages and disadvantages of the proposed undertaking and the alternatives.[8]

Another key feature of Ontario's EA Act is the broad definition of "environment", which is generally defined as the ecological, social, cultural, economic and built environments.[9] The stated purpose of the EA Act is "the betterment of the people of Ontario" by providing for the protection, conservation and wise management of the environment. The EA Act remained largely unchanged from 1976 to 1996. However, in January 1997, a number of amendments to the EA Act came into force as a result of the passage of Bill 76 (the *Environmental Assessment and Consultation Improvement Act*). The expressed intention of Bill 76 was to make EA "less costly, more timely and more effective,"[10] although it is debatable whether these goals have been achieved to date, as described below.

At the present time, the EA Act is administered by the Minister of the Environment, who is assisted in this regard by the EAAB established under the Ministry's Operations Division.

In broad terms, the EA Act applies to "undertakings" (as defined by the Act) proposed by public sector proponents (e.g. municipalities or provincial ministries), unless such undertakings have been exempted from the Act. The EA Act does not generally apply to private sector undertakings, unless such undertakings have been specifically designated by regulation as undertakings to which the Act applies. For example, as a matter of Ministry policy, large waste

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[8] Under the U.S. NEPA, "the analysis of alternatives is the 'heart' of the impact assessment process. As noted earlier, the alternatives analysed should always include the 'no action' alternative. It has also been held ... that an agency is required to consider reasonable alternative means to the same objective even if those alternatives are outside the agency's authority – e.g. energy conservation as an alternative to building a new power plant or on-shore gas development as an alternative to offshore oil leasing." Source: p.46, section 2.2.4 of "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation). Under the *California Environmental Quality Act,* "agencies have a 'strong duty' to consider alternatives and must give reasonable substantive consideration to alternatives in light of the nature of the project. The 'no action' alternative should be examined if there are no other feasible alternatives" (p.52, section 3.1.1).

[9] This broad definition can be found in other jurisdictions as well. For example, in New York's *State Environmental Quality Review Act*, environment includes, among other things, "'existing community or neighbourhood character' and population concentration, distribution, or growth, in addition to the physical, historical and aesthetic environment." Source: p.53, section 3.2 of "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation).

[10] Levy, Alan. "A Review of Environmental Assessment in Ontario", *Journal of Environmental Law and Practice*, Vol. 11, No. 2, June 2002, pp. 178.

disposal facilities proposed by the private sector (i.e. landfills or incinerators) have generally been designated as undertakings subject to the EA Act.

Where an undertaking is subject to the EA Act and requires the preparation of an individual EA, the proponent is responsible for preparing technical studies, undertaking public consultation, and submitting EA documentation to the Ministry. At the present time, Ontario's individual EA process generally consists of four main steps:

- Preparation and approval of "Terms of Reference" to direct the content and conduct of the EA process for the proposed undertaking;
- Preparation and submission of the EA consisting of the studies, reports and research required by the Terms of Reference;
- Government and public review of the EA submitted by the proponent; and
- The Minister's decision on the proposed undertaking (i.e. approve, reject, or refer to mediation or a public hearing before the Environmental Review Tribunal).

It should be noted that each of the foregoing steps is to be carried out with notice and comment opportunities for First Nations, communities and stakeholders who are interested in, or affected by, the proposed undertaking.

It should be further noted that Part II of the EA Act provides statutory authority for the approval of "Class EAs", which set out streamlined planning procedures and documentary requirements for certain classes of projects (e.g., provincial roads, municipal projects, GO transit facilities, etc.). If subject to an approved parent Class EA, the proponent of a proposed project follows the prescribed planning/documentary requirements set out in the Class EA without preparing an individual EA, although the Minister has authority to issue an order "bumping up" a project to an individual EA if warranted in the circumstances.

At the present time, it appears that the vast majority of projects and activities subject to the EA Act are processed under the auspices of Class EAs rather than through individual EAs. Moreover, it appears that after the Bill 76 reforms took effect, only two individual EA matters were referred to hearings before the Environmental Review Tribunal. Virtually all other individual EA applications have been decided (and approved) by the Minister without the benefit of any public hearings.

HISTORY OF EA REFORM IN ONTARIO

Despite the strengths (and successes) of the EA Act, it has been recognized over the past two decades that there are opportunities to improve and enhance Ontario's EA program. For example, proponents and the public at large have expressed concerns about the timing, cost, inconsistency, and uncertainty within the EA process. To address these and other concerns, there have been a number of important initiatives in Ontario aimed at reforming the EA program.

In 1988, for example, the Ontario government established the Environmental Assessment Program Improvement Project (EAPIP), which was followed by the creation of an EA Task Force in 1989. This Task Force issued a 1990 discussion paper on EA reform, and the Task

Force's recommendations were subject to public consultation carried out by the Environmental Assessment Advisory Committee (EAAC). In 1991 and 1992, EAAC released two reports that called for legislative and administrative changes to Ontario's EA program.

In response, the Ontario government issued a 1993 report that adopted some – but not all – of EAAC's suggested administrative reforms, and generally deferred the EAAC proposals regarding legislative change. It should also be noted that during the early 1990s, the EA Board [now the Environmental Review Tribunal] undertook consultation and implemented changes aimed at making pre-hearing and hearing procedures more timely, effective, and efficient.

It was against this backdrop of EA reform efforts that Bill 76 was enacted by the Ontario government in 1996. Among other things, Bill 76 created the new "Terms of Reference" requirement, imposed a mandatory duty upon proponents to undertake public consultation, and entrenched Class EAs on a firm legislative basis. While these reforms enjoyed some public and proponent support, there were various concerns expressed about the high degree of Ministerial discretion (i.e. political intervention) under the EA Act, particularly in relation to EA content and public hearings. Stakeholders also expressed concern about the EA consequences of the Ontario government's decision to allow the *Intervenor Funding Project Act* to expire without renewal in 1996. While in effect, this Act had provided a legal mechanism for eligible public interest representatives to obtain funding to participate meaningfully in EA hearings.

During the past seven years after Bill 76 came into effect, it appears that many long-standing concerns about Ontario's EA program have not been addressed adequately or at all. These concerns include the following issues and questions:

- what is the overall purpose of the Ontario EA program: to simply mitigate environmental impacts or to secure environmentally sustainable benefits?
- should the nature and extent of EA requirements be dependent upon the degree of environmental risks and benefits posed by undertakings?
- should prescriptive regulations, siting standards, policy guidelines or other instruments be developed under the EA Act to direct the planning and decision-making process?
- when and how should undertakings get exempted from the EA Act?
- when and how should the EA Act apply to private sector undertakings?
- when and how should EA planning and decision-making become integrated with other land use planning or resource management regimes?
- should individual EAs delve into technical design or operational details that are traditionally addressed under other regulatory statutes?
- is it possible to shorten (or extend) timelines under the EA process without compromising environmental protection and public consultation requirements?
- how can First Nations, communities, and stakeholders access the required technical or legal expertise to participate meaningfully in the EA process?
- when is it appropriate to refer an individual EA matter to mediation or a public hearing?
- when is it appropriate to "bump-up" a Class EA project to individual EA?
- who should decide requests related to mediation, hearings, or bump-ups?

- should Class EAs be restricted to small-scale projects that recur frequently, pose relatively minor environmental impacts, and are generally amenable to well-established mitigation measures?
- what is the appropriate role and function of the Environmental Assessment and Approvals Branch?

The continued debate over these and many other key questions prompted Ontario's Environment Minister to establish the EA Advisory Panel in 2004.

CHAPTER 3: KEY RECOMMENDATIONS FOR IMMEDIATE ACTION

ISSUE: GENERAL NEED FOR PRINCIPLES, POLICIES AND PROCEDURES

In general terms, Ontario's EA program does not adequately identify, prioritize or expedite the planning or approval of "green projects" within the waste, energy or transportation sectors. While some current EA Act mechanisms (i.e. Class EA schedules) attempt to do so to a limited degree, there is room for considerable improvement in order to better facilitate "green projects" in particular, and to more effectively achieve the EA Act's purpose in general.

RECOMMENDATION 1: GENERAL NEED FOR PRINCIPLES, POLICIES AND PROCEDURES

The *Environmental Assessment Act* (EA Act) should deliver major improvements across three sectors – waste, energy, transportation – by immediately addressing three fundamental matters: (1) general EA principles within MOE policy guidelines on how to interpret and apply the purpose of the Act to specific undertakings; (2) provincial policies for each sector on what factors contribute to "green" undertakings and thereby merit priority compared to other undertakings in the sector; and (3) prescriptive sector-specific procedures which correlate EA requirements with the degree of societal benefits and environmental risks associated with an undertaking.

DISCUSSION

Given the broad purpose of the EA Act (see discussion below), the Executive Group strongly believes that the EA program should be redesigned and implemented in a manner that more effectively achieves public policy objectives. One such objective articulated by the Environment Minister and endorsed by the Executive Group involves the need to ensure that "green projects" (i.e. public transit, renewable energy, waste diversion) are not unnecessarily delayed or precluded by inappropriate EA planning and decision-making requirements.

To achieve this objective, the Executive Group has developed a series of key recommendations that are constructed upon three fundamental building blocks: (1) the development of general EA principles to provide provincial direction and guidance in EA planning and decision-making at large; (2) the development of sector-specific policies that are consistent with general EA principles, but which provide a greater level of detail on how the principles are to be implemented in each sector; and (3) the development of sector-specific procedures that clearly prescribe the nature and extent of EA requirements on the basis of the ecological and socio-economic benefits and risks associated with proposed undertakings within the sector.

Having described the conceptual basis for its key recommendations, the Executive Group provides greater detail on each of these three fundamental components in the following sections of this Report.

ISSUE: EA ACT PRINCIPLES

The EA Act states that its purpose is to achieve the "betterment" of Ontarians as well as the "protection, conservation, and wise management" of the environment. However, aside from this broad statement of purpose, the MOE has not articulated explicit EA principles to ensure that EA planning or decision-making actually achieves the purpose of the Act. The ongoing absence of overarching EA principles promotes uncertainty, undermines accountability, unduly politicizes the process, and subverts the potential effectiveness of the EA Act in securing societal benefits and environmental protection.

RECOMMENDATION 2: EA ACT PRINCIPLES

In order to ensure that all EA participants – proponents, the public and decision-makers – have a common framework to assess specific undertakings and assign preferences among alternatives, it is essential that more attention be devoted to the purpose of the EA Act. The purpose seeks the "betterment of the people" of Ontario and requires "protection, conservation and wise management in Ontario of the environment". Based on this purpose, a set of general EA principles should be articulated in EA Act policy guidelines for specific application to all decisions made under the EA Act.

DISCUSSION

General

The general principles suggested by the Executive Group are based on a desire to create an EA regime in Ontario which encourages and supports undertakings which produce social, economic and environmental benefits, while also providing a clear and understandable framework for review of undertakings that may impact the environment in a negative way. Therefore, it is important to clearly identify a set of overarching principles which can encourage or facilitate these benefits from the outset.[11] This parallels sector-specific recommendations articulating the need to have overarching provincial policy which establishes the need for specified projects or facilities within a particular sector. Having an overarching set of clear principles to guide EA planning and decision-making serves to benefit Ministry staff, proponents and other EA participants, as each will be working from the same reference point when considering and evaluating proposed undertakings and EA documentation under the EA Act. Moreover, if broadly applied under the EA Act, these general principles provide a succinct and consistent benchmark for evaluating all aspects of EA planning and decision-making in Ontario (i.e. decisions respecting approvals, exemptions, designations, bump-ups, etc.).

Perhaps more importantly, the general EA principles advocated by the Executive Group do something that has yet to be done for Ontario's EA regime: they articulate, reinforce and implement the two central goals already articulated in the EA Act's statement of purpose (i.e.

[11] See Gibson, Robert B. "Specification of sustainability-based environmental assessment decision criteria and implications for determining 'significance' in environmental assessment". A paper prepared for the Research and Development Monograph Series, 2000. http://www.ceaa-acee.gc.ca/015/0002/0009/print-version_e.htm. Accessed, July 14, 2004.

that EA seeks to achieve both societal betterment and environmental protection). Accordingly, the Executive Group further explores in detail the EA Act's statement of purpose in this Report (see below). The Executive Group also notes that its recommended EA principles are strongly informed by Sectoral Table recommendations, as well as by current and proposed environmental commitments made by the Ontario government and already entrenched in laws, policies and guidelines under other planning or regulatory regimes (i.e. the Provincial Policy Statement issued under the *Planning Act*, the MOE Statement of Environmental Values issued under the EBR, the legislative purposes of the EBR, etc.).

In addition, the Executive Group received submissions from the public that affirmed the importance of achieving the purpose of the EA Act. For example, one commentator advised the Executive Group as follows:

> In undertaking the current review to identify improvements to Ontario's EA process, the Panel is encouraged to ensure that the original purpose of the EA process is enhanced and achieved. Recent experience indicates that proponents are focusing on how to remediate the negative impacts associated with their projects more than they are considering alternatives to their undertaking that would avoid the environmental impacts in the first place.
>
> Often, the focus of the environmental assessment process is the preparation of the environmental assessment document rather than on ensuring sound environmental planning.

With such comments in mind, the Executive Group has attempted to clarify the scope and content of the EA Act's statement of purpose, and has identified various means by which to more effectively achieve the legislative purpose.

Purpose of the EA Act

The purpose of the EA Act is stated in section 2 as follows:

> The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.

The only term in this statement of purpose to receive definition is the "environment". The EA Act broadly defines the "environment" as follows:

> "environment" means,
> (a) air, land or water,
> (b) plant and animal life, including human life,
> (c) the social, economic and cultural conditions that influence the life of humans or a community,
> (d) any building, structure, machine or other device or thing made by humans,

(e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
(f) any part or combination of the foregoing and the interrelationships between any two or more of them,

in or of Ontario;

Beyond this defined term, the purpose section appears to include two major goals which receive no definition, as follows:

Goal (1): "the betterment of the people of the whole or any part of Ontario";

Goal (2): "providing for the protection, conservation and wise management in Ontario of the environment".

Each of these goals merits more detailed examination, as set out below.

Goal (1) makes three fundamental claims. The first claim is that the EA Act is about *betterment* of the people (i.e. obtaining positive benefits, advantages or improvements). This claim may be contrasted with the view of some EA participants that EA is primarily about *preventing or avoiding* adverse effects. The second claim is that the EA Act is about betterment of the *people*. This claim may be contrasted with the idea that EA is primarily about the biophysical environment and not human interests. The third claim is that the EA Act is about bettering people *of the whole or any part of Ontario*. This claim makes the point that the EA Act may better the people of the whole of Ontario, and it may also better the people of any part of Ontario, but it need not better both the whole *and* the part *at the same time*. This third claim demands attention because, put simply, it suggests that the Act allows division of the people of Ontario into a whole and parts such that a decision may benefit the whole people, but harm people of a part of Ontario or, conversely, benefit people of a part of Ontario, but harm the whole. We return to this controversial trade-off below.

Goal (2) also makes three fundamental claims. The first claim is that the EA Act is about providing *protection* of the environment. In general, "protection" means preserving the status quo. This scope of this claim may be compared with the purpose of the *Environmental Protection Act* (EPA), which is about the protection of the *natural environment* (generally defined in the EPA as the air, land and water of Ontario). Thus, a key difference between these two Acts is in their respective definitions of "environment" and "natural environment". For example, returning to the EA Act definition of the "environment" set out above, the EPA definition of the "natural environment" encompasses clauses (a) and (f) only, namely "air, land or water" and their parts, combinations, and interrelationships. Thus, by comparison to the EPA, the EA Act is about protecting not merely the *physical* environment, but also the *biological* environment, the *human social* environment, and the *human built* environment, among other things.[12]

[12] The Espoo Convention defines 'impact' to mean "any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-

The second claim in Goal (2) is that the EA Act is about providing *conservation* of the environment. This is a different claim than protection: conservation is fundamentally about *use*, such as conservation of water or energy through efficiency programs or demand management practices. Thus, typically, conservation is about *resources*: things that humans use. Further, *conservation* is about use of a resource so that the resource may continue to be used into the future. In this way, conservation appears related to the idea of sustainable use and development. The scope of the EA Act claim to conservation is important and ambitious. In contrast with another longstanding Act on the environment, the *Ontario Water Resources Act* (OWRA), which addresses a single *natural* resource only (water), the EA Act is aimed at *conserving* the full range of resources: natural, biological, built and human.

The third claim in Goal (2) is that the EA Act is about providing *wise management* of the environment. Initially, it is tempting to consider this claim superfluous as it seems difficult to conceive how there could be protection and conservation *without* wise management. However, the significance of this third claim comes from the broad definition of the environment: although, in theory, everything subject to the EA Act must be protected and conserved, there are many domains of human activity where neither of these claims affects existing *practices* and *policies*. Thus, "wise management" may be seen to be an overarching term for the environment: at a minimum, human activity must show wise management of the environment.

Additionally, beyond each of these three claims, the purpose section suggests that EA Act decisions must jointly address or satisfy all three claims, namely the protection, conservation *and* wise management of the environment.

What emerges from this detailed examination of the two goals extracted from the purpose section of the EA Act is that *neither* goal can be considered in isolation from the other. In short, one cannot consider the *betterment* goal without also considering the *protection* goal, and vice-versa. Environmental assessment provides the mechanism for achieving these goals through the broad definition of the 'environment' and consideration of alternatives.

Although the Act does not define the term "environmental assessment", it provides a starting point for what an individual EA must consist of in subsection 6.1(2), as follows:

> Subject to subsection (3), the environmental assessment must consist of:
> (a) the purpose of the undertaking;
> (b) a description of and a statement of the rationale for,
> (i) the undertaking,
> (ii) the alternative methods of carrying out the undertaking, and
> (iii) the alternatives to the undertaking;
> (c) a description of,

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economic conditions resulting from alterations to those factors": source - Article 1(vii) of UNECE "Convention on Environmental Impact Assessment in a Transboundary Context" (Espoo Finland, 1991).

(i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,[13]

(ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and

(iii) the actions necessary or that might reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment,

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;

(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and

(e) a description of any consultation about the undertaking by the proponent and the results of the consultation.

Thus, the scheme of the EA Act seeks to ensure that an EA exists *before* there are any decisions about proceeding with a new undertaking (see also section 5 of the EA Act).[14] In this respect, the EA should be seen to be as the source of information required to make decisions consistent with the purpose of the EA Act.[15] Given the complex issues raised by the EA Act's purpose section, an individual EA is also necessarily complex: one cannot easily assess whether an undertaking has provided that all aspects of the environment are appropriately *protected*, *conserved* or *wisely managed.* Nor can one easily assess whether an undertaking should benefit the whole and not a part, or a part and not the whole. It would seem essential to meeting *both* goals evident in the purpose section of the Act and their interrelationship that an EA should consider an appropriate range of *alternatives* (see discussion of "alternatives" below). Neither principle is about *absolute* claims or priorities; rather, each is about *relative* claims and priorities. Thus, the role of EA is to provide the best kind of information to assess these relative claims and priorities across the full range of the "environment", as defined in the EA Act.

On the basis of the complex analysis envisaged by the EA Act in its current form, the Executive Group cautions against suggestions that the EA Act would benefit from the drafting of numerous new terms or the inclusion of more detailed definitions. Thus, the general EA principles

[13] "Another question [under NEPA, the U.S. *National Environmental Policy Act*] is the indirect impact that the action may have. For example, the construction of a highway may lead to commercial or residential development of land near the highway. Here, too, the test is one of foreseeability and degree of connection to the proposed action." Source: "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at pp.45-6, section 2.2.3.

[14] Under NEPA (the U.S. *National Environmental Policy Act*), the EIS (environmental impact statement) should be commenced "as early as possible in the project planning stage": source - p.44, section 2.2.1, "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation). "The environmental impact assessment should be part of the decision about whether and how to proceed with the action, and should not become an after-the-fact rationalization for a decision already taken" (p.45).

[15] "One of the primary functions of the environmental impact assessment process under NEPA is to educate and inform the public, as well as government decision makers, about the environmental consequences of planned actions." Source: p.51, section 2.2.10, "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation).

suggested by the Executive Group in this Report are not intended to *introduce* new concepts into the EA Act; rather, they are intended to integrate concepts that already enjoy public prominence and provincial support outside the EA Act, and that are already implicit or entrenched within the dual goals of the EA Act's statement of purpose.

Suggested EA principles

Consistent with the purpose of the EA Act, the Executive Group endorses the following goals, objectives and values for inclusion within the EA principles to be developed by the MOE pursuant to Recommendation 2:

Goal 1: Betterment

1) **Sustainability benefits**

The goal of EA should be to contribute to ecological and community sustainability, and to create a more desirable and durable future.[16] This includes the need to reduce gaps in resources and opportunities within communities, to ensure that everyone has enough for a decent life and that everyone is able to seek improvement in ways that do not compromise future generations' possibilities. EA should also incorporate sound economics, taking into account the full costs to society and to nature of all mitigation and impacts. EA should infuse a rational and traceable planning process into decision-making by proponents so that wise decisions are made.[17] EA is not merely for the limited purpose of avoiding or mitigating harm to human health and the environment, but for achieving societal benefits through consideration of a reasonable range of alternatives.

2) **Clear, Predictable and Timely**

The process should be clear, predictable and timely across sectors. Clarity and consistency of application of existing legislation and approvals processes is essential to effective EA. Projects with similar benefits and risks should be treated in the same way.

3) **Transparent**

The EA process should be transparent and enable proponents, reviewers and the public to understand the process and to follow projects through the various stages of government review and approvals. Among other things, this would include adequate public notice of proposed decisions and timely and full access to relevant information and sufficient resources.

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[16] According to the United Nations Environment Program (UNEP, 1987, Preliminary Notes), "'EIA' means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development": source - section on Term of Art Definitions Contained in International Agreements (Part 1, p.12), "Transboundary Environmental Impact Assessment," *North American Environmental Law and Policy* (vol.4, 2000, NAFTA Commission for Environmental Cooperation).

[17] For example, the Espoo Convention requires that EA documentation must include, among other things, details of predictive methods, underlying assumptions, environmental data used, gaps in knowledge, and information uncertainties encountered: Appendix 2, UNECE "Convention on Environmental Impact Assessment in a Transboundary Context" (Espoo Finland, 1991).

4) **Public Participation**

The EA process should include opportunities and resources for participation by all potentially affected parties.[18] Meaningful public participation by all interested and affected communities, including First Nations and aboriginal communities, should be part of the EA planning and decision-making process. This would consist of: sufficient opportunities to participate in the planning of proposed projects; opportunities to come to the table to discuss, question and negotiate agreements; ability to comment upon proposed decisions; and, involvement in post-approval monitoring programs and follow-up measures. Dispute resolution processes (e.g., mediation) should be utilized throughout EA planning and decision-making processes, wherever necessary, to reduce conflicts and develop consensus.

5) **One project, one integrated process**

To promote the review, assessment and approval of projects through a single and appropriately staged process, an EA should be commenced early in the planning process. Further, an EA should, to the extent possible, integrate the substantive considerations of other approvals required by the undertaking so that the assessment may guide and be consistent with subsequent approvals.[19]

Goal 2: Protection

6) **Precautionary Principle**

Caution should be exercised in favour of the environment, and the lack of full scientific certainty should not be used as a reason to avoid or defer measures to protect, conserve or wisely manage the environment. Undertakings should not proceed where there is a threat of significant harm to the environment, even if the threat of harm cannot be definitively proven.[20]

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[18] "Environmental assessment (EA) is one of the most important tools available for the prevention of environmental harm. As such, the public consultation and public hearing components of many modern EA statutes are often seen as important parts of a strategy of public access to environmental rights and remedies." Source: "Access to Courts and Administrative Agencies in Transboundary Pollution Matters," *North American Environmental Law and Policy* (vol.4, 2000, NAFTA Commission for Environmental Cooperation) at pp.265-6. Article 6.4 of the Aarhus Convention provides for "early public participation, when all options are open and effective public participation can take place": source - UNECE "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Denmark, 1998).

[19] The EA legislation of Mexico's various states includes coverage of a list of works and activities including "Land distribution, housing units and new urban centres": source - "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at p.35, section 3. Mexican legislative reform in 1996 was intended, among other things, "to simplify the EIA process for works and activities under the jurisdiction of local authorities. The reform was intended to prevent the proliferation of administrative procedures requiring several authorities to authorize projects that, in fact, could be handled in a single procedure and to further the integration of urban development with environmental management." (p.36)

[20] With respect to the issue of uncertainty under NEPA, the U.S. *National Environmental Policy Act* (e.g. does an environmental impact statement for a terminal for oil tankers "need to evaluate the consequences of a catastrophic oil spill") "agencies are still required to apply the best available evidence about reasonably foreseeable possibilities, however low the probability, along with the best available evidence about the likelihood that such an event will in

7) **The Ecosystem Approach**

An ecosystem approach should be applied in order to ensure the sustainability of Ontario's environment, protect human health and safety, and enable future generations to meet their needs. At a minimum, using an ecosystem approach, consideration should be given to the following factors: the direct, indirect and cumulative effects upon the environment;[21] the interdependence of air, land, water and living organisms; and the relationship between the environment and the economy.

8) **Based on Good Data, Good Science and Sound Engineering**

All elements of the EA process should be based upon the best information available, and upon sound scientific and engineering practices.

9) **Environmental Protection**

Facilities, projects, activities, programs or plans[22] approved under the EA Act should, where applicable:

a) prevent, reduce or eliminate the creation, use or release of substances that contaminate, or are likely to contaminate, the environment;
b) protect and conserve biological, ecological and genetic diversity, including sensitive or significant species, areas or processes;
c) reduce overall energy, water, and other material demands upon Ontario's renewable and non-renewable resource base; and,
d) identify and pursue opportunities to restore or rehabilitate degraded environments wherever feasible.

These priorities are best achieved through consideration of alternatives.

10) **Avoidance First**

Undertakings subject to the EA Act should be directed away from:

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fact occur": source - "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at p.46, section 2.2.3.

[21] With respect to the issue of cumulative effects under NEPA (the U.S. *National Environmental Policy Act*), if "other actions [which may precede or follow the proposed action] are reasonably connected to the proposed action, or are reasonably foreseeable, their potential impacts should be included": source - "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at p.45, section 2.2.3.

[22] In addition to projects, New York's *State Environmental Quality Review Act* also "applies to agency decisions on policies, regulations or procedures": source - "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at p.53, section 3.2. Under NEPA (U.S. *National Environmental Policy Act*), in some instances "agencies have prepared 'programmatic' EISs discussing the general scope and effect of a nationwide government program, with separate environmental assessments or EISs done for specific projects or actions under that program." (p.45, section 2.2.1).

a) critical habitat of endangered and threatened species;
b) provincially and regionally significant wetlands, valleylands, woodlands, or wildlife habitat;
c) provincially and regionally significant areas of natural and scientific interest;
d) prime agricultural lands or specialty crop areas;
e) significant areas of cultural heritage or archeological value;
f) lands subject to flooding or erosion hazards; or
g) significant or sensitive groundwater or surface water features.

This is achieved by a consideration of alternatives.

ISSUE: SECTOR-SPECIFIC POLICY

Consistent among the Sectoral Tables was the identified need for the Ontario government to develop sector-specific policy to help guide the EA planning and decision-making process for each sector. For example, the Report of the Waste Table suggests that a provincial waste policy be developed that clearly articulates the provincial need for, and the interrelationship among, all elements of waste management in Ontario. This would include a statement of goals, measurable targets and timelines, as well as a quantitative evaluation of collection, transfer, reuse and recycling, other forms of waste diversion and all forms of disposal. Likewise, Recommendation 2 of the Energy Table's Report suggests that the Ontario Government should provide clear policy guidance in a number of areas to promote a focused and consistent energy system, to avoid duplication and inefficient use of proponent and stakeholder resources, and to facilitate approvals for energy projects. Similarly, many of the recommendations of the Transportation Table speak directly to the need for improved provincial policy direction. In summary, all three sectors strongly argued that the absence of, and lack of clarity in, provincial policy and sectoral priorities have caused significant delays and confusion for proponents and other EA participants.

Submissions received by the Executive Group from members of the public also supported the need to develop clear provincial policy. For example, an environmental consultant working within the waste sector noted that "an integrated waste management policy is essential for a coherent, responsible and equitable system of managing waste". Similarly, a non-governmental organization recommended the development of "provincial guidelines which set out provincial priorities, like Provincial Policy Statements under the *Planning Act*, established by the appropriate provincial ministries with which proponents must comply when planning and/or carrying out undertakings". According to this submission, these provincial guidelines should form part of the proponents' Terms of Reference (TOR).

The nature, scope and effect of sector-specific EA policy at the provincial level was the subject of considerable discussion between the Executive Group and the Waste, Energy and Transportation Tables. The Executive Group also drafted illustrative examples of what these provincial policies might look like for each of the three sectors, and provided copies of these draft policies to the Sectoral Tables for review and comment.

Unfortunately, given the deadline for the submission of this Report, the Executive Group had insufficient time to finalize these policies and submit them to the Minister for her consideration. The Executive Group was also concerned that its membership lacked the technical or scientific expertise required to inform the content of sector-specific policies, particularly in the energy context. Similarly, it was recognized that sector-specific policies should be reflective of a broader range of public and private interests and perspectives that were not fully represented on the Executive Group or the Sectoral Tables (e.g. provincial ministries, naturalist groups, public health organizations, agricultural associations, First Nations and aboriginal communities, etc.).

Accordingly, the Executive Group recommends that the Minister should immediately appoint small, balanced and representative sectoral working groups to develop the actual content of the sector-specific policies envisioned by this Report. While some observers might criticize this deferral of detailed policy development to another round of public consultation, the Executive Group concludes that this deferral is inevitable in light of the constraints noted above.

We further note that in other environmental reform initiatives, it has not been unusual for the initial round of consultation to centre on fundamental issues, or new policy direction, at a general level of analysis, which is then followed by subsequent rounds of more focused consultation on implementation matters and related details. For example, following extensive public consultation across Ontario, the Part 2 Report of the Walkerton Inquiry made a number of general recommendations regarding the need to develop an effective source water protection regime in the province. Although these recommendations were immediately adopted by the Ontario government, there were further rounds of successively more detailed public consultation to work out the legislative, regulatory and administrative details.[23]

Given these and other examples, the Executive Group suggests that the drafting of sectoral policies during the next round of consultation is neither unprecedented nor inappropriate. To the contrary, the Executive Group believes that sector-specific EA policies play a crucial role in the overall reform package outlined in this Report. Therefore, the content of sector-specific policies should be systematically developed in an open and consultative manner by the persons or groups most interested in, or affected by, the matters to be addressed in such policies.

[23] For example, the Part 2 Walkerton Report was followed by the Report of the multi-stakeholder Source Protection Advisory Committee (2003), the release of a government White Paper and draft legislation, and, most recently, the reports of the province's Implementation Committee and Technical Experts Committee (2004). A similar multi-stage process was used to develop Ontario's EBR (e.g. the multi-stakeholder EBR Advisory Committee (1990) dealt with general principles, while the EBR Task Force (1992) worked out implementation details).

RECOMMENDATION 3: SECTOR-SPECIFIC POLICY

The Government of Ontario should develop sector-specific policies which must be followed under the EA Act, just as the Provincial Policy Statement is issued and applied under the *Planning Act*. These sectoral policies should include a hierarchy of preferences based on degree of benefit and risk of impact (e.g. policy preference for renewable energy, public transit, and waste diversion). As an immediate measure the Province should ensure that EA decisions are consistent with PPS provisions respecting renewable energy systems, transit, and waste reduction, reuse and recycling.

RECOMMENDATION 4: ESTABLISHMENT OF SECTOR WORKING GROUPS

The MOE should immediately establish small sectoral working groups for Energy, Transportation and Waste sectors. Members should be experienced in EA to expeditiously develop each sectoral policy, which can be forwarded to the Minister for review and adoption under the EA Act.

DISCUSSION:

In the absence of sector-specific policies under the EA Act, Terms of Reference become a vehicle for proposing specific approaches for particular undertakings, particularly in the individual EA context.[24] Not only do the negotiations that follow cause delays, but they can also limit access by other participants to this process. In addition, the project-specific approach results in considerable inconsistencies in scope and procedures both among and within sectors. While draft guidelines for Terms of Reference have been under development by MOE for years, they have not been finalized nor formally released to date.

The Executive Group further notes that there is a limited opportunity for the Minister to reference government policy in "policy guidelines" (see section 27.1 of the EA Act), but this authority has never been used to date. Even if the Minister issued appropriate policy guidelines, the current wording of section 27.1 suggests that such guidelines are only relevant to the ERT, rather than other decision-makers in the EA process. Indeed, such policy guidelines would not even be binding on the ERT since section 27.1 merely states that the ERT "shall consider" policy guidelines issued by the Minister. This language is analogous to the much-maligned "have regard for" provision under the *Planning Act*, which the Ontario government has recently committed to changing to the more rigorous "shall be consistent with" standard to ensure that all planning authorities (not just the Ontario Municipal Board) make decisions that are consistent with the Provincial Policy Statement. Therefore, in order to facilitate the development and effective implementation of sector-specific policies (and the above-noted EA principles) under the EA Act, it will be necessary to amend section 27.1 accordingly.

[24] In the Nova Scotia EA regime, unlike Ontario, the EA Administrator (a provincial agency) prepares the TOR, not the proponent, and consults widely in so doing (source: MOE Environmental Assessment & Approvals Branch).

In any event, given the current absence of any MOE policy guidelines under the EA Act, it appears that governmental policy in relevant areas is not properly integrated into the EA process, except perhaps indirectly, during the government review of terms of reference or EAs. In the view of the Executive Group, clear statements of government sectoral policies under the EA Act would significantly clarify for proponents and EA participants what benefits are currently most valued, and what prohibitions should be respected during the process. At the same time, the promulgation of provincial sectoral policy (with quantified assessments of the "need" for specified facilities or projects) should significantly ease the description of "need" and "alternatives to" within EAs prepared for projects within such sectors, as described below.

For example, more stringent EA requirements regarding "need" and alternatives might be required (i.e. by sectoral regulation) for a non-renewable energy plant than for a renewable energy project, provided that the sectoral policy articulates a clear provincial preference for renewable energy. Similarly, siting standards premised upon sectoral policy could be set out in regulation to assist in identifying project locations that should not be developed. Such regulations could also specify provincial design and operational standards to ensure proper construction and use of facilities at locations that meet prescribed siting standards. The Executive Group recognizes that this sectoral approach may not completely eliminate siting controversies, but appropriate and well-drafted sectoral policies and implementing regulations (both of which should be developed with meaningful stakeholder input) should go a long way in minimizing conflict and confrontation, particularly where provincial policy clearly delineates "green projects" that should be preferred over more risky or controversial undertakings. In addition, sectoral policy could specify the nature or extent of local community support that must be satisfactorily demonstrated by the proponent prior to EA submission (see discussion of "willing host communities" below).

While the task of creating and implementing sectoral policies is challenging, it is the Executive Group's belief, which is buttressed by the findings and recommendations of the Sectoral Tables, that implementing other recommendations for EA reform in the absence of overarching policy guidance is tantamount to building a shelter without a roof – regardless of the strength of the walls or foundation of the structure, the inherent unpredictability of the weather will always influence one's willingness or ability to plan future activities. Likewise, in the absence of sector-specific policy under the EA Act, there is considerable unpredictability and uncertainty, which significantly affects the willingness or ability of proponents to initiate or complete the EA planning and decision-making process, even for "green projects".

The Executive Group recognizes that the development of sector-specific policies would require staff time and resources which may not be readily available within the MOE at the present time. Consequently, the Executive Group suggests that these policies should be drafted by small, representative working groups in each sector. Once appointed by MOE, these *ad hoc* working groups can start by examining the existing policy framework, inviting comments from the public and affected parties, and preparing clear, concise and consensus-based sectoral policies, which can be forwarded to the Minister for review and adoption as policy guidelines under the EA Act.

These working groups would be advisory in nature, and should have balanced representation from involved parties and affected interests (including MOE representatives). In addition, the working groups should be given Ministerial direction to complete their policy drafting exercise

within 6 months of being appointed. If consensus is not achieved within this timeframe, then the matter should be referred to the provincial advisory body for review and completion (see discussion immediately below). Once the sectoral policy development is complete, the advisory body would submit the proposed policy to the Minister for review and adoption under the Act. In either case, the Minister still retains ultimate approval authority over the sectoral policies, but the actual content of the policies could be developed expeditiously and effectively by engaging outside resources and expertise.

ISSUE: EA PROCEDURES

Ontario's current EA program is characterized by uncertainty, unpredictability and inconsistency as to the nature and extent of procedural requirements that may be applicable to undertakings (or classes of undertakings) subject to the EA Act. For individual EAs, procedural requirements are frequently determined on a case-by-case basis in the approved Terms of Reference, but the MOE has not finalized any overarching guidance in terms of what constitutes acceptable TOR content or EA planning methodology, and sometimes undertakings within the same sector (e.g. waste) receive differing EA treatment (i.e. some landfills are subject to full EAs while others are subject to scoped EAs). In addition, it is uncertain whether a proposed undertaking may ultimately get referred, in whole or in part, to the Environmental Review Tribunal for a public hearing. Similar concerns exist in the Class EA context and the O.Reg. 116/01 regimes, where it is uncertain whether a particular project may get bumped up or elevated to an individual EA. This has led some proponents and EA participants to complain that the EA process has become politicized rather than predictable in terms of procedural requirements.

Similarly, in general terms, the application of the EA Act often depends on whether the particular undertaking is being proposed by a public proponent (e.g. a municipality or provincial Ministry) or a private proponent (e.g. a limited company or corporation). Public proponents are generally subject to the Act unless they (or their undertakings) have been exempted by regulation (e.g. Regulation 334) or by declaration order (e.g. section 3.2 of the EA Act). Conversely, private proponents are generally not subject to the Act unless their undertaking is designated, by regulation or agreement, as an undertaking to which the Act applies: see section 3 of the EA Act.[25]

This general distinction between public and private proponents has implications for the content of EA requirements under the Act. For example, it remains unclear (and controversial) whether – and to what extent – public and private proponents should be required to fully address the threshold issues of "need" and alternatives in relation to certain undertakings subject to the EA Act. As a submission received from a member of the public to the Executive Group correctly

[25] There is no similar public/private distinction in the EA regimes of other jurisdictions such as British Columbia, Quebec, Minnesota and Mexico: sources - MOE Environmental Assessment & Approvals Branch, and "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at pp.27 and 35. Under the *California Environmental Quality Act* "most private development projects involving construction or other physical alteration of the environment will require the approval of one or more state or local agencies, so most private projects are covered" (p.52, section 3.1). Like CEAA, the California legislation is triggered if a permit, licence, certificate, etc. is required or if State financial support is provided. The same holds true under New York's *State Environmental Quality Review Act* (p.53, section 3.2).

noted, "there is no guidance in [the EA Act] around how proponents should demonstrate need/justification for a project", and "there is no guidance in [the EA Act] in identifying **reasonable** alternatives to the undertaking" (original emphasis).

This uncertainty is particularly acute in relation to "green" projects whose benefits appear self-evident and clearly in the public interest (e.g. transit, waste diversion, renewable energy sources, etc.). In such cases, it has been suggested that it is inefficient and pointless to require proponents to justify such projects by formally proving there is a public "need" for the undertakings in question.

Similar concerns have been expressed about the efficacy of requiring proponents to consider alternatives that may be beyond their corporate mandate, business objectives, economic capability, or legal powers to implement. Such concerns may apply to both private proponents and public proponents.

Nevertheless, the demonstrations of "need" for an undertaking, and the consideration of alternatives (especially "alternatives to"), are arguably the most important environmental planning considerations under the EA Act. Indeed, the content requirements for an EA under the Act imply that before an environmentally significant undertaking proceeds, the EA planning and decision-making process should, among other things, require:

- a demonstration that the undertaking is actually necessary;
- an evaluation of a reasonable range of alternatives and options; and
- a comparison of the environmental benefits and risks of the undertaking and its alternatives.

Ideally, pursuing these matters in a traceable, rational and public process will ultimately lead to the identification of an environmentally preferable undertaking to address the problem or opportunity described by the proponent. Indeed, as noted above in this Report, the stated purpose of the EA Act (section 2) implies that only those undertakings that result in the "betterment" of Ontarians (i.e. by providing biophysical and socio-economic benefits) should be permitted to proceed under the EA Act.

Therefore, to enhance the fairness and effectiveness of the EA program, it is necessary to ensure that the EA Act applies to environmentally significant undertakings, regardless of whether the proponent is a public or private sector entity. At the same time, the nature and extent of EA requirements should correspond to the relative benefits or risks associated with such undertakings. It is also necessary to address the EA Act's lack of clarity and consistency regarding the consideration of "need" and alternatives within the EA planning and decision-making process, in both the individual and Class EA context. The Executive Group concludes that a clearer set of sector-specific procedures would help address these concerns.

RECOMMENDATION 5: EA PROCEDURES

a) A procedural framework should be developed such that the nature and extent of EA documentation, notification, and planning depend on the environmental benefits and risks associated with a particular undertaking. Undertakings that pose benefits without

corresponding risks should be given priority under the EA Act in the sense that their process and approval standards are easier to meet than undertakings that create risks and produce few or no benefits. For each sector, existing Class EA and regulatory instruments should be adapted accordingly.

b) Guided by the procedural charts in Chapter 3 and the principle that sector rules should be consistent across sectors, the Minister should ask the proposed working groups to recommend binding rules for EA triggers and processes for each sector. Thus, the procedural charts should be adopted as a future regulation, as amended by working group recommendations that treat similar projects within all sectors consistently. In particular, as suggested by the Waste Sector Table, the waste sector working group should consider the following issues:

   i. designate certain waste management facilities (e.g. all landfills and incinerators accepting municipal and IC&I waste) as being subject to the EA Act, regardless of proponency;
   ii. exempt certain facility-related proposals from EA obligations (e.g. Category 1 projects);
   iii. establish an appropriate EA process for small-scale or less environmentally significant projects within prescribed thresholds or categories;
   iv. ensure that individual EAs are conducted for large-scale or environmentally significant waste management undertakings;
   v. provide prescriptive details on undertakings that require the highest level of assessment(e.g., TOR content or category 5 projects); and,
   vi. compile and update a comprehensive provincial database on waste management.

c) Pending the completion of the revised sectoral procedures, as an interim measure the MOE should immediately revise the draft TOR guideline to ensure consistency with this Report (especially in relation to "need" and alternatives to"), and should post the revised TOR guideline on the EBR Registry for public review and comment prior to finalization.

