Environmental Assessment in Ontario: Rhetoric vs. Reality

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Ontario enacted the Environmental Assessment Act *in 1975, and substantially amended the legislation in 1996. However, there has been long-standing concern about how to make Ontario's environmental assessment program more effective, efficient and equitable. In this article, the authors summarize Ontario's current environmental assessment program, and review recent trends and developments that warrant further reform initiatives.*

L'Ontario a adopté en 1975 la Loi sur les évaluations environnementales *puis l'a modifiée substantiellement en 1996. Malgré cela, on tente encore d'améliorer le programme d'évaluation environnementale de l'Ontario afin de le rendre plus efficace, économique et équitable. Dans le présent article, les auteurs décrivent brièvement le programme d'évaluation environnementale de l'Ontario et passent en revue les récentes tendances et les développements qui empêchent la mise sur pieds de mesures de réforme.*

1. INTRODUCTION

In 1973, Ontario's Ministry of the Environment released a discussion paper, which boldly proposed the establishment of a new environmental planning process to ensure "an integrated consideration at an early stage of the entire complex of environmental effects which might be generated by a project."[1] To achieve this laudable objective, the Ontario Legislature enacted the *Environmental Assessment Act*[2] (EAA) in 1975 and proclaimed the EAA in force in 1976 after considerable public and political debate over the appropriate nature, scope and content of the ground-breaking legislation.[3]

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1 Ministry of the Environment, *Green Paper on Environmental Assessment* (September 1973) at 5.

2 R.S.O. 1990, c. E-18.

3 Generally, see Alan Levy, "A Review of Environmental Assessment in Ontario" (2001) 11 J.E.L.P. 173 at 194–207 [Alan Levy]; Rod Northey & John Swaigen, "Environmental Assessment" in Estrin & Swaigen, eds., *Environment on Trial*, 3d ed., (Toronto: Emond Montgomery Publications Limited, 1993) at 193–96.

The newly enacted legislation was noteworthy for requiring proponents subject to the EAA to: (a) consider a reasonable range of alternatives; (b) assess the environmental effects of such alternatives; and (c) demonstrate that their preferred alternative is environmentally superior and necessary.[4] Moreover, the EAA required proponents to systematically address these matters with public input at key stages of the EA process, which was intended to be traceable, rational and iterative in nature.[5]

Since 1975, however, there have been periodic attempts by the Ontario government to review and revise the EA program in order to address stakeholders' concerns about cost, timing, complexity, inconsistency, and uncertainty.[6] For example, major amendments to the EAA were enacted in 1996, and various regulatory and administrative reforms have been implemented since 2006.

In his 2006-2007 Annual Report to the provincial Legislature, the Environmental Commissioner of Ontario (ECO) was highly critical of recent EA reforms undertaken by the province:

> For years, the ECO has pointed out that an effective EA process — a process with both integrity and teeth — is essential to protect Ontario's environment. The EA Advisory Panel similarly recommended that the ministry develop guiding EA principles that embrace, among other things, the precautionary principle and the concept of "avoidance first". MOE's own language promises "a faster yes or a faster no for applicants while completely protecting the environment." The changes unveiled thus far seem weighted towards delivering the "faster yes". But the ability of the system to deliver a "faster no" — or indeed any "no" at all — remains unclear so far.
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> Unfortunately, it does not appear that MOE's reform initiatives will address a number of the ongoing weaknesses described in recent ECO annual reports, including inadequate transparency and public consultation provided under the Class EA process, and the need for better enforcement of the EAA.[7]

Similarly, in his 2007-2008 Annual Report, the Environmental Commissioner again criticized the current state of the EA program, despite recent changes implemented by the Ministry of the Environment. Among other things, the Environmental Commissioner concluded that "Ontario's EA process is broken" for a variety of reasons:

> [E]nvironmental assessment has a crucial role to play in our lives; it should be society's pre-eminent tool to carry out farsighted planning for public in-

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4 See, for example, *West Northumberland Landfill Site, Re* (1996), 19 C.E.L.R. (N.S.) 181 at para. 86–94 (Ont. Joint Bd.).

5 *Ibid.* at paras. 47–51.

6 Environment Minister's Environmental Assessment Advisory Panel — Executive Group, *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), at 25-26 [EA Advisory Panel Report]. For an overview of past EA reform efforts in Ontario, see also Alan Levy, *supra* note 3 at 194–207; and Environmental Commissioner of Ontario, *Annual Report 2007-2008*, (Toronto: Queen's Printer for Ontario, 2008) at 32–35 [ECO, *Annual Report 2007-2008*]. The ECO reports cited in this article are available online: <www.eco.on.ca>.