DISCUSSION:

Background: Current EA Coverage and Content Requirements

The environmental risks (or benefits) posed by a proposed undertaking are not necessarily dependent upon whether the proponent is a public or private entity, or whether the lands in question are in public or private ownership. Similarly, the size, scale or cost of a proposed undertaking may not necessarily be indicative of the environmental significance of the undertaking. For example, a relatively small or inexpensive undertaking (with fewer mitigation measures) may create significant adverse effects if sited within a sensitive environment (i.e. local municipal road through a provincially significant wetland), while a larger or more costly undertaking may pose relatively fewer risks if sited in a suitable location (i.e. regional road through an urbanized area).

Accordingly, many EA stakeholders have suggested that it is time to reconsider the EA Act's current differential treatment between private and public proponents, and to revisit the current thresholds or "triggers" that are used to determine whether a particular undertaking is subject to (or exempted from) the EA Act. For example, the attached Report of the Transportation Table has identified the need to "establish EA practice guidelines which require proponents to meaningfully consider all reasonable alternative solutions, irrespective of their agency/business mandates" (Recommendation 4.1). Similarly, the attached Report of the Waste Table criticizes the "piecemeal" criteria used to decide which waste facilities are subject to the EA Act, and recommends the passage of a sectoral regulation governing TOR content so that EAs, "whether they are public or private, should be subject to similar levels of scrutiny" (pages 8 to 10). A somewhat similar comment was received by the Executive Group from a municipality which recommended that "the EA planning process with respect to expanding or siting a new landfill must be articulated clearly with guidelines that are both practical and environmentally sound."

EA stakeholders have also expressed concern about the lack of an environmental rationale for the wholesale exemption of municipal undertakings (i.e. building construction, parkland development, etc.) whose estimated cost is less than $3.5 million: see section 5(2) of Regulation 334. Concerns have also been raised over the fact that the regulatory definition of "estimated cost" excludes costs for land acquisition, feasibility studies, facility operation, buildings and ancillary equipment or machinery. Moreover, the blanket exemption for any municipal project worth less than $3.5 million may encourage piecemeal planning and construction by municipal authorities.[26] On the other hand, the Transportation Table has recommended the wholesale exemption of any smaller projects costing less than $250,000 (Recommendation 13). At the same time, the Transportation Table suggests that the $3.5 million exemption limit be increased to $10 million for municipal transit projects (Recommendation 1.3). The Executive Group does not take a position on how the $3.5 million limit should be adjusted, but notes that this fiscal exemption has attracted considerable criticism and clearly requires further review and/or revision, as discussed below.

For some sectors, the MOE has attempted to make the application of the EA Act more equitable, predictable and responsive to the degree of environmental risks (or benefits) posed by an undertaking or a class of undertakings. This approach is heavily reliant upon prescribed thresholds or "triggers" that indicate whether – or to what extent – proponents must address EA requirements. As described below, these thresholds have generally been expressed in quantitative terms (i.e. number of mega-watts ("MW"[27]) produced by the facility, number of persons served by the undertaking, volume of waste received or processed, etc.), although

[26] Piece-mealing has been addressed under NEPA (U.S. *National Environmental Policy Act*):
"Another issues that often arises in this context is 'segmentation' - whether the proposed action stands alone or is part of a larger plan that should be evaluated for its overall effect. If there is sufficient connection between the activity described in the EIS [environmental impact statement] and other planned activities, the EIS should evaluate the environmental effects of the total project concept. If, however, the project segment under review is viable as an independent project, and if related projects are not reasonably foreseeable, an EIS on the segment alone is usually adequate." Source: "Environmental Impact Assessment - Law and Practice in North America," *North American Environmental Law and Policy* (vol.3, 1999, NAFTA Commission for Environmental Cooperation) at p.46, section 2.2.3.

[27] One MW of generation can produce enough electrical energy to supply the power needs of about 500 homes per year.

triggers can also be expressed in qualitative terms (i.e. "minor" or "major" improvements, potential for "significant" environmental effects, etc.). However, it has become increasingly apparent to many Ontario stakeholders that a number of these existing EA thresholds are subjective, impractical, or in serious need of revision.

Example 1: Current EA Thresholds for Electricity Projects

Traditionally, EA requirements in the energy sector applied only to Ontario Hydro, its successors, and other public bodies and such requirements were largely implemented through Class EA mechanisms. Private sector energy facilities were generally not subject to EA requirements unless they were specifically designated as undertakings to which the Act applied.

In the late 1990s, the Ontario government announced its intention to open up the electricity market to competition while protecting the environment and providing a level playing field for proponents. Among other things, this new policy direction required changes to EA requirements for electricity projects, which were implemented in the Electricity Projects Regulation (O.Reg.116/01), which was promulgated in 2001.

As a result of these changes, the EA Act now generally applies to both public and private electricity projects caught by O.Reg. 116/01, which essentially identifies three classes of project categories (A, B and C) and prescribes varying levels of assessment, consultation and documentation requirements (i.e. ranging from no EA to an "environmental screening process" or an individual EA). Details about the implementation of the O.Reg.116/01 regime are found in the MOE's "Guide to EA Requirements for Electricity Projects" (March 2001).

Projects under Category A are considered to be "clean" energy facilities that have relatively minimal environmental effects, and such projects are effectively exempted from the EA Act and do not trigger any EA requirements. These projects include wind turbines producing less than 2 MW, natural gas-fired generating stations producing less than 5 MW, and natural gas cogeneration or landfill gas/biogas facilities producing less than 25 MW. Despite being exempted from the EA Act, Category A projects must still comply with other applicable statutory requirements, and if Crown lands or resources are required to carry out the project, then environmental reviews may be necessary under other EA instruments (i.e. ORC Realty Activities Class EA, MNR Resource Stewardship & Facility Class EA, etc.). It should be further noted that the Minister has the residual power to designate a particularly significant Category A project as an undertaking requiring an individual EA.

Projects under Category B are considered to have potential environmental effects that can likely be mitigated, and such projects do not trigger individual EA requirements on the condition that proponents of Category B projects successfully complete an "environmental screening process". Category B projects include wind turbines producing more than 2 MW, natural gas-fired generating stations producing more than 5 MW, and hydro-electric generating stations producing less than 200 MW. The Category B screening process is, in essence, a proponent-driven self-assessment process that requires consultation with agencies and the public, and requires preparation of prescribed notices, reports and statements of completion. There is also a public opportunity to request that a particular project be "elevated" (i.e. bumped up) to an individual

EA. Elevation requests are decided at first instance by the EAAB Director, with the right to appeal the Director's decision to the Minister. To date, it appears that few, if any, elevation requests have been granted.

Projects under Category C are considered to be major projects with known significant environmental effects, and proponents of Category C projects are required to prepare individual EAs in accordance with Part II of the EA Act. These projects include hydroelectric generating stations producing more than 200 MW, and 500 kilovolt ("kV") transmission lines longer than 2 kilometres.

The project categorization/screening process under O.Reg.116/01 has been in force for approximately three years, and over a dozen Category B projects (with a total of 2,400 MW) have completed the environmental screening process. However, there has been ongoing debate about whether the current thresholds between the project categories are appropriate, especially in relation to "clean" energy projects. In 2003, for example, the MOE undertook public consultation on possible revisions to the O.Reg.116/01 regime, and proposed to increase the Category A threshold for certain "clean" electricity projects to 100 MW.[28] In addition, the MOE solicited public input on how new and emerging technologies (i.e. synthetic gas) should be treated under O.Reg.116/01. These public discussions have become increasingly important in light of the Ontario government's commitment to phase out all coal-fired generating stations by 2007, and to increase electrical production from renewable and clean energy sources. To date, however, no corresponding amendments have been made to the O.Reg. 116/01 regime.

It should be further noted that the attached Report of the Energy Table includes a recommendation that the province provide "clear instruction and guidance on definition of projects/bundles to be subject to the EA process" (page 10). The Energy Table has also recommended several "interim" revisions to O.Reg. 116/01 and the Guide (pages 17 to 24). Due to time constraints and the technical nature of certain suggestions, the Executive Group has been unable to fully evaluate these proposed changes to the Regulation and Guide, and therefore we are forwarding these recommendations to the Minister for her consideration.

Example 2: Current EA Thresholds for Waste Management

"Waste management" generally refers to a diverse range of waste-related activities and facilities, including waste collection, transportation, storage, transfer, processing and final disposal. In Ontario, private and public proponents typically carry out waste management.

In addition, this sector involves different waste streams (i.e. municipal waste, industrial, commercial and institutional, hazardous and liquid industrial wastes, etc.) and different types of facilities (i.e. waste processing sites, transfer stations, landfills, incinerators, etc.), all of which may pose varying degrees of environmental risks or benefits at the local, regional or provincial level. Waste management systems and waste disposal sites require certificates of approval under Part V of the EPA, but EA requirements may – or may not – be required, depending on the nature of the facility and its proponent.

[28] See EBR Registry No. RA03E0020 (July 3, 2003).

In general terms, EA requirements are currently applied to private and public waste management proponents through a complex mix of law, regulation and policy. For example, Regulation 334 wholly exempts certain types of municipal transfer stations and organic soil conditioning sites from the EA Act. Regulation 334 further provides, in effect, that municipal landfills are subject to the EA Act if section 30 of the EPA is applicable to such proposals. Section 30 of the EPA is applicable where a landfill, regardless of its physical size, design or location, will be receiving the waste equivalent to the domestic waste generated by 1,500 persons. The origin of, and environmental rationale for, this numerical trigger is unclear, and it has prompted considerable debate among waste management stakeholders, as described below.

As a matter of Ministerial policy developed in late 1980s, private landfill sites are subject to the EA Act if such proposals involve a total of 40,000 m^3 (or greater) of municipal waste. In practice, it requires either a project-specific designating regulation, or a voluntary agreement with the proponent, in order to apply EA requirements to private landfills. Again, however, it is unclear how or why this particular waste volume was deemed to be significant enough to warrant the application of the EA Act and the preparation of an individual EA.

The MOE has also developed quantitative policy triggers for applying the EA Act to other types of waste management facilities. For example, incinerators disposing of more than 100 tonnes/day of municipal waste, processing facilities producing more than 200 tonnes/day of residual municipal waste, and transfer stations handling more than 300 tonnes/day of municipal waste, will be subject to EA requirements as a matter of MOE policy. On the other hand, MOE policy indicates that landfills or incinerators disposing of hazardous or hauled liquid industrial waste will be subject to EA requirements, regardless of waste quantity.

In summary, under current MOE regulation and policy, municipal waste management facilities over certain thresholds (i.e. municipal landfill serving greater than 1,500 persons; private landfill receiving more than 40,000 m^3; an incinerator receiving more than 100 tonnes/day) must conduct an individual EA and obtain approval to proceed under the EA Act. No Class EA for municipal waste has been developed to date, largely because of disagreement whether waste disposal projects have appropriate characteristics (i.e. similar, small-scale, recur frequently, known impacts, mitigable effects, etc.) for inclusion within a Class EA. There has also been uncertainty over which entity or organization could properly serve as the "proponent" for the purposes of developing such a Class EA.

In any event, there is increasing concern among waste management stakeholders that the simplistic quantitative triggers used by the MOE are outdated, inflexible, and require revision in light of current waste management trends (i.e. bigger centralized facilities, larger service areas, municipalities contracting out waste management services, etc.). For example, the members of the Waste Table have recommended that the EA Act (and the EPA) "be applied to projects in such a way that projects ranging from those with the least likely impact (such as small transfer stations) to those projects with the greatest possible impact (such as landfills and thermal treatment) are subject to the appropriate level of assessment and review" (Recommendation 3). These and other stakeholders correctly contend that the amount of waste received (or the number of persons served) may not necessarily be the best indicator of the likelihood or significance of environmental effects associated with a particular facility. In addition, the MOE's reliance upon

quantitative triggers for applying EA requirements has caused some proponents to propose facilities just under the threshold (i.e. a 299 tonne/day transfer station), then seek incremental expansions thereafter. Such piecemeal planning is inconsistent with the principles of sound EA planning, and should no longer be countenanced. To delineate suggested thresholds for applying the EA Act to waste management facilities, the Waste Table has appended a chart to its Report (see Volume II). The Executive Group does not endorse the draft thresholds articulated by the Waste Table for discussion purposes, but we fully agree with the Waste Table that there is a pressing need to immediately review and revise the current thresholds or triggers found in existing MOE policy and criteria.

Under the current EA program, it is also unclear how new and emerging waste technologies will be addressed under existing MOE criteria for applying EA requirements to the waste management sector. Indeed, because such criteria are largely entrenched in non-enforceable policy, there is considerable uncertainty whether they will actually result in the application of EA requirements to a particular undertaking. This gives rise to an additional concern that limited EAAB resources are being unnecessarily consumed by case-by-case reviews of whether a particular waste management project should be subject to EA requirements.

Accordingly, some waste management stakeholders have advocated the development of a waste management sectoral regulation under the EA Act that: (a) provides that all private and public waste management facilities are designated as being subject to the Act; (b) prescribes different classes or categories of waste management facilities (i.e. diversion projects, transfer/processing facilities, landfills, incinerators, etc.); and (c) imposes varying levels of EA requirements that reflect the significance of the environmental effects (or benefits) associated with the different facility categories (i.e. no EA requirements for prescribed diversion projects, environmental screening for prescribed transfer/processing facilities, and individual EA for new or expanded landfills and incinerators). If such a regulation were promulgated, then the current uncertainty and inequity in the EA process would be substantially reduced because similar waste projects would receive the same treatment under the EA Act, regardless of proponency.

It should be noted that the Waste Table strongly recommended the development of a sectoral regulation, based on provincial policy that describes how private and public proponents should address "rationale", "alternatives to" and "alternative methods" (see Waste Management Panel Recommendation 4). Conceptually, the Executive Group supports the development of such a regulation, but notes that the regulatory details must be developed in an open and consultative process prior to implementation (see Recommendation 5).

Additional support for greater consistency in EA requirements for private and public proponents in the waste sector was evident in the public submissions received by the Executive Group. For example, an environmental consultant wrote as follows:

> If waste management is considered a public utility and the private sector wants to be a partner in this public utility, then it should be required to adhere to public policy. The TOR must establish the proponent's need based on public policy, and alternative methods must include achieving the province's waste diversion goals and objectives, the same as those for the public sector.

Example 3: EA Thresholds for Transit/Transportation Projects

Transit/transportation projects can be planned and implemented on local, regional and provincial scales, and include various forms of infrastructure such as new highways, road widenings, rail corridors, subway or light rail transit, and bus ways or transit ways. Generally, the proponents of transit/transportation projects are public bodies, such as municipalities, Ministry of Transportation ("MTO"), GO Transit and other transit authorities (i.e. TTC and OC Transpo).

EA requirements are applied to transit/transportation projects either through individual EAs or approved Class EAs. For example, the MTO Class EA specifies that Group A projects (i.e. new provincial highways, transitways, and ferryboat connections) will require an individual EA. Similarly, this Class EA categorizes improvements to existing provincial transportation facilities as Group B or C projects, and prescribes varying levels of assessment, consultation, and documentation, depending on whether the improvement is "major" or "minor". Group D projects (i.e. facility operation, routine maintenance, etc.) do not trigger any consultation or documentation requirements.

A similar classification scheme is contained within the Municipal Engineers Association ("MEA") parent Class EA, which delineates three categories of projects (i.e. Schedules A, B and C), and prescribes assessment, consultation and documentation requirements for each category. Schedule A projects are municipal maintenance and operational activities that are small-scale and pose minimal adverse environmental effects, and therefore trigger no documentation requirements. Schedule B projects include improvements and minor expansions to existing municipal facilities that have some potential for adverse environmental effects, and therefore trigger a screening assessment, mandatory consultation, and screening documentation. Schedule C projects include construction of new facilities and major expansions of existing facilities that have potential for significant environmental effects, and therefore require more detailed analysis, evaluation of alternatives, mandatory consultation, and preparation of an Environmental Study Report (ESR).

The GO Transit Class EA describes similar categories of projects (i.e. Groups A, B and C), and prescribes varying levels of assessment, consultation and documentation. Group A projects are routine or operational projects with minimal or no environmental effects, and therefore trigger no consultation or documentation requirements. Group B projects include construction and operation of commuter rail stations, rail routes, bus terminals and storage/maintenance facilities with some potential for environmental effects, and therefore require mandatory consultation and preparation of an ESR. Group C projects include construction of new rail lines and large-scale route extensions with potential for significant environmental effects, and requires the preparation of an individual EA.

It should be noted that each of the foregoing parent Class EAs include "bump-up" provisions that enable the Minister to order that an individual EA be prepared for particularly significant or controversial projects that would otherwise be planned and implemented in accordance with the applicable Class EA procedures. It appears, however, that very few bump-up requests (also known as "Part II orders") have been granted by the Minister to date, as discussed below. It has

also been suggested that there has been a proliferation of bump-up requests in relation to relatively benign projects (i.e. speed bumps on residential streets).

In the context of the transit/transportation sector, one of the major drawbacks of the existing EA regime is that there is no Class EA for public transit projects proposed by authorities other than GO Transit. Thus, municipal transit projects generally have to undergo an individual EA (or be exempted from the EA Act), rather than be expedited through the streamlined Class EA planning procedures in place for road infrastructure. As noted in the attached Report of the Transportation Table, EA procedures that apply to "transit lagged behind those that apply to building roads", which means that "municipal transit systems are currently put to a higher test than other transportation projects" (page 2).

Given the Ontario government's "Growth Management Strategy", and given the provincial commitment to contain urban sprawl and combat gridlock, the need for Class EA coverage for public transit has assumed renewed urgency in order to "level the playing field" between municipal transit and road projects. Accordingly, the Executive Group endorses the Transportation Table's recommendation that transit projects be incorporated within the MEA Class EA, as discussed below (see Recommendation 37).

The Executive Group received strong public support in relation to this recommendation. For example, a submission received from a member of the public supported "preferential treatment of green transportation infrastructure" by including transit within the MEA Class EA because "investing in transit… is an investment in sustainable communities rather than a drain on the public purse." Another commentator supported Class EA coverage of transit projects, but cautioned that clear guidance is needed to identify *bona fide* transit projects which warrant Class EA treatment to ensure that transit facilities are not simply "bundled" with large-scale highway projects in order to avoid triggering an individual EA for such projects.

"Need"

It should be noted that the term "need" does not actually appear within the EA Act, but Joint Board jurisprudence[29] has established that certain provisions of the Act implicitly require "need". For example, the Board has held that an examination of "need" is necessarily implied by the EA Act's requirement that proponents must describe the "rationale" for the proposed undertaking and its alternatives: see subsection 6.1(2)(b). Similarly, the Board has held that the purpose section of the EA Act (section 2) also requires the proponent to prove that there is an actual need for the undertaking. According to this reasoning, if there is no demonstrable need for an environmentally risky undertaking, then it is not in the public interest to approve it. This general approach appears to be consistent with the above-noted analysis of the "betterment" and "protection, conservation and wise management" aspects of the purpose of the EA Act.

This Joint Board jurisprudence was recently reviewed by the Ontario Divisional Court, which found that that "need" is an important component of EA planning (at least prior to the Bill 76

[29] See, for example, *Re Steetley Quarry Products Inc.* (1995), 16 C.E.L.R. (NS) 161 (Jt. Bd.), and *Re West Northumberland Landfill Site* (1996), 19 C.E.L.R. (NS) 181 (Jt. Bd.).

reforms).[30] While the Divisional Court judgment was overturned on other grounds,[31] it is noteworthy that the Ontario Court of Appeal did not disagree with the Divisional Court's findings regarding "need". Instead, the Court of Appeal held that it was open to the Minister, on a case-by-case basis, to exclude EA planning issues (such as "need" or alternatives) from Terms of Reference approved under the EA Act. However, even if the Minister has general discretion to exclude "need" from further consideration by proponents in the EA process, it remains uncertain whether he or she should (or should not) exercise this discretion for specific undertakings or classes of undertakings, as discussed below.

Alternatives

A robust EA planning and decision-making process generally requires three types of alternatives to be examined by proponents: (a) "alternatives to"; (b) "alternative methods"; and (c) the "null" (or "no go") alternative. "Alternatives to" are generally regarded as functionally different ways of dealing with a particular problem or opportunity (i.e. waste diversion is an "alternative to" waste disposal). "Alternative methods" refer to different operational options or ways of carrying out the same activity (i.e. establishing a new landfill or expanding an existing landfill, or utilizing engineered facilities or "natural attenuation" designs, are "alternative methods" of carrying out waste disposal). The "null" (or "no go") alternative refers to the assessment of the environmental risks and benefits if the proponent simply does nothing to address the identified problem or opportunity.

"Need" and Alternatives in Individual EAs

For individual EAs prepared under Part II of the EA Act, section 6.1(2) specifies that, among other things, proponents must:

- describe and state the rationale for the undertaking, alternatives to the undertaking, and alternative methods of carrying out the undertaking;
- describe the expected environmental impacts from (and necessary mitigation measures for) the undertaking, alternatives to the undertaking, and alternative methods of carrying out the undertaking; and
- evaluate the environmental advantages and disadvantages of the undertaking, alternatives to the undertaking, and alternative methods of carrying out the undertaking.

The Ontario Court of Appeal has indicated that there is a "presumption" that all of the foregoing matters should be considered by proponents during the EA process, although the Minister has residual discretion to approve Terms of Reference which exclude certain matters where appropriate.[32]

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[30] *Sutcliffe et al. v. Ontario (Minister of Environment) et al.,* (2003), 2 C.E.L.R. (3d) 303 (Ont. Div. Ct.), per Lang and Kurisko JJ.

[31] *Sutcliffe et al., v. Ontario (Minister of Environment) et al.,* (Aug. 25, 2004), CA File No. C40916 (Ont. C.A.), 7 C.E.L.R. (3d) 184. Leave to appeal the Court of Appeal's judgment to the Supreme Court of Canada is currently being sought by the judicial review applicants.

[32] *Ibid*, para.23. The Court opined that where the Minister purports to exclude most or all of the prescribed EA matters, he or she will be subject to judicial review since such a constrained EA may be inconsistent with the overall purpose of the Act and the public interest.

To date, however, it appears that "scoped" Terms of Reference have been the rule rather than the exception under Ontario's EA program. For example, the Executive Group has been advised by MOE that since 1997, 23 Terms of Reference have been approved for waste undertakings. Of these, 19 were "scoped", and only 4 were not. Despite this extensive scoping track record, the MOE still has not finalized any policies or guidelines which clearly articulate circumstances where the Minister should – or should not – approve scoped Terms of Reference. In the view of the Executive Group, the continuing absence of such policy direction undermines clarity, predictability, and accountability within the EA program.

Accordingly, the Executive Group is recommending that sectoral working groups should be established as soon as possible with a mandate to develop sector-specific policies and procedures that clearly delineate the nature and scope of EA requirements for different categories of projects (see discussion below). However, the Executive Group recognizes that it may take some time for the working groups to complete their work, and to have the results of such work reflected in sectoral regulations under the EA Act.

Therefore, as an interim measure, the Executive Group recommends that the MOE should revise its draft TOR guideline to ensure consistency with this report, and to achieve conformity with the Court of Appeal's judgment in the *Sutcliffe* matter. In particular, the revised TOR guideline should, among other things, clearly emphasize the importance of "need" and "alternatives to" analysis, and should narrowly prescribe those circumstances where the Minister may limit or scope the consideration of "need" and "alternatives to" within a proponent's EA process (i.e. where the proposed undertaking is consistent with applicable provincial policy). Prior to finalizing the revised TOR guideline, the MOE should post the revised guideline on the EBR Registry for public review and comment.

***"Need" and Alternatives in Class EAs and O.Reg.116/0*1**

Section 14(2) of the EA Act prescribes the mandatory content requirements for Class EAs, but does not expressly mention project "rationale", "alternatives to", or "alternative methods". Nevertheless, certain approved Class EAs require proponents of projects within the prescribed "class of undertakings" to consider a limited range of alternatives before selecting and implementing a preferred option.

For example, the MNR's Class EA for Provincial Parks and Conservation Reserves establishes a project evaluation/consultation process for Category B and C projects that, among other things, requires the proponent to collect and evaluate information on:

- alternatives to the project and alternative methods of carrying out the project, and the rationale for selecting the preferred alternative over the other alternatives considered;
- where there are unresolved issues, new approaches to meet the need that the project is intended to address; and
- for Category C projects, the implications of not proceeding with the project (the "no-go alternative").

Depending on the nature of the project, proponents under Class EAs may also be required to demonstrate "need" for their projects at the local level. Assuming that "need" is adequately demonstrated, the proponent may proceed with the project, provided that proponents otherwise comply with the planning, consultation and documentation requirements prescribed under the applicable Class EA. At all times, however, it remains open to the Minister to "bump-up" a particular project to an individual EA which, among other things, could require a demonstration of "need" before the undertaking can proceed.

For example, the MNR's Class EA for Provincial Parks and Conservation Reserves requires proponents of Category B projects to provide information on the purpose of the project, including the problem or opportunity being addressed. Similarly, this Class EA requires proponents of Category C projects to describe "what is to be accomplished by the project (the problem, opportunity or issue) and why".

Similarly, for the transportation sector, the June 2000 Municipal Engineers Association Municipal Class EA begins with the requirement to identify the "problem or opportunity" and follows this up with two distinct requirements to assess alternatives: Phase 2 "Alternative Solutions" and Phase 3 "Alternative Design Concepts". The July 2000 Ministry of Transportation Class EA for Provincial Transportation Facilities begins with a requirement for a "Transportation Needs Assessment" and, depending on the project, requires up to four distinct considerations of alternatives: Planning Alternatives, Preliminary Design Alternatives, Detail Design Alternatives and Construction Method Alternatives. The recently approved December 2003 GO Transit Class EA begins with a Stage 1 "Problem Identification/ Needs Analysis" and follows this up with two distinct requirements to assess alternatives: Stage 2 "Concept Alternatives" and Stage 3 "Preliminary Design Alternatives".

For the energy sector, the 1992 Hydro One Class EA for Minor Transmission Facilities begins with the requirements to "Establish Need" and follows this up with requirements to assess "Alternatives to the Undertaking" and "Identify and Evaluate Alternative Methods". Similarly, the August 1993 Class EA for Modifications to Hydroelectric Facilities begins with the requirement to identify the "Problem or Site Opportunity" and follows this up with requirements to consider "Alternatives to Modification Projects" and "Alternative Methods of Carrying Out Modification Projects". On the other hand, the MOE "Guide to EA Requirements for Electricity Projects" under O.Reg. 116/01 does not expressly require proponents to address "need" or alternatives during either the environmental screening or environmental review stages for Category B projects. While not a Class EA *per se*, this Guide's treatment of "need" and alternatives provides a further example of the inconsistent treatment of "need" and alternatives within and between sectors subject to the EA Act.

In the attached Report of the Energy Table, the public interest importance of "alternatives to" analysis is clearly recognized:

> The Panel agrees that a defensible analysis of "alternatives to" is necessary to ensure appropriate public accountability for decisions made on energy projects (subject to the Act) because it is at this strategic decision-making point when the most dramatic changes can be made to reduce and avoid environmental impacts. Examples for the energy sector include strategic choices to: (a) support energy conservation to reduce the need for

generation; and (b) promote renewable energy supplies and distributed energy production rather than strictly conventional approaches (page 7).

As noted by the Energy Table, the question is not whether "alternatives to" should be considered, but how and at what point of the planning process. In the view of the Energy Table, it is up to the Government of Ontario to "complete the strategic analysis of need and alternatives for energy", and "to identify the optimum mix of projects to be subject to the project-specific EA process" (page 8). The Executive Group generally agrees with this suggestion and strongly urges the development of overarching provincial energy planning or policy.[33]

Moving Forward: Development of Sector-Specific EA Procedures

As described above, Ontario's EA program has generally been plagued by inconsistency regarding which undertakings are subject to (or exempted from) the EA Act, and uncertainty regarding the nature and extent of EA obligations imposed upon those undertakings that are subject to the EA Act. Hence, the Executive Group has sought to lay the foundation for a more equitable, predictable and rule-based path of EA planning and decision-making that can be readily understood by proponents, participants and public agencies.

By equity, the Executive Group means an EA process where undertakings in all sectors are subject to the same general criteria and procedure for assessment, particularly when projected impacts and benefits are similar. Thus, the Executive Group is recommending that the required level of detail and stages of EA requirements should depend upon the significance of the environmental risks and benefits posed by the specific undertaking.

By predictability, the Executive Group means an EA process where all stakeholders – proponents and other participants – can clearly identify and understand how an EA will take place long before the planning and decision-making process begins for a specific undertaking. The need for greater predictability was also clearly articulated in the recommendations of the Sectoral Tables (i.e. Transportation Table's Recommendation 16, and Waste Table's Recommendation 1).

The Executive Group also received submissions from the public that supported the creation of clearer and more consistent procedural requirements. For example, a submission supported "the need to establish clear, prescriptive rules for proponents", particularly in relation to public consultation requirements and Terms of Reference content (e.g., cumulative effects analysis). Another submission recommended that "consistency in EA requirements for all projects be worked towards" in order to produce improvements in the EA process.

Therefore, the Executive Group identified the need for sector-specific assessment standards and procedures which would seek to categorize undertakings within a sectoral "grid" or procedural

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[33] It should be further noted that the province has recently announced certain energy initiatives that are relevant to the Energy Table's recommendations. For example, the Ontario government has proposed to create and direct the Ontario Power Authority to prepare an integrated system plan, which will be prepared in a consultative manner and publicly reviewed by the Ontario Energy Board. However, given that implementation details have not been finalized to date, it is difficult for the Executive Group to determine whether such a provincial plan should itself be subject to the EA Act. In any event, there can be little doubt that such a plan is urgently required and could have important implications for EA coverage and content within the energy sector.

framework according to their public benefits and environmental significance as articulated in the general EA principles and sector-specific policies. Each stream or component of the "grid" would clearly prescribe, among other things, appropriate documentary requirements, public consultation requirements, and EA planning/approval criteria for projects caught within that category.

The Executive Group has drafted a suggested framework to serve as a template to review, revise and develop procedures for each sector, which builds on those frameworks that currently exist in the electricity and transportation sectors, and which are absent in the waste sector.

Based on a careful review of procedural issues that arise within each sector, this suggested procedural framework classifies only those undertakings that may be considered to be *projects*. This terminology is deliberate: the proposed procedure applies to those undertakings that involve a specific *project*, namely proposed physical enterprises and activities. This kind of undertaking is considered distinct from proposed *plans* or *programs* covering classes of proposed projects. The proposed chart does *not* cover these latter kinds of undertakings. Where applicable, the definition of project is broad, covering the entirety of what is physically proposed by one proponent or more, if a joint venture is involved or one group of enterprises or activities is inter-related with another group of enterprises or activities.

For projects, the suggested procedure sets out five categories (1, 2, 3, 4, and 5), with each category prescribing EA requirements that reflect the degree of environmental risks and benefits associated with a project within the category. The key challenge to successful implementation of the proposed approach is the development of assessment-specific provincial policy for each of the three identified sectors: energy, transportation, and waste.

Where applicable provincial policy exists, the applicable project category is determined project-by-project, based on specific review of the four-part project triggers. The approach is objective, not subjective. To determine the *correct* category for a specific project, one must start with the two-column test of benefits, such that the proposed project satisfies both tests. Where a project satisfies the two-column benefits tests for multiple project categories (e.g., categories 3 or 4), it is necessary to review the two-column test of risks for each potentially applicable project category and, reviewing *each* column of risk, apply the highest applicable category to the whole project.

Consistent with the EA Act, the proposed approach recognizes that there may be *exceptional* circumstances where a specific project warrants more detailed or less detailed scrutiny than is provided in the procedures chart. In such circumstances, application for variation may be made to the Minister; however, to promote project certainty, we suggest that the application would be deemed to be denied within 30 days unless the Minister specifically responds otherwise in writing.

Within the assessment process, the chart provides complete integration of trigger issues and assessment requirements, such that higher category projects involve more serious trigger issues and thus require more detailed assessment. To ensure consistency and clarity, all assessment documents have a prescribed form and length according to category of assessment. Similarly,

the role of the public and available resources for peer review increase as project issues increase in seriousness.

Within the suggested procedural grid, the EAAB would have lead responsibility to: (1) integrate EA with other applicable assessment (e.g., *Canadian Environmental Assessment Act* (CEAA)), planning (e.g., *Planning Act* and *Niagara Escarpment Planning and Development Act*) and design (e.g., EPA and OWRA) approvals; (2) ensure the implementation of provincial policy for EA; (3) coordinate and complete the timely government review of category 3, 4 and 5 projects; and (4) ensure all EBR notice requirements are met. A major change to the current process is that there is very limited room or time devoted to bump-up requests, since the Executive Group is recommending that such matters be adjudicated by the ERT, rather than by the Minister (see Class EA discussion below).

The options for ERT hearings are designed to provide predictability to all parties by including specific approval tests, timelines and funding rules. In all instances, hearings should occur on the basis of major issues: where an issue appears frivolous or vexatious, the ERT would have the ability to strike the matter in whole or in part (a power currently used by the Ontario Municipal Board under the *Planning Act*). This power has been used by the Environmental Assessment Board and the Environmental Appeal Board in the past.

Environmental Assessment Practices and Procedures: Draft Charts

All parties making up the Advisory Panel have agreed that Ontario's EA program must deliver results "on the ground". In seeking to deliver such results, the Executive Group has judged it essential to move beyond principles and policies into procedures. The Executive Group has concluded that it needs to provide detailed recommendations on procedures, not because it presently has all the answers, but rather because it believes that its proposed approach provides a solid starting point for further discussions about classes of projects within specific sectors, and further discussions about treatment of specific projects subject to designation, exemption, bump-up or elevation requests.

These detailed recommendations have two forms: text and charts. The text is intended to: (1) describe the issues covered by the charts; and (2) provide a context for the recommendations set out in the charts. The charts address: (1) a general template for procedures across all three sectors; and (2) an annotation explaining how the general template departs from existing procedures for each of the three sectors.

We begin with the text and then provide the charts; however, given the detail present in both the text and charts, we expect that readers will be required to review both items iteratively.

(1) Description of the Issues covered by the Charts:

The underlying principle of the proposed procedural chart is that the nature and extent of EA requirements should be dependent upon the environmental benefits and risks associated with the particular undertaking. In general terms, undertakings that pose benefits without corresponding

risks should be given priority under the EA Act in the sense that their process and approval standards are easier to meet than undertakings that present risks.

The proposed procedural framework has been drafted to be implemented largely without changes to the EA Act or other legislation; however, it will require reforms to regulations, policies and/or procedures, including the development of sector-specific policies and priorities, as discussed above.

Based on a careful review of procedural issues that arise within each sector, the present proposed framework classifies only those undertakings that may be considered to be *projects*, namely proposed physical enterprises and activities. Where applicable, the definition of project is broad, covering the entirety of what is physically proposed by one proponent or more, if a joint venture is involved or one group of enterprises or activities is inter-related with another group of enterprises or activities.

The template set out below provides the basis for the procedural matrix. Key terms are explained before proceeding to the specific trigger and procedural requirements associated with each project category.

General Template for Procedures Chart

PROJECT CATEGORY	**PROJECT TRIGGERS**			**ASSESSMENT PROCESS**				**HEARING**	**TIME**
	BENEFITS	**RISKS**		**PHASES**	**DOCUMENTS**	**PUBLIC ROLE & RESOURCES**	**APPROVAL TEST(S)**		
	PROVINCIAL	**ON-SITE**	**OFF-SITE**						

Project Category: This column sets out the applicable project category, within the 5-category scheme. It should be noted that the five-part categorization of projects corresponds with the required phases in the prescribed environmental assessment process, such that category 1 projects involve a 1-phase assessment process, category 2 projects a 2-phase assessment process, etc.

Project Triggers: This heading is intended to set out the criteria for determining what category of assessment is required for a particular project, or a class of projects. It contrasts with the present approach to triggering assessment. The present approach (e.g., waste sector and electricity sector) expressly considers the scale of facility only, with implicit but not express consideration of the type of facility. The approach is also predominantly negative in that larger-scale projects trigger greater assessment. The proposed approach seeks to consider both benefits and risks. The *benefits* considered are that of advancing provincial policy, including the PPS and the anticipated sector-specific policies proposed earlier in this Report. Where a project advances provincial policy, the present proposal is to limit such a project to a category 4 assessment, thereby restricting category 5 assessments to those projects that are not consistent with provincial policy. On the other hand, projects which are consistent with Provincial Policy must be categorized as category 4, unless they raise no risks, in which case they are category 1. The *risks* considered are those associated with a specific project both *on-site* and *off-site*. The focus on risks is intended to minimize the conundrum that would be associated with using effects or impacts to determine project triggers: it is difficult to make these determinations without doing an assessment. Thus, consideration of risk is intended to consider effects generally having regard to the proposed project, its duration, and where appropriate, a specific location. Duration is a critical issue as any project having an anticipated duration of more than 15-20 years is deemed to be multi-generational, a term relevant to its impacts on future generations. In all cases, the proposed trigger issues are intended to apply to a project without consideration of mitigation measures as the assessment process is intended to consider mitigation in detail. The sole and limited exception to this rule on mitigation concerns mitigation that meets all aspects of the following three-part test: (1) it does not trigger or require approval under any other regulatory regime (e.g., EPA, OWRA); (2) it has been recognized in previous EAA approvals; and (3) it has a proven record of success.

Assessment Process: This heading sets out the various procedural and substantive standards associated with each project category. The key to this aspect of the table is the assessment phases. The *phases* of assessment are tailored to the specific assessment category, not only in the sense that the five project categories are matched to assessment phases, with category 1 projects triggering 1-phase

assessments, et cetera, but also in the sense that the specific phases are directly related to kinds of risks associated with the project. Thus, for example, a project assessment will require express consideration of alternative locations where its risks include multi-generational harm to human health and/or regionally or provincially significant resources. In turn, *documents* are also tied explicitly to phases, with each assessment document required to describe each aspect of the applicable assessment phases, thereby increasing in length with each project category. Similarly, the *public role & resources* also increase with each project category: not only are there more requirements for notice and thus opportunities to participate in an assessment process, there are also increasing resources made available beginning with category 3 projects. The *approval test(s)* is or are the substantive test or tests that an assessment must meet to receive approval. The test is calibrated to accord with the specific requirements of each applicable phase of assessment, thereby increasing in complexity with each increase in project category. In sum, the proposed assessment processes tailor phases, documents, consultation and approval tests to each respective project category, with the most onerous requirements applying to category 5 assessments.

Hearing: This heading refers to the ability to request or require a public hearing by an independent body, such as the Environmental Review Tribunal or a joint board struck under the CHA. For lower category assessments, no hearings are available. Hearing opportunities exist for category 3, 4, and 5 projects. A critical issue for each category is the test for obtaining a public hearing. Currently, the EA Act provides that for individual EAs, any person has a right to request that the Minister refer the application to a hearing and, if requested, the Minister shall refer the application to the Tribunal under section 9.1 unless in his or her absolute discretion, (a) the Minister considers the request to be frivolous or vexatious; (b) the Minister considers a hearing to be unnecessary; or (c) the Minister considers that a hearing may cause undue delay in determining the application. The Executive Group believes that this discretion-laden approach to hearings must be reformed if the EA process is to better deliver benefits: in particular, the EA test for a hearing for any sector subject to an EA procedures chart should be reformed to focus on the issue of benefits as much as impacts. This leads to three general situations:

(1) projects advancing provincial policy (e.g., green projects, windmills);
(2) projects consistent with provincial policy (e.g., natural gas generation); and,
(3) projects inconsistent with provincial policy (e.g., coal fired power plants).

For projects advancing provincial policy, there would be no direct right to a hearing; rather, there is either no hearing at all (i.e., category 1 or 2 projects) or a right of interested persons to request a hearing, depending on the type of multi-generational impacts that are at risk (i.e., category 3 or 4 projects).

For projects that are merely consistent with provincial policy, there is either no hearing where there are no risks of multi-generational impacts (i.e. category 1 projects) or, where the project risks multi-generational impacts (i.e., category 3 or 4 projects), there is an

opportunity to request a hearing (category 3 nuisance impacts only) or to require a hearing (category 4 risks of impacts on health or regionally or provincially protected resources) available to interested persons.

For projects that are inconsistent with provincial policy (i.e., category 5 projects), there is a direct right to a public hearing available to interested persons.

Where there is a hearing, the hearing parameters are designed to provide predictability to all parties by including specific approval tests, timelines and funding rules. The proposed timelines set out for hearings are deliberate and should be accompanied by timelines regarding all other aspects of the hearing route that shorten current timeframes associated with bump-ups (or legally speaking, Part II orders). In all instances, hearings should occur on the basis of major issues: where an appeal appears frivolous or vexatious, the ERT would have the ability to strike the appeal (a power currently used by the Ontario Municipal Board).

Time: This heading refers to the overall timeframe for each category of assessment, including EA Act hearings if applicable. The timeframe does not include integrated processes or appeals for projects requiring multiple approvals. While the Executive strongly supports the integration of multiple approval processes and increased use of the *Consolidated Hearings Act* (as discussed below), the work required to properly integrate these multiple processes is beyond the scope of the current work. Consistent with the rest of this proposed chart, timeframes increase with each project category.

Note on numbers used in the chart. In reviewing the proposed charts, one of the most difficult topics is the specific numbers proposed (e.g., time limits, page limits, etc.). The reader is asked to regard these numbers as the starting point for discussion, not a final proposal; however, as no such number is isolated, but embedded in a context involving five categories of project, the reader is also asked to consider each such number with regard to the numbers set out in the same column for all other project categories.

(2) Context for the Charts

The proposed chart seeks to address two related objectives: first, to integrate the various components of the EA process; and, second, to balance the ways that EA serves the interests of proponents, government and the public.

The proposed chart seeks to address the integration objective in four ways. First, it integrates benefits and harms posed by proposed projects, such that assessment procedures are based upon both benefits and risks, and not just on the scale of the project or its identified risks. Second, it integrates provincial policy and phases of assessment, such that projects advancing provincial policy trigger less, more expeditious assessment than projects which do not. Third, it integrates all EA process issues, including required phases of assessment, document content and length, public participation and funding. Fourth, it integrates the test for EAA approval

with the phases of assessment, such that more contentious projects face more onerous approval tests. Fifth, it integrates project categorization with phases of assessment and EA documents, such that category (1) projects have one phase of assessment and require a phase 1 EA document, and category (2) projects have two phases of assessment and require a phase 2 document, et cetera. This is intended to increase the overall transparency of EA procedures to all parties.