7 ECO, *Annual Report 2006-2007* (Toronto: Queen's Printer for Ontario, 2007) at 94-95.

> frastructure in the name of the public good. Unfortunately, Ontario has been long burdened with an EA system where the hard questions are not being asked, and the most important decisions aren't being made — or at least not being made in a transparent, integrated way. The province has increasingly stepped away from some key EA decision-making responsibilities, and the Ministry of the Environment (MOE) is not adequately meeting its vital procedural oversight role. As a result, the EA process retains little credibility with those members of the public who have had to tangle with its complexities.[8]

Therefore, despite various EA reform initiatives in recent years, there remains well-founded concern about whether — or to what extent — Ontario's EA program is actually achieving its statutory purpose, *viz.*, "the betterment" of the people of Ontario by providing for the "protection, conservation and wise management" of the environment.[9]

Accordingly, the purpose of this article is to provide a general overview of the main components of the current EAA, and to review recent trends and developments, which warrant further reform efforts by the provincial government. In light of this analysis, it is clear that there is considerable room for improvement in virtually every aspect of Ontario's EA program.

2. OVERVIEW OF ONTARIO'S EAA

Ontario's Minister of the Environment has overall responsibility for the EAA,[10] but the EA program is generally administered by the Director and staff of the EA, and Approvals Branch of the Ministry of the Environment.

The EAA has been used to establish various environmental planning procedures, consultation obligations, and documentary requirements (*e.g.* individual EA, Class EA, environmental screening process, etc.) which are intended to be commensurate with the environmental significance of the undertaking being proposed. For example, proponents of major or complex undertakings which may pose serious risks to the environment or public health (*e.g.* large landfills or hazardous waste facilities) are generally required to perform more detailed and rigorous studies under the EAA than those required for small-scale, frequently occurring projects with minor and mitigable impacts (*e.g.* municipal road widenings or sewer projects).

In general terms, proponents subject to the EAA must examine the environmental advantages and disadvantages of their proposals (as well as a reasonable range of alternatives) in an open, transparent and timely manner. In addition, Ontario's EA program is intended to be anticipatory and preventative in nature, as proponents cannot proceed with their projects unless they have conducted comparative assessments of various options, and can demonstrate that their selected alterna-

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8 ECO, *Annual Report 2007-2008*, *supra* note 6 at 28.

9 EAA, s. 2.

10 EAA, s. 1(1) (definition of "Minister").

tive is environmentally preferable and needed to address the stated problem or opportunity identified in the EA documentation.[11]

(a) Application of the EAA

Part I of the EAA contains a number of important provisions regarding the interpretation and application of the statute.

As noted above, the public interest purpose of the EAA has been articulated by the Ontario Legislature 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.[12]

A key feature of the EAA is the broad definition of "environment," which is defined as including biophysical, socio-economic, and cultural considerations and the interrelationships between them.[13] Accordingly, proponents who are caught by the EAA must generally examine more factors than just the undertaking's potential impacts upon the natural environment.

In terms of its application, the EAA draws an important distinction between private and public sector proponents.[14] For example, the EAA generally applies to "undertakings" (as defined by the Act) proposed by public sector proponents (*i.e.*, municipalities, public bodies, or provincial ministries), *unless* such undertakings (or proponents) have been exempted by order or regulation from the EAA. Conversely, the EAA does not generally apply to private sector undertakings, *unless* such undertakings have been specifically designated by regulation as undertakings to which the EAA applies. It is also possible for private sector proponents to agree to the application of the EAA to their undertakings.[15]

Where the EAA is applicable to an undertaking, the Minister is empowered to vary or dispense with statutory requirements in order to "harmonize" the Ontario process with the EA requirements of any other jurisdiction which may also apply to the same undertaking.[16] Similarly, the Minister, with the approval of the Ontario Cabinet, may issue "declaration" orders (with or without conditions) to exempt any proponent, class of proponents, undertaking, or class of undertakings from the requirements of the EAA or regulations.[17] Regulatory exemptions under the EAA are discussed in more detail below in Part 3 of this paper.

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11 Paul Muldoon *et al., Environmental Law and Policy in Canada* (Toronto: Emond Montgomery Publications, 2009), at 132-33 [Paul Muldoon *et al.*]. See also Michael I. Jeffrey, *Environmental Approvals in Canada: Practice and Procedure*, Issue 29, Peter Pickfield, ed., looseleaf (Markham: Butterworths, 2002).