The proposed chart seeks to balance the interests of all major EA stakeholders in the following respects. Proponents get timelines and increased efficiency; members of the public get more notice and resources and thus increased effectiveness. Proponents get focus and predictability; members of the public get increased rigour. For government, the procedures represent a shift from broad discretion to clear rules. When implemented, these rules will increase and improve implementation of provincial policy. Less discretion and more rules will provide more expeditious decision-making and thus greater efficiency of human resources. Less discretion and more rules will also provide increased transparency. Put more colloquially, the proposed reforms deliver to government more steering and less rowing.

PROJECT CATEGORY	PROJECT TRIGGERS			PROCESS				HEARING	TIME
	BENEFITS	RISKS		PHASES	DOCUMENTS	PUBLIC ROLE & RESOURCES	APPROVAL TEST(S)		
	PROVINCIAL	ON-SITE	OFF-SITE						
1	Advances/ consistent with provincial policy	None/ very limited	None/ very limited	1 phase: project description	Category 1 Assessment (prescribed form and length: 5 pg plus appendices)	• Local notice of project completion; • www-accessible documentation; • no financial resources	•Conformity to standard *and* •purpose of EA Act	None	0-1 month

Notes:

1. The key trigger issue for this category of project is that there is little or no risk of impacts, both on-site and off-site. Projects meeting this rigorous standard on impacts are not required to show benefits, i.e., advancing provincial policy, but they must be consistent with provincial policy, not inconsistent.
2. Projects fitting the trigger requirements face a 1-phase process. This requires only that the proponent prepare a project description and file public notice of the project. There is no opportunity for comment. This process therefore resembles current class EA projects that are pre-approved; however, the proposed chart departs from the "pre-approved" process under various Class EAs by formally requiring the creation of a project description document and public notice of the project, so that any claim for approved status is open and transparent. The approval test is also minimal, requiring only that the project conform to this procedural standard (i.e., meet the trigger requirements).
3. There is no hearing available to challenge projects in this category; however, where this procedural chart has legal status, a project categorization would be subject to legal challenge or prosecution for non-compliance with the EA Act.
4. The time for projects in this category is minimal, depending solely on the time required to describe the project and determine that its risks are minimal.

Examples: transportation: pre-approved projects (Category A MEA); energy: windmills in limited number.

PROJECT CATEGORY	PROJECT TRIGGERS			PROCESS				HEARING	TIME
	BENEFITS	RISKS		PHASES	DOCUMENTS	PUBLIC ROLE & RESOURCES	APPROVAL TEST(S)		
	PROVINCIAL	ON-SITE	OFF-SITE						
2	Advances provincial policy	None/ very limited	•None/ very limited *and* •potential for cumulative impacts with other similar projects	2 Phases: •project description; •cumulative effects	Category 2 Assessment (prescribed form and length: 10pg plus appendices)	• Local notice of project completion *and* Council decision; • www-accessible documentation; • no financial resources	•Conformity to standard *and* •purpose of EA Act *and* •local Council approval	None	2-3 months

Notes:

1. The key trigger issue distinguishing a category 2 project from a category 1 project is the risk of causing an off-site cumulative impact. Thus, where a project does not appear to have, by itself, risks of serious impacts on-site or off-site, it should be considered as a category 1 or 2 project. However, where the project is proposed in combination with other projects in proximity to each other or in the same municipality, it should be considered a category 2 project so that the local municipal council may determine the acceptability of the numbers of these proposed projects.
2. Consistent with the trigger issues, the process issue for a category 2 project is the requirement to consider the potential cumulative effects and to provide notice of the project and of the required consultation with the local municipality.
3. There is no hearing under the EA Act from this category of project to any administrative tribunal.
4. The time limit for this category of project is still limited, but longer than a category 1 project to address cumulative effects.

Examples: energy: wind farms; transportation: transit stations

PROJECT CATEGORY	PROJECT TRIGGERS			PROCESS				HEARING	TIME
	BENEFITS	RISKS		PHASES	DOCUMENTS	PUBLIC ROLE & RESOURCES	APPROVAL TEST(S)		
	PROVINCIAL	ON-SITE	OFF-SITE						
3	Advances provincial policy	•May/ may not have potential for on-site impacts, but not upon provincially / regionally protected resources/ features	•Potential for cumulative effects with other projects; *and/or* •potential for multi-generational off-site nuisances (e.g., noise), but not nuisance risking health or provincially/ regionally protected resources	3 Phases: - •project description; •alternatives; •cumulative effects	•Category 3 Assessment (prescribed form and length: 25 pg plus appendices); •Category 3 Government Review (prescribed form, scope & 30-day time limit at end)	• Local and EBR notice of project proposal and project completion; • EBR notice of completion of government review; • www-accessible documentation; • participant funding for expert peer review prior to end of assessment process; • if public concern, 1-day mandatory mediation, prior to appeal period	•Conformity to standard *and* •purpose of EA Act *and* •most reasonable alternative to minimize on-site & off-site impacts	•ERT request for hearing following mediation; •if granted, maximum 3-day hearing unless further leave	6-9 months

Notes:

1. The key change distinguishing a category 3 project from a category 2 project is that it may have on-site and off-site impacts; on the other hand, the key feature distinguishing a category 3 project from a category 4 project is that the category 3 project both advances provincial policy and has limited risks of impacts (i.e., no risk of on-site impacts upon regionally or provincially protected resources and no risks of off-site multi-generational impacts on human health and/or regionally or provincially protected resources).
2. Consistent with these trigger issues, the process for a category 3 project adds one phase to consider alternatives. The kinds of alternatives are not specified, but the purpose of the requirement is to show that, the proposed undertaking is preferred among reasonable alternatives. Furthermore, because the project risks causing multi-generational impacts to neighbours, there is provision for participant funding to review compliance with the procedure regarding trigger, process and approval requirements.
3. There is provision for hearings for category 3 projects. One option is to permit any two interested persons to seek leave to appeal the assessment result, in whole or in part, to the Environmental Review Tribunal, if they meet the test set out above in the text. If leave is granted, there is provision for a maximum 3-day hearing unless further leave is granted by the Tribunal.
4. The anticipated time to carry out this procedure, including any required hearing, is 6-9 months.

Examples: waste: transfer stations, small waste recovery facilities; transportation: new on-road transit routes.

PROJECT CATEGORY	PROJECT TRIGGERS			PROCESS				HEARING	TIME
	BENEFITS	RISKS		PHASES	DOCUMENTS	PUBLIC ROLE & RESOURCES	APPROVAL TEST(S)		
	PROVINCIAL	ON-SITE	OFF-SITE						
4	Advances/ consistent with provincial policy	May/ may not have potential impact upon provincially / regionally significant resource	•Potential for cumulative effects with other projects; *and/or* •potential for multi-generational nuisance and health impacts *and/or* impacts upon provincially/ regionally protected resource	4 Phases: •project description; •alternative designs; •alternative locations; •cumulative impacts	•Category 4 Assessment (prescribed form and length: 50 pg plus appendices); •Category 4 Government Review (prescribed form, scope and timing, concluding with 45-day time limit at end)	• Local and EBR notice of project proposal & each phase of assessment process; • EBR notice of completion of each stage of government review; • www-accessible documentation; • participant funding for expert peer review prior to end of each of phases 3 &4 in assessment process; • if public concern, 1-day mandatory mediation for each of phases 3 & 4 following peer and government review and prior to any appeal period	Conformity to standard *and* purpose of EA Act *and* most reasonable design *and* reasonable location	• ERT request for hearing following mediation; •maximum 10-day hearing all phases unless special permission; •intervenor funding (prescribed eligibility and approach)	1-1.5 years

Notes:

1. The key trigger issue for a category 4 project is that it includes projects that do not advance provincial policy, but are merely consistent with it. For projects that do advance provincial policy, a category 4 project is distinguished from a category 3 project by the risks of on-site or off-site impacts it may cause: a category 4 project may risk on-site impacts upon regionally or provincially protected resources or off-site multi-generational impacts on human health and/or regionally or provincially protected resources.
2. Consistent with these trigger issues, the process for a category 4 project includes two phases on alternatives: the requirement to consider alternative designs and the requirement to consider alternative locations. The purpose of these requirements is to show that, the proposed undertaking is preferred among reasonable alternatives. Furthermore, because of the issues raised by the project, there is provision for participant funding to review compliance with the procedure regarding trigger, process and approval requirements.
3. The type of hearing process for a category 4 project differs depending on whether the project advances provincial policy (e.g. leave to appeal required) or is merely consistent with such policy (variable requirements, as set out in the text). In all cases triggering a hearing, there is provision for a maximum 10-day hearing unless further leave is granted by the Tribunal.
4. The anticipated time to carry out this procedure, including any required hearing, is 1 to 1.5 years, including any required EA hearing.

Examples: transportation: transit lines.

PROJECT CATEGORY	PROJECT TRIGGERS			PROCESS				HEARING	TIME
	BENEFITS	RISKS		PHASES	DOCUMENTS	PUBLIC ROLE & RESOURCES	APPROVAL TEST(S)		
	PROVINCIAL	ON-SITE	OFF-SITE						
5	Not consistent with provincial policy	May/ may not have potential impact upon provincially / regionally significant resource	•Potential cumulative impacts with other projects; *and/or* •potential for multi-generational nuisance and health impacts *and/or* •impacts upon provincially/ regionally significant resource	5 phases following TOR: (e.g., project description; need; alternative designs; alternative locations; cumulative impacts)	•Category 5 Assessment: prescribed form and length (100 pg plus appendices); •Category 5 Government Review (prescribed form, scope and timing for each phase, concluding with 60-day time limit at end)	• Local and EBR notice of project proposal and each phase of assessment process; • EBR notice of completion of each stage of government review; • www-accessible documentation; • participant funding for expert peer review prior to end of each phase of assessment process; • if public concern, 1-day mandatory mediation for each phase following peer and government review and prior to appeal period	•purpose of EA Act *and* •Conformity to TOR *and/or* - need for project; - most reasonable design; - reasonable location; and - project advantages outweigh disadvantages)	• ERT request for hearing following mediation; ERT hearing following mediation (10-day maximum for each phase where TOR permits), unless frivolous; •maximum 10-day hearing per phase unless leave; •intervenor funding (prescribed eligibility and approach)	2-3 years

Notes:

1. The key trigger issue for a category 5 project is that it deals with projects that are inconsistent with provincial policy. Currently, this category of project is also considered to be a project that triggers individual EA; however, were the proposed procedure adopted through regulation or class approval, that instrument could make provision for a category 5 that does not involve individual EA.
2. Consistent with the principal trigger issues, the process for a category 5 project includes not only the four phases present in a category 4 assessment, but also a new initial phase to specifically address need for the project. Similarly, like category 3 and 4 projects, the nature of the issues raised by a category 5 project supports participant funding to review compliance with the procedure regarding trigger, process and approval requirements.
3. For category 5 projects, public hearings are mandatory. Unlike other categories, the identified maximum hearing length applies to *each* phase of the assessment unless the Minister (e.g., TOR) or the Tribunal determines otherwise.
4. The anticipated time to carry out this procedure, including any required hearing, is 2 to 3 years, including any required EA hearing.

Examples: waste: new landfill or incinerator waste disposal sites; transportation: new arterial roads.

ISSUE: PROVINCIAL ADVISORY BODY

From the early 1980s to the mid-1990s, Ontario's Environment Minister created and maintained the provincial Environmental Assessment Advisory Committee ("EAAC"), which was a small, independent body that provided expert advice to the Minister on a broad range of EA-related matters. However, EAAC was abolished by the previous government in 1995, and EAAC has not been replaced to date. The continuing absence of an "arm's length" provincial advisory body has deprived the Minister of external expert advice on EA policy, guidelines, procedures, and case-specific issue resolution. This absence has also deprived the public of enhanced opportunities to review and comment upon crucial or controversial EA matters.

RECOMMENDATION 6: PROVINCIAL ADVISORY BODY

The Minister should establish an independent advisory body to provide advice to the provincial government and solicit public input in relation to EA matters as may be warranted.

RECOMMENDATION 7: FUNDING FOR ADVISORY BODY

Funding for the advisory body should be drawn, at least in part, from revenues generated from EA application fees (as described below in Recommendation 24).

DISCUSSION

EAAC was formally established in 1983, and its members were appointed from outside government in order to provide impartial expert advice to the Environment Minister on EA matters referred by the Minister from time to time. The members were largely drawn from academic and legal backgrounds, and they received administrative support and modest per diems from the Ministry for their specialized work.

During its tenure, EAAC provided the Minister with advice on numerous case-specific matters, such as bump-up, designation and exemption requests. In addition, EAAC also reviewed and commented upon larger or systemic EA issues, such as legislative and regulatory reform[34] or integration of EA and land use planning.[35] In order to prepare its reports and recommendations, EAAC frequently provided public notice, solicited public input, and held informal public meetings among interested persons to discuss the issues in dispute. Thus, EAAC was highly regarded by many EA stakeholders, and was "proven time and time again to be a useful watchdog [and] often put forward useful compromises and well-reasoned recommendations."[36]

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[34] See, for example, EAAC's two-part report *Reforms to the Environmental Assessment Program* (Oct. 1991 and Jan. 1992).

[35] See, for example, EAAC's *Report 38: The Adequacy of the Existing Environmental Planning and Approvals Process at the Ganaraska Watershed* (1989); and *Report 41: Environmental Planning and Approvals in Grey County* (1990).

[36] R. Northey and J. Swaigen, "Environmental Assessment", in Swaigen & Estrin (eds.), *Environment on Trial* (3rd ed., 1993), page 195.

Nevertheless, EAAC was terminated by the Minister in 1995 on the grounds that EAAC had "completed its job", and that "the Ministry now has a sufficiently sound basis of advice and experience from which to ensure the effective operation of the [EA] program".[37] Not surprisingly, EAAC and other EA stakeholders did not share this opinion, and they objected to the abolition of this cost-efficient mechanism for ensuring broad public input and independent advice in controversial EA disputes.

Shortly after EAAC was disbanded, the EA Act itself was amended to specifically empower the Minister to "appoint committees to perform such advisory functions as the Minister considers advisable" (see section 31(1)(g)). To date, however, this authority has not been used to establish a permanent advisory body, and, in fact, this authority has only been used to establish the EA Advisory Panel on an *ad hoc* basis.

Given the controversy and litigation that has ensued under the EA Act since 1995, the Executive Group concludes that it was premature (if not erroneous) to terminate EAAC. In our view, it is extremely helpful and productive to have a permanent advisory body to solicit broad public input, and to provide expert advice to the Minister, on a number of contentious EA issues that have emerged under the amended Act.

Moreover, as noted above, the Executive Group is recommending that the MOE should develop general EA principles and sector-specific policies to direct the EA planning and decision-making process. With respect to development of general EA principles, the MOE could initiate this by referring this matter to the provincial advisory body and asking for advice on the appropriate content of an appropriate EA Act policy guideline that entrenches such principles.

Similarly, with respect to sector-specific policies, the Executive Group is recommending that the MOE should initiate this process by appointing sector-specific working groups (consisting of proponent, stakeholder and governmental representatives) to develop and consult upon policy content, and to submit proposed policies to the Minister for review and adoption. However, if the working groups are unable to reach a consensus on the proposed policies, or if there are unresolved public concerns about the proposals, then such proposals should be referred by the Minister to the provincial advisory body for further consideration and resolution of stakeholder concerns if possible.

It should be further noted that the mandate of the *ad hoc* EA Advisory Panel will expire shortly, and following the dissolution of the Panel, there will be no advisory body to oversee and report upon the implementation of the critical changes recommended in this Report. Given the importance and magnitude of the legislative, regulatory and administrative reforms described in this Report, the Executive Group believes that a provincial advisory body could play an extremely useful role in assisting the MOE in developing these various changes in an open and consultative manner. In our view, merely posting an EBR Registry notice, and providing a perfunctory comment period under the EBR, will likely be highly inadequate for the purposes of ensuring public input and facilitating informed decisions about the reforms recommended in this report.

[37] A. Levy, "Environmental Assessment in Ontario" (2002), 11 J.E.L.P. 173, f.n. 95.

For these reasons, the Executive Group recommends that the Minister should exercise her authority under the EA Act as soon as possible to establish a new provincial body and give it a broad advisory function. Funding for the provincial advisory body should be drawn, at least in part, from revenues generated by the EA application fees recommended below in this Report.

The Executive Group hastens to add that it is not our intention to simply recommend a re-incarnation of the previous EAAC. In our view, this new provincial advisory body does not necessarily have to duplicate the previous EAAC model; in fact, there are numerous other options that may be considered when establishing the structure, mandate and composition of this body. For example, consideration could be given to providing the advisory body the ability, on its own initiative or upon the request of Ontario citizens, to inquire into and provide advice on key or urgent EA matters that come to its attention. This flexibility would represent an improvement over the previous EAAC, which could only react to those issues that the Minister had specifically referred to EAAC.

In addition, all requests for designation, exemption, and harmonization orders received by the Minister could be automatically forwarded to the provincial advisory committee for monitoring, comment, and tracking purposes. Such requests should also be routinely posted on the MOE's specialized EA website that is being recommended by the Executive Group, as discussed below.

Finally, it should be noted that there are numerous legislative precedents for the creation of specialized provincial advisory bodies under Ontario's environmental laws. For example, pursuant to section 4 of the *Safe Drinking Water Act*, the Minister has established the Advisory Council on Drinking-Water Quality and Testing Standards, which is currently consulting Ontarians in relation to drinking water standards for small systems (O.Reg. 170/03) and well disinfection (Regulation 903). Similarly, section 10 of the *Pesticides Act* authorizes the establishment of the Pesticides Advisory Committee to review and report back to the Minister on various pesticide-related issues. In addition, section 4 of the *Niagara Escarpment Planning and Development Act* authorizes the establishment of a public advisory committee to make recommendations and provide advice in relation to the Niagara Escarpment Plan. Likewise, section 14 of the *Crown Forest Sustainability Act* authorizes the creation of advisory committees in relation to the preparation of forest management plans and manuals under the Act.[38]

These and other precedents demonstrate the utility, versatility and benefits of creating specialized advisory bodies under environmental legislation. Therefore, the Executive Group recommends that a provincial advisory body be established forthwith under the EA Act. This provincial advisory body could not only serve a valuable role in developing EA principles, but it could also provide considerable assistance in developing the implementation details for the numerous other changes recommended throughout this Report.

[38] It should be further noted that Condition 36 of the 2003 "declaration order" issued under the EA Act in relation to Crown forest management requires the Ministry of Natural Resources to establish two provincial level advisory committees regarding policy and technical matters.

ISSUE: PUBLIC PARTICIPATION

Sections 5.1 and 13.1 of the EA Act currently provide that when preparing Terms of Reference or EA documentation, proponents "shall consult with such persons as may be interested." However, the Act does not provide further direction on what constitutes adequate "consultation", nor does the Act provide any guidance on who may be an "interested person" for the purposes of these sections. These interpretive difficulties are compounded by the continuing absence of any finalized MOE guidance documents regarding public consultation under the EA Act. Furthermore, the ability of First Nations, aboriginal communities, and other stakeholders to meaningfully participate in the EA planning and decision-making process has been significantly affected by the continuing absence of mandatory participant funding mechanisms. Finally, the siting of contentious fixed or linear facilities (i.e. landfills or transmission corridors) has given rise to considerable debate over what constitutes a "willing host" for the purpose of gauging community acceptance of proposed undertakings. This debate is compounded by the lack of explicit siting standards under the EA Act.

RECOMMENDATION 8: PUBLIC PARTICIPATION

The MOE should revise the draft consultation guideline to reflect the recommendations in this report, paying particular attention to the following issues. Following this revision the MOE should consult widely on their guideline before finalizing:

a) identification of "interested persons" within the meaning of the EA Act;
b) provision of timely and effective public notices;
c) ensuring public access to relevant documents and information;
d) provision of adequate comment periods;
e) effective methods and techniques for soliciting public input (including using municipal council proceedings where applicable);
f) provision of adequate resources to members of the public to participate meaningfully in the EA process; and
g) methods for accommodating public concerns and resolving issues in dispute.

RECOMMENDATION 9: PUBLIC PARTICIPATION

Once the consultation guideline has been finalized, the MOE should organize workshops and undertake other measures to ensure that proponents, participants and agencies understand public participation rights and responsibilities under the EA Act.

RECOMMENDATION 10: PUBLIC PARTICIPATION

The Ontario government should develop, with First Nations and aboriginal community input, appropriate protocols, procedures and collaborative agreements to facilitate meaningful participation by First Nations and aboriginal communities in the EA planning and decision-making process, particularly in relation to:

a) improving notice requirements;
b) enhancing comment opportunities;

c) resolving funding issues; and
d) involving First Nations and aboriginal communities as part of the government review team where appropriate under the EA Act.

RECOMMENDATION 11: PUBLIC PARTICIPATION

The Minister should request that the advisory body review and report upon options for obtaining or confirming community acceptance (e.g., willing host) of undertakings proposed under individual EAs and Class EAs. At a minimum, the advisory body should be asked to consider whether there is a need for:
a) inclusive, resourced local bodies to negotiate, monitor and revise agreements;
b) explicit local benefits targeted towards closest neighbours to the site;
c) comprehensive efforts to identify and engage diverse groups within the local community at the earliest planning stages; and
d) an option to site elsewhere if negotiation efforts fail.

DISCUSSION:

(a) Public Involvement in EA Planning and Decision-Making

Under the EA Act, it is the proponent's responsibility to design and implement an EA process that facilitates the effective involvement of all persons affected by, or interested in, the proposed undertaking. For example, the attached Report of the Waste Table states that the EA process must be "participatory" and "include opportunities and resources for participation by all potentially affected parties" (Recommendation 1, paragraph 3). Similarly, the attached Report of the Energy Table identifies the need to "maintain or enhance opportunities for effective public participation in decision-making processes" (page 4).

In order to achieve this fundamental objective, the Executive Group suggests that the following principles should be observed within the EA planning and decision-making process:

- **Interested persons should help plan the undertaking, and should participate in critical decision points within the EA process**. This means that a consultation program should not be carried out as a separate procedure that is parallel or subsequent to the EA planning process. Instead, the EA planning and decision-making process must be built upon the direct involvement and contributions of interested persons;[39]

- **EA planning occurs through a phased sequence of decisions.** This means that meaningful consultation must occur before significant decisions are made, and must be

[39] The recitals to the Aarhus Convention of UNECE (United Nations Economic Commission for Europe) recognize the importance that "the respective roles that individual citizens, non-governmental organizations and the private sector can play in environment protection," and note that "in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns": source - "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Denmark, 1998).

scheduled and implemented in a manner that permits interested persons to make informed contributions to the decisions in question.

- **Consultation must commence at the earliest possible stage of the EA planning and decision-making process.** This means that interested persons should be consulted long before final and irreversible decisions are made. This is particularly true of the critical upfront decisions regarding the content of the Terms of Reference for an individual EA.

- **Consultation documents must be accessible and understandable.** This means that information provided to interested persons should be complete, intelligible, and free of excessive technical or scientific jargon. Where appropriate, funding should be provided to ensure that interested persons can obtain professional assistance to understand and respond to consultation documents.

- **Consultation must be systematic and flexible.** This means that consultation opportunities and events (i.e. workshops, public meetings, open houses, etc.) should be appropriately scheduled and well-advertised to ensure that interested persons understand the significance and purpose of such consultation efforts. Adequate comment periods should be provided, and the planning schedule should be able to accommodate new information, changes in circumstances, and shifts in public views.

- **The role and effect of consultation must be documented.** This means that all aspects of the consultation must be properly documented. Procedures should be in place to ensure that public concerns and issues are accurately recorded, and that the proponent describes how public input influenced the EA planning and decision-making process.

However, serious concerns have been repeatedly expressed by First Nations, aboriginal communities and various stakeholders (referred to collectively hereafter as participants) that they cannot effectively participate in the planning, approval and monitoring of undertakings subject to the EA Act. They claim that comment periods are too short, relevant documents are too inaccessible, and consultation efforts are too superficial and with no real purpose other than to enable a proponent to report to the EAAB that it has fulfilled its statutory obligation to consult. In addition, concern has been raised that public consultation rights are illusory at best if participants lack sufficient resources to retain the technical, scientific or legal assistance that may be necessary to meaningfully participate in the EA process, as discussed below.

The overall purpose of consultation is the early identification of issues, problems or concerns from the point of view of various participants, so that they can be adequately addressed by the proponent or the MOE. Thus, consultation is intended to be an integral part of the EA planning process by ensuring that all meritorious matters are identified, examined and satisfactorily resolved. Where properly implemented, consultation efforts facilitate "buy-in" of both the process and outcome by participants and the public at large, and contributes to superior results by ensuring all relevant evidence, opinions and perspectives are considered.[40] Proponents maintain

[40] According to UNECE, its Aarhus Convention emphasizes the importance of "the role of members of the public and environmental organizations in protecting and improving the environment for the benefit of future generations": source - UNECE press release October 29, 2001 with respect to the "Convention on Access to Information, Public

that they do make serious efforts to consult, but note that public participation levels tend to be minimal until an EA is well advanced and the preferred undertaking has been determined and announced. By then it is too late and costly to effectively 'start all over' in response to participants' demands.

In addition to being "consulted", many participants (particularly municipalities and those who represent significant groups within the community) often desire "a seat at the table" during the EA process in order to participate in and affect decision-making which occurs along the way, and also to ensure that proper post-approval monitoring is required, conducted and reported. In addition, they want to review the monitoring results and recommendations, and to ensure that all necessary adjustments or remedial measures are promptly implemented and complied with by proponents.

This is particularly true of First Nation and aboriginal communities which are concerned that proposed undertakings may affect treaty and aboriginal rights that are constitutionally protected by section 35 of the Charter. Such concerns have also resulted in the judicial development of a legal duty upon governments to meaningfully consult affected aboriginal peoples and to accommodate their interests or concerns. For example, the Supreme Court of Canada has recently held that this duty is rooted in the honour of the Crown, and that the duty arises when governments have knowledge of aboriginal right or title and are contemplating conduct (i.e. issuance of an environmental permit or approval to a third-party) that may adversely affect it.[41]

In a related decision, the Supreme Court of Canada affirmed that the duty to consult and accommodate applies to provincial governments, but found on the facts that certain procedures established under B.C.'s EA legislation (i.e. involving the First Nation in a "Project Committee" established as part of the environmental review process) satisfied the duty to consult and accommodate.[42]

Although the precise breadth and scope of this "duty to consult" is still being developed by the courts, it is clearly necessary in Ontario to design and implement consultation procedures under the EA Act (and other statutes) that satisfy the province's duty towards First Nations and aboriginal communities.

In some recent EA cases, the EAAB has utilized some intriguing approaches (i.e. entrenching special notification procedures, involving First Nation representatives on the government review team, etc.) where proposed undertakings may affect treaty or aboriginal interests. In the Executive Group's view, such innovative EA practices and procedures should be encouraged and enhanced. At a minimum, the Ontario government (i.e. MOE, Ontario Native Affairs Secretariat, etc.) should, with the direct involvement of aboriginal representatives, develop

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Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Denmark, 1998). By recognizing "citizens' environmental rights to information, participation and justice, it aims to promote greater accountability and transparency in environmental matters." As well as protecting the environment, it promotes "democracy" by creating "an opportunity for people to express their opinions and concerns on environmental matters and ensure that decision makers take due account of these."

[41] See *Haida Nation v. B.C.,* 2004 SCC 73.

[42] See *Taku River Tlingit First Nation v. B.C.,* 2004 SCC 74

appropriate policy, guidelines and protocols regarding EA consultation with First Nations and aboriginal communities.

It should be further noted that the federal government has recently amended CEAA to improve "communication and cooperation between responsible authorities and aboriginal peoples with respect to environmental assessment", and to formally recognize the value and importance of using aboriginal traditional knowledge during the conduct of EAs.[43] The federal government has also proposed the establishment of an aboriginal advisory committee to offer advice on EA issues such as consultation. In light of these federal initiatives, the Executive Group strongly urges the Ontario government to make efforts to improve and strengthen the role and responsibilities of First Nations and aboriginal communities within Ontario's EA program.

Some proponents, however, may be reluctant to embrace enhanced participatory rights (especially the "seat at the table" concept), maintaining that the entitlement to be consulted does not accord participants the power to insert themselves into actual decision-making -- to potentially vote on and veto decisions made at various stages in the EA process. Private sector proponents assert that EA was not intended to extend democratic rights to the decisions made in their board rooms and executive suites. Public proponents no doubt agree with this concern. On the other hand, given the purpose section of the EA Act (i.e. "betterment of the people of Ontario"), it has been recognized that a proponent's corporate interests must be weighed against broader public interest considerations during the EA planning and decision-making process.

In any event, there appears to be overwhelming consensus among EA stakeholders that the MOE must develop appropriate policy and guidelines to ensure meaningful public participation in the EA planning and decision-making process. For example, the attached Report of the Waste Table recommends that the MOE develop, with stakeholder input, "clear guidelines for the type, form and level of public participation, emphasizing a range of approaches" (Recommendation 6).

Similarly, the attached Report of the Energy Table calls for "better public engagement and consultation", and suggests that "the scale and extent of public participation and consultation should reflect the scale and extent of potential impacts and the level of public interest in a project" (pages 5 and 16). Among other things, the Energy Table has recommended greater disclosure of EA documentation, improved use of current information technology, and the creation of a "process co-ordinator" to enhance public consultation and to promote public understanding of the EA process.

Likewise, the attached Report of the Transportation Table recommends that: (a) MOE should define minimum public participation thresholds for individual EAs based on local community needs and project complexity; (b) MOE should develop "practice guidelines" that "encourage proponents to consult as early as possible in the EA process and give direction on how to be responsive to changes in the process as they evolve"; (c) MOE should prepare and distribute a "best practices" document on effective public consultation; and (d) EA notices and reports should be "published in a jargon-free, plain language" (Recommendations 10.1 to 10.4).

[43] CEAA, section 4(1)(b.3) and 16.2 (as amended by Bill C-9 in 2003).

Public input received by the Executive Group also supported the need to substantially improve public consultation within Ontario's EA program. For example, a submission commented as follows:

> [Public consultation] is in need of a total overhaul so there is true participatory planning and, therefore, a balance of power between the proponent and public stakeholders (and between stakeholders themselves). If this is to happen, the process must be proactive, provide complete information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement.

The Executive Group fully endorses these kinds of recommendations, and strongly urges the MOE to develop and implement long-overdue policy and guidelines to ensure meaningful public participation in the EA planning and decision-making process for all sectors subject to the EA Act.[44]

In this regard, the Executive Group notes that the MOE has already prepared a draft consultation guideline that has not been finalized to date. Accordingly, the Executive Group recommends that the MOE should revise the draft guideline in accordance with the findings and recommendations of this report. The revised guideline should then be posted on the EBR Registry for public notice and comment before it is finalized.

Once the guideline is finalized, the Executive Group recommends that the MOE should organize workshops and other public outreach measures so that all EA participants are fully cognizant of public participation rights and responsibilities under the EA Act. The elements of appropriate public consultation programs should also be a topic for the EA training and educational materials recommended below.

(b) Participant Resources

Public consultation is not a new requirement in EA, although it gained prominence in the 1996 amendments to the EA Act. Prior to 1996, a program for funding public participation in EA hearings had been available under the *Intervenor Funding Project Act* ("IFPA"), which was introduced by former Attorney General Ian Scott in 1988.[45]

Under the IFPA, proponents – not the Ontario government at large – were generally required to provide funding to eligible public interest participants for specified hearing-related purposes. Issues related to eligibility, quantum, and purpose of allocated funding were decided by the EA Board (now the ERT), and conditions were typically imposed to ensure that intervenors were

[44] Article 3.2 of the Aarhus Convention of UNECE provides that governments will "assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters": source - "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Denmark, 1998).

[45] The recitals to the Aarhus Convention (UNECE) recognize that citizens "may need assistance in order to exercise their rights" to access to information, participation in decision-making and "access to justice in environmental matters": source - "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Denmark, 1998).

accountable for expended funds. It should be noted that the IFPA was only applicable to individual EAs, rather than projects proposed under the auspices of Class EAs.

Despite general public and proponent support for the IFPA program, the previous Ontario government allowed the IFPA to expire without renewal in 1996, just before the Bill 76 amendments to the EA Act came into force. The net result is that intervenor funding is no longer mandatory for hearings held under the EA Act or the *Consolidated Hearings Act* where applicable. It should be further noted that during its lifetime, the IFPA was never extended to any part of the EA process which did not involve, or was prior to, public hearings. The IFPA has not been replaced by any program or process requirements since 1996, nor has the EAAB provided, promoted or advocated funding in any EA files which it supervises.

The need for, and benefits of, funding public participation in the EA process is well documented in studies, reports and published literature.[46] The high degree of technical, engineering and scientific investigation and analysis involved in EA work requires considerable professional assistance for participants, just as it does for proponents. Numerous disciplines and fields of inquiry are often involved in any particular EA study (e.g. hydrogeology, acoustics, toxicology, planning, etc.). The cost of obtaining competent professional assistance of this nature is very considerable, easily outstripping the expense of legal advice.

Without the assistance of expert advisors, public participation is likely to be of amateur quality and technically superficial, and therefore of little consequence in the EA planning and decision-making process. Such input is dismissed by decision-makers who prefer to rely on the technical opinions and advice of MOE staff and/or consultants employed by proponents. For example, the quality of interventions in hearings after the abolition of the IFPA was sharply reduced, if not entirely eroded.

Some public and private proponents were reluctant to fund participants who were often perceived to be critical of, and opposed to, the proposed undertaking as well as the EA process being followed by the proponent's consultants. Proponents were also concerned that the cost of the funding process, and the quantum of funding awards, were too high. They also were concerned that intervenor funding served to fuel lengthy hearings. Participants were also critical of the IFPA program, and were particularly concerned about artificial limits on the scope and amount of funding, eligibility limits on intervenors, and the lack of availability of funding for work done outside of (or before) the hearing process.

Despite such concerns, an independent study of the IFPA commissioned by three provincial Ministries (i.e. Attorney General, Energy, and Environment) found that intervenor funding was both effective and necessary to facilitate informed public participation.[47] To address concerns about the implementation of the IFPA, this study offered a number of suggested improvements to the IFPA. The EA Board, EAAC and other interested stakeholders also offered similar

[46] See, for example, R. Anand and I.Scott, "Financing Public Participation in Environmental Decision-Making" (1982), 60 Can. Bar Rev. 81, and Canadian Environmental Defence Fund, *Intervenor Funding and the Intervenor Funding Project Act in Ontario* (CEDF, 1991).
[47] W. Bogart and M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act* (1992).

recommendations for funding reform. As noted above, however, the IFPA was abolished – not reformed – in 1996, and no alternative funding regimes have been developed to date.

The current absence of participant and/or intervenor funding leaves Ontario at the trailing edge of EA regimes across Canada. For example, the *Canadian Environmental Assessment Act* (CEAA) specifically mandates the establishment of a participant funding program to facilitate public participation in comprehensive studies, mediations and panel reviews under the Act: see section 58(1.1) of CEAA. Similarly, Manitoba's EA legislation empowers the Minister to require proponents to provide financial or other assistance to persons or groups involved in the EA process: see section 13.2 of the *Environment Act* and the "Participant Assistance Regulation" (Reg. 125/91). Clearly, it is time for Ontario to revisit the critically important issue of funding public participation in EA planning and decision-making.

In this regard, it should be noted that the attached Report of the Waste Table expresses concern that the absence of MOE policy direction on funding leaves "the determination of the need for participant funding to the discretion of proponents" (page 12). Moreover, the Waste Table identified the need for the MOE to "define when it would be appropriate for proponents to provide financial assistance to participants", and recommended that every TOR should "include an outline of how the proponent will assist the public in participating in the process" (Recommendation 6). This recommendation further states that the level of participant funding "would be commensurate with the size and nature of the project". The Executive Group concurs with these recommendations, but suggests that they should not be confined to the waste sector. Instead, an appropriate model for funding public participation should be developed for the EA program at large.

There are different options and issues that should be considered for ensuring the timely provision of resources to facilitate public involvement in the EA planning and decision-making process. For example, a private waste management proponent made a submission to the Executive Group indicating that proponents should provide funding to community-based liaison committees (rather than to individual citizens), which could use the funding to retain qualified consultants in various disciplines to undertake peer reviews of proponents' technical work. Another submission received from the public by the Executive Group recommended that: (a) the funding program should be entrenched in rules rather than guidelines; (b) that the quantum of resources provided by proponents should be proportional to the size, scale and significance of the proposed undertaking; and (c) that resources should be made available directly to citizens' groups or local communities (rather than just municipal councils). The Executive Group also received public input suggesting that interested or affected individuals should be eligible to apply for participant or intervenor funding from proponents. Another submission from the public urged caution when applying the "proponent pay" principle in the renewable energy sector, since the proponents of such projects tend to be small, community-based or non-profit groups that may be ill-equipped to provide resources to all interested or potentially affected participants.

In light of the foregoing comments, the Executive Group concludes that there is a strong level of conceptual support for funding public participation in the EA process, but there is no unanimity at this time about the details on how to best construct an effective, efficient and equitable funding model.

In carrying out its mandate, the Executive Group had insufficient time to fully develop and consult upon a new funding model for Ontario that strikes an appropriate balance between the needs of proponents and other EA participants. Accordingly, the Executive Group suggests that the Minister should refer the issue of funding public participation to the provincial advisory body (see Recommendation 6 above) for its consideration and further consultation. Ideally, this public review should proceed in conjunction with the finalization of the consultation guideline, as described above. In particular, the provincial advisory body should be requested by the Minister to develop an appropriate participant funding model for Ontario that addresses concerns which had been expressed by proponents and participants about the previous IFPA regime. In addition, the model should ensure that sufficient resources are made available for public participation early in the EA planning and decision-making process. In general terms, the amount of funding should be commensurate with the significance (or categorization) of the proposed undertaking or project.

(c) Siting Exercises and "Willing Host" Communities

Siting of fixed and linear projects is often challenging under the EA Act, especially since very local impacts upon neighbours are often unavoidable, reducing land values and quality of life, and prompting staunch objections to the proposed undertaking, regardless of proposed mitigation measures or the creation of local, regional or provincial benefits arising from the project. Problems inherent in siting unpopular facilities like landfills have led to the development of processes aimed at identifying eager, or at least "willing", hosts for these projects, with very explicit attendant local benefits defined at the outset.

The still rather sparse experience with willing host procedures is not encouraging, and indicates that much more work and experimentation is required before this process is likely to succeed. Problems have included the proper definition (or gauge) of community consent: does it refer to the views of elected officials rather than the community at large? Does it refer to one portion of the community rather than all groups in the area (particularly those downwind, downstream or downgradient of a proposed facility)? Should formal plebiscites or referenda be undertaken to determine local acceptance?

It should be further noted that diversity of opinion regarding proposed projects is common, and it is critical that the reluctant or opposing community members be included or at least targeted by any willing host process. Moreover, since communities are reluctant to accept long-term arrangements, time-limited agreements should be considered with provisions for review and revision. Furthermore, an inclusive forum for community representatives with sufficient resourcing to ensure a stable existence, beyond the current elected council, is essential for negotiation of any agreement and monitoring of conditions.

On this point, it should noted that the attached Report of the Waste Table stipulated that the EA process must be "socially responsible" in the sense that waste management proponents should be "responsive to the needs of the community, listen to their concerns, and act accordingly" (Recommendation 1, paragraph 5).

Thus, the Executive Group recommends that the Minister should request the provincial advisory body to review and report upon appropriate models for obtaining or confirming community acceptance to undertakings proposed under individual EAs and Class EAs.

ISSUE: GREEN PROJECT FACILITATOR

The Energy Table and other EA stakeholders supported a broad objective characterized as "one project, one process" to promote the review, assessment and approval of projects through a single process by integrating administrative functions of multiple review and approval authorities, clarifying criteria and accountability for decision-making, and eliminating redundant and unnecessary steps and processes. Given the Advisory Panel's mandate, the Executive Group determined that this suggestion would be especially valuable for the facilitation of "green projects" in Ontario (e.g., projects that maximize benefits to the people of Ontario and minimize negative impacts).

RECOMMENDATION 12: GREEN PROJECT FACILITATOR

The Ontario government should create the office of a provincial process facilitator for green projects. This office will facilitate approval of green projects by: (1) expediting EA and other provincial requirements; and (2) resolving cross-jurisdictional or interministerial issues.

DISCUSSION:

The Executive Group considered a range of options to facilitate the EA process. At one end of the continuum is the option of maintaining the status quo – that existing authority in legislation is essentially left untouched, but provincial officials are given the resources and direction to oversee the EA planning and decision-making process. In other words, Ministries and agencies of the Crown could retain their entire existing jurisdiction, while local decision-making under legislation, such as the *Planning Act*, would continue.

On the other end of the spectrum, the Executive Group discussed fundamentally changing the roles, responsibilities and statutory powers of all authorities responsible for the approval and development of energy projects, for example, thereby creating an entirely new structure. After considerable discussion, the Executive Group did not feel that either one of the extreme ends of this continuum would satisfy the goal of improving the EA process.

Rather, the Executive Group decided that the most effective strategy would be the creation of a process facilitator at the provincial level. The office of the process facilitator would be responsible for ensuring an integrated and coordinated review, and for ensuring the EA process solicits and accommodates public participation. The focus of the office would be to facilitate "green projects", as identified and prioritized in the sector-specific policies described above. Essential to the success of the process facilitator would be the authority to help resolve conflicts on matters of provincial interest. Of necessity, the facilitator would have to be a senior or high-level bureaucrat who could be established with an interministerial mandate under the auspices of the Premier's Office rather than the Minister of the Environment.

Precedents for this approach exist at both the provincial and federal levels. For example, the Ontario government had previously established the Office of the Provincial Facilitator (Dale Martin), which resolved inter-agency or public disputes regarding significant land use or development proposals that triggered multiple approval requirements. Similarly, at the federal level, CEAA has been recently amended to establish the "Federal Environmental Assessment Coordinator" whose mandate is to "coordinate the participation of federal authorities" in the EA process, "facilitate communication and cooperation" among federal authorities, provincial governments, and other EA participants, and ensure that federal authorities perform their obligations "in a timely manner": see sections 12.1 and 12.2 of CEAA.

If a similar office is established in Ontario, successful implementation would require participation by responsible authorities at the provincial and municipal levels. Each authority would produce a checklist detailing the review and approval process, and establishing the standards and requirements to be met. Public expectations, industry compliance, corporate due diligence and public fiduciary obligations would then be met and discharged in one, single process.

ISSUE: HEARINGS, ALTERNATIVE DISPUTE RESOLUTION (ADR) AND MEDIATION

Under Ontario's current EA program, there are separate decision-making roles being performed by the Minister, EAAB and Environmental Review Tribunal ("ERT"). The EAAB also is the administrator and coordinator of the EA program. For many years, the Environmental Assessment Advisory Committee provided external advice to the Minister on contentious EA disputes, but EAAC no longer exists. In addition, there is no ADR department, nor personnel, within MOE or EAAB who are actively facilitating ADR in EA matters.

Sections 9.1 and 9.2 of the EA Act empower the Minister to refer an application, in whole or in part, to the ERT for a public hearing and decision. This discretion may be exercised by the Minister on her own initiative, or upon the request of any person (see section 9.3 of the EA Act). Where the Minister refers a matter to the ERT, the Minister is further empowered to impose directions, conditions and deadlines regarding the ERT hearing and decision. Similar provisions apply to Class EAs under Part II.1 of the EA Act. With two exceptions, however, there have been no public hearings held under the EA Act since these statutory provisions were enacted under Bill 76 in 1996. The ERT's rules of practice encourage pre-hearing mediation and other ADR techniques to identify, scope, or settle issues in dispute.

RECOMMENDATION 13: HEARINGS, ADR, MEDIATION

The MOE should revise the draft mediation guideline and should specifically request consider circumstances or criteria when it may be appropriate for the Minister to refer matters to ADR and mediation under the EA Act. One recommended issue to consider is the role of ADR when there is continuing public concern about a project. A one-day mandatory mediation could be considered for use at the end of contentious phases of an EA

project before the proponent advances to the next stage or any public right of review (e.g., Part II Order or elevation request) can be exercised. Following the revision the MOE should consult widely on the guideline before finalizing.

RECOMMENDATION 14: HEARINGS, ADR, MEDIATION

Pending the completion of the sectoral procedural framework, as an interim measure the Minister should ensure that there are public hearings before the ERT on individual EA applications where:

a) ADR and mediation efforts have been employed; and,

b) there is significant unresolved public controversy about substantive and procedural issues arising from the proposed undertaking.

DISCUSSION:

The Executive Group firmly believes that ADR and mediation efforts – and fair, timely and efficient hearings – can both play important roles under Ontario's EA program.

(a) ADR and Mediation

ADR is a process which can utilize numerous different approaches to reduce or eliminate disputes and conflicts, and be engaged at any stage in the EA process, including individual and Class EA undertakings (i.e. bump-up or elevation requests). ADR is used widely in a variety of legal contexts beyond the EA Act. For example, mediation is commonplace in the civil and family court process, and in proceedings before administrative tribunals. Although voluntary (party-directed) mediation is preferred, mandatory mediation is also in use. Mandatory mediation has been in place since at least 1999 in Superior Court of Justice proceedings in Toronto and Ottawa, pursuant to the Ontario Mandatory Mediation Program. These mediations are required during the first few months of a lawsuit, although the court may extend the time limit where appropriate.

This process is now under review, and allowing mediations to occur closer to the stage of trial scheduling, if the parties prefer it, is now permitted. The practical reason for this change is that many lawsuits are settled through negotiation only when the day of reckoning (i.e. the trial) is drawing near. At that point, avoidance and delay are no longer options if settlement is to occur. Decision and/or hearing deadlines cause pressure to mount, and this in turn can motivate parties to come to the table, however reluctantly, and negotiate in earnest.

EA often involves difficult multi-party disputes involving numerous issues and public interest values. Resolution of these complex disputes generally requires more time and effort then does private two-party disputes. Facilitating negotiations among parties early in the process, and whenever else disputes arise, is generally a very constructive step. But in the shadow of administrative decision-making, hearings or litigation, it is practically a necessity.

Given the benefits of ADR, the Executive Group believes that EA disputes should be referred to mediation whenever possible or appropriate. In fact, the Minister is empowered to refer various

EA matters (i.e. Terms of Reference, EA approval, or "bump-up" requests (Part II orders)) to a mediator (see sections 6(5), 8, and 16(6) of the EA Act). It appears, however, that this Ministerial authority has not been invoked to date. The general lack of formal mediation efforts under the EA Act may be attributable, at least in part, to the lack of MOE policy or guidance documents concerning mediation.

Accordingly, the Executive Group recommends that ADR should be utilized extensively throughout the EA program, particularly with appropriate staging and deadlines. The Minister and EAAB should take a leadership role in developing a culture and programs which encourage its use.

Similarly, the Executive Group recommends that the MOE should revise its draft mediation guideline in accordance with the findings and recommendations in this report. The revised guideline should then be posted on the EBR Registry for public notice and comment before it is finalized. In finalizing the guideline, particular attention should be given to specifying circumstances or criteria when it may be appropriate for the Minister to refer matters to ADR and mediation under the EA Act.

(b) Hearings

If the public consultation reforms recommended by the Executive Group are implemented, and if EA disputes are referred to mediation more frequently, then hearings become the tool of "last resort" under the EA Act. Put another way, if members of the public are properly consulted, and if their concerns are duly accommodated by proponents (with or without mediation), then the likelihood of hearing requests being filed at the end of the EA process is substantially diminished. On the other hand, if inadequate consultation has occurred, or if ADR or mediation has not resolved public concern about the proposed undertaking, then the Minister should not be reluctant to send the matter, in whole or in part, to a public hearing before the ERT, as described below.

Public hearings under the EA Act are important mechanisms for gathering information, testing evidence, weighing competing interests, and making informed decisions about particularly significant or controversial undertakings.[48] Since the EA Act came into force, public hearings have been held on a wide variety of high-profile undertakings, including landfills, incinerators, highways, transmission lines and timber management on Crown lands. More often than not, these EA hearings have resulted in approval of the proposed undertakings, subject to terms and conditions that are intended to prevent, mitigate and monitor the environmental effects associated with the proposals.

As a specialized tribunal with origins dating back almost 30 years, the ERT is required by law to conduct hearings in a procedurally fair manner. To ensure the independence and institutional

[48] Article 9 ("Access to Justice") of the Aarhus Convention of UNECE provides in 9.2(b) that members of the public shall "have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission": source - "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Denmark, 1998).

expertise of the ERT, it is necessary for the Ontario Cabinet to appoint ERT members who are knowledgeable, experienced, and free of perceived or actual conflicts of interest. In addition, the ERT should be adequately resourced so that members can receive ongoing professional training and development, and hearing panels can appoint their own experts, if required, in order to assist in the ERT's adjudicative duties. The cost of delivering such hearing-related services could be recovered, at least in part, by prescribing appropriate application fees under the EA Act (i.e. filing fees at the ERT for matters referred to a public hearing – see Recommendation 24), as are currently prescribed for other ERT hearings.

In recent years, the ERT has developed rules of practice that include provisions aimed at identifying, narrowing and resolving issues in dispute through mediation and other pre-hearing and hearing procedures. Thus, positive steps have been taken to address historic concerns raised by proponents and others about the cost, complexity and duration of EA hearings.

Despite having the power under the revised EA Act to impose hearing deadlines and circumscribe hearing issues, since 1996 only two undertakings have been referred by the Minister to public hearings under the EA Act. The first was the Adams Mine Landfill hearing, in which the Minister referred only a single issue (i.e. the "hydraulic trap" design), imposed a relatively short deadline for the decision, and approved all other aspects of the application without a hearing. The second was the Quinte Landfill case, in which the Minister referred the entire application for a hearing. Given the continuing absence of MOE policy or guidance documents regarding hearing referrals or decision deadlines, it is difficult to understand why one landfill application triggered a "scoped" hearing, one triggered a "full" hearing, but countless other landfill applications have been approved without any hearings whatsoever under the EA Act.

In fact, aside from these two cases, virtually all other individual EA approval decisions under the EA Act have been made by the Minister without the benefit of public hearings. In addition, it appears that EA hearing requests from the public are being routinely refused by the Minister despite concerns about the adequacy of the proponent's EA work or the acceptability of the proposed undertaking. Indeed, given that the EA Act was specifically amended in 1996 to allow the Minister to, in effect, "tailor" the hearing to fit the undertaking, it is unclear why the Minister has consistently refused to refer matters to ERT hearings at all.

The ongoing absence of hearings under the EA Act is both ironic and perplexing when compared to hearing opportunities under other Ontario statutes. Under the *Planning Act*, for example, appeals to the Ontario Municipal Board are available to the public as of right, even in relation to relatively minor zoning and planning disputes. On the other hand, public hearings are currently non-existent under the EA Act, despite the profound ecological and socio-economic impacts of the type of large-scale undertakings subject to the EA Act.

More fundamentally, the lack of EA hearings appears to be inconsistent with the language of the EA Act, which provides that upon the request of any person, the Minister "shall" refer the EA application, in whole or in part, to ERT, unless the Minister opines that the request is "frivolous or vexatious", or that a hearing is "unnecessary" or may cause "undue delay" (see section 9.3 of the EA Act). However, there appear to be no explicit MOE criteria in the public domain that

clearly explain how these vague grounds are to be interpreted or applied in refusing hearing requests. Unless and until this ambiguity is resolved, the public and proponents alike will have little or no certainty as to when an EA hearing may be ordered, and there will be little or no accountability for Ministerial refusals to grant the hearing rights entrenched in the EA Act.

This overwhelming "no EA hearing" trend is particularly significant since the MOE passed regulations in 1997 stipulating that where waste disposal sites, waste management systems or sewage works are approved (or exempted) under the EA Act, then there will not be any public hearings that are otherwise mandatory under the *Environmental Protection Act* or *Ontario Water Resources Act* (see O.Regs. 206/97 and 207/97). Members of the public and the Environmental Commissioner of Ontario have also expressed concern about the "EA exception" under section 32 of the *Environmental Bill of Rights* ("EBR"), which provides that "instruments" (i.e. licences, permits or approvals) that implement an undertaking approved (or exempted) under the EA Act are not subject to the mandatory public notice, comment and third-party appeal provisions of Part II of the EBR.

Thus, the combined effect of the "no EA hearing" trend, the 1997 regulations, and the "EA exception" under the EBR means that the critically important details regarding design and operation of an undertaking escape meaningful scrutiny by the public and the ERT. As noted above, the Executive Group feels that the EAAB is in a position to encourage and facilitate ADR for stakeholders and proponents, but does not do so. The absence of institutionalized efforts to resolve disputes is surprising in view of the fact that the threat of impending decisions by the Minister, including the option of referral to a hearing, creates a strategic opportunity for facilitating serious negotiations among parties.

However, it must be noted that merely referring matters more frequently to the ERT for public hearings does not resolve concerns raised by participants about the lack of intervenor funding. The pioneering *Intervenor Funding Project Act* was allowed to lapse without renewal in 1996 despite receiving consensus support for its continuation. In the absence of any current legislation requiring the provision of intervenor funding to eligible parties, there is continuing concern about the ability of the public to participate in a meaningful manner in ERT hearings under the EA Act.

Some EA stakeholders have suggested that if the Minister made judicious use of the EA Act powers to scope hearings and impose decision deadlines, then proponents would obtain the certainty of time-limited and issue-focused hearings. Thus, anecdotal concerns about hearing length and complexity under the "old" EA Act would no longer be relevant. However, the *quid pro quo* for hearing restrictions under the current EA regime should be the mandatory provision of intervenor funding to eligible parties. This would be particularly true if the ERT was legally required to allocate to every hearing party, including the proponent, equal amounts of time to present their respective cases, unless the parties agreed otherwise. For example, if the proponent (and its supporters) requires 5 days to make its case, then opposing intervenors should receive 5 days (and intervenor funding) to make their case.

As noted above, the Executive Group sees merit in the development of a procedural framework which automatically specifies which matters may – or may not – go to a public hearing (see Recommendation 5). However, pending the development of such a framework, the Executive

Group recommends that as an interim measure, the Minister should ensure that there are public hearings before the ERT on individual EA applications where:

a) ADR and mediation efforts have been employed; and
b) there is significant unresolved public controversy about substantive and procedural issues arising from the proposed undertaking.

The Executive Group suggests that there are various options to achieve this objective (i.e. legislative amendment, hearings regulation, policy development), but we have no particular preference as to which option is employed by the Minister. The overall intent of this recommendation is to ensure that EA hearings are again available in Ontario – not necessarily in every case, but only in appropriate cases (i.e. where there are unresolved public concerns regarding the environmental risks posed by a proposed undertaking). In this regard, the Executive Group believes that it is time to move the pendulum back from "no EA hearings" to "some EA hearings". In our view, the public interest benefits of EA hearings (or at least the realistic possibility of EA hearings) far outweigh the potential resource implications. After all, given the profound environmental significance of undertakings that are subject to individual EAs, it is critical to ensure that unresolved controversy or conflicts are adjudicated in an independent, credible and publicly accessible forum.

ISSUE: INTEGRATION

Undertakings subject to the EA Act frequently require approvals under other planning or regulatory statutes. Proponents sometimes apply for these other approvals concurrently with the EA process, and sometimes these approvals are sought subsequent to the completion of the EA process. In either case, proponents have reported that considerable delay may be encountered in obtaining these other approvals from other regulatory agencies. There is also proponent and public concern about inadequate integration of the EA process with other planning or regulatory statutes. For undertakings that potentially affect areas of federal interest, there is also uncertainty over the relationship between Ontario's EA Act and the *Canadian Environmental Assessment Act* (CEAA). EA participants are also concerned that if proponents apply first for EA Act approval, then critical design and operational details may be deferred to other approvals regimes with fewer (or non-existent) opportunities for meaningful public scrutiny.

RECOMMENDATION 15: INTEGRATION

The Minister should, as soon as reasonably possible, ensure the EA Act:
a) adopts by cross-reference the *Provincial Policy Statement* ("PPS") that is issued by Cabinet under section 3 of the *Planning Act*;
b) specifies that all statutory decisions under the EA Act shall be consistent with the PPS, as may be amended from time to time; and
c) provides that, in cases of conflict between the PPS and EA policies, the latter shall prevail.

RECOMMENDATION 16: INTEGRATION

The MOE should develop, with proponent and EA participant input, clear and concise guidelines that explain when and how the EA Act will be harmonized with CEAA in relation to undertakings that are potentially subject to both statutes.

RECOMMENDATION 17: INTEGRATION

The MOE should amend the general "EA exception" in section 32 of the *Environmental Bill of Rights* ("EBR") to ensure that:

a) public notice is provided under the EBR in relation to prescribed instruments that are proposed to implement environmentally significant projects or undertakings which have been approved or exempted under the EA Act; and

b) residents may seek leave to appeal such instruments under the EBR only where the environmentally significant project or undertaking has been approved or exempted under the EA Act without a public hearing.

DISCUSSION:

Integration with Other Statutes

Public and private undertakings that are subject to the EA Act may require various other licences, permits, or certificates of approval under other statutes before the undertaking can be constructed or established. For example, a proposed landfill or incinerator typically requires approvals under other statutes administered by the MOE (i.e. *Environmental Protection Act*, and *Ontario Water Resources Act*), but may also need rezoning or official plan amendments pursuant to the *Planning Act* as well as other statutory approvals.

Similarly, Appendix II of the Report of the Energy Table describes the diverse range of federal and provincial licences, permits and approvals that may be required for energy projects, depending on the nature and location of the proposal. Aside from the EA Act (or O.Reg.116/01 and related Class EAs), these other statutes include: *Canadian Environmental Assessment Act; Fisheries Act; Navigable Waters Protection Act; National Energy Board Act; Environmental Protection Act; Ontario Water Resources Act; Lakes and Rivers Improvement Act; Public Lands Act; Conservation Authorities Act; Ontario Heritage Act; Drainage Act; Provincial Highways Act; Planning Act;* and *Ontario Energy Board Act.* Similarly, a participant at the Energy Sector workshop commented that "under the current process with sequential EA and OEB [Ontario Energy Board] approvals, there is the potential for conflicting decisions on what is acceptable and who should pay". To remedy such situations, this participant suggested greater usage of joint EA and OEB review where necessary. Another submission received by the Executive Group from an energy proponent commented that the "provincial permitting process needs to be streamlined and linked to the EA approvals people and procedures/process."

The need for better integration also arises with respect to transportation projects planned under Class EA procedures, which frequently intersect the *Planning Act* regime. The Report of the Transportation Table also expresses concern over the apparent lack of integration between

community transportation master planning and the EA process (pages 19 to 20). This Table further notes the differential treatment between transit stations on commercially zoned properties (which simply require rezoning and/or site plan approval under the *Planning Act*) and municipal transit stations (which are subject to the EA Act), even though both types of transit facilities may be virtually identical (page 21).

The Executive Group also received public input that highlighted the need to improve the integration of the EA program with other approvals regimes. For example, a submission received from a member of the public urged the Ontario government to "look for efficiencies in dealing with decisions/appeals required under multiple Acts/regulations, provided that the requirement for local government approval continues to be respected where required." As noted by another commentator, "there can be a disconnect between the EA process and the approvals process within the MOE," and "improvements in communications and coordination between the EA Section and Approvals Section staff would help facilitate an efficient conclusion to the two processes." Similarly, another submission from the public supported a more "transparent" integration between the EA process and the *Planning Act*, and suggested that there were a number of other statutes or regulations that should be better integrated with the EA process (e.g. *Development Charges Act*, *Municipal Act*, *Public Transportation and Highway Improvement Act*, and O.Reg.239/02). Similarly, another submission recommended "a one window approach to the approval process whereby approvals required under the *Planning Act,* the *Ontario Energy Board Act*, the *EA Act*, the *Environmental Protection Act*, the *Ontario Water Resources Act* and other legislation are administered and coordinated by one government contact point that is aware of the status of each approval and ensures there is no overlap or duplication and a consistent schedule is maintained."

In light of the regulatory complexity described above, the Executive Group recommends that the Ontario government should develop appropriate regulatory and administrative tools to improve the integration of the EA Act with other relevant statutes. For example, this report recommends certain revisions to the *Consolidated Hearings Act* regime to better coordinate hearings that may be triggered by undertakings requiring EA Act approvals and other prescribed licences or permits. Similarly, this report recommends that the Ontario government should create an inter-ministerial "green project facilitator", who would liaise with EAAB and other public authorities in order to resolve delays or difficulties in processing multi-jurisdictional applications for such projects, as described above. In this regard, the Executive Group notes that there are recent precedents for the establishment of provincial facilitators or coordinators to assist in the approval and implementation of projects deemed to be in the public interest at the local, regional or provincial scale (i.e. former Office of the Provincial Facilitator, Dale Martin).

However, while the foregoing recommendations would improve administrative efficiency for certain projects, they do not necessarily result in better integration of the EA Act and the *Planning Act*. The need for enhanced coordination between EA planning and municipal land use planning has been well-recognized over the past decade,[49] but has not been adequately addressed to date. This is unfortunate because a comprehensive approach is needed to ensure that planning

[49] See, for example, EAAC, *Report No. 38: The Adequacy of the Existing Environmental Planning and Approvals Process* (November 1989); and Commission on Planning and Development Reform in Ontario, *New Planning for Ontario* (June 1993).

and decision-making processes ultimately lead to long-term societal benefits, such as building strong, livable communities, protecting environmental resources, and supporting a sustainable economy.

The need to better integrate the EA program and the *Planning Act* was highlighted in a number of submissions received by the Executive Group from the public. For example, one commentator recommended that "the Ontario government [should] ensure better integration of planning and environmental decisions so that sustainable communities can be developed". This commentator succinctly noted as follows:

> The apparent disconnect between the land use planning decisions made under the *Planning Act* and decisions on projects and undertakings under the *Environmental Assessment Act*, creates the serious problem of piecemealing municipal decision-making on the related matters. Municipal, or provincial, approval of a new subdivision results in demand for new roads, transit, waste, energy, water and sewage infrastructure and other services to match the needs of the new residents. Carrying out any of these subsequent municipal government actions will trigger the EA Act either as individual or Class EA projects. When the EAs are carried out, proponents (often the municipality that made the land use decisions) claim that they have no alternatives but to build the new road or install new infrastructure – the classic model of piecemealing.

In the view of the Executive Group, an excellent starting point towards better integration is for the Minister to make a regulation or policy guideline under the EA Act (i.e. see sections 27.1 or 42) that adopts by cross-reference the Provincial Policy Statement (PPS) issued by Cabinet under section 3 of the *Planning Act*. Furthermore, the Executive Group recommends that the regulation or guideline should require all decision-makers under the EA Act (i.e. Minister, Director, and ERT) to ensure that their decisions are consistent with the PPS.

The primary rationale for this recommendation is that the PPS not only provides a greater level of planning detail than the general EA principles articulated above in this report, but the PPS also addresses a larger range of key environmental matters (i.e. urban growth management, brownfields redevelopment, transit-supportive land use patterns, greenspace preservation, protection of air and water quality, etc.) that should be specifically integrated into the EA process.

Moreover, by adopting and applying the PPS under the auspices of the EA Act, critical upfront direction will be provided to proponents and the public alike as to the likely acceptability of proposed projects. In short, projects that are consistent with PPS policies are more likely to be approved, and projects that are inconsistent with PPS policies are more likely to be rejected. Thus, PPS policies (and related implementation manuals) should assist considerably in siting exercises, and the consideration of alternatives, under the EA Act.

It is conceivable that the sector-specific policies, once finalized by the representative working groups recommended by this Report, could be used to supplement the PPS policies (or could result in consequential amendments to the PPS) in respect of these sectors. However, the Executive Group sees no compelling reason why the adoption of PPS under the EA Act should

await the finalization of sector-specific policies. In our view, the Minister should adopt the PPS policies as soon as reasonably possible as the first modest step in better integrating the EA Act and *Planning Act*.

The Executive Group further concludes that there is a similar need to better integrate the EA Act with land use planning initiatives on Crown lands where, because of limits on the *Planning Act*, the PPS does not apply. However, due to time constraints, we were unable to fully evaluate potential mechanisms to achieve such integration regarding Crown lands and resources, and suggest that this matter should receive further consideration and consultation after the release of this Report.

Integration with CEAA

In addition to requiring approvals under the EA Act and other provincial legislation, some undertakings may trigger the application of CEAA (i.e. where federal lands are to be acquired or used; where federal financial assistance is to be provided; or where a prescribed federal license, permit or approval is required to proceed with the undertaking).

To facilitate this inter-jurisdictional coordination, Ontario and the Government of Canada have recently finalized a federal-provincial agreement that sets out a cooperative framework for notification, consultation and communication procedures that should be followed by EA staff in relation to undertakings subject to the EA Act and CEAA.[50]

1996 amendments to the EA Act make provision under section 3.1 to "harmonize" the Ontario EA and CEAA processes by empowering the Minister to vary or dispense with provincial EA requirements "in order to facilitate the effective operation of the requirements of both jurisdictions." It is anticipated that by avoiding separate EA reviews under provincial and federal law, more timely and efficient EA planning and decision-making can take place, which will benefit proponents, participants and both levels of government. Similarly, section 54(1) of the CEAA makes provision to use the Ontario EA process in place of the CEAA regarding certain kinds of funding agreements and arrangements.

Notwithstanding such statutory provisions and ministerial agreements, however, several EA stakeholders have commented upon the continuing lack of clarity regarding joint assessments under the EA Act and CEAA. For example, a submission received by the Executive Group from an energy proponent indicated "support [for] harmonization with the federal EA process to ensure that projects are not subject to multiple EAs." Similarly, the Report of the Energy Table states that:

> Although coordination procedures have been established by the CEA Agency and the Ministry of the Environment to facilitate a single EA and review process for a proposed project involving both jurisdictions, there may still be considerable overlap in jurisdictional authority among different federal, provincial and municipal agencies (page 28).

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[50] *Canada-Ontario Agreement on Environmental Assessment Cooperation* (2004).

In addition to recognizing the Energy Table concern about "overlap in jurisdictional authority", the Executive Group expresses concern about the different process emphases of the Ontario EA and CEAA, particularly as concerns requirements to identify and evaluate "alternatives to" a project or undertaking and alternative "methods" or "means" of carrying out a project or undertaking. The Executive Group takes notice of the May 2004 "Advice to Proponents at the Terms of Reference Stage for a Coordinated Federal/Provincial EA Process" (CEA Agency May 2004) and, particularly, the Draft Figure 1 in this document regarding Federal/Provincial Coordination Process for Individual EAs/ Screenings. Recognizing that this "Advice" document is limited to projects subject to the Terms of Reference Stage, the Executive Group recommends that the MOE should develop, with proponent and participant input, clear and concise guidelines that explain when and how EA Act requirements will be "harmonized" with CEAA in respect of undertakings that are potentially subject to both statutes.

The EBR's "EA Exception" to Public Participation

Section 32 of the EBR currently provides that the public participation rights under Part II of the EBR do not apply in relation to instruments (i.e. licences, permits, certificates of approval, etc.) that are issued to implement projects or undertakings which have been approved (or exempted) under the EA Act. This so-called "EA exception" under the EBR means, among other things, that instruments issued for EA-approved (or exempted) projects or undertakings are not subject to: (a) public notice through EBR Registry postings; (b) mandatory public comment under the EBR; or (c) third-party appeal provisions under the EBR.

For example, a landfill proponent could seek approval "in principle" (i.e. at a conceptual level) under the EA Act, and given the recent track record, would likely obtain this approval without a public hearing under the EA Act. The detailed design and operational details could then be submitted to the EAAB Director as part of the proponent's application for a certificate of approval under Part V of the EPA. However, as noted elsewhere in this Report, O.Reg. 206/97 specifies that the proponent's EPA application is not subject to a public hearing. Moreover, section 32 of the EBR prevents the EPA application from becoming subject to mandatory public notice or comment requirements under the EBR. Similarly, section 32 of the EBR prevents the public from seeking leave to appeal the EPA instrument to the Environmental Review Tribunal.

Thus, under the current regulatory regime, it is entirely possible to obtain approval to proceed without public hearings under the EA Act or EPA, and without public notice/comment opportunities prescribed under the EBR, due to section 32. This situation was sharply criticized in the most recent annual report by the Environmental Commissioner of Ontario:

> Section 32 was initially intended to avoid duplicating public consultation process since the EAA, at least in theory, has similar public consultation requirements. However, in our 2001/2002 annual report, the ECO evaluated public participation rights under several environmental assessment processes and concluded that they are deficient in many respects compared to the EBR process for instrument approvals.
>
> These deficiencies mean that the existing broad application is depriving the public of rights to comment on and request appeals of instruments – rights that the EBR is intended

> to safeguard… As a consequence of section 32, some environmentally significant decisions are receiving no public notification, and indeed, no public scrutiny at all.[51]

The ECO annual report goes on to discuss these and other concerns in the context of Class EAs (i.e. MEA, MTO and MNR) and individual EAs (i.e. Adams Mine Landfill).

The Executive Group concurs with the Environmental Commissioner's concerns that section 32 of the EBR is being used to "shield" important EA-related approvals from adequate public scrutiny, and that public participation rights are being frustrated as a result.

Accordingly, the Executive Group recommends that the MOE should amend section 32 of the EBR to ensure that the current "EA exception" to EBR public participation requirements does not undermine public scrutiny of instruments that implement projects or undertakings approved (or exempted) under the EA Act.

ISSUE: CLASS ENVIRONMENTAL ASSESSMENT

As of 2004, there were nine approved "parent Class EAs" for a very wide variety of both municipal and provincial undertakings. These cover municipal activities, GO Transit, provincial highways, provincial parks and conservation reserves, land held by the Ontario Realty Corporation, MNR resource stewardship and facility development projects, conservation authorities, and minor electrical transmission facilities. In addition, the Electricity Regulation (O.Reg. 116/01 and Guide) establishes what is, in effect, a Class EA process for both public and private sector electricity generation projects. As a result, 30 years after the EA Act took effect, the vast majority of undertakings considered under the EA Act are processed through a Class EA type process, with very few undertakings subject to an individual EA.

The parent Class EAs and the O.Reg.116/01 regime categorize projects according to potential environmental effects and levels of concern, and they require varying degrees of study and consultation for different categories, or "schedules", of projects. However, considerable controversy has arisen under the Class EAs and the Electricity Regulation as to when it is appropriate to bump-up, or elevate, a particular project so that an individual EA is prepared by the proponent. In particular, extensive concern has been expressed about who should decide such requests, what is the appropriate basis or criteria for deciding such requests, and what remedies should be available to concerned citizens once planning efforts have been commenced under Class EAs or the Electricity Regulation. The Energy Table recommended that an independent adjudicative body carry out this function. The Executive Group considers that the existing ERT meets these needs and should carry out this function.

RECOMMENDATION 18: CLASS ENVIRONMENTAL ASSESSMENT

As an interim measure while considering the recommended procedural reforms, the MOE should create an opportunity for the proponent and public, as well as the Minister, to make summary applications for interim directions (which could include mediation or rulings)

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[51] ECO, *Choosing Our Legacy: 2003-2004 Annual Report* (Oct. 2004), page 53.

from the Environmental Review Tribunal during the preparation of a project-specific Class EA/ESR or screening/review under Electricity Projects Regulation 116/01.

RECOMMENDATION 19: CLASS ENVIRONMENTAL ASSESSMENT

The government should create a formal adjudicative process, administered by the ERT, to expeditiously hear and decide applications for 'bump-ups' and elevation requests.

DISCUSSION:

(a) Resolving Issues During the Preparation of a Project-Specific Class EA/ESR/environmental screening

During the time that a parent Class EA is being applied to a project and an Environmental Study Report (ESR) is being prepared, where there are differences of opinion between the proponent and others as to the proper project schedule, the appropriate level of public consultation, or adequacy of studies required to comply with the parent Class EA, there is no meaningful procedure or mechanism for resolving such issues. Failing agreement between the proponents and EA participants, the only remedy is for those concerned to await the completion of the project-specific Class EA and resulting ESR, and then request a bump-up/Part II order. The same issue exists in relation to projects subject to environmental screening under the Electricity projects Regulation. The lack of a mechanism for resolving issues prior to completion of the project-specific Class EA is problematic both for proponents and others. Both sectors would benefit by having timely procedures which can resolve disputes during, and not at the end of, the preparation of the ESR, with the objective of avoiding or limiting subsequent bump-up requests.

(b) Increasing certainty and transparency in the processing and resolution of bump-up and elevation requests

Bump-up and elevation requests are especially problematic for proponents, in that they may result in unfathomable delays before they are acted on by Minister's staff, and because they can result in new and unknown factors being potentially considered by MOE staff in their processing. Virtually all Sectoral Tables have recommended that there must be a more transparent and objective basis for the processing of bump up and elevation requests, with some participants suggesting that an entity other than the Minister be given the responsibility to decide such matters.

For example, the Energy Table's Report commented that the elevation process under the Electricity Projects Regulation has been criticized by stakeholders and the public:

> …on the basis that it becomes, by definition, "political", is open-ended and lack transparency. Proponents are concerned about the open-ended timelines for decision-making, and the possibility of entering into a seemingly endless loop of studies and further elevation requests. The affected public are often concerned that imposing conditions or ordering additional studies does not necessarily given them the opportunity

to know that their concerns have been taken into account; nor is there any quick way to obtain a decision that the project should not be proceeding.

The Energy Table Report contained the following recommendation:

> That the Ministry of Environment eliminate the elevation request process, placing the responsibility for public consultation, appeals, recourse and redress in an adjudicated process. This would have the benefit of depoliticizing the approval process and eliminating the single-most significant source of political risk and investment uncertainty. This would result in approval or denial of the project.

In light of the foregoing observations, the Executive Group concludes that there should be processes and means for dealing with obvious problems in the preparation of a project-specific Class EA/ESR while it is ongoing, instead of waiting until the end for a "bump-up" request. For example, those persons who are concerned about the process might identify a problem with the "need" discussion, or allege there are deficiencies in the scope of alternatives being considered, or the screening criteria being used. If the proponent and stakeholders cannot resolve these themselves, provision should be made for seeking directions from the ERT which could include ERT mediation, or rulings from the ERT during a "time out". We observe that if these procedures are established, the mere fact they exist will likely cause proponents to more carefully consider and use more genuine effort to resolve community concerns during the preparation of an ESR, and not allow these to fester until the end of the process.

Currently there is no regular MOE or other (e.g. public, ERT or EA Advisory Committee) oversight of whether the requirements of the parent Class EA are followed in processing individual projects. Unless a bump-up or elevation is requested, MOE staff do not substantively review or substantively evaluate the Class EA work. Even an MOE internal review pursuant to a bump-up request, in the vast majority of cases, does not lead to any requirement for further or different proponent actions. Moreover, even if an MOE critique is prepared, it is not made public. This "closed door" practice should be contrasted with the public availability of staff reports prepared under the *Niagara Escarpment Planning and Development Act*, which are routinely made available to all interested persons so that they can understand and comment upon the planning advice being provided by staff to the Niagara Escarpment Commission. Under the EA program, without regular oversight analysis or mechanisms for transparency and accountability, there is a diminished ability of the public, the Minister, EAAB or the ERT to cause proponent to act on perceived problems. Accordingly, legitimate concern exists that proponents using the Class EA process can effectively ignore the intent and objective of the EA Act by paying only lip service to the process, and thus deprive the public and environment of discernable public benefits that EA is meant to achieve.

This concern is exacerbated in the absence of any cogent, published analysis of whether the intent of the EA Act, to ensure appropriate consideration of alternatives and the selection of a preferred alternative having regard for predicted environmental impacts, is being achieved through the Class EA process. Despite obvious and significant public concern about how a proponent may be approaching its tasks under a Class EA, the only current means available of getting the proponent's attention is to threaten a bump-up request. Yet with a track record of

only a handful of bump-up requests being granted over two decades, this is not a meaningful sanction for proponents.

For example, information supplied to the Executive Group by the MOE indicates that from July 2002 to August 2003, some 68 bump-up requests were received under various Class EAs; however, none of these requests were granted by the Minister.[52] This general refusal to grant bump-up requests appears to continue unabated to the present time.[53]

In general terms, it appears that parent Class EAs are useful mechanisms for expediting the planning and implementation of appropriate classes of projects (i.e. small-scale, recur frequently, minor impacts, amenable to known mitigation, etc.). Thus, the Executive Group is not calling for the repeal of Part II.1 of the EA Act, nor are we suggesting the revocation of approved parent Class EAs in Ontario. Nevertheless, the Executive Group has concluded that there are opportunities to strengthen and improve Class EA procedures, particularly in relation to planning, documentation and consultation requirements.

Some proponents whose projects are covered by Class EAs claim that the absence of successful bump-up requests demonstrates that such requests are unmeritorious, and proves that Class EA planning procedures are working well. The Executive Group respectfully disagrees with this claim, especially given the inherently political nature of the current bump-up decision-making process. In our view, the fact that bump-up requests continue to be filed by Ontarians (despite the strong likelihood of rejection) suggests that there is significant and ongoing public dissatisfaction with Class EA implementation (i.e. insufficient or untimely public notices, inadequate documentation prepared by proponents, unacceptable environmental impacts or trade-offs, inappropriateness of Class EA procedures for particularly significant projects or sensitive sites, etc.).

In this regard, the Executive Group received submissions from members of the public that expressed considerable concern about Class EA implementation. For example, a non-governmental organization provided examples of controversial road projects which were planned under Class EA procedures, but posed significant environmental impacts that appeared to warrant individual EA treatment or resulted in piecemealing (see discussion above).

Procedural and substantive concerns about the Class EA track record – and the general lack of successful bump up requests – have also been raised by the Environmental Commissioner in his most recent annual report as follows:

- MOE staff have observed that some proponents under the Municipal Class EA submit inadequate environmental studies, and have incomplete or missing project files at key review stages of projects. For example, information on water quality, water quantity, contingency plans and baseline data has been lacking. Tight timeframes prohibiting proper technical reviews are also cited as concerns…

[52] MOE, *Ontario's Environmental Assessment Program: Report to Environmental Assessment Administrators* (August 2003), page 3.
[53] MOE, *Ontario's Environmental Assessment Program: Report to Environmental Assessment Administrators* (April 2004), page 5.

- MNR staff have similarly raised concerns that the MTO Class EA for highway construction has been unable to achieve environmental protection in instances involving provincially significant wetlands and threatened species habitat. There is also no requirement to prevent a continual net loss of natural heritage features.

- Under Class EAs, the public does have certain time-limited opportunities to request more detailed environmental studies (termed "Part II orders" or, previously, "bump-up requests"). But in practice, there is a very low likelihood that such requests will be granted by MOE. For example, MOE reviewed 11 such requests under the Municipal Class EA in 2002, and all were denied. Similarly, MOE reviewed six such requests under MTO's Class EA in 2001/2002, and all were denied. Under MNR's Class EA for Timber Management, over 80 bump-up requests were made from 1994 to 2001, and all were denied.[54]

- In some cases, members of the public are frustrated when proponents operating under Class EAs change their projects in a significant way after most of the public consultation opportunities are over. The ECO has observed that concerned residents have few options of redress in such situations.

- Under Class EAs, public comments and concerns are submitted to the proponent, rather than to an independent arbiter. The proponent can decide how (or whether) to respond to the concerns. MOE also tends to bounce commenters' procedural concerns about a project back to the proponent.[55]

Furthermore, many bump-up requests are a time-consuming and difficult matter for MOE staff to analyze and process. This is especially so when there are often hundreds of such requests for the same controversial project. But even one bump-up request is sufficient to mandate analysis and time by MOE staff.

To address such concerns, the Executive Group is recommending that proponents, members of the public, and the Minister should be enabled to make summary applications for interim directions (which could include mediation or rulings) from the ERT during the preparation of a project-specific Class EA/ESR or screening under the Electricity Sector Regulation 116/01. No leave test for such applications would be required.

Having determined that there is a need for an expedited mechanism to obtain binding rulings or directions during Class EA or O.Reg.116/01 procedures, the Executive Group carefully considered which administrative decision-maker would be best positioned to adjudicate the issues likely to be in dispute. In particular, the Executive Group considered five possible decision-makers: (a) the Minister; (b) the EAAB Director; (c) the provincial advisory body recommended elsewhere in this Report: (d) a new environmental tribunal; or (e) an existing

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[54] In 1998, the Ontario Divisional Court declared that the MNR had not complied with several provisions of the EA Board's approval of the Timber Management Class EA: see *Algonquin Wildlands League v. Ontario* (1998), 26 CELR (NS) 163; rev. in part (1998), 29 CELR (NS) 29; additional reasons (2000) 32 CELR (NS) 233 (Ont. C.A.).

[55] ECO, *Choosing Our Legacy: 2003-2004 Annual Report* (Oct. 2004), pages 56 to 57.

tribunal. After considering the advantages and disadvantages of these options, the Executive Group decided against using the provincial advisory body since, by its very nature, that body is intended to be advisory rather than adjudicative or quasi-judicial in nature. The Executive Group also decided against using either the Minister or the EAAB Director to resolve interim disputes since both options, in essence, simply represent a continuation of the controversial status quo under Class EAs and the O.Reg.116/01 regime. Similarly, the Executive Group decided against creating a new permanent tribunal, which would pose new fiscal costs, create a new level of bureaucracy, and require new legislation. Accordingly, the Executive Group decided it would be most efficient to utilize an existing tribunal to resolve interim disputes on a summary basis.

The next question considered by the Executive Group was which existing tribunal would be best positioned to serve as an effective, efficient and credible decision-maker for these purposes. Options include the ERT, Ontario Energy Board, and Ontario Municipal Board. Having regard for the institutional experience and legislative jurisdiction of these existing tribunals, the Executive Group concluded that the ERT was the best candidate for hearing and deciding summary applications arising under Class EAs and the O.Reg.116/01 regime. For example, the ERT (formerly the EA Board) has long held public hearings under the EA Act, and is already conversant with many of the substantive issues likely to arise on summary applications (i.e. consideration of alternatives, adequacy of public consultation, etc.). Moreover, the ERT's existing rules of practice include a number of important procedural safeguards to ensure that matters are determined on their merits as soon as possible.

In selecting the ERT, the Executive Group recognizes that there may be resource implications associated with using the ERT for this new purpose. Nevertheless, given the expedited nature of the proposed summary application (which could be heard in writing or by teleconference), the Executive Group anticipates that the existing complement of full-time and part-time members of the ERT would not have to be significantly expanded to handle the new workload. Existing and new appointees to the ERT should also receive legal education and professional development opportunities in relation to the new summary procedure. Consideration could also be given to cross-appointing members of the Ontario Energy Board to the ERT to help spread out the workload, and to allow the use of decision-makers with energy expertise to adjudicate applications arising under the O.Reg. 116/01 regime.

In carrying out its mandate, the Executive Group had insufficient time to fully develop and consult upon the operational details that are necessary to implement the new summary application. In addition, it remains to be determined whether the necessary changes can be accomplished via amendments to either the EA Act or regulations, or whether the Minister can administratively delegate her current decision-making authority on bump up/elevation requests to the ERT without legislative change. In any event, to guide further public discussion of this key matter, the Executive Group suggests that this type of summary procedure should include the following features and characteristics:

(a) The ERT should be enabled to provide guidance on the need for the proponent to take further steps to comply with the parent Class EA (e.g., consider further alternatives, gather more or further analyze data, undertake further consultation), and generally advise on or direct the resolution of differences between the proponent and the public. The

jurisdiction of the ERT to provide such rulings should, if necessary, be clarified under the EA Act for these purposes.

(b) The ERT should have the authority to determine that the parent Class EA schedule/ category being used by the Proponent should be changed to a more rigorous one, require the proponent to carry out supplementary studies and consultation prior to completing the ESR, as well as direct that the Class EA process be terminated and an individual EA be undertaken, with Terms of Reference to be approved by the ERT.

(c) The ERT should have the authority to impose a "time out" on the proponent proceeding further with or completing the ESR process, where the ERT is of the opinion such time out is appropriate.

(d) Applications to the ERT should be dealt with in an expedited way, and any hearing for these purposes should be limited to one day or less, unless the ERT is persuaded otherwise. Subject to any rules made by the ERT, the hearing should occur within 10 business days of the applicant's materials being filed with the ERT and any usual notice provisions should be modified so as not to delay the hearing of the application. The ERT should be encouraged to provide its direction as soon as possible, and in any event within one week of hearing the application.

(e) MOE staff should be encouraged to provide the Ministry's views on the matter to the parties, and make a written submission to the ERT with the objective of attempting to provide a resolution of the issues, without prejudice to any decision by the ERT.

(f) Where the ERT deems it appropriate, the proponent may be required to provide funding to the community for their engagement of independent expertise and obtaining expert information, and for participation in mediation, with the objective of resolving differences and avoiding bump-up requests at the end of the process.

(g) The ERT should clearly have the authority to engage in mediation as well as rule on applications.

(h) Where the ERT directs that an individual EA with appropriate Terms of Reference be undertaken in substitution for the Class EA process, this ruling becomes final and binding unless within 30 days the Minister rejects or modifies the direction.

(i) Factors to be considered by the ERT in considering whether an undertaking should be required to be processed under a more rigorous category or pursuant to an individual EA should include:

- the intended timing of and any substantive urgency related to the proponent's undertaking;
- likely environmental impacts of the project and their significance;
- extent and nature of public concerns;
- the adequacy of the proponent's planning process;
- the availability of other alternatives to the project;
- the adequacy of the public consultation program and the opportunities for public participation;
- the involvement of the community or complaining party in the planning of the project;
- the nature of the specific concerns which remain unresolved;

- details of any discussions held between the community or person and the proponent;
- benefits of requiring the proponent to undertake further studies and/or an individual EA;
- degree to which public consultation and dispute resolution have occurred;
- how the proposed undertaking differs from other undertakings in the class and the significance of those factors; and
- any other important matters considered relevant.

In addition to the foregoing procedures that may be triggered *during* Class EA planning exercises, the Executive Group is also recommending the creation of a formal adjudicative process, administered by the ERT, to expeditiously hear and determine requests for bump-ups/Part II Orders/elevation requests *after* the completion of an ESR/screening report. For the reasons outlined above, the Executive Group considers that the ERT is best positioned to serve as the adjudicative body to hear and determine bump up or elevation requests that arrive at the end of planning procedures.

More specifically, for the purpose of guiding further public discussion of this key matter, the Executive Group suggests a bump-up application process that includes the following features and characteristics:

a) Where a request is made for a Part II order, bump-up or elevation ("a request") unless the Minister decides the request within 30 days, or within the 30 day period the Minister stipulates a decision will be made within a further 30 day period and makes a decision within a total of 60 days, the proponent or requestor who has substantively participated throughout the project-specific Class EA process, may require the project-specific Class EA to be referred to the ERT for its consideration and decision;

b) The Minister shall provide reasons for any decision made regarding such requests;

c) The ERT shall not consider a request for an individual EA where, prior to completion of the ESR, the ERT had determined no individual EA was warranted for the specific project in issue;

d) Where the ERT holds a hearing in respect of the ESR, the ERT shall have the power to:
   - approve the undertaking with or without conditions;
   - require an individual EA, including approval of the Terms of Reference, and the completion of the EA within specified time limits;
   - require further studies and consultation within specified time limits and adjourn the hearing pending completion of such requirements, following which it shall determine whether or not to approve the ESR/undertaking, unless in the interim the bump-up requests have been withdrawn, whereupon it shall be deemed approved;

e) A hearing before the ERT may be in writing only or an oral hearing. Any hearing before the ERT shall be commenced within 30 days of a hearing request, the hearing limited to 1 day, and a decision rendered within 45 days of the hearing request, unless the ERT otherwise orders;

f) No request shall be granted by the ERT where:
- There is an objective and apparent basis to conclude that the proponent's project-specific Class EA process conformed to all substantive and procedural requirements of the applicable parent Class EA for the undertaking and the commitments, if any, made by the proponent during the preparation of its ESR or which may have been ordered during that period by the ERT; and,
- The decision by the proponent as to the schedule in the parent Class EA used for its project was not patently unreasonable.

g) Factors to be considered by the ERT in making its decisions should include:
- the intended timing of and any substantive urgency related to the proponent's undertaking;
- likely environmental impacts of the project and their significance;
- the extent and nature of public concerns;
- the adequacy of the proponent's planning process;
- the availability of other alternatives to the project;
- the adequacy of the public consultation program and the opportunities for public participation;
- the involvement of the community or requesting person in the planning of the project;
- the nature of the specific concerns which remain unresolved;
- details of any discussions held between the community or requesting person and the proponent;
- benefits of requiring the proponent to undertake further studies and/or an individual EA;
- degree to which public consultation and dispute resolution have occurred;
- how the proposed undertaking differs from other undertakings in the class and the significance of those factors; and
- any other important matters considered relevant.

The Executive Group recognizes that the foregoing recommendations represent a significant change from current practice and procedure under parent Class EAs and the O.Reg.116/01 regime. Nevertheless, the available evidence suggests that significant changes are required in the review and disposition of bump-up or elevation requests.

Some Class EA proponents might argue that permitting Ontarians to file bump-up applications with the ERT will, in effect, open the "floodgates", overwhelm the ERT, and create unnecessary and costly delays for proponents. The Executive Group rejects this argument for several reasons.

First, the overall numbers of bump-up requests are relatively small, particularly in light of the thousands of projects that are pursued under the auspices of Class EAs (especially "pre-approved" and unreported Schedule A projects). Second, even if all current bump-up requests ended up at the ERT, the resulting caseload would still be relatively light when compared to the thousands of planning and zoning matters heard annually by the Ontario Municipal Board.[56] Third, the ERT already has adequate procedural safeguards to screen out applications that are truly frivolous, vexatious, or brought solely for the purposes of delay. Fourth, if ADR and mediation are judiciously used to resolve disputes early and often under Class EA regimes (as recommended elsewhere in this report), then numerous bump-up requests should be scoped if not settled entirely without resorting to the ERT. Indeed, if there is a realistic chance that a bump-up application may be brought (and granted), then proponents may become more amenable towards accommodating the issues raised by concerned citizens in order to avoid an ERT hearing.

Accordingly, the Executive Group is confident that its suggested reforms will result in a more equitable, credible and efficient process than the current regime regarding bump-ups.

ISSUE: TIMELINES

For the most part, the EA Act itself does not expressly impose timelines or deadlines for the completion of key stages of the EA planning and decision-making process. In 1998, however, the Ontario government promulgated the Deadlines Regulation (O.Reg. 616/98), which prescribes deadlines for certain stages involving individual EAs (i.e. completion of the government review). Similarly, Class EAs typically include timeframes for certain steps (i.e. filing or deciding bump-up requests). Despite such timelines, however, many EA stakeholders are concerned that EA decision-making is still not completed in a timely manner, and that there is often uncertainty among proponents (and the public) over the exact status of a particular project within the decision-making process.

RECOMMENDATION 20: TIMELINES

The MOE should review, with proponent and stakeholder input, the adequacy and enforcement of the current timeframes and deadlines within the Deadlines Regulation (O.Reg. 616/98), approved Class EAs, and the Electricity Projects Regulation (O.Reg. 116/01) and Guide.

RECOMMENDATION 21: TIMELINES

The MOE should develop, with proponent and stakeholder input, regulatory amendments that authorize the EAAB Director to extend prescribed deadlines where warranted, provided that:

[56] In the 2002-03 fiscal year, the Ontario Municipal Board received over 2,000 files on land use matters, including minor variances, consents, zoning by-laws, official plans and plans of subdivision: see OMB 2002-2003 Annual Report.

a) **written notice of the extension, with reasons, is provided to the proponent and stakeholders; and**
b) **the extension notice identifies a new final deadline for the making of the EA decision under consideration.**

RECOMMENDATION 22: EA WEBSITE

The MOE should establish a new EA website to include means to enable proponents and stakeholders to electronically track the status of the matter under consideration (i.e. government review, bump-up request, etc.) and to access information or supporting documentation about the matter, and other documentation relating to Ontario's EA program.

DISCUSSION:

Proponents and stakeholders agree that the EA planning and decision-making process should occur in a timely and efficient manner. The Executive Group strongly shares this view, but has received numerous indications that it is necessary to revisit the issue of timelines and deadlines under the EA Act.

For example, the attached Report of the Waste Table states as a fundamental principle that the EA process "should be clear, predictable and timely" (page 6). This Table also notes that "proponents and the public alike have difficulty in acquiring information" on the EA process and on "the status of projects undergoing" EA (page 10). Moreover, this Table expresses concern about government review periods that have exceeded prescribed deadlines, which may be attributable, in part, to incomplete applications (page 11) or staff turnover at the EAAB (page 13). At the same time, this Table acknowledges that it may be necessary for the MOE to extend deadlines in undefined "exceptional circumstances". In such cases, however, this Table recommends that the extensions must be developed and disclosed in a consultative manner, and the MOE must complete its work prior to the expiry of the revised deadline (page 11).

Similarly, the attached Report of the Transportation Table states that the MOE "can take a significant amount of time to consider bump-up requests, sometimes beyond the prescribed 66 days in the MEA Class EA" (page 12). According to this Table, "this practice has the potential to result in delays and extending the timeframes for decisions on projects". Therefore, the Transportation Table recommends that the MOE establish and adhere to "precise deadlines" for making decisions on Part II (bump-up) requests (Recommendation 3.2).

In addition, the attached Report of the Energy Table notes that "significant improvement" in project timelines is "imperative", which will require coordinated action among different levels of government and regulatory agencies (page 5). Accordingly, this Table recommends the establishment of a "process coordinator" to integrate the EA process with other planning or regulatory requirements (page 13). This Table further recommends usage of web-based technology to create an EA registry and information management system in order to ensure better project tracking and enhance public participation (pages 15 to 16).

Similar comments were contained in submissions received by the Executive Group from the public. For example, one submission expressed concern about the difficulty in accessing EA notices on the current EBR Registry, and suggested that "the province provide a free subscription service and list that would provide advance notice of upcoming EAs within a geographic area or type of EA." Other submissions from members of the public commented that the generic timeframes for public and agency review of EA documentation were too short and inflexible, and that they should be amended to set more realistic timeframes that are proportionate to size, cost, duration, complexity and provincial impact of the proposed undertaking. Similarly, one commentator stated that current comment periods tended to deprive municipalities, agencies, and members of the public of a meaningful role during TOR and EA reviews, especially given the voluminous and detailed nature of proponents' submissions.

The Executive Group generally agrees with the above-noted observations and recommendations for website-based reforms. In this regard, it should be noted that the federal government has recently amended CEAA in order to specifically require the establishment of a website that, among other things, provides public notice of EA projects and procedures, EA decision statements, results of mediation or panel reviews, summaries of follow-up programs, and other EA-related records and information: see section 55.1 of CEAA. Thus, the Executive Group strongly urges the MOE to develop and implement an upgraded and effective EA website as soon as possible, with a view towards enabling persons to sign up for notices or updates on EA activities involving a particular issue, undertaking or geographic area.

However, before proceeding with time-related reforms, the Executive Group notes that it is important to have regard for two discrete issues. The first issue is the purpose of EA timelines. To date, EA timelines are largely focused on delivering government performance by a specified deadline. However, it is evident that the public may also be subject to timelines, as they are under other regulatory processes. It is also clear that the public may be adversely affected by uncertainty once EA preparations are underway, but the completion of the EA is largely within the control of the proponent and its consultants. This raises the spectre of a controversial undertaking hanging over the heads of the public for prolonged periods of time. More importantly, this scenario raises the question whether the purpose of timelines should include delivering proponent performance by specified deadlines once the EA process is started or made public.

For example, it may be possible to impose an expiry date on approved Terms of Reference (as was suggested in some public submissions received by the Executive Group) so that if the EA is not completed before the expiry date, the TOR approval lapses and the proponent must submit new Terms of Reference. Such an approach would reduce public uncertainty about slow-moving or incomplete EA preparation, and it ensures that the renewed TOR can reflect changed circumstances or new technologies that emerge during EA preparation. It was further suggested to the Executive Group that there should be an outside time limit placed on EA approvals to ensure that proposed undertakings, if approved, are not "parked" or slowly implemented by proponents over lengthy periods of time, which could result in material changes in circumstances, standards or technologies that make the original EA approvals (or terms and conditions therein) questionable or "stale-dated". On the other hand, there is concern that putting an arbitrary "shelf life" on TOR approvals is contrary to the iterative nature of EA planning, and

may tempt proponents to cut corners, or avoid looking at new issues identified by the public, in order to meet the TOR expiry date. With respect to placing expiry dates on EA approvals, it should be noted that the EA Act already provides the Minister with statutory authority to revisit previous decisions where there are changed circumstances (see section 11.4 of the EA Act), although it appears that this power has rarely if ever been used to date.

In light of these competing policy considerations, the Executive Group does not make an explicit recommendation on whether TOR or EA approvals should be time-limited. Nevertheless, this is an option that could be given further consideration by MOE with appropriate proponent and stakeholder input. In any event, given the various implications outlined above, it is clear that the issue of timelines and deadlines is a topic requiring comprehensive, not piecemeal, treatment.

The second issue is what aspects of the EA planning and decision-making process should be subject to explicit timelines and deadlines. Options include: (1) individual EA only; (2) individual and Class EA; and/or (3) individual, Class and sectoral EA. Consideration should also be given to whether regulatory timelines or deadlines should be imposed in relation to other statutory powers of decision under the EA Act (i.e. requests for designation orders, declaration orders, harmonization orders, re-consideration of EA decisions, etc.).

As noted above, the Deadlines Regulation applies only to undertakings for which an individual EA must be prepared and submitted. In particular, the Regulation divides the EA process into seven steps: (1) terms of reference; (2) public notice of the completed EA; (3) initial comment period (prior to government review); (4) review completion; (5) final comment period (following government review); (6) Minister's decision (partial) regarding referral of matter to hearing or mediation; and (7) Minister's decision (complete). For each step, the Regulation provides a specific deadline. The Regulation also varies the applicability of prescribed deadlines in two scenarios: (a) where the proponent wishes to amend the terms of reference; or (b) where the Minister has referred a matter to mediation or hearing: see sections 2 and 3 of O.Reg. 616/98.

The Deadline Regulation appears to be a relatively straightforward regulation with a specific objective and clear deliverables. Nevertheless, it is not as comprehensive as it appears, nor does it seem to have been followed by the MOE in every case. The regulation is not comprehensive in that it does not cover all actions by all participants in an EA process. For example, the regulation prescribes a timeline for MOE action following the submission of proposed TOR, but does not prescribe a timeline for proponent actions leading up to the submission of the TOR, such as public consultation. Similarly, the Regulation provides a timeline for the government review following the submission of the EA, but lacks a timeline to govern how long it takes a proponent to prepare the EA. In addition, the Regulation does not provide any deadlines on matters referred to mediation or a hearing, although the EA Act specifically authorizes the Minister to impose hearing deadlines: see sections 9.1 and 9.2 of the EA Act. There may be legitimate rationales for *not* having deadlines for any of these actions; however, it is arguable that the absence of comprehensive treatment, whatever the reason, undermines the overall purpose and deliverables of the Regulation.

The second major issue with the Regulation is that Ministry personnel do not always comply with the prescribed deadlines. For example, there have been occasions where the MOE has not

adhered to prescribed deadlines for TOR approvals and EA reviews, which, in some instances, have been stalled for considerable periods of time. The Executive Group infers that there may be resource reasons that explain, at least in part, this non-observance of prescribed deadlines. For example, it has been suggested to the Executive Group that the EAAB is understaffed and unable to meet all required timelines imposed in relation to individual and Class EAs. Presumably, the imposition of EA application fees (see discussion below) could generate additional revenue to address staffing or resource limitations within the EAAB in order to meet prescribed deadlines.

Another possible explanation for non-observance is that the Ministry, as representative of the provincial Crown, cannot tie its hands to limit action that protects the public interest. If true, this is a structural or institutional limitation which suggests that while timelines can provide an overall administrative target to keep the process moving, they cannot legally bind Ministerial or even Ministry actions.

On this point, the Executive Group notes that similar concerns about timeliness have arisen under the *Canadian Environmental Assessment Act*, and resulted in the 1997 passage of a federal EA timelines regulation (SOR/97-181). However, in response to concerns about governmental non-compliance with the timelines, the federal government created a new position of EA coordinator to try to ensure that federal authorities act in a timely manner, rather than impose even more rigorous or tighter timing requirements.

The Executive Group received a suggestion that if the MOE's review of an individual EA is not completed within the prescribed timeframe, then the undertaking should be deemed to be approved. The Executive Group places great importance on the topic of timeframes and seeks binding procedures that include comprehensive timeframes; however, the Executive Group disagrees with the suggestion that the sole remedy for a missed timeline is "deemed approval" of an undertaking. The essential public interest aspect of environmental assessment and the number of parties affected by undertakings subject to environmental assessment demand that these undertakings receive appropriate examination. Furthermore there may be legitimate reasons (i.e. complexity of undertaking, EAAB staffing constraints, etc.) that prevent the government review from being completed within the prescribed time. It is our expectation that if EAAB is properly resourced, and if the current deadlines are reviewed for their adequacy (see Recommendation 20), then missed deadlines should be the exception rather than the rule.

ISSUE: FEES

Timely and thorough governmental review of individual and Class EAs (and other EA-related activity) requires a significant commitment of EAAB staff time and resources. However, many EA stakeholders have expressed concern that the EAAB may lack sufficient technical, administrative or personnel resources to enable this review function to be carried out effectively and efficiently. Accordingly, there is a need to consider options for generating provincial revenue under the EA Act that can be specifically dedicated towards EA activities undertaken by EAAB staff or other persons or agencies.

RECOMMENDATION 23: FEES

The EA Act should be amended to authorize the making of regulations that prescribe fees (or the method for calculating fees) for certain matters under the Act. Fee revenue should be directed towards EA program delivery and efficiency.

RECOMMENDATION 24: FEES

Once authorized to impose fees under the EA Act, the MOE should develop, with proponent and stakeholder input, a regulation that establishes an appropriate fee schedule for EA actions including hearings. Such regulation should also govern the use, retention, payment or refund of prescribed fees.

RECOMMENDATION 25: FEES

Application fees collected under the EA Act should be used to fund or undertake specified EA-related activities.

DISCUSSION:

There are several environmental precedents in Ontario for requiring applicants to pay filing fees to help offset the cost of delivering governmental services (i.e. technical reviews) related to such applications. For example, applicants seeking certificates of approval under section 9 (air) or 27 (waste) of the *Environmental Protection Act* are required to pay prescribed fees (i.e. a flat fee for "administrative processing" plus additional fees depending on the subject-matter of the application): see O.Reg. 363/98. A similar fee structure has been prescribed for sewage works and water works approvals under the *Ontario Water Resources Act*: see O.Reg.364/98. More recently, the MOE has announced its intention to impose fees in relation to applications for permits to take water.[57] Thus, the current absence of filing fees under the EA Act is highly anomalous, particularly in light of the significant governmental resources that are required to process and review highly technical and often complex EA applications.

Accordingly, the Executive Group recommends that reasonable EA filing fees be established and collected under the EA Act. Such fees are analogous to "user pay" charges levied by all levels of government, and would be consistent with the "proponent pay" principle. Options include establishing a fee tariff or schedule that sets out fixed rates, variable rates (based on scale or complexity of the undertaking), or a combination of both.

While the Executive Group recognizes the need for these revenues to flow into the province's Consolidated Revenue Fund, we feel strongly that the equivalent sum to that collected in EA fees should be directed to support key aspects of the EA program which are currently under-resourced so that they do not place an undue burden on consolidated revenue. If the Ontario government commits to this general principle, then it should not be necessary to establish a special purpose

[57] MOE, *White Paper on Watershed-Based Source Protection Planning* (Feb. 2004), pages 30 to 33.

account or trust, as has sometimes occurred under other environmental laws.[58] The Executive Group further acknowledges that it will be necessary to expand the regulation-making powers under the EA Act in order to provide authority to prescribe EA application fees.

It should be noted that the attached Report of the Waste Table recommends that "the Province allocate sufficient resources" to the EAAB. This Panel further recommends that EA application fees "should be commensurate with the complexity of the review", and that "fees should be applied directly to the EAAB to finance the approvals process" (Recommendation 7).

In order to establish a fair and transparent fee schedule under the EA Act, there are key implementation questions that need to be answered with proponent and stakeholder input. For example, what EA documents or filings should trigger a prescribed fee (i.e. application for approval of terms of reference; application for approval of an individual EA; application for approval (or renewal) of a parent Class EA; filing a notice of completion under a Class EA; filing compliance monitoring reports required by conditions of approval; filing a bump-up, elevation, designation or exemption request)? If fees are payable, what is the appropriate quantum or scale, having regard for the actual cost of delivering governmental services, and for the need to promote a strong economy within Ontario? Should fees be waived or reduced for "green projects" that are subject to the EA Act? Due to time constraints, the Executive Group was unable to address these and other implementation issues related to fees. Thus, the Executive Group raises these issues for further consideration during public consultation on this Report.

ISSUE: MONITORING AND REPORTING

When an individual EA or parent Class EA is approved, terms and conditions are typically imposed by the Minister to ensure that undertakings and projects are carried out in a manner that is consistent with the purpose of the EA Act (i.e. societal "betterment" and protection, conservation and wise management of the environment). Among other things, these terms and conditions often require monitoring and reporting activities by the proponent.

Pursuant to section 38 of the EA Act, it is an offence to contravene the Act, regulations, or terms and conditions of EA approvals. Persons and corporations convicted under section 38 are subject to a fine not exceeding $10,000 for a first offence, or a fine not exceeding $25,000 for subsequent offences.

Despite these provisions, however, EA stakeholders have raised various concerns about adequacy of EA conditions that impose monitoring and reporting obligations regarding environmental impacts (especially cumulative impacts) or the effectiveness of mitigation measures. In addition, some EA stakeholders have questioned the MOE's willingness or ability to undertake inspection and enforcement activities to ensure compliance with the EA Act. Particular concern has been expressed about proponents' non-compliance with terms and conditions contained within individual EA approvals, and with prescribed planning procedures under approved Class EAs. Moreover, some stakeholders report that they have experienced considerable difficulty in accessing monitoring and reporting information in a timely manner

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[58] See, for example, section 85 of the *Fish and Wildlife Conservation Act*, section 6.1 of the *Aggregate Resources Act*, and Part V of the *Crown Forest Sustainability Act*.

under the EA Act, and there have been suggestions that the MOE's internal EA information management system should be upgraded and expanded.

Accordingly, the Executive Group is proposing a set of integrated legislative and administrative reforms to strengthen and improve monitoring and reporting under the EA Act, as described below.

RECOMMENDATION 26: MONITORING AND REPORTING

The MOE should, with public input, revise its draft EA compliance strategy, especially in relation to cumulative impacts. Among other things, the revisions should consider the following tools:

a) third party audits;
b) third party notification;
c) electronic access to monitoring reports on proponent websites (or a new EA registry to be established by MOE: see Recommendation 22);
d) "model" monitoring/reporting provisions that can be imposed as conditions for approval in the context of individual EAs, Class EAs, declaration (exemption) orders, and other EA decisions; and
e) periodic review and/or revision of terms and conditions in instruments issued under the EA Act to ensure they remain current, effective and enforceable.

RECOMMENDATION 27: MONITORING AND REPORTING

The MOE should, with public input, develop amendments to the EA Act that:

a) provide provincial officers with inspection and enforcement powers that are currently available under other environmental laws;
b) increase fines to make them consistent with fine levels that are currently available under other environmental laws;
c) empower the courts to impose innovative sentencing orders that are currently available under other environmental laws;
d) impose a "reasonable care" duty upon corporate officers and directors to ensure compliance with the Act, regulations, or terms and conditions in EA approvals; and
e) prescribe a two-year limitation period for the prosecution of offences under the EA Act.

RECOMMENDATION 28: MONITORING AND REPORTING

The MOE should, with public input, develop EA compliance programs and procedures that include substantive guidance on:

a) voluntary abatement and other measures to address relatively minor problems where the non-compliance poses no direct risk to the environment;
b) mandatory abatement and other measures to address all other instances of non-compliance with the Act, regulations or terms and conditions in EA approvals;
c) prosecutions to enforce EA obligations imposed by law; and

d) inspection protocols (i.e. frequency, follow up measures, MOE record-keeping, announced vs. unannounced visits, integration with MOE district work plan inspections, etc).

RECOMMENDATION 29: MONITORING AND REPORTING

The MOE should ensure that the finalized EA compliance strategy is accompanied by appropriate training and educational programs for all MOE staff involved in EA monitoring, inspection and enforcement activities.

RECOMMENDATION 30: MONITORING AND REPORTING

The MOE's current administrative practices/procedures should be reviewed and/or revised to ensure that they adequately reflect or integrate the essential elements of the finalized EA compliance strategy.

RECOMMENDATION 31: MONITORING AND REPORTING

The MOE's current EAIMS (environmental assessment information management systems) should be reviewed and/or upgraded to ensure that it is electronically accessible by all MOE regional and district offices.

DISCUSSION:

General

Under Ontario's EA program, there are three distinct types of EA monitoring that may be carried out by proponents, MOE, or other agencies or stakeholders.[59]

The first type of monitoring is commonly known as "effects monitoring". In essence, such monitoring is generally carried out in the post-approval period (or project implementation phase), and is intended to identify and evaluate the actual environmental impacts that are being caused by the undertaking or project. This exercise generally takes the impact predictions (and baseline conditions) that were noted during the EA process, and compares them to the actual impacts that are being detected through field research, studies, or data collection activities (i.e. soil, water or air sampling/analysis). If effects monitoring reveals that the actual impacts are more significant than originally predicted, or that unpredicted impacts are occurring, then it may be necessary to alter or adjust the undertaking.

[59] CEAA (*Canadian Environmental Assessment Act*) includes provisions for follow-up programs. At the international level, Appendix V ("Post-Project Analysis") of the UNECE Espoo Convention ("Convention on Environmental Impact Assessment in a Transboundary Context," Espoo Finland, 1991)) includes the following 3 objectives:"(a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures; (b) Review of an impact for proper management and in order to cope with uncertainties; (c) Verification of past predictions in order to transfer experience to future activities of the same type."

Effects monitoring is closely related to the second type of monitoring, which is often referred to as "effectiveness monitoring". In essence, such monitoring is intended to evaluate the efficacy of mitigation measures that were proposed and implemented to prevent, minimize, or ameliorate impacts associated with the undertaking. If, despite mitigation measures, undesirable environmental impacts are being detected, then it may be necessary to expand or strengthen the mitigation measures through amended or new terms and conditions. The systematic process of reviewing environmental impacts, and making necessary changes to conditions of approval, is generally known as "adaptive management".

The third type of monitoring is commonly known as "compliance monitoring". Such monitoring is intended to determine whether the proponent has complied with all applicable laws, regulations, or standards. In the individual EA context, compliance monitoring would include a determination of whether the proponent complied with all conditions of approval, and honoured all commitments made to agencies or the public during the EA process. In the Class EA context, compliance monitoring would include a determination whether the proponent complied with all prescribed assessment, consultation, and documentation requirements for the particular project.

The public interest benefits of robust effects/effectiveness and compliance monitoring are well-documented in the literature, and include safeguarding ecosystem and human health, enhancing proponent accountability, and improving the overall quality of EA practice.[60] However, numerous concerns have been raised about the adequacy of the monitoring and reporting regime under the EA Act. For example, a submission received by the Executive Group from the public noted that "the activity of monitoring and reporting on post-construction effects and mitigation is problematic", and that "this issue requires, and deserves, immediate attention" by MOE as the administrator of the EA Act. This submission also posed a number of key questions that, in the view of the Executive Group, are not satisfactorily addressed within the current EA program:

> Are conditions of approval monitored? Does the information learned on one project get carried forward to improve the next project? How does an individual or ENGO access the information? How are cumulative impacts assessed? Who guarantees the authenticity of the data and information and study results?

The Executive Group's more specific concerns about EA monitoring and reporting are set out below.

Effects/Effectiveness Monitoring and Reporting

Effects/effectiveness monitoring and reporting obligations may be imposed as conditions of approval under the EA Act. For example, during an individual EA for a new or expanded landfill, proponents will often propose various monitoring programs to assess the ongoing impacts (if any) upon the environment (i.e. groundwater or surface water quality). If the landfill proposal is approved, the conditions of approval typically impose a legal obligation to not only

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[60] Generally, see A. Levy, "Environmental Assessment in Ontario" (2002), 11 J.E.L.P. 173, at pages 247 to 255; Environment Canada, *Strengthening Environmental Assessment for Canadians* (March 2001), page 20; and R. Lindgren, *Monitoring and Environmental Assessment in Ontario* (CELA, 1994).

conduct the monitoring, but also to periodically provide the results to an MOE official (i.e. annual reports), and to develop a contingency plan in the event that monitoring reveals serious or unanticipated impacts.

However, some EA stakeholders have questioned whether the EAAB has sufficient capacity to rigorously scrutinize the incoming monitoring reports and supporting documentation. In such circumstances, it has been suggested that it may preferable to have qualified third parties perform audits of selected undertakings or projects in order to critically review the accuracy and implications of monitoring results.

Another stakeholder concern is that while annual reports and monitoring data may be submitted to the MOE, they are not generally disclosed to, nor easily accessible by, members of the public. For example, monitoring reports are not posted on the MOE's current "EA activities" website, nor have proponents been generally required to post such reports on their own project or corporate websites. In some instances, monitoring information may be provided to facility-specific "site liaison committees" or "public advisory committees" for specific facilities (i.e. landfills). However, these committees do not exist in relation to every project or undertaking subject to the EA Act, and committee members may lack technical or scientific expertise to review and comment upon monitoring reports.

Concern has also been expressed about monitoring and reporting in the Class EA context, particularly since some Class EAs do not yet require the collection and reporting of data regarding the number and type of projects being carried out. Even for Class EAs that now require data reporting, it is unclear how such reports can be used to assess the cumulative impact of countless "Schedule A" projects undertaken under Class EAs (i.e. projects that trigger no EA or documentary requirements).

In light of the foregoing concerns and options, the Executive Group believes that there is room for improvement in key aspects of effects/effectiveness monitoring under the EA Act. Accordingly, the Executive Group recommends that the Minister should refer the matter of effects/effectiveness monitoring to the public advisory body for further consideration and consultation.

Compliance Monitoring and Reporting

The various prohibitions and requirements specified by the EA Act are effective only if there are adequate compliance tools available under the Act, and only if there is a commitment by MOE to utilize such tools in a timely manner. This is especially true in relation to terms and conditions attached to EA approvals, which are generally intended to prevent, minimize or mitigate environmental impacts as undertakings are implemented. However, the mere existence of terms and conditions will not necessarily protect the environment or safeguard the public interest unless there are adequate mechanisms to ensure proponent compliance.

Traditionally, Ontario's EA program has been characterized by an *ad hoc* approach to monitoring, inspection and enforcement activities. For example, where a proponent had made certain commitments during the EA process, or where certain conditions had been imposed by an

order or approval under the EA Act, the MOE did not systematically follow up to verify that such commitments or conditions were being complied with by the proponent, or to assess whether the commitments or conditions were actually effective in addressing biophysical or socio-economic impacts associated with the undertaking. Where MOE follow up did occur, it was likely to be complaints-driven rather than an integral part of annual work plan inspections by MOE staff.

Some proponents have expressed the view that non-compliance is a non-issue in both the individual EA and Class EA context. The Executive Group does not share this view, and finds that the available evidence indicates that there is sufficient reason to be concerned about non-compliance under the EA Act.

For example, the EAAB recently conducted an audit of EA files (1988 to 1998) to assess the level of proponent compliance with conditions of approval under the EA Act. Significantly, this study found that "only about 50% of the proponents audited were in full compliance with conditions of EA approval, which indicated a need for a better compliance and monitoring plan".[61]

Similarly, the attached Report of the Energy Table suggests that "more stringent monitoring provisions are required to ensure that proponents comply with the Electricity Regulation, including compliance with commitments and conditions contained within Screening and Environmental Review Reports" (page 23).

Significantly, the most recent annual report of the Environmental Commissioner of Ontario strongly criticizes the MOE's current approach to compliance monitoring:

> The ECO's 2001-2002 annual report raised a number of concerns about MOE's ability as regulator to oversee compliance trends in the various Class EAs. MOE promised a number of improvements to compliance and monitoring of Class EAs, including a requirement that annual reports eventually be prepared by all proponent agencies. But MOE conducted only cursory reviews of annual reports submitted for 2002 and carried out little follow-up…
>
> MOE has taken several important steps to implement a compliance monitoring program. But the ministry should be more active to ensure that proponents are complying with the terms and conditions of their Class EA… In 2002, MOE reviewed a number of Municipal Class EA planning processes and found examples where the proper process was not used and the required documentation was incomplete. MOE staff noted at the time that proponents should give more attention to compliance with EA commitments, and should carry those commitments through into project-specific environmental permits…
>
> It is noteworthy that many applications for investigation under the EBR have involved alleged violations of Class EAs and concerns were not adequately monitored by MOE…

[61] MOE, *Ontario's Environmental Assessment Program: Report to Environmental Assessment Administrators* (2003), page 7.

> These applications for investigation and court proceedings reinforce the need to take its responsibility for monitoring Class EAs seriously…
>
> Overall, this application [individual EA for Highway 69 expansion] illustrates a number of systemic weaknesses in the EA process: that MOE does not have the resources to properly monitor the large number of approvals it issues under the EAA; that MOE continues to rely on a complaints-based compliance model; and that MOE is practically unable to prosecute proponents for failure to comply with the EAA.[62]

In addition to the Environmental Commissioner's reports, the need to improve the MOE's EA compliance monitoring efforts has also been highlighted by the Provincial Auditor and other EA stakeholders in recent years.

In response to such concerns, the MOE has developed an EA information management system (EAIMS) to record EA submissions and track EA conditions in order to facilitate compliance monitoring. Similarly, the MOE has attempted to incorporate compliance monitoring details into conditions of EA approval (i.e. annual reporting obligations within some approved Class EAs). The MOE has also considered the use of third party audits, Internet posting of monitoring reports, and other options for ensuring compliance with EA obligations.

While this recent progress is encouraging, these reform efforts should be prioritized and implemented as soon as possible. In addition, there is still room for considerable improvement in EA monitoring, inspection and enforcement activities, as discussed below.

Powers of Provincial Officers

A perusal of the current powers conferred upon provincial officers under the EA Act (Part IV) reveals that such powers are not as extensive as those typically found under other environmental statutes in Ontario. For example, the *Environmental Protection Act*, *Ontario Water Resources Act*, *Safe Drinking Water Act*, *Pesticides Act*, and *Nutrient Management Act* generally empower provincial officers to undertake a wide variety of inspection activities and to issue binding administrative orders to require compliance or to prevent or remediate environmental harm. More recently, the Ontario government has proposed statutory amendments that would empower provincial officials to issue immediate monetary penalties in order to punish and deter spill-related offences under environmental legislation (see Bill 133).

In contrast, all of the inspection powers currently available under the EA Act are compressed within a single provision (section 25), which does not provide authority to issue field orders, install tracking devices, use reasonable force, obtain police assistance, secure places or things, or undertake other investigative practices and techniques available under other environmental laws.

In the absence of such provisions under the EA Act, it has sometimes fallen by default to non-governmental organizations to ensure compliance by filing investigation requests under the *Environmental Bill of Rights*, initiating private prosecutions under the *Provincial Offences Act*, or commencing judicial review applications under the *Judicial Review Procedure Act*. It goes

[62] ECO, *Choosing Our Legacy: 2003-2004 Annual Report* (Oct. 2004), pages 57, 73, and 150.

without saying that these legal measures can be time-consuming, costly, uncertain, and, most importantly, occur *ex post facto* (i.e. after the alleged non-compliance has occurred). From the public interest perspective, inspection and enforcement activities should be aimed at preventing the commission of offences under the EA Act. Similarly, inspection and enforcement activities should be undertaken in a proactive manner by the MOE, which has the mandate to do so but must be adequately resourced and staffed to undertake such measures. Accordingly, citizen enforcement of EA Act requirements should be viewed as a supplement to – not a substitute for – governmental activities to ensure compliance with the Act.

Fines and Offences under the EA Act

As noted above, the maximum fine currently available under the EA Act is $25,000, which can be imposed only where the defendant is convicted of committing subsequent offences under the Act.

This limited fine quantum stands in contrast to the much larger fines available under the EPA and OWRA. For example, depending on the nature of the offence, maximum fines for corporate defendants range between $100,000 to $10 million under these environmental laws. The courts are also empowered to order imprisonment for certain offences, and can impose other innovative sentencing dispositions (i.e. restoration order, profit-stripping, restitution, forfeiture, etc.). From a public policy perspective, it is unclear why offences under these other laws trigger much higher penalties, even though the potential for environmental harm is omnipresent for the environmentally significant undertakings subject to the EA Act. At the very least, the fine structure under the EA Act should be generally consistent with fine structures currently available under other environmental legislation.

It may be countered that higher fines are not appropriate under the EA Act because it is an environmental planning statute rather than a pollution control law like the EPA or OWRA. It should be noted, however, that other environmental planning statutes (i.e. *Niagara Escarpment Planning and Development Act*, *Oak Ridges Moraine Conservation Act*, etc.) prescribe fines that are higher than those found in the EA Act. Even the *Planning Act* prescribes $50,000 fines for first offences by corporations that contravene the Act or by-laws enacted thereunder.

Another significant omission in the EA Act is the continuing failure to impose a statutory duty upon directors and officers to take all reasonable care to ensure that corporations comply with the Act, regulations, or terms and conditions of EA approvals. Given that similar provisions imposing officer/director liability are currently found in the EPA, OWRA, and the *Nutrient Management Act*, it is unclear why such a provision is wholly absent from the EA Act. Indeed, as private corporations assume greater roles within the electrical and waste sectors (see discussion elsewhere in this Report), a director/officer provision under the EA Act can only serve to enhance – not reduce – corporate compliance with EA obligations imposed by law.

Significantly, the EA Act does not prescribe a specific limitation period for the commencement of prosecutions under the Act. In effect, this means that EA prosecutions must be commenced within the six-month limitation period prescribed by section 76 of the *Provincial Offences Act*. This relatively short limitation period stands in sharp contrast to Ontario's other environmental

laws (i.e. EPA, OWRA, *Pesticides Act*, etc.), which generally prescribe a two-year limitation period for environmental offences. Presumably, the two-year limitation period is intended to provide MOE officials sufficient time to investigate alleged environmental offences, verify the nature and extent of the alleged non-compliance, and determine whether prosecution or some other regulatory response is warranted in the circumstances. Since there appears to be no public policy rationale for prescribing different limitation periods for environmental offences, the Executive Group recommends that the EA Act should be amended to establish the two year limitation period found in other environmental laws in Ontario. It should noted that an identical recommendation has recently been made by the Environmental Commissioner of Ontario.[63]

Comprehensive EA Compliance Strategy

Merely "beefing up" provincial officers' powers, increasing fines, creating new legal duties, or extending limitation periods under the EA Act does not necessarily resolve non-compliance concerns unless the MOE concurrently adopts a comprehensive compliance strategy under the EA Act. To date, the MOE has initiated some steps towards developing an EA compliance strategy, but this work appears to remain unfinished at the present time.

On this point, it should be noted that the attached Report of the Energy Table recommends that the MOE "develop and approve a plan for proponents to monitor compliance with the environmental screening process, and for MOE to monitor the performance of the Guide and Regulation" (page 23). The Executive Group concurs with such suggestions, but believes that the need for comprehensive EA compliance monitoring is not unique to the energy sector. In our view, effective compliance monitoring is required across the entire EA program whenever conditions are imposed or commitments are made.

The Executive Group is aware that the MOE's current "Compliance Guideline" (Guideline F-2) provides general guidance on the use of voluntary abatement (i.e. written requests or agreements), mandatory abatement (i.e. issuing orders or revoking approvals), or prosecutions. However, this Guideline provides no EA-specific details on ensuring compliance under the EA Act (i.e. by imposing effective monitoring/reporting conditions in EA approvals). In addition, the MOE has prepared – but has not finalized – a draft EA compliance strategy. Moreover, the EA Act currently confers no statutory authority for provincial officers to issue compliance or preventative orders, as discussed above.

Thus, it is incumbent upon the MOE to publicly develop and implement a comprehensive strategy for ensuring compliance under the EA Act. Once finalized, this strategy could be implemented via EA compliance programs and procedures that provide substantive direction on key EA matters, such as:

- circumstances where it would be appropriate to use voluntary abatement measures (i.e. where the alleged non-compliance with EA obligations does not pose a direct risk to the environment);

[63] ECO, *Choosing Our Legacy: 2003-2004 Annual Report* (Oct. 2004), Recommendation 7, page 73.

- circumstances where it would be appropriate to use mandatory abatement measures (i.e. where the alleged non-compliance represents a serious contravention of the Act, regulations, or terms and conditions in an EA approval);
- circumstances where it would be appropriate for the MOE to initiate a prosecution under the EA Act;
- criteria and standardized wording for monitoring/reporting provisions that can be imposed as conditions for approval in individual EAs and Class EAs, as well as conditions for granting exemption requests or refusing designation or "bump-up" requests;
- inspection protocols (i.e. frequency, follow up measures, MOE record-keeping, announced vs. unannounced visits, integration with MOE district work plan inspections, etc.); and
- criteria and standardized wording for conditions for requiring third party audits, third party notification, statements by proponents to certify compliance, and post-approval reporting on a proponent website (or an EA registry established by MOE).

In addition, the EA compliance strategy should clearly articulate an MOE policy of strictly enforcing the EA Act, regulations and terms and conditions in EA approvals. In particular, the strategy must make it abundantly clear that violations of EA planning requirements or EA conditions will not be tolerated, and will result in adverse consequences for the persons responsible for such violations.

Once the EA compliance strategy has been finalized, it should be accompanied by appropriate training and educational programs for all MOE staff involved in EA monitoring, inspection and enforcement activities (see EA training discussion, *supra*). The MOE's other administrative practices and procedures should be reviewed and/or revised to ensure that they adequately reflect or integrate the essential elements of the finalized EA compliance strategy. Similarly, the current EAIMS should be reviewed and/or upgraded to ensure that it is electronically accessible by all MOE regional and district offices.

As discussed above, the overall intent of the EA Act is "the betterment of the people of Ontario" by providing for the protection, conservation and wise management of the environment. In short, this laudable legislative purpose cannot be realistically achieved unless there is a coordinated and properly resourced effort by MOE to ensure proponent compliance with all EA obligations imposed by law.

ISSUE: TRAINING

The quality, credibility and reliability of EA documents submitted by proponents under the EA Act are heavily dependent upon the knowledge, skill and experience of the consultants retained by proponents to undertake the necessary EA work. However, no explicit training, testing or certification standards exist under the EA Act in relation to persons who perform EA work on behalf of proponents, or who review such EA work on behalf of the Ontario government.

RECOMMENDATION 32: TRAINING:

The MOE should develop, with proponent and stakeholder input, appropriate EA training and educational programs under the EA Act, and should recover the cost of developing and

delivering EA training and educational programs by charging appropriate fees to participants in such programs. The MOE should ensure that EA training and educational programs are available to all Ontario government staff (including but not limited to MOE EAAB, Regional Office, and District Office staff) involved in the delivery of the province's EA program.

RECOMMENDATION 33: EA REVIEW PROTOCOLS

The MOE should develop appropriate collaborative protocols with other provincial ministries and agencies in order to ensure that government reviews under the EA Act are undertaken by qualified persons in accordance with specified parameters and timeframes.

DISCUSSION:

The success of Ontario's EA program is greatly dependent upon the competence of EA consultants and governmental EA reviewers. Education and experience are important components of ensuring such competence.

Under Ontario's EA program, proponents are generally required to initiate planning exercises, design consultation programs, prepare technical reports, perform literature reviews, complete scientific studies, and pursue other detailed work as may be warranted by the proposed undertaking. This is particularly true in the individual EA context, where proponents are obliged by law to assess, evaluate and consult upon the issues and options described in approved Terms of Reference. This is also generally true in the Class EA context, where proponents must prepare adequate (and accurate) public notices, environmental study reports (ESR's) or related documentation, and must otherwise comply with the applicable planning procedures specified in the approved parent Class EA.

However, some EA stakeholders have expressed concern over poor quality EA submissions that have been submitted for public and agency review, and over the inadequacy of public consultation programs undertaken by some proponents. Similar concerns have been expressed about the capacity of EAAB project officers (or other government reviewers) to undertake meaningful reviews of specialized work completed by proponents and their consultants. Such problems may be exacerbated as EAs become increasingly complex in terms of the technical and scientific issues to be considered.

The Executive Group also received public input that expressed concern about the general lack of continuity in EAAB staff who are assigned responsibility for a specific individual EA or Class EA project. Proponents have expressed similar views indicating that while occasional staffing limitations may arise from time to time, "it is obviously preferable to have systems in place to ensure continuity on a project from commencement to completion." For example, an energy proponent advised the Executive Group that "for each proposed project, we recommend that there be one MOE EAAB staff and one Senior Manager designated as contacts for the project, including EA approval; permitting; and any other environmental approvals relating to the project."

At the same time, some EA proponents have been critical of the MOE's general reluctance to provide substantive advice to them (or their consultants) on how to comply with EA requirements. For example, in the attached Report of the Transportation Table, it is stated that "MOE staff have been reluctant to provide advice on how to apply the Class EA process to individual projects, although there is some variance across the province" (page 12). It is further suggested that the MOE reluctance to provide upfront advice may result in delayed approvals and wasted resources where proponents have pursued EA procedures or methodologies that may ultimately be judged by MOE to be procedurally incorrect or substantively deficient (pages 12 to 13).

To address such problems, the Transportation Table recommends that: (a) the MOE take "a more active role in ensuring that municipalities have a clear understanding of the EA process in Ontario"; (b) the "MOE should provide appropriate resources for course development and training for existing and future EA practitioners"; (c) the "MOE and MEA [Municipal Engineers Association] collect best practices related to the Class EA process and make them available to practitioners and the public"; and (d) the MOE should provide "sound EA practice guidance" by disseminating EA updates through traditional and electronic means such as email or EA website posting (Transportation Table Recommendations 6, 7.1, 7.2, 9.1, 9.2, and 9.3).

The Executive Group received similar public input in relation to training. For example, a submission received from a member of the public commented that "the MOE does not provide adequate training, guidance and consistency for proponents and, especially, for the public." According to this commentator:

> [P]roponents must be taught better consulting methods whereby all EA participants can learn from and with each other (e.g. Action Learning). Training opportunities open to the public and practitioners must be available at prices that are within reach of all attendees. Different course levels must be available in the evening so that all persons can attend. An updated website that provides information in non-technical language to all citizens and proponents must also be created to ensure full understanding.

It should be noted that some people who are involved in EA planning exercises (i.e. lawyers, professional engineers or geoscientists, etc). are licensed or accredited, and may be subject to sanctions imposed by their self-governing professional bodies for breaches of professional standards. However, other practitioners who conduct or participate in EA matters (i.e. planners, wildlife biologists, social impact assessors, etc.) may have received post-secondary education in their respective disciplines, and may be members of professional or voluntary associations, but are not generally subject to regulation by self-governing bodies. Indeed, it appears that virtually any person can identify himself (or herself) as an "EA planner" without completing any special licencing or training requirements whatsoever.

It should be noted that such problems are not unique to Ontario's EA program. In fact, these kinds of difficulties have been encountered in other areas of environmental law, particularly where the Ontario government and the public alike are greatly dependent upon the education and experience of environmental consultants.

In the context of "brownfields" development, for example, the *Environmental Protection Act* has recently been amended to specify that "records of site condition" may be filed only where a "qualified person" has certified that a phase one or two environmental site assessment has been completed in accordance with the regulations: see section 168.4 of the EPA. The phrase "qualified person" is further defined in O.Reg.153/04 by describing the licencing and educational requirements that must be held by persons who conduct or supervise site work, or risk assessments, in relation to "brownfield" properties.

In light of this legislative precedent, the Executive Group has considered whether the EA Act (or regulations) should require EA submissions to be formally "signed off" by qualified persons who, acting on behalf of proponents, certify that all required EA steps have been duly completed by the proponent. However, acting on the advice of the Transportation Table and other EA participants, the Executive Group does not recommend the development of a formal licencing, accreditation or "certification" regime under the EA Act at this time.

Instead, the Executive Group recommends that the immediate focus should be the provision of comprehensive EA training and educational courses that provide practical information and user-friendly materials on how to satisfy the procedural and substantive requirements under Ontario's EA program.

In this regard, it should be noted that the Minister is already empowered under section 31 of the EA Act to:

- convene conferences and conduct seminars and educational and training programs with respect to EA;
- gather, publish and disseminate information with respect to EA; and
- make grants or loans for research or training of persons with respect to EA.

Given that this statutory authority currently exists, the Executive Group suggests that the Minister should make more extensive use of such powers to deliver EA training and educational opportunities.

It should be noted that under the *Canadian Environmental Assessment Act*, the Canadian Environmental Assessment Agency is actively involved in designing and delivering training opportunities (i.e. seminars and educational documents) regarding federal EA requirements, and the Agency charges people a fee to participate in such programs. Accordingly, the Executive Group sees no reason why the MOE cannot become similarly proactive in EA training and educational matters under the EA Act.

A renewed emphasis upon EA training and professional development in Ontario will require the MOE to develop course curricula and training materials on key EA matters, such as the conduct of EA planning, preparation of EA documentation, and implementation of public consultation programs. EA training courses and educational materials could be developed in partnership with interested professional or industry associations, and EA training opportunities should be provided to proponents, consultants or other stakeholders on a full cost recovery basis.

However, EA training opportunities should not just be limited to proponents, consultants or other stakeholders. Instead, EAAB project officers and other government reviewers should also be encouraged to participate in EA training and educational opportunities. Not only would such an approach improve the soundness and credibility of governmental EA decisions, but it would also enhance the quality and consistency of governmental advice to proponents and other stakeholders. In this regard, the attached Report of the Transportation Table notes that sometimes "different MOE staff provide inconsistent EA-related advice to practitioners on similar projects" (page 14). Similarly, the attached Report of the Waste Table recommends that the province provide sufficient resources to the EAAB to ensure that the EA Act and EPA "approval processes are supported by the technical expertise expected by proponents and the public" (Recommendation 7).

Accordingly, the Executive Group recommends that the MOE should ensure that adequate training and continuing education opportunities be made available to provincial employees who are directly involved in the review of EA submissions. In addition, the Executive Group recommends that the MOE should develop appropriate collaborative protocols with other provincial ministries and agencies in order to ensure that government reviews under the EA Act are timely, effective and expert.

In summary, the benefits of enhanced EA training and educational opportunities include:

- ensuring that both MOE and other reviewing Ministries have adequate expert capacity;
- producing more effective consultation and better quality EA submissions (i.e. draft and final documents);
- promoting more efficient use of government review resources (i.e. less time spent on deficient EAs, or bump-up requests based on non-compliance with prescribed Class EA procedures); and
- enhancing accountability and professionalism within the EA planning process.

ISSUE: CONSOLIDATED APPROVALS

When passed initially, the *Consolidated Hearings Act* (CHA) was intended to assist proponents subject to the EA Act by facilitating the hearings process and eliminating the potential for inconsistent hearings results. The CHA also has potential to address many undertakings not subject to the EA Act, but nevertheless subject to several regimes and tribunals. In recent years, the CHA has not been widely used because the EA Act has not triggered hearings, the list of statutes has not been updated, and the change from the Environmental Assessment Board and the Environmental Appeal Board into the Environmental Review Tribunal has exempted a broad range of undertakings from the CHA, even where such undertakings may trigger major hearings before different regulatory tribunals. Changing this situation is directly related to the larger agenda of clarifying and expediting approval processes, particularly for undertakings facing multiple approvals and processes.

RECOMMENDATION 34: CONSOLIDATED APPROVALS

The MOE should amend regulations under the *Consolidated Hearings Act* to facilitate one consolidated hearing for matters subject to EA and other approvals, (e.g., *Environmental Bill of Rights, Aggregate Resources Act, Ontario Water Resources Act*).

RECOMMENDATION 35: RELATIONSHIP BETWEEN EPA AND EA:

The MOE should amend O.Regs. 206/97 and 207/97 to remove the automatic prohibition on EPA and OWRA hearings to ensure that:

a) mandatory and/or discretionary hearings under the EPA and OWRA may be held in relation to waste disposal sites, waste management systems and sewage works which are subject to approval (or exempted) under the EA Act, depending upon the environmental significance (i.e. risks and benefits) posed by such facilities; and

b) joint board hearings under the EA Act, EPA and/or OWRA are available pursuant to the *Consolidated Hearings Act* where applicable.

DISCUSSION:

The CHA was passed in 1981. It has no purpose section, but its purpose is clear from section 2, which deals with its application. According to section 2:

> This Act applies in respect of an undertaking in relation to which more than one hearing is required or may be required or held by more than one tribunal under one or more of the Acts set out in the Schedule or prescribed by the regulations.

Thus, section 2 makes four points:

(1) it may apply to any undertaking, which is broadly defined, using terms similar to those found in the EA Act;
(2) it applies where more than one hearing is required or *may be required*;
(3) it applies where the existing or potential hearings involve more than one tribunal; and
(4) it applies where the existing or potential hearings are set out in the statutes set out in the Schedule to the Act or *prescribed by regulations*.

According to this section, the application of the CHA is mandatory: if there is a *possibility* of multiple hearings before multiple boards under the scheduled or prescribed legislation, then the Act applies. There is no discretion set out in section 2.

Where the CHA applies, section 3 requires the proponent of the undertaking to give written notice to the Hearings Registrar established under the Act, who is presently the secretary to the Environmental Review Tribunal (ERT). Once notice is received, the Hearings Registrar refers the matter to the chairs of the ERT (formerly, the Chair of the Environmental Assessment Board) and the Ontario Municipal Board (section 4(1)). These two chairs create a joint board from among their combined membership (section 4(2)). The resulting joint board hears all of the matters identified in the notice and can make any decision that the original tribunal(s) could have

made (section 5(2)), and a decision by the joint board is final, subject to a cabinet appeal (section 13).

The CHA also makes provision for third parties to trigger the CHA. Section 24 makes provision for any party to a hearing before a tribunal under a scheduled or prescribed Act to bring a motion seeking to trigger the application of the CHA. The motion is brought to any of the tribunals subject to the statute and the tribunal may thereby order the proponent to give notice to the Hearings Registrar set out by the Act.

From its inception until the mid-1990s, the CHA was used for a vast array of major undertakings from the waste and energy sectors, with virtually all such applications involving the EA Act. The benefit offered proponents was to ensure that matters which received the comprehensive planning review provided by former section 5(3) of the EA Act could in turn receive a single, comprehensive hearing as opposed to a succession of hearings before different boards with the potential for different, if not inconsistent, results.

To display the scope of the problem remedied by the CHA, it is helpful to review merely a few of the notices issued under the CHA for different landfill projects:

(1) Halton landfill (notice: 1986; decision 1989): EA Act, *Environmental Protection Act* , *Ontario Water Resources Act*, *Conservation Authorities Act*, *Ontario Municipal Board Act*, *Municipal Act*, *Expropriations Act*.
(2) North Simcoe landfill (notice: 1987; decision: 1989): EA Act, EPA, *Planning Act*, *Expropriations Act*, *Ontario Municipal Board Act*, *Municipal Act*.
(3) Meaford landfill (notice: 1988; decision: 1990): EA Act, EPA, *Planning Act*, *Expropriations Act*.

More recently, however, the CHA has not been widely used. There are at least three major reasons for this lack of use:

(1) the EA Act has not been the source of more than two hearings in ten years;
(2) the list of statutes subject to the CHA has not been updated to address all Acts and approvals which raise significant environmental issues and involve regulatory hearings before different tribunals; and
(3) the CHA exemption regulation has not been updated to properly address the ERT or the new complexities raised by water takings and/or air approvals.

Each of these points merits further examination.

(1) The CHA is largely a proponent-driven statute. As set out above, the CHA is triggered by a notice from a proponent who has a number of approvals that will or may trigger hearings. In the late 1980s, where individual EA Act approvals were virtually always referred by the Minister to a hearing, a proponent could move pre-emptively to trigger the hearing by the CHA notice and thereby save what could have been months of time associated with a Ministerial referral. By contrast, under the post-1996 EA Act regime, there have been virtually no Ministerial referrals to the ERT, making it disadvantageous for a proponent to act pre-emptively by triggering a hearing

where none may otherwise be required. One reason for this difference is an amendment to the CHA regulation preventing an EA proponent from using the CHA without the permission of the Minister.

(2) The CHA schedule lists ten statutes: the EA Act, EPA, *Expropriations Act*, *Municipal Act*, *Niagara Escarpment Planning and Development Act*, *Ontario Municipal Board Act*, *Ontario Planning and Development Act, 1994*, the *Ontario Water Resources Act*, the *Planning Act*, and the *Regional Municipality of York Act*. Two significant omissions from this schedule are the *Aggregate Resources Act* (ARA) and the *Environmental Bill of Rights, 1993* (EBR).

The CHA also makes provision for regulations to add additional statutes to section 2. For example, Regulation 171, as amended, has added the ARA to the listed statutes on an undertaking-by-undertaking basis. This approach has largely followed the wishes of proponents: where they seek a consolidated hearing, the government has passed the amending regulation, but where not requested by the proponent, the government has not acted to pass a regulation. Last year, for example, regarding the proposed McCarthy quarry that is now before the ERT for a sewage works approval and the water takings permit, the Ontario Municipal Board sought to grant the motion of the Trent Talbot River Property Owners Association by specifically requesting that the MOE pass a regulation adding a proposed quarry to the CHA Regulation. However, the Ministry refused, apparently supported by the Ministry of Natural Resources. As a result, the OMB hearing went forward for three weeks, and subsequently the separate ERT hearing will go forward for at least two weeks.

On the other hand, the EBR is not a listed Act or addressed through any CHA regulation. The EBR triggers hearings where the tribunal such as the ERT grants leave to appeal a decision that is subject to leave according to EBR regulations. The failure to include the EBR means that a hearing which has received leave cannot be consolidated under the CHA.

(3) The CHA authorized an exemption regulation – Regulation 173, as amended - which is now significantly out of date.

Reviewing what the authors of Regulation 173 did intend, it would appear that they intended to exempt an undertaking from the CHA where it involves the *Planning Act* and *only* an approval that could be subject to a hearing through an appeal to the Environmental Appeal Board. The leading example of such an approval is a water taking permit. Thus, the CHA currently exempts undertakings that require both *Planning Act* approval and water taking approval, such as bottling plants and pits or quarries below the water table. It is not clear what the historic basis for this exemption was, although one possible rationale was that such permits or approvals were not considered sufficiently important to require a consolidated hearing. However, that history is no longer consistent with current priorities or public attitudes. Today, the Ministry is clearly devoting major attention to water taking permits and the public is clearly concerned with such permits. Furthermore, given recent history involving water issues and the Ontario Municipal Board, there are an increasing number of undertakings which will require both *Planning Act* approvals and water taking permits. It may also be the case that some air approvals also raise significant issues and currently lack integrated hearings with other approvals related to the same

undertaking. Without a consolidated hearing, there is a duplicative and thus unduly expensive hearing process as well as potential for inconsistent hearing results.

In sum, having regard to both points, it appears anachronistic to maintain this exemption in its current form.

ISSUE: REFINEMENTS TO THE ELECTRICITY PROJECTS REGULATION AND GUIDE

As noted above, EA requirements for electricity projects are currently set out in O.Reg. 116/01 and the associated Guide. However, based upon three years' worth of experience under this EA regime, the Energy Table has identified potential changes aimed at clarifying and improving the EA requirements that are applicable to electricity projects.

RECOMMENDATION 36: REFINEMENTS TO ELECTRICITY PROJECTS REGULATION AND GUIDE

The MOE should post a notice on the EBR Registry to solicit public comment on changes to the Electricity Projects Regulation and Guide proposed by Section 5 of the Energy Table Report.

DISCUSSION

This matter is discussed in detail at pages 17 to 24 of the Report of the Energy Table. The Executive Group also received some submissions from the public that supported the need to adjust or "finetune" the Electricity Projects Regulation and Guide.

ISSUE: REFINEMENT TO MUNICIPAL CLASS EA

As noted above, the current municipal Class EA does not include municipal transit projects. This omission means that such transit projects must undergo an individual EA (or be exempted) under the EA Act.

RECOMMENDATION 37: REFINEMENT TO MUNICIPAL CLASS EA

In collaboration with the Municipal Engineers Association (MEA), the MOE should immediately initiate amendments to the MEA Class EA to include municipal transit projects.

DISCUSSION

This matter is discussed in detail at pages 9 to 11 of the Report of the Transportation Table.

ISSUE: RESEARCH UNDERTAKINGS

Currently, "research" undertakings are exempted from the provisions of the EA Act. The lack of definition of what "research" entails has led to uncertainty regarding this type of exemption, as well as the temptation to include activities which may be closer to development than research. For these reasons, it is important to clarify the nature of the research undertakings eligible for exemption; while this category could be especially useful for emerging green technologies, it is critical that those technologies with the potential to cause significant harm be thoroughly tested in a safe manner, and that exempted projects not cause or contribute to environmental risks.

RECOMMENDATION 38: RESEARCH UNDERTAKINGS

The MOE should review and revise the "research" exemption under the EA Act to include emerging green technologies, and to clearly define appropriate parameters for "research" undertakings (i.e. temporal limits or operational capacity).

DISCUSSION:

The issue of emerging technologies is one that warrants much thought in the application of EA requirements. While new green technologies offer the promise of reducing environmental and social impacts associated with waste, transportation and energy production, some of them may still cause significant adverse effects and should be carefully examined prior to implementation. Technologies tested elsewhere but new to Canada should, when they can be shown to be benign, be either exempted or expedited through an abbreviated process.

"Research" as referenced in the regulation could be expanded to include emerging green technologies, but only if they meet certain criteria, which are determined to avoid negative impacts. These could possibly be based on experience elsewhere, but for new Canadian-developed technologies, this will be more difficult to assess. In these latter cases, "research" could be defined to identify very small-scale projects, designed to generate local data. They should, furthermore, be limited to only three years duration, and have a low capital cost and geographic span and extensive monitoring requirements. Monitoring results should be shared with a community group, established to participate in the evaluation of the research results.

CHAPTER 4: RECOMMENDATIONS REQUIRING FURTHER CONSULTATION/REVIEW

In this chapter, the Executive Group lists several recommendations which require further public consultation or review before being implemented. In general terms, the matters addressed by these recommendations were inspired by issues raised by the Reports of the Waste, Energy and Transportation Tables, or by submissions received by the Executive Group from the public. However, the substance of these issues could not be adequately considered by the Executive Group due to time constraints, and further reflection and/or consultation should be undertaken by MOE in order to develop appropriate measures to address these issues.

ISSUE: GENERAL REGULATION

The General Regulation under the EA Act (Regulation 334) has evolved over a lengthy period of time, and currently contains a diverse range of definitions, exemptions, and procedural requirements. As the recommendations in this Report are implemented, it will be necessary to review and, where necessary, revise the General Regulation to ensure consistency.

RECOMMENDATION 39: GENERAL REGULATION

The MOE should consider revising Regulation 334 in accordance with suggested changes found in Volume II.

DISCUSSION

The General Regulation under the EA Act currently applies to individual undertakings and those which may be covered by the Class EA process. It would not influence undertakings which are governed now or in future by sectoral regulations (e.g. O.Reg.116/01, “Electricity Projects”). It includes a grab-bag of provisions dealing with a variety of issues.

Additions or changes can be made to the General Regulation without the need for any legislative amendments, or if necessary, after some minor house-keeping amendments of the EA Act’s regulation-making powers. Several changes to Regulation 334 could be effected in the near future, while others may require a longer timeframe to implement.

In Volume II of this Report, the Executive Group provides a list of potential changes to the General Regulation that the MOE might consider, along with some illustrative and diverging comments brought forward by the three Sectoral Tables.

ISSUE: MUNICIPAL EA COMMUNITY ADVISORY/LIAISON COMMITTEES

The Executive Group believes that there is a potential for establishing formalized municipal EA community liaison committees in the EA process. The general intent of such committees would be to provide a forum and mechanism whereby the Class EA process and individual EAs are given transparency at the local level, to ensure that reasonable alternatives are identified and

given serious consideration by the proponent prior to completing its Class EA, with the objective of resolving issues and avoiding the need for, or narrowing the basis for, bump-up requests.

RECOMMENDATION 40: MUNICIPAL EA COMMUNITY ADVISORY/LIAISON COMMITTEES

The MOE should request that the advisory body consider the option of creating local or regional standing EA advisory and/or liaison committees, with a role in the EA development and review process (for projects subject to Class EAs as well as for individual EAs) within delineated study areas.

DISCUSSION:

The Executive Group believes that long-term consideration should be given to whether permanent (volunteer) EA liaison committees should be established in municipalities or regions across Ontario. Conceptually, these committees would be analogous to site liaison committees sometimes established by proponents in relation to waste disposal facilities, or public advisory committees sometimes established by municipalities to assist in land use planning matters. However, EA liaison committees would not be focused exclusively upon an individual project, nor would the committees be disbanded once a particular project has been planned and completed. Instead, these committees would continue to exist as stand-alone entities which could be engaged whenever proponents initiate planning procedures under a parent Class EA (or O.Reg.116/01 and Guide) for projects to be sited within the locality.

The actual role, composition and mandate of EA liaison committees should be developed and refined by the provincial advisory body in consultation with proponents and other EA participant. To assist in such deliberations, the Executive Group offers the following preliminary thoughts on the structure and function of EA liaison committees.

In general terms, the overall intent of EA liaison committees would be to provide a public forum at the local level to enhance the accountability and transparency of Class EA procedures (i.e. to ensure that reasonable or locally appropriate alternatives are identified and given serious consideration by the proponent). By facilitating and accommodating public concerns over such issues, the existence of these local EA committees may greatly assist in resolving the issues in dispute and avoiding the need for (or at least narrowing the basis of) bump-up applications.

Where no municipal EA liaison committee exists, the proponent, in conjunction with the MOE staff, could be encouraged (or directed) to ensure such a committee is established before the proponent begins planning or designing a project that is subject to Class EA procedures.

EA liaison committees should be comprised primarily of non-elected residents, with at least some members experienced or knowledgeable in EA. Provision should be made to declare and avoid conflicts of interest. In some cases, the committee might include or consist of the local planning advisory committee or another existing municipal committee, provided that there are persons on it with EA experience and that there is a majority of non-elected citizens. The composition of the committee should allow for the appointment of one or two additional temporary members to represent communities affected by a particular proposal.

Fiscal and administrative support for EA liaison committees could be provided by MOE, municipalities and/or proponents. Generally, committees should be enabled to access independent technical or EA planning expertise (i.e. peer reviews) in order to meaningfully review and comment upon proposed Class EA projects. Provincial funding for such committees could be derived either from general revenues or from the pool of funds collected from EA application fees (see discussion above).

The committees should be enabled to request (or require) a "time out" in the Class EA process to ensure the generation and meaningful consideration by proponents of appropriate alternatives, mitigation actions, or compensatory measures, prior to the finalization of the Class EA studies or reports.

Specific responsibilities of the EA community liaison committee could include the following matters:

(a) provide a consultation/feedback forum to assist affected communities and proponents in coming to common understandings or resolving issues about proposed projects;
(b) ensure that proponents understand procedural concerns raised by the public (e.g. inadequate notice, lack of consideration of appropriate alternatives, etc.) and suggest measures to address such concerns;
(c) determine whether independent technical or EA process advice would be helpful in resolving public concerns, and arrange for such advice where warranted;
(d) carry out or arrange for alternative dispute resolution procedures (e.g. mediation); and
(e) request or require a "time out" on the proponent taking future steps in the Class EA process, where the committee is of the view that further studies, consultation or ADR processes may assist in resolving stakeholder concerns.

ISSUE: INCORPORATING MASTER PLANS INTO EA PROCESS

When evaluating transportation infrastructure projects, alternatives to the undertaking (including transit (such as increased service) and transportation demand management (TDM) strategies) cannot always be effectively considered in a corridor. Due to the diverse nature of trip origins and destinations in a community, the Transportation Table suggests that transit improvements need to be implemented on a broader basis to be effective as a transportation alternative. Exceptions would include implementation of higher order transit. These types of strategies are generally described within a community's Transportation Master Plan. Currently, the Master Plan process does not result in approvals through the EA or *Planning Act*. It would be beneficial for transportation network strategies such as transit and TDM to receive recognition through an approval process, so they become the starting point or base case against which other alternatives are measured.

RECOMMENDATION 41: INCORPORATING MASTER PLANS INTO EA PROCESS

The MOE should request the advisory body to review the relationship between infrastructure master plans (e.g., transportation) and the EA process.

DISCUSSION

This matter is discussed on pages 19 to 20 of the Report of the Transportation Table. The Executive Group also received public input raising concerns about the uncertain manner in which transportation master plans are proposed and implemented (with minimal public awareness) through instruments under the *Planning Act* (i.e. official plan amendments) and the EA Act.

CHAPTER 5: CONCLUSIONS

In June 2004, the Ontario government established an Advisory Panel to the Minister of the Environment, consisting of an Executive Group and three Sectoral Tables, to provide recommendations for improving Ontario's EA program, particularly as it relates to the energy, waste and transportation sectors.

The Executive Group began detailed work on its EA review and recommendations in August 2004. Over the past six months, we have been actively engaged in the process of considering concerns with the current application of the EA program, and developing appropriate recommendations in this Report to address such concerns. During this time, from September to November 2004, the three Sectoral Tables also examined EA-related problems in each of their sectors, and submitted their reports to the Executive Group in November 2004.

The Executive Group has benefited from reports and comments of the Sectoral Tables, discussions with MOE staff, and various public submissions, all of which have suggested ways in which EA planning and decision-making can be strengthened and improved in the province. This Report and its recommendations reflect the considerable effort and discussion contributed by all parties.

The Executive Group has concluded that Ontario's EA Act is fundamentally sound but requires minor legislative, regulatory and administrative fine-tuning. In the view of the Executive Group, the problem is not the EA Act itself, but the way in which the Act has been interpreted and applied without the benefit of overarching principles and sector-specific policies to guide EA planning and decision-making. One of our principal findings is the need for the MOE to develop guiding principles and to entrench them in a policy guideline under the EA Act. We have suggested that the Ministry adopt the goals of "betterment" and "protection of the environment", and enshrine such principles as sustainability benefits, public participation, the precautionary principle, the ecosystem approach and environmental protection under the Act. The Executive Group also endorses the objectives of having a process that, among other things, is: (a) clear, consistent, predictable, transparent and timely; (b) integrated with other planning and approvals processes; and (c) is based on good data, good science and sound engineering.

A related key recommendation is that the MOE should develop sector-specific policies under the EA Act that would direct EA planning and decision-making in sectors such as waste, energy and transportation. Sector-specific government policies should include a hierarchy of preferences based on the degree of benefits and the risk of impact of different types of projects within each sector. These policies could be used to identify and prioritize "green projects". Since the Executive Group did not have sufficient time to finalize such policies, we recommend that the government appoint small, balanced and representative sectoral working groups to develop them. The Executive Group did, however, develop draft policies that are included in Volume II of this Report, and strongly encourages the MOE to use these as a template and starting point for sector working group activities.

At the same time, the Executive Group has identified the need to develop better, clearer and more timely EA procedures that are directly tied to the degree of environmental benefits or risks posed by any undertaking or class of undertaking. The EA procedural framework that we have

developed in our Report is intended to impose appropriate planning, consultation and documentation requirements that reflect the benefits and risks associated with different types of projects within each sector. As per the draft sector policies, the Executive Group has also included a set of draft sector procedures for energy, transportation and energy (see Volume II), and strongly encourages the MOE to use these as a starting point and template for the work of sectoral working groups.

The Executive Group's key recommendations will result in some significant changes in the content, structure and delivery of Ontario's EA program. The Executive Group recognizes that these changes, which will improve the EA process, may impose costs on the government, at least in the short term. In considering the cost of implementation, the Executive Group has weighed the short-term costs against the medium and long-term benefits and savings associated with the proposed reforms. Although there may be a need for a reassignment of staff within and outside the MOE to facilitate EA reform, the Executive believes that implemented reforms can be realized with the existing complement of provincial staff. Initially there will be some increased costs associated with start-up of the reform process, however, when implemented, the EA reforms will result in a more cost-efficient program for both the public and private sector. Moreover, when compared to the cost of doing nothing, or maintaining the status quo the upfront cost of reform is modest. Therefore, we are proposing that the provincial government introduce a system of EA fees that will be used to enhance the operational capacity of the Ministry and all facets of its EA program.

The Executive Group has made a concerted effort to articulate and build a system of recommendations that will achieve the goals of the Minister of the Environment to revitalize, rebalance and refocus the EA program in Ontario. We hope that our recommendations will provide the basis for changes to the EA program that can be implemented as effectively and as expeditiously as possible.

APPENDICES

APPENDIX 1: EA GLOSSARY

Note: Definitions provided in this glossary are intended to assist the reader in understanding the provisions related to the environmental assessment program areas as defined in the *Environmental Assessment Act*. The terms may hold slightly different meanings in other contexts. An asterisk (*) beside a defined term indicates that the term is defined in the Act. For these terms, the Ministry of the Environment advises that both the definitions in this section and in the Act be consulted for a complete understanding. In all cases, the wording contained in the Act shall prevail.

Alternative Methods:
Alternative methods of carrying out the proposed undertaking are different ways of doing the same activity. Alternative methods could include consideration of one or more of the following: alternative technologies; alternative methods of applying specific technologies; alternative sites for a proposed undertaking; alternative design methods; and alternative methods of operating any facilities associated with a proposed undertaking such as: facility capacity; service area; rate of use; alternative preventative and monitoring techniques; and alternative end uses for a site or facility where appropriate.

Alternatives To:
Alternatives to the proposed undertaking are functionally different ways of approaching and dealing with a problem or opportunity. For example, functionally different methods of addressing a waste disposal problem may include: source reduction; recycling; composting; energy from waste facilities; incineration, and disposal at a landfill site.

Alternatives:
Both alternative methods and alternatives to a proposed undertaking.

Amendment:
A change to an application which can be initiated by the proponent before a decision is made about the undertaking. The Act specifies when amendments can be made and under what circumstances.

Application:
An application for approval to proceed with an undertaking under subsection 5(1) of the Act.

Approved Terms of Reference:
A Terms of Reference that has been approved by the Minister of the Environment.

Class Environmental Assessment Document:
A document that sets out a planning process under the Act for certain classes of undertakings that have predictable and mitigable environmental impacts. A proponent that receives approval for a class of undertakings does not need to obtain separate approval under the Act for each specific undertaking, provided the class planning process prescribed for that class is adhered to for the undertaking.

Class Environmental Assessment Undertaking:
An undertaking that does not require any further approval under the Act if the planning process set out in the Class Environmental Assessment document is followed. The Class environmental assessment planning process may occasionally result in an environmental assessment having to be done for the undertaking under section 5.1 of the Act.

Commitments:
A guarantee from the proponent that a mutually agreed upon solution to a problem will be carried out in a certain way. Proponents acknowledge these guarantees by documenting obligations and responsibilities which they agree to follow in environmental assessment documentation. Once the Minister approves the undertaking, the commitments in the document become legally binding.

Consultation:
The activities carried out by a proponent to provide a two-way communication process to involve interested parties in the planning, implementation and monitoring of a proposed undertaking. Consultation is intended to:

- identify issues and concerns;
- identify relevant information;
- identify relevant guidelines, policies and standards;
- facilitate the development of a list of all required approvals, licences or permits;
- provide guidance to the proponent about the preparation of the Terms of Reference and Environmental Assessment document;
- ensure that relevant information is shared about the proposed undertaking; and
- encourage the submission of requests for further information and analysis early in the environmental assessment process.

Consultation Record:
A document submitted with the proposed Terms of Reference that identifies all persons consulted during Terms of Reference preparation; outlines the preliminary consultation activities undertaken; clearly and accurately summarizes the issues and concerns raised; provides copies of written comments, names and addresses received from interested persons; and demonstrates how concerns raised were addressed in the proposed Terms of Reference.

Deadlines Regulation:
Refers to Ontario Regulation 616/98, which establishes the timing of reviews and decisions for Terms of Reference and environmental assessments.

Declaration Order:
An Order-in-Council, made by the Minister and approved by the Lieutenant Governor in Council, declaring that some or all of the provisions of the *Environmental Assessment Act* do not apply to the proposed undertaking.

Declaration Order Request:
A request to the Minister, usually from a proponent of a proposed undertaking subject to the *Environmental Assessment Act,* requesting that some or all of the provisions of the *Environmental Assessment Act,* not apply to their proposed undertaking.

Designating Regulation:
A regulation made by the Lieutenant Governor in Council which designates a proposed undertaking that normally would not be subject to the *Environmental Assessment Act* as subject to the requirement of the *Environmental Assessment Act.*

Designation Request:
A request from a proponent, member of the public or government agency asking that a proposed undertaking normally not subject to the requirements of the *Environmental Assessment Act* be made subject to the Act's requirements.

Director:
Director of the Environmental Assessment and Approvals Branch, Ministry of the Environment

Do Nothing Alternative:
An alternative that is typically included in the environmental assessment that identifies the implications of doing nothing to address the problem or opportunity that has been identified.

Draft Environmental Assessment:
A version of the environmental assessment that the proponent may submit to the Ministry and other interested persons before a formal submission to solicit comments so that issues and concerns about the document can be identified and considered before the formal submission.

Draft Terms of Reference:
A version of the Terms of Reference that the proponent may submit to the Ministry and other interested persons before a formal submission to solicit comments so that issues and concerns about the document can be identified and considered before the formal submission.

Environment*:
air, land or water;
plant and animal life, including human life;
the social, economic and cultural conditions that influence the life of humans or a community;
any building, structure, machine or other device or thing made by humans;
any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities; or;
any part or combination of the foregoing and the interrelationships between any two or more of them.

Environmental Assessment:
An environmental assessment is a document submitted pursuant to subsection 6.2(1) of the Act. The environmental assessment process is a planning and decision-making process used to promote good planning by assessing the potential effects of certain activities on the environment.

Environmental Assessment Act:
The *Environmental Assessment Act* [as amended by the *Environmental Assessment and Consultation Improvement Act*, 1996, S.O. 1996 c. 27, Schedule E and F of the *Red Tape Reduction Act*, 2000, S.O. 2000 c. 26 and c.9, Schedule G, s.3 S.O. 2001] provides for the protection, conservation and wise management of the environment in Ontario by providing for an accountable, logical and reproducible decision-making process. It lays out a planning and decision-making process and encourages environmental protection within the context of a broadly defined environment.

Environmental Assessment and Approvals Branch:
The branch of the Ministry of the Environment that administers the Act.

Environmental Effects:
The effects that a proposed undertaking has, or could potentially have, on the environment, either positive or negative, direct or indirect.

Environmental Registry:
An online registry, administered by the *Environmental Bill of Rights* Office, that provides Ontario residents with access to vital information about environmentally significant proposals and decisions of prescribed Ontario government ministries. Ontario residents have a right to comment on proposals for certain new acts, regulations (such as designation regulations and declaration orders), policies or instruments (such as permits and Certificates of Approval) posted to the Registry (generally, a 30-day comment period applies).

Environmental Review Tribunal (Tribunal):
The Environmental Review Tribunal is a quasi-judicial, independent and impartial tribunal which conducts public hearings to determine applications under prescribed environmental legislation in Ontario. The members are appointed by the Lieutenant Governor in Council, of which there must be a minimum of 5 members, none of whom may be employed by the Ministry of the Environment.

Environmental Study Report:
The documentation for a specific project planned in accordance with a parent Class Environmental Assessment document which sets out the planning and decision-making process, including consultation, followed to arrive at the

preferred solution. It also sets out impact management measures proposed to avoid or minimize environmental effects and commitments to monitoring and compliance.

Government Review Team:
The staff from the Ministry of the Environment (including Ministry of the Environment technical reviewers), various other federal, provincial and local government agencies and others who are invited to participate, who contribute to the review of the proposed Terms of Reference by providing comments based on their mandated areas of responsibility.

Impact Management Measures:
A range of activities carried out by the proponent of an undertaking to avoid, minimize, adverse environmental effects of a proposed undertaking and to enhance the benefits of an undertaking.

Individual Environmental Assessment:
A term used to distinguish an environmental assessment conducted under subsection 5(1) of the *Environmental Assessment Act* from Class environmental assessment projects carried out under subsection 13(1) of the Act.

Interested Persons:
Individuals, First Nations, or organizations with an interest in a particular undertaking. Interested persons are not required to demonstrate that they will personally be affected by a particular undertaking. Often called stakeholders.

Master Plans:
Long range plans integrating infrastructure requirements for present and future land use with environmental planning principles. These plans examine the whole infrastructure system in order to outline a framework for planning for subsequent projects and/.or developments.

Mediation:
A non-binding technique used to resolve disputes with the assistance of a neutral third party (mediator).

Minister*:
Minister of the Environment.

Ministry*:
Ministry of the Environment.

Ministry of the Environment Technical Reviewers:
Ministry staff, other than the Project Officer, who contribute to the review of the proposed Terms of Reference. Comments from Ministry of the Environment technical reviewers form the ministry input with respect to those matters related to the administration of statutes for which the ministry is responsible, other than the Act.

Mitigation:
The activities carried out by a proponent of an undertaking to avoid/minimize or ameliorate the potential adverse environmental effects of the undertaking.

Monitoring:
The activities carried out by the proponent after the approval of an undertaking to determine the environmental effects of an undertaking (effects monitoring). It can also refer to those activities carried out by the ministry in ensuring that a proponent complies with the environmental assessment and the terms and conditions of the approval of the undertaking (compliance monitoring). A third type of monitoring is effectiveness monitoring in which a proponent evaluates how effectively the parent Class Environmental Assessment document is working in the planning and implementation of the Class Environmental Assessment projects.

Net Environmental Effects:
The environmental effects of an undertaking, or its alternatives, after all reasonable impact measures have been considered.

Places of Public Record:
Official location(s) where interested persons may review the Terms of Reference and Environmental Assessment submitted to the ministry during the environmental assessment process.

Project Officer:
The assigned staff member from Environmental Assessment and Approvals Branch who manages and coordinates the review of Terms of Reference and Environmental Assessments for specific undertakings.

Proponent*:
A person who: carries out or proposes to carry out an undertaking; or is the owner or person having charge, management or control of an undertaking.

Proposed Terms of Reference:
A Terms of Reference that has not yet received the approval of the Minister.

Public Record File:
A record of every undertaking for which there is an application for approval under the Act which is maintained by the Environmental Assessment and Approvals Branch in accordance with section 30 of the Act.

Significant Environmental Impact:
An impact to the environment caused directly or indirectly that cannot be mitigated and/or managed effectively.

"**Stand Alone" Documen**t:
Additional documentation prepared separately from the Terms of Reference and Environmental Assessment, which provides more information, but is not subject to the approval of the Minister.

Supporting Documentation:
Documentation that is submitted to the ministry in addition to the proposed Terms of Reference, which provides further information on issues discussed in the proposed Terms of Reference. Information contained in the supporting documentation should support the proponent's request that the Terms of Reference be approved by providing rationale for the choices made and details of processes or methodologies to be used.

Terms and Conditions:
Represent the resolution of outstanding issues after an environmental assessment has been submitted to the Minister of the Environment. A tool for making sure that the implementation, construction, operation or closure of an undertaking satisfies the requirements of the Government Review Team and addresses public and community concerns. Terms and conditions are also used in Declaration Orders. Terms and conditions are legally binding.

Terms of Reference:
A document submitted by the proponent to the ministry which sets out the framework for the planning and decision-making process to be followed by the proponent during the preparation of the Environmental Assessment for the proposed undertaking. The Terms of Reference is submitted early in the environmental assessment process and must be approved by the Minister. Once approved, the Terms of Reference becomes the framework for the preparation of the Environmental Assessment. The Environmental Assessment must be prepared in accordance with the approved Terms of Reference.

Undertaking*:
An undertaking means:

- an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities.
- a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity of a person or persons other than a person or persons referred to in clause (a) that is designated by the regulations; or

- an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause (a), if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program.

APPENDIX 2: ENERGY TABLE REPORT

(Formatting of below Sector Table Report may be different than originally submitted)

Energy Panel's Report and Recommendations on Improvements to Ontario's Environmental Assessment Process

November 23, 2004

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Introduction

Environment Minister Hon. Leona Dombrowsky appointed an executive advisory panel, and three sector-specific panels, to provide "expert advice and guidance on improvements to Ontario's Environmental Assessment process" to support the "… government's waste diversion and waste management, clean energy and transportation objectives".

The stated purpose of the advisory panel is to meet the government's goals to:

1. "**Revitalize** the EA program, providing clear, prescriptive rules for appropriate environmental planning and decision-making.
2. **Rebalance** EA decision-making by setting out clear roles for all participants.
3. **Refocus** the EA process such that the level of assessment and review of proposed undertakings reflects the potential that proposal have to positively or negatively impact the environment as defined by the *Environmental Assessment Act*."

Further details were provided[64] including terms of reference for the panel and sector sub-panels and a "statement of challenge":

> "The challenge identified by the Environment Minister's EA Advisory Panel is how to improve the environmental assessment regime of Ontario in order to ensure fair, balanced, comprehensive, transparent, accessible, inclusive and participatory environmental planning and decision-making for all undertakings (plans, policies, programs and projects) governed by the Environmental Assessment Act, resulting in outcomes that maximize sustainability while at the same time providing for the benefit of all proponents and other participants, particularly in priority sectors (waste management, clean energy and transportation-transit), an effective process that is reasonably: efficient (with respect to cost); timely (with respect to speed); clear (with respect to rules); disciplined (with respect to process); independent (non-biased and apolitical); flexible (adjustable where appropriate to time constraints, size of undertaking, level of potential environmental impacts, etc.); and, sensitive to specific context (including individual sectoral needs and differences)."

After the appointment of the energy sector panel, the members first met with members of the Executive Panel and staff of the Ministry of the Environment on October 4, 2004. The energy panel then met on four occasions. At these meetings, they discussed the Executive's advice to the energy sector panel as expressed through its General Principles, the Terms of Reference and the EA Policy Guideline for energy generation undertakings. The current operation of the provincial government's EA requirements for

[64] http://www.ene.gov.on.ca/envregistry/023747ex.htm

electricity facilities was assessed, and a number of issues and possible solutions were identified for further discussion.

On November 8, the energy panel held a workshop at the Ontario Heritage Centre. The panel distributed a series of principles and questions in advance of the workshop to energy stakeholders. The workshop was attended by a broad range of interested people including representatives of the energy industry, the consulting community, the provincial government, municipalities, environmental organizations and community groups. The energy panel invited the participants' input on issues, challenges, opportunities and priorities. These were discussed in both a plenary session and individual workshop groups.

A report of the workshop was done for the energy panel (see Appendix II), and individual stakeholders who attended the conference submitted to the Ministry of Environment and to the panel further proposals for improvements to the EA process for the energy sector. The input of the stakeholders present at the workshop reinforced the energy panel's appraisal of the key impediments and added to the potential improvements to environmental assessment processes that had been identified. The energy panel met after the workshop to discuss issues arising from stakeholder consultations.

1.1 Principles and themes

Consistent with the direction of the Minister and the Executive Panel, and reflecting the expertise and experience of energy panel members and stakeholders, the Panel has developed its own "Principles and Themes" to guide its work. These incorporate a number of the elements contained in the Executive's advice, and they also reflect our experience with the current EA framework for these projects.

1. **One project, one process**—to promote the review, assessment and approval of projects through a single process by integrating administrative functions of multiple review and approval authorities; clarifying criteria and accountability for decision-making, and eliminating redundant and unnecessary steps and processes.

2. **Transparency and disclosure**—to promote better information management and fuller disclosure, to increase stakeholders' understanding of legal and regulated requirements, to maintain or enhance opportunities for effective public participation in decision-making processes, to remove undue hurdles and barriers to entry for smaller enterprises and to reduce regulatory burden and cost for proponents, regulatory authorities and the public.

3. **Refinement rather than wholesale change**—the regulation of EAs for the energy sector went through an extensive process of consultation and change in 2001, resulting in the Electricity Projects Regulation and the Guide to Environmental Assessment Requirements for Electricity Projects ("the Guide"), and further consultation in 2003. Based on the breadth and depth of that process

and considering the recent experience of proponents, review agencies and the public, the panel is inclined towards a pragmatic approach to recommend incremental and positive changes, but not to make change for its own sake.

4. **Clear policy role**—issues such as need, alternatives, and the public interest need to be clearly related to overall Provincial goals with respect to energy, land use and resource management planning and public engagement.

5. **Improvements should be lasting and positive**—recommendations for changes to environmental assessment processes should create opportunities for improvements that benefit proponents, regulatory authorities, the public and the environment.

Further to these general themes, the panel has discussed more specific principles that should guide improvements in environmental assessment and approval processes. While the report does not align specific recommendations against these principles, the panel recommends that implementation mechanisms be assessed against them.

1. The scale and extent of project review and assessment and approval should reflect the scale of potential negative and positive impacts of a project.

2. The scale and extent of public participation and consultation should reflect the scale and extent of potential impacts and the level of public interest in a project.

3. The question of scale includes addressing challenges faced by small projects and the potential for disproportionate regulatory burden.

4. Significant improvements to project timelines will require coordinated action by multiple levels of government, within and across government departments, and among government and regulatory authorities is imperative.

5. Matters of provincial interest are most appropriately defined by clear policy direction at a provincial level.

In discussing issues and recommendations, the Panel has reflected whether comments and suggestions from stakeholders, and proposed recommendations, are consistent with these principles.

1.2 Comments on Principles Suggested by Executive Members

At the commencement of the process the Executive of the Minister's Panel provided the Energy Panel with a number of general principles regarding EA and an EA policy guidelines for energy generation undertakings.

The energy panel supports a number of the general principles suggested by the executive panel, relating to a desire overall to:

- Promote more sustainable development in Ontario,
- Err on the side of caution in making decisions with uncertain impacts,
- Engage meaningful public participation in decision-making processes,
- Apply appropriate ecosystem and life-cycle principles in project review and approvals,
- Protect the environment, broadly defined, and
- Promote provincial interests and government policies.

The current EA requirements for electricity projects already incorporate these features to some extent and our recommendations will, we hope, enhance them still further. However, the Energy Panel has reservations regarding the extent to which a number of the principles, policies and priorities created by the Executive Panel would assist in meeting the purpose of the panel review and the EA Advisory Challenge in the energy sector. The Energy Panel does not recommend enshrining these principles in legislation without thorough analysis and extensive additional consultation. The approach to environmental protection is well established in existing legislation and profound changes, such as those suggested by the Executive Panel, would require a comprehensive assessment of the impacts.

It is not clear that making these principles paramount is in the public interest, given the broad articulation of the public interest (in respect of matters of provincial interest) with respect to the energy sector that already exists and is documented in this report

Further to the discussion of principles, the Energy Panel has developed a number of recommendations and proposals for improving the environmental assessment process for energy projects in the areas of:

- **clarifying government policy (Section 2),**
- **integrating the administration of approvals and permit requirements into a single coordinated process (Section 3),**
- **improving the transparency of the process and enhancing public participation (Section 4), and,**
- **making immediate improvements to environmental assessment through refinements to "The Guide" and Regulation 116.**

The recommendations in our report represent a broad consensus on changes that need to be made to achieve the objectives outlined in the Minister's challenge. While not all the members of the Panel agree with all the recommendations, we agree with the general directions suggested in the report.

2. Clear Government Policy

The Energy Panel identified the need for the Government to provide clear policy guidance in a number of areas to promote a focused and consistent energy system, to avoid duplication and inefficient use of proponent and stakeholder resources, and to facilitate approvals for energy projects.

The following outlines four key areas for provincial policy intervention:

2.1 The Need to Clarify the Province's Leadership Role in the Assessment of "Alternatives To" Undertakings

The *Environmental Assessment Act* contains clear requirements for proponents to consider alternatives to undertakings in the EA process. Such alternatives typically encompass strategic alternative ways of solving problems. In the energy sector, such alternatives encompass identification of the optimum overall blend of generation and distribution to serve a given population, and also drive the selection of a mix of renewable versus non-renewable energy sources. In practice, the need for the undertaking is also typically addressed by this step in the EA process.

The Panel agrees that a defensible analysis of "alternatives to" is necessary to ensure appropriate public accountability for decisions made on energy projects (subject to the Act) because it is at this strategic decision-making point when the most dramatic changes can be made to reduce and avoid environmental impacts. Examples for the energy sector include strategic choices to: a) support energy conservation to reduce the need for generation; and b) promote renewable energy supplies and distributed energy production rather than strictly conventional approaches.

Thus, the question is not whether strategic alternatives should be considered but how. Specifically, the question is how or whether the EA process can best contribute to this part of the decision-making process. For the energy sector, the analysis of energy needs and "alternatives to" is clearly being directed by the Province. The relevant recent initiatives announced by the Government include:

- Creation of the Ontario Power Authority (OPA) which will ensure long-term supply adequacy in Ontario including preparation of an integrated system plan. It is expected that this plan will be prepared in an open and consultative manner and will be reviewed and approved in a public forum by the OEB. The plan will direct the private sector when needed to build new generation capacity;

- Creation of a Conservation Secretariat within the Ontario Power Authority to direct Ontario's conservation effort;

- Redefinition of the role played by the Independent Electricity Market Operator (IMO) as defined in its new name - the Independent Electricity System Operator (IESO) through which decisions on issues of relevance to the EA process (such as the need for transmission capacity) will be directed;

- An intention to create specific provincial policy that sets conservation targets (through the Ministry of Energy). The OPA will be charged with achieving the targets set by the government and would include them in their system planning.

The targets will include conservation, the use of renewable energy, and the overall supply mix of electricity in the province.

It is the Panel's opinion that it is fully appropriate for the Government to complete the strategic analysis of the need and alternatives for energy in the province and to identify the optimum mix of projects to be subject to the project specific EA process. The Government has a wide breadth of authority for determining the mix of generation and transmission as well as pricing and conservation that cannot be matched by individual project proponents.

In developing the mandate of the Ontario Power Authority, the government should ensure that the proposed decision-making process for strategic energy choices meets the core principles of the EA process – open and consultative, considering natural, social, technical and economic criteria and considering a reasonable range of alternatives. If this proves not to be possible then an alternative mechanism that meets these requirements should be developed. The use of strategic environmental assessment is provided for by the EA Act as a means of developing plans, policies and programs, and may be a useful model in this instance.

Recommendations:

Given these initiatives by the Province, documentation and reference to alternatives to (and need) in the EA process for individual energy projects should be limited to reference to the specific directive(s) from the Province that have identified the specific project. Examples would include a Government led RFP process for increased generation or direction from the IMO to reinforce transmission capacity.

Regulation 116 and the associated Guidelines should be clarified to reflect this Government led process and the expectations for proponents to document the government's directives. The Regulation cannot be silent on this important issue. The Regulation and Guide must be clear that all levels of regulated EAs (i.e. Levels A, B, C and any Class EA) following from the Regulation and Guidelines defers decisions on "alternatives to" to the Provincially led decision-making process for energy.

Given that the Government's recently announced initiatives for energy management are not fully approved or implemented, the Ministry of Environment will have to work closely with other sectors of government (notably the Ministry of Energy and the Ontario Energy Board) to be assured that the expectations and principles described above are in place before changes are entrenched in the EA process deferring responsibility for "alternatives to" from proponents to the Government.

It is important to note that the Panel recommends that responsibility for a full evaluation of alternative methods/means for Category C and certain transmission projects will remain the responsibility of individual proponents. Typically, this includes an assessment of alternative sites/routes and relevant technologies/designs. Such analysis will be necessarily constrained by the mandate and authority of the proponent to implement alternatives.

2.2 The Need for Greater Clarity on Matters of Provincial Interest

Discussion:

Recognition of "provincial interests" (e.g. the Planning Act Policy Statement) is necessary, but it needs to be recognized that provincial interests will collide in some cases, where significant trade-offs are at hand and difficult decisions must be made e.g. for linear infrastructure facilities, which do not have the flexibility to avoid provincially significant features that may be possible for site based projects.

The policy planning and decision-making process should not exclude all potential sites and infrastructure corridors for economic development and investment, but rather must recognize that trade offs are sometimes necessary. In particular, the Panel heard clearly that municipal planning and decision-making is paying insufficient attention to the requirements for strategic energy infrastructure. Municipalities should be encouraged to consider future land use needs and energy infrastructure requirements to meet the peoples' need for heat, light and power in their homes.

The Provincial Policy Statement – Draft Policies (June 2004) section on Implementation and Interpretation states that "the applicable policies would be considered as part of the evaluation conducted under the relevant environmental assessment process" (p. 33). Clearly, in many EA projects, it will not be possible to comply with all Provincial Policy Statement (PPS) policies, most notably for linear facilities which will be compelled to impact provincially significant features at times. Thus, it is not clear how proponents are meant to "consider" the PPS in EA processes. Moreover, Section 1.6 of the draft PPS (Long-Term Prosperity and Social Well-Being) includes reference to "alternative energy systems" (includes renewables, and, presumably the required infrastructure). Again, it is unclear how support for such facilities is to be integrated into planning decisions.

Recommendation:

The PPS provide greater direction/clarity to EA proponents concerning how to consider the PPS in EA processes <u>and most importantly</u> identify the forum for resolution of conflicts with Provincial Policy. (See our Recommendations regarding One Project, One Process).

2.3 The Need for Policy Guidance Regarding Definition of Projects

Discussion:

Energy projects are inter-related – e.g. generation projects often spawn the need for new or reinforced transmission, roads or other infrastructure that is also subject to the EA process and other approval requirements. Typically, projects are defined by the mandate of an individual proponent or through a desire to "fall under the wire" for

Category B, C or individual EA status. The Province should take a leadership role in defining the specific projects entering the EA process given that the Province is defining the suite of projects that will trigger the EA process through its energy management initiatives and policy direction as noted above in (1).

Recommendation:

That the Province provide clear instruction and guidance on definition of projects/project bundles to be subject to the EA process when it provides direction to proponents on generation or transmission projects to be initiated that will trigger the EA process.

2.4 The Need for Policy Leadership on Controversial Issues

There are a number of controversial issues that emerge with energy projects on a repeat basis and in each case attract a significant workload for technical studies, assessment and consultation. Some of these include the biophysical impacts of technologies such as bird kills for wind turbines, and EMF for transmission facilities. Others relate to land use conflicts such as protection of wind and water resource areas. The necessity to conduct such studies can be a significant barrier to smaller projects with more limited available resources.

Proponents and the Panel believe that the Province should take a leadership role in facilitating generic work on these issues and providing a policy framework, guidelines and an even playing field for all proponents. We recommend that the Province commission research in moving towards resolution of these issues.

Recommendation:

That the Province undertake to commission research to provide resolution for a number of controversial issues that emerge on a repeat basis for the energy sector, slow down the decision-making process and waste limited resources. In some circumstances it may not be possible to go beyond identifying the appropriate level of study for particular types of projects and settings.

As has been the case for other sectors (e.g. landfill design guidelines), where appropriate the Province will then provide a consistent basis for decision-making by preparing Regulations or Policy/Guidance documents for use by proponents and stakeholders as they complete EAs for projects.

2.5 The Need to Elevate the Status of Energy in Provincial Policy

If the Province wants to ensure that energy projects are given weight in the consideration of all provincial goals and objectives, the Province should give energy projects a higher status in the Provincial Policy Statement. Energy could be elevated to the same status as other infrastructure.

Recommendation:

That the Province elevate energy infrastructure to the same level as other infrastructure (such as transportation) in the policies of the Provincial Policy Statement.

3. Administrative Integration and Regulatory Coordination

The Panel supports an integrative approach to planning and decision-making that facilitates the integration of those aspects of decision-making processes that affect the environment, according to shared principles, towards greater transparency in terms of what's expected from proponents, regulatory authorities and the public, with respect to:

- Detailed, technical standards and requirements that must be met,
- The process by which decisions will be made,
- Clear roles, responsibilities and accountabilities for proponents, for regulatory authorities and for the public,
- Eliminating unnecessary impediments to good projects, and,
- Promoting greater regulatory efficiency and effectiveness overall.

Appendix II provides a brief account of some of the numerous processes, regulatory approvals and permits potentially required for energy projects in Ontario. The proponent's management of these requirements includes posting of information and responding to submissions and requests for information in the many instances where some form of consultation is required.

As set out in our Terms of Reference, the Panel has identified recommendations for both short and long term improvements to the EA process as it applies to energy projects. This distinction is reflective of the time and effort that will be required to implement some of our proposed changes, and the need to provide relief from some of the inefficiencies of the current process during the interim period. The Energy Panel is strongly committed to the long term solutions as proposed – we see the short-term recommendations as part of a process towards longer term change. The shorter term recommendations are described in Section 5 below.

3.1 One Project, One Process

The Panel and stakeholders support a broad objective characterized as "one project, one process" to promote the review, assessment and approval of desirable projects through a single process by integrating administrative functions of multiple review and approval authorities, clarifying criteria and accountability for decision-making, and eliminating redundant and unnecessary steps and processes.

The Panel has considered a range of all the options along the continuum. At one end of the continuum is the option of the status quo -- that existing authorities in legislation are essentially left untouched but are given the resources and direction to facilitate the assessment process. Existing Ministries and agencies of the Crown could retain all the

authorities and powers provided in existing legislation. Local decision making under legislation such as the Planning Act, for example, would continue.

On the other hand, the Panel discussed fundamentally changing the roles and responsibilities of all the authorities responsible for the approval and development of energy projects, and creating an entirely new structure. After considerable discussion, the Panel did not feel that either one of the extreme ends of this continuum would satisfy the goal of improving the assessment process.

Rather, the Panel decided that the most effective strategy would be the creation of a process coordinator. The office of the process coordinator would be responsible for administering an integrated and coordinated review, and for ensuring the assessment process accommodates public participation. Essential to the success of the process coordinator would be the authority to decide conflicts on matters of provincial interest.

Such a process would require participation by responsible authorities at the provincial and municipal levels. Each authority would produce a checklist detailing the review and approval process and standards and requirements to be met. Public expectations, industry compliance, corporate due diligence and public fiduciary obligations would then be met and discharged in one, single process.

Recommendation:

The Energy Panel recommends the creation of the office of a provincial process coordinator for energy projects to administer an integrated and coordinated review and assessment process that accommodates public participation. Further, the Panel recommends that an inter-agency commitment be made to place EA as a priority and to cooperate with the process coordinator in order to improve the assessment of energy projects in the province.

3.2 First in Line, Last in Line

The Executive Panel members proposed that Ontario's EA process should be "first in line", i.e., that a proponent must complete an EA process before commencing any other process.

In the case of environmental assessment for electricity projects this concept is difficult to apply. When dealing with project specific processes, most of the information required for the Environmental Assessment has to be developed for other approvals. Therefore, these other approval processes should proceed concurrently with the environmental assessment process.

Recommendation:

The Panel recommends that the environmental screening process continue throughout the planning process until the conditions required to issue a notice of completion have been met.

The panel also recommends the development of a straightforward check list and decision tree process that identifies government review authorities, that resides in one place and that includes municipalities, federal authorities, First Nations, stakeholders and the public.

3.3 Elevation Requests

Under Reg. 116/01, any person may request an elevation following the notice of completion of review. The Director has the option to:

- deny the request and allow the project to proceed;
- deny the request with conditions and allowing the project to proceed;
- refer the matter to mediation before making a decision;
- require the proponent to provide additional information and/or conduct further study before making a decision; or
- recommend to the Minister that the project be elevated to an individual EA.

The Director's decision can then be appealed to the Minister. However, the result, in the end, is either elevation to an individual EA, which involves another lengthy and expensive process, or eventually allowing the project to proceed.

Several stakeholders and members of the public have criticized this process primarily on the basis that it becomes, by definition "political", is open-ended and lacks transparency.

Proponents are concerned about the open-ended timelines for decision-making, and the possibility of entering into a seemingly endless loop of studies and further elevation requests. The affected public are often concerned that imposing conditions or ordering additional studies does not necessarily give them the opportunity to know that their concerns have been taken into account; nor is there any quick way to obtain a decision that a project should not proceed.

Most approvals required for projects to proceed incorporate an appeal process that includes specific timelines and involves a process in which all participants are "heard" by the decision-maker. Decisions are made based upon the evidence and opinions put forward by the various interested parties, all of which are available to others in the process.

Recommendations:

To deal with the problems arising from elevation requests, the Energy Panel recommends:

1. That the Ministry of Environment eliminate the elevation request process, placing the responsibility for public consultation, appeals, recourse and redress in an adjudicated process. This would have the benefit of de-politicizing the approval process and eliminating the single most significant source of political risk and investment uncertainty. This would result in approval or denial of the project.

2. Processes like coal in Schedule C such as nuclear and petroleum coke would be subject to full environmental assessment.

This is consistent with the Executive Panel's "statement of challenge" which seeks to make the assessment process independant, non-biased and apolitical.

4. The Need for Better Transparency, Greater Disclosure, and Clearer Roles for Stakeholders

Greater transparency promises to improve stakeholders' understanding of legal and regulated requirements, to remove undue hurdles and barriers to entry for smaller enterprises and to reduce regulatory burden and cost for proponents, regulatory authorities and the public.

Better disclosure promises to promote better information management and project tracking, to enhance and facilitate public decision-making processes, and to provide better oversight and compliance risk management for proponents and regulators.

In the Panel's view, greater transparency and disclosure is required in three primary areas:

1. Transparency of regulatory requirements, standards, processes for proponents, and standardized processes wherever possible;
2. More comprehensive publication of project plans, applications, approval processes and provisions for consultation, including opportunities for appeal, recourse and redress;
3. Clear accountability, analytical rigour and rational compliance enforcement by MOE and other regulatory authorities.

The first requirement for enhanced transparency and greater disclosure is improved information and improved information technology. Much information seems to be required and is collected by regulators, but not so much is published. The Environmental Bill of Rights Registry cans not, as currently structured, produce a comprehensive record of project and process information. Nor does the Ministry's environmental information site provide a complete story. A lot of information is available publicly if requested directly, but the requestor needs to know what he or she is asking for and many such requests are subject to the delays and costs caused by reviews and consideration under Freedom of Information laws and guidelines.

In the years since the EBR Registry was established, information technology has evolved significantly.

Recommendation:

The Panel recommends that the province and municipalities use available web-based information management applications to create an environmental assessment information registry and management system. Such a registry will improve the quantity, timeliness, transparency and quality of the information and better inform policy planning, assessment and decision-making processes.

4.1 Better Public Engagement and Consultation

The ultimate objective is better and more comprehensive information and more effective approaches to increasing awareness both in terms of processes to be followed, requirements to be met, opportunities to participate, issues under consideration, public interest objectives and principles guiding decision-making, including criteria and time lines.

Current standards, rules and guidelines set out minimum standards and requirements for notification and publication of information about projects and processes. Different agencies have different processes. At the provincial level, the process at the Ontario Energy Board is probably the most highly evolved in terms of the detailed guidance provided to proponents, the specificity of the requirements and the benefit of years of experience under a relatively consistent review and approval regime.

Many stakeholders commented on what would be appropriate standards for public notification and consultation and how to measure whether the standards are being met. There is a high level of variation among projects in terms of complexity, environmental effects and public interest, and it would be difficult to establish more prescriptive requirements in the Guide. The Guide already encourages proponents to take advantage of opportunities to integrate the consultation requirements of different approval processes, and again circumstances are very specific to each project.

Some proponents were particularly concerned that commenting agencies and the public are able to severely impact the viability of good projects by manipulating the consultation and elevation provisions in the Guide. We have made suggestions in the following Section 5 for changes that can be implemented in the short term and that would clarify the role of commenting stakeholders.

Recommendation:

That effective consultation provisions be incorporated into one window process through the office of the process coordinator to enhance public consultation and to promote the education of the public about the environmental assessment process.

5. Refinements to the Guide to the Environmental Assessment Requirements for Electricity Projects

EA requirements for the energy sector went through an extensive process of consultation and change in 2001, resulting in the Electricity Projects Regulation and Guide, and further consultation in 2003. The panel's original inclination towards a pragmatic approach to recommend incremental and positive changes to the regulation itself was endorsed by participants representing a range of perspectives at the energy sector workshop.

The following changes are intended to bring about improvements to the electricity screening process, and can be implemented in the short term. A number are proposed as interim measures to improve the operation of the process set out in the Guide while longer term solutions are further researched and implemented. They respond in large part to practical issues encountered in implementing the Guide for Category B projects. They are intended to remove ambiguities and unnecessary process steps while maintaining the level of environmental protection and the effectiveness of the consultation requirements provided for by the Environmental Screening Process.

While we believe that none of the changes would require modifications to the Environmental Assessment Act, minor changes to the Electricity Projects Regulation 116/01 would be required in some instances. The recommended changes are described generally in the order of the relevant sections as they appear in the Guide.

5.1 Improvements to Introduction

The description of the context for the Environmental Screening Process in the Guide should be updated.

Recommendation:

The Introduction would be supplemented by a summary of the process by which the further refinements to the process were made through the Minister of the Environment's Advisory Panel on Improvements to the Environmental Assessment Process.

5.2 Clarity on Blended Fuels

The Regulation and Guide should provide clarity as to how generation projects using blended fuels should be classified.

Recommendation:

The Glossary in Regulation 116/01 should be modified so that that where the electricity generated by a facility would be derived from a second fuel source in addition to the

primary fuel source, the categorization of the project must be based on the prescribed threshold for the fuel source that is subject to the most rigorous environmental assessment processes. This requirement should also be described in the Guide.

5.3 Projects with no Negative Environmental Effects

Projects to improve energy efficiency at generation plants that increase nameplate capacity but have no negative environmental effects should not be required to go through the screening process.

Recommendation:

The Regulation and Chart 1 in the Guide (Section A2 – Project Classification) should be modified so that energy efficiency projects that do not increase total annual air emissions or other negative environmental effects but increase the name plate capacity of a generation plant should be classified as Category A projects and not subject to the Environmental Screening Process or individual EA.

5.4 Petroleum Coke

The appropriate category for an electricity project type that uses synthetic or petroleum coke as a fuel should be specified.

Recommendation:

The Regulation and Chart 1 should be modified so that petroleum coke is included with coal as an Electricity Project Type that requires individual EA in all cases.

5.5 Unspecified Technologies

At present, "any technology using an energy source not designated in the Regulation" is placed in Category A. Unspecified technologies and fuels therefore have no EA requirement, unless they are designated by the Minister in which case they require an individual EA. This has been considered a loophole by some. However, the effect has been to increase delays and uncertainty.

Recommendation:

The Regulation and Guide should provide for a formal review process to assign unspecified generation technologies to an appropriate category.

5.6 Refinements to the Environmental Screening Process

To avoid misunderstandings among stakeholders who may be more familiar with other Ontario EA requirements, Section A6 of the Guide should be clear in specifying what the

Environmental Screening Process does not require, as well as describing the Environmental Screening Process. It should also identify energy planning issues that are addressed by government policy in response to the recommendations in Section 2 of this report.

Recommendation:

The Overview should specify that the Environmental Screening Process does not require the proponent to identify or describe alternatives to the undertaking (such as alternative fuels or technologies) or alternative methods of carrying out the undertaking (including alternative sites) for Category B electricity generation projects.

5.7 Role of Stakeholders

The Guide should more clearly set out the role of stakeholders in the process by expressing an expectation that they will identify their issues early in the Environmental Screening Process and participate in efforts to resolve issues.

Recommendation:

Section A.6.2, Consultation should state that the requirement for proponents to consult on the screening criteria provides an important opportunity for stakeholders to raise issues and concerns early in the process. If a stakeholder does not disclose issues until late in the process or chooses not to participate in efforts by the proponent to resolve issues, this will be taken into consideration in the conduct of any appeal mechanisms that are incorporated into the modified Guide.

5.8 Agency Consultation

The Guide should describe enhanced arrangements for agency consultation arising from the Minister's decisions on the Panel's recommendations.

Recommendation:

Subsection A.2.2, Agency Consultation, should include a description of the coordination committee of agencies involved in the review of Category B energy projects recommended elsewhere in this Report, and timelines for the provision of requested information and the review of pre-circulated materials. The timelines would be established based primarily on proponents' need for timely completion of Screening and Environmental Review Reports, and on resource considerations to be established among reviewing agencies.

Our Report suggests in Section 3 that a process coordinator should be assigned to act on behalf of proponents to facilitate provision of information and review of materials. If it is implemented, this arrangement should also be described.

5.9 Requirement for a New Notice to Transfer from Screening to Environmental Review

At present proponents are permitted to transfer from the Screening to the Environmental Review process without completing a Screening Report, but the requirement for a new notice to enable this takes has no real benefit, takes additional time and can create mistrust among stakeholders that the Screening that they were asked to respond to has been somehow interrupted by the proponent.

Recommendation:

Subsection A.6.2.4, Mandatory Notification should be modified to reflect new provisions in Parts 2 and B3 that would allow a proponent to choose to embark on a combined Screening and Environmental Review at the beginning of the Environmental Screening Process. This will require a Notice of Commencement of a Combined Screening and Environmental Review and public and agency review of the screening checklist within 30 days. No new notice would be required to announce the commencement of the Environmental Review portion of the process. This amendment will allow proponents to embark on a more rigorous Environmental Review process from the outset if they so choose, while still requiring a description of the project and the use of the screening checklist as an initial tool to identify issues and concerns. The proponent should be required to provide the circulated and final (i.e. with any modifications arising from submissions received during the initial 30 – day consultation period) screening checklists as appendices to the Environmental Review Report.

5.10 Public Availability of Reports

It is important with respect to the Energy Panel's principle of transparency that proponents make Screening Reports readily available to the public in order to maintain an open and collaborative process.

Recommendations:

If there is to be any delay in implanting a web–based registry for energy and other EA projects as recommended in Section 4 of this Report, the Guide should specify in Subsection A.6.2.5 Documentation that Screening Reports and Environmental Review Reports are part of the permanent public record. In addition to keeping the Report in its own files, the proponent must make arrangements with a municipal office or other suitable repository in the locality of the project where the Report will remain available for public review and may be reproduced (at the cost of the reviewer) for a reasonable time.

When a web – based EA information registry is implemented as recommended in Section 4, it should be described in this Section of the Guide.

5.11 Likelihood of Effects

The evaluation of the significance of an environmental effect should include consideration of the likelihood of the effect.

Recommendation:

In Section B.3.2, Conducting an Environmental Review, "Likelihood of the effect" should be added to the criteria for assessing significance.

5.12 Standards and Guidelines

The Guide does not clarify that meeting a standard or guideline does not necessarily mean that there is no environmental effect.

Recommendation:

Section B.3.2 should include a discussion of the use of regulatory requirements such as noise and air quality standards in assessing the significance of effects. It should state that while such standards are often helpful in determining significance, the achievement of a standard does not necessarily mean that there is no net effect. The criteria for assessing significance should be consulted in deciding the actual effect in each case.

5.13 Elevation Requests

The project elevation provisions in Section B.4, Changing the Project Status and Process Completion, generated a greater degree of dissatisfaction among stakeholders than any other provision in the Guide. Proponents considered that the process is very open ended from a timing point of view and that decisions are not made within the timelines indicated by the Guide. They felt that this threatens the financial viability of good projects and has enabled some participants to abuse the process by demanding unreasonable concessions in exchange for withdrawing an elevation request. Others at the stakeholder workshop were equally dissatisfied with the elevation process, saying that few requests are granted, that the process is not transparent and that that those who requested elevation did not feel their views had been heard.

Recommendation:

Elsewhere in this Report the use of hearings or other proceedings – which may be combined with proceedings for other approvals – are discussed as a way of resolving this concern. If it is not possible to incorporate this approach into the first reiteration of the Guide, urgent attention must be given to streamlining this process in the interim. First, consistent with the EA Advisory Panel Challenge Statement, the process must be made "independent (non – biased and apolitical)".

A first step in implementing this approach in relation to elevation requests would be to delegate the Minister's decision to elevate a project to the Director and to remove the opportunity for the Minister to review a Director's decision, and we recommend this as a

priority[65]. There may be resource implications for ensuring that the Director meets the timeline for his or her Decision and this cannot be addressed in the Guide, however the need to meet timelines – even if they are longer than currently provided for – is essential to all parties' confidence in the process.

There should be only one opportunity for the Director to request further study, and if the information received is not sufficient the elevation request may be approved.

The Guide should confirm that the provisions (not just the "principles") of Section 8 of the EA Act apply to mediation under the Environmental Screening Process, including the determination of a timeline within a maximum 60 days for a mediator to produce a report, except that the decision maker is the Director.

5.14 Frivolous and Vexatious Elevation Requests

Some stakeholders also requested that criteria be added to guide the Director in deciding whether an elevation request is "frivolous or vexatious" or submitted with the intent of delaying a project.

Recommendation:

While it is difficult to define criteria that would be useful in all circumstances, the Guide should clearly state that the Director will not consider an elevation request unless it is received by both the Director and the proponent within the 30 – day review period, providing the proponent meets the notice requirements. Also, the nature of the requesting party's involvement in the consultation process for the project should be included in the bulleted list of issues for consideration by the Director in making a decision, as discussed earlier in this Section. When the elevation request process is replaced by a hearing or other process this list of issues should be included in the matters to be considered by a hearing or other adjudicative process in deciding on an appeal.

Figure 3 would be amended to reflect the recommended changes to the elevation process.

5.15 Monitoring Provisions

More stringent monitoring provisions are required to ensure that proponents comply with the Electricity Regulation including compliance with commitments and conditions contained in Screening and Environmental Review Reports, and that the Regulation and Guide continue to be improved in response to changing conditions.

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[65] In the view of one Panel member, a major loophole in Regulation 116 is its failure to subject petroleum coke and nuclear facilities to Ontario's environmental assessment process. This loophole is particularly conspicuous in light of the fact that the Regulation subjects a 5 Megawatt or greater oil-fired power plant to an individual environmental assessment. As long as this loophole persists, it is the recommendation of this Panel member that citizens should retain the right to request the Minister to subject petroleum coke and nuclear facilities to an individual environmental assessment.

Recommendation:

Section B.7, Ministry Monitoring should require MOE to develop and approve a plan for proponents to monitor compliance with the environmental screening process and for MOE to monitor the performance of the Guide and Regulation, within a reasonable period of say one year. This requirement would be comparable with conditions currently applied by the Minister of the Environment to the approval of Class Environmental Assessments.

6. Proposals for Process Integration for Hydroelectric Projects Section A.4 of the Guide

Hydroelectricity (or waterpower) projects in Ontario are subject to myriad federal and provincial legislative and regulatory requirements with environmental requirements and objectives that must be coordinated and harmonized in order to ensure new developments and redevelopments contribute to the province's renewable energy targets and timeframes. Notably, there is no minimum "capacity" threshold below which a new project would be exempt from the requirements of regulation 116, in contrast, for example, with other forms of "clean" generation.

Moreover, upgrades of existing facilities resulting in a capacity increase of 25% or greater are also subject to EA requirements of the regulation. In this regard, capacity increases of less than 25% but resulting in a new disposition of Crown resources are subjected to a separate (and different) EA process led by the Ministry of Natural Resources (Resource Stewardship and Development Class EA). Additionally, any redevelopment, regardless of % increase that results in a new capacity greater than 200MW is subjected to a full EA.

Recommendations:

In order to address these anomalies for hydroelectric projects, the Energy Panel recommends:

Regulation 116 and the November 1, 2004 federal/provincial cooperation agreement be the basis for environmental reviews and approvals for waterpower projects and that such approvals be deemed to satisfy the environmental objectives of other directly relevant provincial legislation including, but not limited to, the Lakes and Rivers Improvement Act and the Public Lands Act.

Projects such as minor equipment replacement and upgrades that are exempt from the requirements of Regulation 116 (as amended) should not be subject to "residual or default" provincial EA requirements (e.g. as Ministry of Natural Resource's Resource Stewardship and Facility Development Class EA).

Upgrades of existing waterpower facilities be treated equitably, regardless of the resulting installed capacity, acknowledging that there are specified federal EA

requirements for a "Comprehensive Review" in this regard. Specifically, an upgrade of an existing facility that results in an installed capacity of 200MW or more should not be subject to a full EA. Rather, the thresholds for increasing capacity (i.e. 25% requires a Screening) should be applied.

The basis for thresholds under which new projects are exempt from provincial environmental assessment requirements should be made consistent.

7. Conclusion: The Need for Lasting and Positive Improvements

The Panel has focused on principles, policies and recommendations that seem most promising in terms of delivering incremental positive improvement in environmental assessment processes. The panel also recognizes that environmental law and regulation is complex, multi-faceted and the responsibility of numerous regulatory authorities at the federal, provincial and municipal level.

Since the introduction of EA concepts into law in the early 1970s, much has been learnt. All agree that the current EA process is better than it used to be and the Ministry of the Environment and the Canadian Environmental Assessment Agency have both demonstrated commitment to continue to seek improvements through consultation with stakeholders.

We believe we have identified a number of simple and quick things that could be changed to improve the process immediately. We have also spent much time discussing more profound changes that might have the potential to deliver a significant step-change in a positive direction. Such changes will require policy leadership. We would also expect that any of these fundamental changes would undergo considerable additional research, analysis and consultation before any decisions were to be made. We do not wish to see an upheaval in basic principles at this moment and are mindful of immediate issues facing the government and the energy industry in planning for the future and delivering new energy projects in support of the government's objectives for infrastructure renewal.

Early, the Panel agreed that any recommendations for changes to environmental assessment processes should create opportunities for improvements that benefit proponents, regulatory authorities, the public and the environment. We also agreed that considering the recent experience of proponents, review agencies and the public, we would look for practical opportunities to make incremental and positive changes. We do not seek to make change for its own sake, nor to recommend changes that provide no benefits to the environment.

Energy Sector Panel Membership

Paul Norris

Mr. Norris is President of the Ontario Waterpower Association (OWA). The OWA was

established to provide a collective voice for waterpower interests in the province. Together, the OWA's founding members represent more than 95% of the waterpower generating capacity in Ontario: Ontario Power Generation, Great Lakes Power, Algonquin Power, Beaver Power, Regional Power, Seine River Power, Orillia Power, Abitibi Consolidated, and Inco.

Adam White
Mr. White is Vice President of Public Affairs and External Relations with the Ontario Energy Association. The Ontario Energy Association represents businesses serving natural gas and electricity customers in Ontario. Members include natural gas and electricity transmitters and distributors, generators, marketers, retailers, appliance and equipment manufacturers, contractors and suppliers, and firms supplying legal and consulting services to the industry.

Prior to joining the OEA in 2003, Mr. White worked for Mirant Canada Energy Marketing and TransAlta Energy Corporation in Ontario's electricity industry. From 1994 to 1999, Mr. White worked in the Ontario Public Service, at the Ministries of Environment and Energy, and Energy, Science and Technology.

Steven Rowe
Mr. Rowe is an environmental planner, and Chair of the Cleaner Energy Table. His background in environmental assessment includes helping MOE to develop the electricity screening process under Regulation 163, and assisting with the implementation of the process for a wind farm proponent. Mr. Rowe is the President of the Ontario Society for Environmental Management.

Jack Gibbons
Mr. Gibbons is the Chair of the Ontario Clean Air Alliance and Director of Pollution Probe's Energy Programme. In the past, he has been a staff member at the Ontario Energy Board and the Toronto Hydro Commissioner.

Ann Joyner
Ms. Joyner is a planner and Partner with Dillon Consulting Limited and has worked on numerous environmental assessments for the electricity and other sectors. The firm is currently completing EAs for wind farms and transmission facilities as well as planning approvals for several district energy facilities. She has been a part-time professor at York University teaching planning and environmental assessment for fifteen years and contributes regularly to the environmental policy sub-committee for the Ontario Professional Planners Inst.

Cathy Spoel
Ms. Spoel is a part-time member of the Ontario Energy Board. She is a lawyer with more than 15 years of experience in administrative law, with a focus on land use planning, environmental, municipal and energy law.

APPENDIX 3: TRANSPORTATION TABLE REPORT

(Formatting of below Sector Table Report may be different than originally submitted)

REPORT OF THE TRANSPORTATION PANEL

November 19, 2004

1. Introduction

Since the Transportation Panel was first convened in September 30, they have looked intensively at the environmental assessment process as it affects transportation and transit projects and facilities in Ontario.

As one of their primary concerns, the Transportation Panel identified the inequity in the environmental assessment process between the creation of new municipal transit systems and the construction of new roads. The Panel found that as the practices and procedures of the environmental assessment process evolved, those that applied to transit lagged behind those that apply to building roads. Consequently, municipal transit systems are currently put to a higher test than other transportation projects under the environmental assessment process, as it is currently practised. The Transportation Panel has made several recommendations that they believe will level the playing field between municipal transit and road projects.

The Transportation Panel has also identified other impediments to obtaining timely approvals for projects. The Panel's recommendations are directed at improving the environmental assessment process by the integration of approvals under the Planning Act and the Environmental Assessment Act, clarifying the procedures around "bump up" or Part II Order requests, addressing the problems of scoping in the Terms of Reference, enhancing the Ministry of Environment's capacity to handle the EA process and providing for long-term transportation planning.

2. Background and Methodology

Environment Minister Leona Dombrowsky appointed an Executive Panel and three sector panels, including one for transportation and transit, to provide "expert advice and guidance on improvements to Ontario's Environmental Assessment process" and to support the "...government's waste diversion and waste management, clean energy and transportation objectives". The members of the Transportation Panel are identified in Appendix I.

The members of the Transportation Panel first met with members of the Executive Panel and the Ministry of the Environment on September 30 and were provided with materials and guidance by the advisory panel. The Transportation Panel were asked by the Executive Panel to identify "quick fix" improvements to the environmental process

that could be implemented quickly. The Transportation Panel identified two items for the Executive Panel which were included in the Interim Report to the Minister on October 8, 2004 (See Section 3 – Quick Fixes).

With respect to other improvements that might be implemented, the Transportation Panel developed position papers and held discussions on what improvements to the Environmental Assessment process would be most appropriate for their sector in a series of telephone conference calls and face-to-face meetings. These discussions took place on 6 different occasions – October 5, October 7, October 15, October 22, October 29 and November 8.

The Transportation Panel through series of discussion papers identified the issues for their sector and developed their recommendations. After these initial discussions, the issues and proposed solutions were put forward in a workshop held November 10 at the Ontario Heritage Centre, and attended by representatives of different umbrella groups with a specific interest in transportation issues. These included municipal representatives, engineers, planners, and interested members of the public. The workshop provided the panel members with interesting perspectives and suggestions, many of which aligned with the Panel's recommendations. Summary notes taken at the workshop are included in Appendix III. Further to the workshop, several participants submitted papers to the Ministry of Environment and to the Panel. These submissions can be found in Appendix IV of this report.

The Panel met on November 17 after the workshop to consider the feedback from the workshop participants, and to finalize their recommendations to the Minister and to the Executive Panel. This report represents the deliberations of the Transportation Panel, the consideration of the consultation with the broader group of participants and the Panel's best advice on how the environmental assessment process can be improved for the transportation sector.

3. Quick Fixes

The Transportation Panel made two recommendations to the Executive Panel for immediate improvements to the environmental process. These were:

a. That "bump up"/Part II Order provisions for traffic calming be removed from the environmental assessment process; and, that requirements for advertising traffic calming proposals be amended so that municipalities have the discretion to develop their own public notice proposals;

b. That transit projects be covered under the existing MEA Municipal class environmental assessment process by changing the definition of "linear paved facility" so that it means "facilities which utilize a linear paved surface including road lanes, or lanes in an exclusive right-of-way for HOV lanes, bus lanes or transit lanes". The present definition is restricted to "facilities which utilize a linear paved surface including road lanes, HOV lanes, bus lanes or transit lanes".

With respect to the first recommendation, the Municipal Engineers Association (MEA) had prepared a clarification regarding public notice for advertising traffic calming projects. The purpose of the change regarding public notice was to allow municipalities to conduct effective public notice without excessive costs. While this would apply to all Class EA projects, it was considered to be especially helpful with traffic calming projects. The Ministry approved the clarification, and agreed that proponents could be responsible for determining the appropriate level of notification consistent with the provisions for public notice in the Municipal Act and the Planning Act.

The MEA and the Toronto Transit Commission had also previously asked the Ministry to approve a minor amendment that would allow additional transit uses to be covered under the existing Municipal Class Environmental Assessment. The notice of this proposed amendment was subsequently posted on the EA Activities Web Site for a 30 day comment period ending November 15, 2004. The Ministry will be considering the comments and making a decision whether to issue a Notice of Amendment.

The Transportation Panel was encouraged that, with respect to these two initial recommendations, one was approved and the other in the process of being resolved.

4. Recommendations of the Transportation Panel

After a productive debate among the members of the Transportation Panel, and having considered the views of a broad group of people with an interest in the transportation sector, the Transportation Panel offers the following table as a reflection of their discussions. The Table presents the issues, the discussion and the Panel's final recommendations on the major issues that were identified.

EA REVIEW TRANSPORTATION PANEL RECOMMENDATIONS

TOPIC	DISCUSSION	RECOMMENDATION/OBSERVATION
Incorporating Transit into the Class EA System	**A significant process inequity exists between municipal road projects and all transit projects. Most road projects are undertaken within the context of the Class EA approvals system. In contrast, transit projects must undergo extensive individual EA approvals. Therefore, to address this inequity,**	**Rec. 1.1 That transit and related projects be incorporated within the existing Municipal Class Environmental Assessment system within two years.**

	the Panel feels that transit and transit-related projects should be incorporated into the Municipal Class EA.	
	In Regulation 334 of the EA Act, there are exemptions currently allowed to the EA process for roads that do not apply to transit; transit projects should be allowed the same exemptions.	**Rec. 1.2 That pending implementation of Rec 1.1, transit facilities should be included within the list of exemptions under Regulation 334.**
	In Regulation 334, an undertaking by a municipality is exempt from the "full" EA process under a number of conditions. Two of these are as per Clause's 5 (2) (a) and (h), where a project is exempt if it costs less than $3.5 million or if the work is provided for in a subdivision agreement. However, as per Clause 5 (3), these exemptions do not apply, "*in respect of a new bus service on an exclusive right-of-way or a new rail transit system".* Note that "exclusive right-of-way", as defined in Clause 1 of the Regulation, includes a "reserved bus lane on an existing road". **There appears to be no**	**Rec. 1.3 That the exemption limit be increased significantly from the current $3.5 million limit to $10 million for transit projects.**

	rationale as to why the $3.5 million exemption limit which has stood for many years has never been updated to reflect today's capital program cost realities. **In the interim period before transit becomes part of the Municipal Class EA, transit projects can be facilitated by immediately amending the MEA Class EA to include municipal vehicles (buses and streetcars) operating on municipal streets. This amendment should include ancillary facilities (such as including stops, stations and bus looping facilities).**	**Rec. 1.4 That transit projects that utilize municipal vehicles (buses and streetcars) operating on municipal streets and ancillary facilities be covered under the existing MEA Municipal Class EA process. Ancillary facilities would include those that are required for the normal operation of the system including stops, stations and bus looping facilities.**
Integration of Planning and EA Decision-Making	**The Municipal Class EA provides proponents with the option of integrating or coordinating Class EA and Planning Act requirements to help streamline the planning and EA approvals processes (ref. Section A.2.9 of Municipal Class EA - Integration with the Planning Act).**	**Rec. 2.1 Make greater use of Section A.2.9 of the Municipal Class Environmental Assessment to harmonize planning and EA approvals and to avoid a second approvals loop, thus saving time and work for the public, proponents, councils and consultants.** **Rec. 2.2 Integrate consideration of Provincial Policy Statements and approved planning policy documents into EA decision-making to ensure societal priorities are reflected in EA process outcomes.**
Part II Orders, known as Bump	**There is insufficient clarity regarding**	**Rec. 3.1 That the circumstances and procedures under which the MOE**

up Requests	conditions under which a "bump-up" request (Part II Order) will be granted. There is a need for more explicit conditions under which the province would order a "bump-up" of a Class EA project in response to a request from the public. At present, it is not uncommon for someone who does not agree with a decision of Council to request a "bump-up" in an attempt to have a higher level of government overturn a municipal decision. This can create unnecessary delays while the matter is being considered by MOE. The Ministry of Environment can take a significant amount of time to consider "bump up' requests, sometimes beyond the prescribed 66 days in the MEA Class EA. This practice has the potential to result in delays and extending the time frames for decisions on projects. The MOE is a stakeholder in the decision making process since one of its main roles is to protect	would consider there to be sufficient justification to grant a "bump up" request be fully documented. Rec. 3.2 That precise deadlines be established and adhered to within which the MOE must render a decision on all Part II order requests. Rec. 3.3 That the Part II Order process be taken out of MOE whose responsibility it is to protect environment and be given to an impartial body established to oversee EA decision-making process and adjudicate Part II Order requests.

	the natural environment. The MOE is somewhat compromised when it comes to fulfilling the role of independent adjudicator of environmental issues.	
Responsibility of the Public with respect to Part II Order Requests	**The Municipal Class EA states that any member of the public has a responsibility to provide a certain amount of information when making a Part II Order request. They are required to demonstrate that their request is not frivolous with the intent only to delay the project.** **Traditionally, MOE staff have placed the onus on the proponent to demonstrate that their planning process has complied with the Class EA process but do not require members of the public to substantiate their Part II Order requests. A screening, by MOE staff, based on clear and accepted criteria to separate legitimate environmental concerns from frivolous or philosophical opposition, would be advisable.** **There is no mechanism in place such as the one**	**Rec. 3.4 That the MOE consider establishing a mechanism to declare non bona fide requests for bump ups frivolous and vexatious.** **Rec. 3.5 That a "how to" guide be published by the MOE which gives direction to the public on their roles, responsibilities and the procedures for requesting a bump up.**

	found under the planning related legislation to enable the Minister to determine whether a bump up request is frivolous or vexatious.	
Scoping and Range of Alternatives in Individual EAs	**Some proponents undertake individual EAs that are very narrow in terms of scope, needs justification, public involvement and consideration of alternatives.** **Some proponents propose projects that satisfy their particular mandate without regard to other solutions outside their primary mandate.**	**Rec. 4.1 Establish EA practice guidelines which require proponents to meaningfully consider all reasonable alternative solutions irrespective of their agency/business mandates.** **Rec. 4.2 Proponents should not be required to devote considerable resources to dealing with unreasonable alternatives.** **Rec. 4.3 Preferred alternatives can include hybrid options that provide for a combination of alternatives.** **Rec. 4.4 In EA's spanning multiple jurisdictions and mandates, multi disciplinary EA teams should be established early in the process to professionally consider all alternatives.**
Creation of a five class system within the Municipal Class EA including a new class of projects which would involve public notice but not an appeal to the province	**"Class EA" processes already exist but are either not consistently applied across different "Sectors" or simply do not exist for some "Sectors".** **In addition, there is often "too much process" where a project has significant**	**Rec. 5.1 Adopt a five "Class" framework for guiding EA process reviews.** **Rec. 5.2 Revise existing Class EA process documents to reflect the new five Class system.** **Rec. 5.3 Create an additional class of projects under Class 2 which would require public notice but would not allow an appeal to the province** **Rec. 5.4 Consider the following**

	benefits and minimal environmental impacts. Secondly, there are numerous projects where environmental considerations are minimal and the undertakings are virtually all of local or neighbourhood interest – yet appeals must be directed for remote consideration by the Minister of Environment and the Ministry staff. Notwithstanding, it is accepted that the consultation format characteristic of the existing Class EA process is universally accepted as a means of doing business in modern society; therefore, the essence of the existing Class EA processes remains valid. A five “Class” framework has been tabled for consideration by the EA Sector Tables. The framework merits comparison with the existing Class EA framework and has been reviewed by the Transportation & Transit Sector Table.	approach in refining the MEA Class EA three “Schedule” framework to the new five Class format: Class 1 - generally includes normal or emergency operational and maintenance activities; the environmental effects of these activities are usually minimal and therefore these projects are pre-approved. Essentially existing Schedule ‘A’. Class 2 - generally includes rebuilding facilities with minor changes or introducing operational changes which are either consistent with provincial policy or not covered by provincial policy; the environmental effects of these activities are usually minimal and confined locally; therefore these projects are approved locally after public input. Possibly a new Schedule, generally between existing A and B should be created. Class 3 - generally includes improvements and minor expansions to existing facilities. There is the potential for some adverse environmental impacts of interest to the province; therefore, the proponent is required to proceed though a screening process including consultation with those who may be affected. Similar to existing Schedule ‘B’ but projects fewer in number, reflecting the creation of “Class 2”. Class 4 - generally includes the construction of new facilities and major expansions to existing facilities. These projects proceed through the EA planning process as

		outlined in the existing Class EA, Schedule C. Class 5 - generally includes construction of major new facilities and major expansions with the potential for significant impact to the environment. Effectively the existing individual EA process.
MOE Guidance on use of Municipal Class EA	While the MOE ultimately approved the Municipal Class EA, MOE staff have been reluctant to provide advice on how to apply the Class EA process to individual projects, although there is some variance across the province. While it is true that the Class EA process is a self-assessment process to a large degree, if a Part II Order request is made at the end of the MOE study, staff and the Minister will make the judgement on whether or not the process has been used correctly. In some cases, a significant amount of time and money could be saved if MOE staff would provide guidance on request, prior to the end of the study.	Rec. 6 That the Ministry of Environment, having jurisdiction over EA issues, should take a more active role in ensuring that municipalities have a clear understanding of the EA process in Ontario, and that they have access to adequate resources to assist them in complying.
Need for More EA Training Resources	Previously, MOE had training programs for the Class EA system. MOE ended its training programs. MOE does not 'own' the Municipal Class EA system since	Rec. 7.1 MOE should provide appropriate resources for course development and training for existing and future EA practitioners. Rec. 7.2 That MOE and MEA collect best practices related to the Class

	they view it as belonging to the MEA and municipalities. While the MEA bridges this gap by providing training for municipal staff, there is a need for more course development resources and EA training for practitioners and the public, since the MEA is a non-profit volunteer organization with limited resources.	EA process and make them available to practitioners and the public.
MOE Technical Reviews	On certain complicated projects, MOE staff conduct technical reviews of components of Class EA studies. Certainly, as a review agency, this is an appropriate role for MOE staff. However, concern lies in the timeliness of MOE's review. Rather than actively participating throughout the process, technical reviews frequently occur when all technical work has been completed, and the Environmental Study Report has been filed in the public record. This has resulted in delayed approvals and additional costs being incurred on these projects.	Rec. 8 MOE staff should be encouraged to actively participate in the entire process on more complicated projects to provide support for proponents in terms of process.
Increase MOE	Currently MOE is not	Rec. 9.1 MOE should become more

Resourcing of EA Program	**providing the resources needed to support its EA program; nor does it have any contemporary practice guidelines to assist practitioners in implementing the EA Act.** **Occasionally, different MOE staff provide inconsistent EA related advice to practitioners on similar projects.** **The current EA program is struggling to keep up with bump-up requests and individual EAs.**	**inclusive in its consultation with all affected stakeholders in all EA processes and should lead the development of clear and consistent EA policies and provide sound EA practice guidance for EAs.** **Rec. 9.2 MOE should establish regular and meaningful communications with respect to current practices, policies and procedures with EA practitioners and proponents. For example, a document equivalent to the former EA Update should be circulated quarterly in hard copy or email format.** **Rec. 9.3 MOE should establish an excellent website to which practitioners can easily refer.**
Meaningful Public Participation	**Proponents of highly complex individual EAs sometimes do not recognize the needs of the affected stakeholders in relation to their ability to obtain and comprehend complex materials and make an informed response.**	**Rec. 10.1 Define minimum public participation thresholds and time frames for individual EAs in a manner that: 1) meets local community needs, and 2) are reflective of project complexity.** **Rec. 10. 2 That MOE develop practice guidelines which encourage proponents to consult as early as possible in the EA process and give direction on how to be responsive to changes in the process as they evolve.** **Rec. 10.3 That MOE prepare a best practices document on effective public consultation with respect to EAs and make it available to EA practitioners.** **Rec. 10.4 That environmental**

		assessment notices and reports be published in jargon-free, plain language.
Incorporating Transportation Master Plans into the EA process	**When evaluating transportation infrastructure projects, alternatives to the undertaking including transit (such as increased service) and Transportation Demand Management (TDM) strategies cannot always be effectively considered in a corridor. Due to the diverse nature of trip origins and destinations in a community, transit improvements need to be implemented on a broader basis to be effective as a transportation alternative. (Exceptions would include implementation of higher order transit.) These types of strategies are generally described within a community's Transportation Master Plan.** **Currently, the Master Plan process does not receive approvals through the EA or Planning Act. It would be beneficial for transportation network strategies such as Transit and TDM to receive recognition**	**Rec. 11.1 That Transportation Master Plans be filed for approval using the Class EA process so transportation network strategies such as improved transit service and TDM initiatives are considered and approved on a system wide basis.** **Rec. 11.2 That municipalities should include their Transportation Master Plans in their Official Plans.** **Rec. 11.3 That the Ministry of Environment and the Ministry of Municipal Affairs provide joint guidance on how to plan for and protect future transportation corridors under the EA Act and Planning Act.** **Rec. 11.4 That the MOE investigate the means of expediting transportation projects which implement Transportation Master Plans and Official Plans and policies undertaken in a manner consistent with recommendations 11.1 and 11.2.**

	through an approval process, so they become the starting point or base case against which other alternatives are measured.	
Modifications to the Individual EA Process	**The requirement for a minister-approved Terms of Reference for Individual EA's is relatively new and adds significant amounts of time to an EA schedule without a clear compensating benefit. Terms of reference can be developed and provided to commenting agencies. It can be explained to the public at the first formal public meeting when the project is underway, with modifications made as appropriate. However, it is difficult to see any situation where changes to the terms of reference would be any more than a "tweaking" of what staff was recommending. In addition, the lack of a clear compensating benefit is especially true given recent litigation**	**Rec. 12 That the Terms of Reference component in the EA process be reviewed and modified so that it includes a scoping component which follows accepted practice guidelines as referred to in Recommendations 4.1, 10.1 and 10.2. If these improvements cannot be achieved, the TOR component should be eliminated.**

	over scoping.	
Relative Costs of Process and Projects	Consideration should be given to establishing a benchmark or threshold project cost (eg. $250K) to provide for the exclusion of a project with appropriate provisions.	Rec. 13 Consideration should be given to establishing a benchmark or threshold project cost (eg. $250K) to provide for the exclusion of smaller projects from the EA process subject to appropriate provisions.
Transit Stations on Commercially Zoned Properties	When a private developer wants to develop a commercial property, the land use planning process must be followed. Provided that the proposed development conforms to the zoning for the site, all that is required is site plan approval. Transit operators develop transit facilities such as stations, which are functionally similar to commercial developments. These transit facilities are subject to the EA process instead of the land use planning process, even though the project may already be in conformance with the existing zoning.	Rec. 14 That when a transit project meets the land use planning requirements that would apply to an equivalent private sector development, the project would be deemed to have met EA requirements. This would simplify the process for transit projects, particularly where a transit facility is identified in the Official Plan. This would also remove a barrier to potential private public partnerships (PPP), as these potential projects are subject to both land use and EA processes.
Flexibility of EA Programs and Contracts	Unanticipated issues invariably arise in a properly conducted EA, which in turn trigger a change in the scope of the project. In turn, such changes cause project design and contractual issues that are sometimes resisted	Rec. 15 MOE should provide practice guidance to stakeholders on the best means of responding to the process and contract related problems that are encountered during the EA process.

	by proponents. The EA process must be responsive to stakeholders' needs.	
Consistency of Environmental Review	**The environmental components of EAs sometimes do not receive the same level of resourcing and rigor that the project design or mitigation measures do. There is a need for Ontario wide consistency in terms of environmental analysis in EA programs**	**Rec. 16 Refine and finalize practice guidelines for individual EAs which will ensure a balanced and consistent review of the transportation and environmental dimensions of identified problems, thus improving predictability for all stakeholders (consultants, clients, public MOE, agencies).**
Harmonization of Canadian Environmental Assessment Act and Ontario EA Requirements	**Almost everyone involved in the EA system is unclear about the relationship between federal impact assessment and provincial EAs. Each system has its own submission requirements, time frames and rules concerning need and alternatives. Within the federal EA system, there is a major difference between how comprehensive screening level EAs are carried out which further adds to the confusion. Under these circumstances, should federal and provincial EAs be carried out in tandem or sequentially?**	**Rec. 17 MOE should take the lead in creating and communicating a clear transportation sector specific EA process harmonization agreement with the federal government, the aim of which is to integrate and streamline federal and provincial EA reviews**

5. Conclusion

The Transportation Table very much appreciates this opportunity to review the current state and practice of environmental assessment in Ontario and to make recommendations to Minister

Dombrowsky on the ways and means of improving our EA review system. We wish the Executive Group and the Minister every success in their deliberations.

6. Appendices (II through IV included in Volume II)

Appendix I – The Transportation Panel Members

Leo Deloyde
Mr. Deloyde has 26 years of experience in the municipal sector dealing with all aspects of development. His education involves an undergraduate degree in urban planning, a Master's in Environmental Studies and has completed an executive program at Harvard's Kennedy School of Government. Leo holds a General Manager position at the City of Burlington.

John S. Sutherns, P.Eng.
Mr. Sutherns is the Chief Executive Officer of McCormick Rankin Corporation. In 1967, John immigrated to Canada where he joined the then Ontario Department of Highways. In 1974, he left the Provincial Government to work in the Private Sector where he joined the Transportation Consulting Firm of McCormick Rankin. John's professional practice with McCormick Rankin has centered on transportation planning, ranging from strategic planning to environmental assessments and from roads to transit to rail service.

David A. Leckie, P.Eng.
David is currently the Director of Roads & Transportation for the City of London and comes to the panel as a nominee of the Ontario Good Roads Association. He comes with five years of municipal engineering and operational experience with the City of London, in roads, traffic, parking, water, wastewater, solid waste and development services. He also holds nearly 30 years of experience with the Ministry of Transportation, Ontario in numerous positions spanning highway planning & design, construction administration, maintenance and operations, program planning and transportation and regulation policy development.

Paul Knowles, P.Eng.
Mr. Knowles is the CAO and Engineer for the Town of Carleton Place since 1989
He participated in the production of the 1993 and the 2000 Municipal Class EAs, and is Chair of the Municipal Engineers' Association's Municipal Class EA Monitoring Committee since it was formed in 2001.

John Kelly, P.Eng.
John Kelly is the Manager of Infrastructure Planning in the Transportation Services Division of the City of Toronto. John holds a BSc. degree in civil engineering from Queen's University and is a licensed professional engineer in the Province of Ontario. He has been employed with the former Metro Toronto and current City of Toronto for the past 14 years, holding various positions in traffic operations and road planning and design. In his current capacity, he is responsible for obtaining environmental assessment approvals for all new and expanded roads and bridges in the City of Toronto.

Michael Wolczyk, P. Eng.
Mr. Wolczyk is the Manager of Marketing and Planning for GO Transit, and is responsible for service and infrastructure planning, and environmental assessment. He has 23 years experience in the transportation sector and holds civil engineering and MBA degrees.

Graham A. Vincent, P. Eng.

Mr. Vincent is the Director of Transportation Planning with the Region of Waterloo. The Transportation Planning division is responsible for development of transportation policy, implementation of the Transportation Master Plan, and planning for all modes of transportation including transit, cycling, pedestrian and roads. The Region is currently embarking on an environmental assessment for a higher order transit service along a corridor central to the urban area.

Appendix II - Workshop Notes

Appendix III - Workshop participant list

Appendix IV - Submissions to the Transportation Panel Members from Workshop Participants
Linda Gasser, 401 Action Group
Marty Collier, Ontario Smart Growth Network
Don Watershed Regeneration Council

APPENDIX 4: WASTE TABLE REPORT

(Formatting of below Sector Table Report may be different than originally submitted)

IMPROVEMENTS TO THE ENVIRONMETAL ASSESSMENT PROCESS FOR WASTE MANAGEMENT PROJECTS

REPORT OF THE WASTE MANAGEMENT PANEL

November 22, 2004

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   II. Table of EA and EPA Criteria
   III. List of Workshop Participants

1. Executive Summary

The province's capacity to handle the waste generated in Ontario is steadily decreasing as older landfill sites are being filled up and the development of new capacity has been hindered by the way in which the environmental assessment process is applied. The creation of new facilities takes many years to plan, develop and get the necessary approvals. Yet, the approvals process has become more uncertain and unpredictable, and municipalities and private sector proponents alike have found it increasingly difficult to navigate their way through the current system.

In order to improve the assessment and decision-making process, the Minister of Environment invited the Waste Management Panel to examine the environmental assessment process as it applies to the management of waste in the province and to develop approaches for improving the process. The Panel has devoted considerable time and energy to the issues and the possible solutions, and has decided on a set of recommendations that will make the environmental assessment and approvals processes more efficient, timely, clear, disciplined, and fair, and will encourage proponents to invest in the development of new facilities in the province.

In the view of the Waste Management Panel, the success of this effort to revitalize the environmental assessment and approvals process rests on a three-legged stool. The first leg is a provincial waste management policy; the second leg, a good database, and the third leg, a strengthened Ministry of the Environment with the capacity to carry out an effective environmental assessment process. If any one of these legs is weak or absent, the effort will fail. With that in mind, the Waste Management Panel offers the following recommendations:

1 - That the Ministry of Environment adopt the following principles in all facets of the environmental assessment improvement initiative, including government policy on waste management:

- Clear, Predictable and Timely;
- Transparent;
- Participatory;
- Based on Good Data, Good Science and Sound Engineering;
- Socially responsible; and,
- Based on Sound Economics.

2 - That the Ministry of Environment clearly articulate in a policy the provincial need for, and the interrelationship among, all elements of waste management in Ontario. This would include a statement of goals, measurable targets and timelines, as well as an evaluation of collection, transfer, re-use and recycling, other forms of waste diversion and all forms of disposal. This policy should be based on a dependable database, updated regularly, that includes:

- estimates of waste currently being generated,

- where the waste comes from and where it goes,
- estimates of capacity to handle those wastes, and
- estimates of changes in waste quantities and projections of future needs.

3 -That the Environmental Protection Act (Sections 30 and 32) and the Environmental Assessment Act be applied to projects in such a way that projects ranging from those likely to have the least impact (such as transfer stations) to those projects with the greatest potential effects (such as landfills and thermal treatment) are subject to the appropriate level of assessment and review, using these two Acts (Appendix II).

4 –That the Ministry of Environment develop a framework regulation for Terms of Reference for waste management undertakings. Based on a clearly stated provincial policy for waste management, the Terms of Reference regulation should set out the rationale, reasonable functional 'alternatives to' and 'alternative methods' along with other provisions that should be addressed by public and private sector undertakings.

The regulation should allow proponents to conduct pre-planning processes at the municipal level to enable them to preliminarily define the project, gauge public support and secure and set aside conditionally zoned land before developing their Terms of Reference document. The results of those discussions should be incorporated into the Terms of Reference as background information and should contribute to the development of the Terms of Reference document without predetermining its content.

5 - That the 'one window' approach used by the Ministry for the public and the proponent be improved. When an undertaking subject to an environmental assessment is proposed, one staff person in the Ministry should be designated to follow the file and to respond to proponent and public inquiries. This person should attend public meetings to explain the environmental assessment process and address questions related to it.

That, as the first step in the environmental approvals process, the Ministry of Environment has a 30-day review period in which to judge whether the environmental assessment documents are complete. If all the required elements are met, then the Ministry must meet the timelines set out in the deadlines regulation.

That the current deadlines regulation be amended so that the government has the right to extend the government or public review period only in exceptional circumstances, and in consultation with the proponent. Extensions to these review periods should be made public well in advance of the deadline. The regulation needs to clearly state that public comments will not be accepted after specific deadlines, and, if the government does not finish its review within the established time frames, the project is deemed approved.

6 – That the Ministry of Environment develop clear specific guidelines for the type, form and level of public participation, emphasizing a range of approaches. These guidelines should be developed in consultation with the audience for whom they are intended. The Terms of Reference for every undertaking should include an outline of how the

proponent will assist the public in participating in the process. The level of participant involvement and funding would be commensurate with the size and nature of the project

7- That the province allocate sufficient resources to the Environmental Assessment and Approvals Branch (EAAB), to ensure that the Environmental Assessment Act and Environmental Protection Act approvals processes are supported by the technical expertise expected by proponents and the public. The application (filing) fees required by the Ministry of Environment should be commensurate with the complexity of the review. These fees should be applied directly to the EAAB to finance the approvals process, and a review of the fee structure should be undertaken to help finance the program.

8 - That the Ministry of Environment conduct a review of similar jurisdictions, including the Canadian Federal Government, to identify the processes used for environmental assessment and to incorporate them into Ontario's processes where appropriate.

9 - That the Minister of Environment continues a consultative process of developing improvements to environmental assessment programs with respect to waste management undertakings.

The Waste Management Panel has identified these issues as having the highest priority and deserving of immediate action. If the province fails to implement these recommendations and fails to improve the environmental assessment process, the current lack of waste management capacity in the province will become more critical. We urge the Minister to act on our recommendations as quickly and expeditiously as possible.

2. Definition of Problem

Although the province has set a goal of diverting 60 per cent of the waste stream from landfills by 2008, there will still be a continuing need for waste disposal. The capacity of the facilities presently available in the province is steadily declining, and the options available to municipal and private companies looking to dispose of their waste are limited. At the same time, the development of new facilities has been hindered by the environmental assessment and approvals process as it is currently practiced in Ontario.

Both public and private proponents seeking to build new landfill capacity or create other waste management facilities face the challenge of an environmental assessment and approvals process in which it is difficult to predict the outcome, difficult to set a clear course and difficult to navigate the process in a predictable and timely way. Moreover, proponents face a process that they believe has resulted in unacceptably long time frames and excessive costs. Similarly, the public are concerned about the lack of clarity around which issues are included in the terms of reference for a proposed undertaking, and the uncertainties about the process, such as whether a hearing will be held or not.

The lack of a clear provincial policy on waste management and the problems arising from the way in which the environmental assessment process is applied have resulted in a reluctance on the part of proponents to propose new projects that are subject to environmental assessment and a failure to develop new disposal capacity in the province. It has meant increased reliance on the export of waste to other jurisdictions - a situation in which municipalities must negotiate with and depend on other jurisdictions where the rules governing the acceptance of waste may be subject to change.

3. Mandate of Waste Panel

To address the problems inherent in the environmental assessment process, Environment Minister Leona Dombrowsky appointed an executive advisory panel and three sector panels on waste management, cleaner energy and transportation and transit. The mandate of the panel is to provide “expert advice and guidance on improvements to Ontario’s Environmental Assessment process” to support the “government’s waste diversion and waste management, clean energy and transportation objectives”.

The stated purpose of the panel is to meet the government’s goals to revitalize the EA program, providing clear, prescriptive rules for appropriate environmental planning and decision-making; rebalance EA decision-making by setting out clear roles for all participants; and, refocus the EA process such that the level of assessment and review of proposed undertakings reflects the potential that proposals have to positively or negatively impact the environment, as defined by the *Environmental Assessment Act*.

It was recognized that waste management undertakings may take several years to obtain necessary ministry approvals, and that consideration should be given to enhancing the quality and timeliness of such decision-making. Each sector panel was asked to report their findings and recommendations to the Executive Panel by November 19. (The members of the waste management panel are listed in Appendix I.)

4. Review Method

After their initial meeting with the Executive Panel on September 28, the Waste Management Panel held 5 meetings. In the course of these meetings, the Panel discussed the issues related to waste management and suggested solutions in preparation for an invitational workshop. The workshop was held on Friday, November 5 in the Gallery Room of the Ontario Heritage Centre from 9:00 a.m. to 2.30 p.m. The workshop was attended by 44 people from a broad range of backgrounds including representatives of municipalities, the waste management industry and the interested public. A discussion paper outlining the topics, issues and the Panel’s proposed solutions was delivered to all workshop participants in advance of the workshop, and sent out to everyone who expressed interest in the work of the Waste Management Panel and the environmental assessment reform process.

The workshop was divided into 5 groups to discuss the report and its proposed solutions, with Waste Management Panel members acting as facilitators in each group. The findings from the 5 tables were reported back to the workshop.

The Waste Management Panel held three more meetings, subsequent to the workshop, to incorporate the feedback and ideas from the workshop into their report and to finalize their recommendations to the Executive Panel and to the Minister.

Although the Waste Management Panel interpreted their mandate to include hazardous as well as municipal, industrial and commercial waste, the Panel did not have sufficient time to give hazardous waste the attention and thorough consideration that it deserves. Nevertheless, the Panel believes that some of the improvements to the EA process that are being proposed would also apply to hazardous waste initiatives.

5. Recommendations

The Waste Management Panel offers the Executive Panel and the Minister of Environment the following recommendations for improving the environmental assessment and approvals process in Ontario.

Issue #1 – Principles

Discussion:

The Waste Management Panel developed a set of principles to guide their discussions and to inform their recommendations. These principles underlie all the recommendations being made to the Minister and the Executive Panel. The Waste Management Panel recommends that these principles be adopted by the Ministry of Environment and the province to guide sound waste management policy and the assessment of all related undertakings in the province.

Recommendation #1:

That the Ministry of Environment adopt the following 6 principles as the basis of a sound waste management policy for the province and an improved environmental assessment process, including:

1. **Clear, Predictable and Timely** – The process should be clear, predictable and timely. Clarity of application of existing legislation and approvals processes is essential to effective environmental assessment. This applies to the Environmental Assessment Act, the Environmental Protection Act and certificates of approval for the waste management sector.

2. **Transparent** – The environmental assessment process should be transparent and enable proponents, reviewers and the public to understand the process and to follow projects through the stages of government review and approvals.

3. **Participatory** – The environmental assessment process should include opportunities and resources for participation by all potentially affected parties.

4. **Based on Good Data, Good Science and Sound Engineering** – All elements of the process should be based on the best information available, and sound scientific and engineering practices.

5. **Be Socially responsible –** Consistent with the intent of the legislation, the environmental assessment process as it relates to waste management should be responsive to the needs of the community, listen to their concerns and act accordingly, and

6. **Based on Sound Economics** – A waste management strategy and all related undertakings should be based on sound economics, among

other factors.

Issue #2 – The lack of a provincial policy for waste management

Discussion:

There is currently no overarching provincial policy for waste management. The approval process needs to be governed by a provincial waste management policy that includes all elements of a waste management system and recognizes the inter-relationship of those elements. This would help streamline the process by identifying the province's need for different types of waste management activities, and by determining the appropriate size and capacity of the facilities that must be created to manage waste.

Issues such as rationale, alternatives, and the public interest need to be clearly articulated in a provincial policy so that sound public policy forms the basis for evaluating waste management proposals under the environmental assessment process. The policy should also reflect the differences in available resources and infrastructure needs between northern and southern Ontario, and between urban and rural areas. This would help to achieve the intent of the Environmental Assessment Act, which is to protect the environment through good planning and decision-making in the province.

The province should start by identifying immediate short-term policy goals. These short-term goals would help guide decisions on what waste management strategies and facilities may or may not be acceptable in the immediate future while designing the long-term strategy. The Panel suggests that these short-term goals include:

- Self-sufficiency in waste management for the province within 5 years; and,
- A target for the amount of diversion that will be achieved within the same time frame.

The creation of short-term goals should not compromise the immediate development of a long-term strategy.

In the long term, the province should develop a more comprehensive waste management policy to articulate the goals for diversion initiatives and an estimate of disposal capacity. This policy would help provide a rationale for undertakings subject to environmental assessment. In developing the longer-term policy, the province should:

- immediately commit adequate resources to develop a provincial policy statement;
- gather data on estimates of waste being generated, their sources and disposition, estimates of the capacity to handle these wastes, and estimates of changes and projections of future needs;

- set goals, measurable targets and timelines for waste diversion and the creation of waste management facilities;
- provide full opportunities for the public to be involved in the development of this strategy;
- consider geographic and demographic diversity in the province;
- create an advisory panel with support from technical, economic, social, scientific and operational experts to assist in the long-term policy development..

Recommendation #2:

That the Ministry of Environment clearly articulate in a policy the provincial need for, and the interrelationship among, all elements of waste management in Ontario, in accordance with the principles in recommendation #1. This would include a statement of goals, measurable targets and timelines, as well as an evaluation of collection, transfer, re-use and recycling, other forms of waste diversion and all forms of disposal. This policy should be based on a dependable database, updated regularly, that includes:

- estimates of waste currently being generated,
- where the waste comes from and where it goes,
- estimates of capacity to handle those wastes, and
- estimates of changes in waste quantities and projections of future needs.

Issue #3 – Clarification of the Applicability of the Environmental Assessment Act and the Environmental Protection Act to Waste Management Undertakings

Discussion:

Historically, criteria have been developed in a piecemeal fashion to decide which waste management undertakings are subject to the requirements of the Environmental Assessment Act and require examination of alternatives and effects on the environment, and which ones require primarily technical scrutiny under the Environmental Protection Act. For example, at present some administrative changes to landfill sites that do not have major environmental impacts must still undergo a full environmental assessment.

A clearer, more rational process is needed – a process that allows projects likely to have no significant environmental or community impacts to be exempted from the environmental assessment process and ensures that projects likely to have the most significant impacts are thoroughly evaluated. The scale and extent of project assessment, review and approval should reflect the nature and extent of the potential negative and positive impacts of a project.

Recommendation #3:

That the Environmental Protection Act (Sections 30 and 32) and the Environmental Assessment Act be applied to projects in such a way that projects ranging from those with the least likely impact (such as transfer stations) to those projects with the greatest possible impact (such as landfills and thermal treatment) are subject to the appropriate level of assessment and review, using these two Acts.

The Waste Management Panel has developed a chart with suggested categories that are shown in Appendix II of this report.

Issue #4 – The Need for a Terms of Reference Regulation that Applies to Public and Private Undertakings

Discussion:

Currently, there are significant differences in the methods by which the provisions of the Environmental Assessment Act are applied to public and private sector undertakings.

The environmental assessment process should take into account the reasonableness of considering certain alternatives for both public and private sector proponents, and these should be made clear through the development of a framework regulation for the terms of reference for waste management undertakings.

Based on a clearly stated provincial policy for waste management, this regulation should set out the rationale, the reasonable functional “alternatives to” and “alternative methods”, and should recognize that conceptual planning and decision-making prior to commencing the environmental assessment may contribute to the development of the content of the terms of reference

The EA process should endorse a preliminary planning step prior to the formal EA process that includes:

- discussions on the nature, extent and purpose of the proposed undertaking,
- discussions of related planning and land use issues, and
- the assessment of the extent of local support.

The results of those discussions should be incorporated into the terms of reference (TOR) as background information and should contribute to the development of the Terms of Reference document without predetermining its content.

The Waste Management Panel is recommending with the development of this framework regulation for Terms of Reference documents that environmental assessments, whether they are public or private, should be subject to similar levels of scrutiny.

Recommendation # 4:

That the Ministry of Environment develop a framework regulation for Terms of Reference for waste management undertakings.

Based on a clearly stated provincial policy for waste management, this regulation should set out the rationale, reasonable functional 'alternatives to' and 'alternative methods' along with other provisions that would be required to be addressed by public and private sector undertakings.

The regulation should allow proponents to conduct pre-planning processes at the municipal level to enable them to preliminarily define the project, gauge public support and secure and set aside conditionally zoned land before developing their Terms of Reference document. The results of those discussions should be incorporated into the Terms of Reference as background information and should contribute to the development of the Terms of Reference document without predetermining its content.

Issue #5 – Lack of transparency in the Ministry of Environment's process

Discussion:

Proponents and the public alike have difficulty in acquiring information on the environmental assessment process and the status of projects undergoing environmental assessment.

There is also considerable concern about the extended time frames for completing the process. Many environmental assessment projects have been delayed when government review periods have gone significantly beyond the timelines set out in the deadlines regulation. This may, in some instances, be due to applications that do not meet the requirements of the environmental assessment process.

The Waste Management Panel recommends that the first step in the environmental assessment process be a 30-day review for administrative completeness. This would allow the Ministry of Environment to judge whether all the required elements of an environmental assessment document are met. If a proponent has met all the requirements, then the timelines in the deadlines regulation should be strictly adhered to. If the Ministry of Environment cannot meet a specific deadline, which should only occur in exceptional circumstances, then the Ministry should notify the proponent and public well in advance of the deadline. Deadline extensions should be undertaken in consultation with the proponent. If the government does not meet the deadlines, then the project is deemed approved.

Recommendation #5:

That the 'one window' approach used by the Ministry for the public and the proponent be improved. When an undertaking subject to an environmental assessment is proposed, one staff person in the Ministry should be designated to follow the file and to respond to proponent and public inquiries. This person should attend public meetings to explain the environmental assessment process and address questions related to it.

That, as the first step in the environmental approvals process, the Ministry of Environment have a 30-day review period in which to judge whether the environmental assessment documents are complete. If all the required elements are met, then the Ministry must meet the timelines set out in the deadlines regulation.

That the current deadlines regulation be amended so that the government has the right to extend the government or public review period only in exceptional circumstances, and in consultation with the proponent. Extensions to these review periods should be made public well in advance of the deadline. The regulation needs to clearly state that public comments will not be accepted after specific deadlines, and, if the government does not finish its review within the established time frames, the project is deemed approved.

Issue #6– Barriers to Public Participation

Discussion:

Public participation is an important element of the environmental planning and decision-making process. Yet, the Ministry of Environment guidelines do not give direction with respect to the form and level of public participation that is appropriate, when and if there should be participant funding and how it should be applied. This leaves the development of consultation plans and the determination of the need for participant funding to the discretion of proponents. There is a need for the Ministry of Environment to articulate clear rules for the participation of affected parties, and to define when it would be appropriate for proponents to provide financial assistance to participants.

Recommendation #6:

That the Ministry of Environment develop clear guidelines for the type, form and level of public participation, emphasizing a range of approaches. These guidelines should be developed in consultation with the audience

for whom they are intended.

That the Terms of Reference for every undertaking include an outline of how the proponent will assist the public in participating in the process. The level of participant involvement and funding would be commensurate with the size and nature of the project.

Issue #7– Allocation of Ministry of Environment Resources

Discussion:

It is recognized by both proponents of waste management undertakings and the public that the Ministry of Environment lacks sufficient resources to fully support the application of the Environmental Assessment Act and technical reviews of proposals submitted under the Environmental Protection Act. If adequate resources are not allocated to the environmental assessment and approvals process, these recommendations cannot be implemented and improvements cannot be achieved.

Because of staff turnover and a diminishing level of support during the last decade, environmental assessment undertakings are likely to have a number of different staff assigned to the project. This has slowed down the approvals process, and even simple applications may take many months to resolve. Moreover, as the majority of EA and EPA approvals are given without hearings, it is difficult for the public to be confident that operational and technical concerns have been adequately addressed.

Recommendation #7:

That the Province allocate sufficient resources to the Environmental Assessment and Approvals Branch (EAAB), to ensure that the Environmental Assessment Act and Environmental Protection Act approvals processes are supported by the technical expertise expected by proponents and the public.

The application (filing) fees required by the Ministry of Environment should be commensurate with the complexity of the review. These fees should be applied directly to the EAAB to finance the approvals process, and a review of the fee structure should be undertaken to ensure that the fees help finance the program.

Issue #8 – What Happens in Other Jurisdictions

Discussion:

Members of the Waste Management Panel and many attendees at the workshop commented on the need for a review of methods used in other jurisdictions where the environmental assessment process appears to run smoothly. Time prevented the Panel from undertaking such a review.

Recommendation #8:

That the Ministry of Environment conduct a review of similar jurisdictions, including the Canadian Federal Government, to identify the processes used for environmental assessment and to incorporate them into Ontario's processes where appropriate.

Issue #9 - Next Steps

Discussion:

The Panel recognizes that the time frame for considering improvements to the environmental assessment process did not allow for the expansion of the detail that was intended to accompany their recommendations. Therefore, the Waste Management Panel recommends that a collaborative consultation be undertaken to further develop the details of these recommended improvements.

Recommendation #9:

That the Minister of Environment continue a consultative process of developing improvements to environmental assessment programs with respect to waste management undertakings.

5. Conclusion

The Waste Management Panel has developed these recommendations as a road map to improving waste management approvals in the province. Addressing these key issues will help to meet the Minister's stated objectives to revitalize, rebalance, and reform the approvals process. Also, given the short time for this review, further discussion with interested and directly affected parties is essential to fully develop and successfully implement the suggested improvements.

The Waste Management Panel wants to emphasize that an effective provincial waste management strategy subject to an environmental assessment and approvals process will only be successful if all three legs of the stool -- a provincial waste management

policy; a good database and a strengthened Ministry of the Environment – are put in place.

ACKNOWLEDGEMENT

The Waste Management Panel members would like to sincerely thank Anne Wordsworth for her untiring efforts and stellar work in recording, deciphering and organizing the many comments and statements made by the members to produce this report. A job very well done!

Appendix I – Members of the Waste Management Panel

Howard M. Goldby
Mr. Goldby is the Vice-President, Environmental Health and Safety with BFI Canada Inc. A registered Professional Engineer, Mr. Goldby graduated as a Civil Engineer in 1972 from the University of Salford, England. He has held positions in the construction industry, consulting and the oil industry, and since 1987 with three major waste management companies: Waste Management Inc., BFI Waste Systems Ltd. and BFI Canada Inc.

Nigel Guilford
Mr. Guilford is President and Director of the Ontario Waste Management Association. The Ontario Waste Management Association, founded in 1977, speaks for nearly 300 independent companies in the private sector who provide the products and services in the waste management sector.

Janine Ralph
Ms. Ralph is currently the Manager of Waste Policy & Planning at the Regional Municipality of Niagara's Waste Management Services Division. She has been involved in the waste management field at the municipal level for over 12 years. During this time she has been responsible for the development and implementation of a wide range of waste management programs, approvals processes and environmental policies and practices. She has a Bachelor of Science in Biochemistry from Queen's University in Kingston.

Usman Valiante
Mr. Valiante is an environmental consultant who has undertaken work for a number of waste management companies in Ontario. He has extensive background in the field of waste diversion and recycling, including involvement with Waste Diversion Ontario. Mr. Valiante has previously been involved with both the Brewers of Ontario and the Brewers Association of Canada.

John Jackson
Mr. Jackson has worked with citizens groups on waste issues for the past 25 years. In this capacity he has been involved in environmental assessments on provincial, municipal, and private sector hazardous waste and municipal waste proposals.

Paul H. Rennick
Mr. Rennick is Principal of Rennick and Associates, providing services in natural resource and environmental management. Paul has many years of experience in consulting, administration and training in environmental assessment. Paul was formerly the Director of the Ministry of the Environment's Environmental Assessment Branch.