12 EAA, s. 2.

13 EAA, ss. 1(1) (definition of "environment").

14 EAA, ss. 1(1) (definition of "undertaking") and s. 3.

15 EAA, ss. 3(c) and s. 3.0.1.

16 EAA, s. 3.1.

17 EAA, s. 3.2.

(b) Individual EAs

Part II of the EAA establishes various requirements for the preparation, review and approval of an "individual EA" for a specific undertaking to which the Act applies.

Where an individual EA is required, the proponent cannot proceed with the undertaking unless the EA has been submitted to, and approval to proceed has been granted by, the Minister or, alternatively, the Environmental Review Tribunal (ERT), where the matter has been referred to the ERT for a public hearing under the EAA.[18] Subject to certain exceptions, the EAA also prohibits the issuance of other statutory approvals (or the provision of provincial funding assistance) in respect of the undertaking unless the proponent has first received approval to proceed under the EAA.[19]

In general terms, the individual EA process under the EAA currently consists of four sequential steps:

> 1. Preparation, review and approval of Terms of Reference ("TOR"), which effectively serves as the work plan for the conduct and content of the EA;[20]
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> 2. Preparation and submission of the EA documentation, consisting of studies, reports, and research carried out by the proponent in accordance with the approved TOR;[21]
>
> 3. Government and public review of the EA documentation submitted by the proponent;[22] and
>
> 4. Minister's decision on the proposed undertaking (i.e., approval; rejection; referral to mediation; or referral to the ERT (or another tribunal) for public hearing and decision).[23]

It should be noted that when preparing the TOR and the EA, proponents are under a mandatory duty to consult "such persons as may be interested,"[24] and public notice/comment opportunities are provided at various key stages.[25] In addition, a regulation under the EAA prescribes specific deadlines for the completion of many of the above-noted steps in the individual EA process.[26]

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18 EAA, s. 5. If approval is granted, the proponent must comply with any conditions imposed by the Minister or ERT: see EAA, ss. 5(4) and s. 38.

19 EAA, ss. 12.2.

20 EAA, s. 6.

21 EAA, ss. 6.1 to 6.4.

22 EAA, s. 7.

23 EAA, ss. 8 to 11.4.

24 EAA, s. 5.1.

25 EAA, ss. 6(3.1) to (3.6) (TOR notice/comment); ss. 6.3 to 6.4 (EA notice/comment); and ss. 7.1 to 7.2 (government review notice/comment).

26 O. Reg. 616/98 (Deadlines).

(c) Class EAs

Part II.1 of the EAA establishes various requirements for the preparation, review and approval of "Class EAs" (also known as "parent Class EAs"), which generally set out streamlined "self-assessment" procedures for certain classes of undertakings to which the EAA applies.

If a particular project is within a class of undertakings subject to an approved Class EA, then the proponent does not prepare an individual EA. Instead, the proponent follows the planning, documentary and consultation requirements prescribed by the approved Class EA, which are typically less extensive than those required in the individual EA process. Approved Class EAs usually delineate different categories or levels of assessment for projects within the class of undertakings, depending upon the nature of the project and the potential for environmental impacts.

It is important to note that projects subject to a Class EA are effectively "pre-approved," which means that proponents may proceed directly with the project (without review or approval by the Minister or ERT), provided that the proponent has fully complied with the prescribed Class EA requirements, and has otherwise obtained all other necessary instruments required by law. However, Class EAs (and the exempting regulations described below) generally include provisions which confer residual discretion upon the Minister (or Director) to issue a Part II order (also known as a "bump up" or "elevation" order) to require the project to undergo an individual EA if warranted in the circumstances.[27] Despite such discretion, it appears that Part II orders are rarely made under the EAA.

In general terms, the process for preparing, reviewing and approving Class EAs under Part II.1 of the EAA essentially mirror the above-noted sequential steps and consultation requirements for individual EAs (*i.e.*, TOR; Class EA preparation; government review; Ministerial decision).[28] At the present time, there are ten Class EAs which have been approved in Ontario for a wide variety of projects. These projects tend to be carried out routinely by municipal or provincial proponents, and have relatively minor environmental impacts that are generally predictable and manageable (*e.g.* municipal infrastructure, provincial highways, minor electrical transmission facilities, etc.). Further details about these 10 approved Class EAs are set out in Appendix A, *infra*.

(d) Other Matters

Aside from the above-noted provisions, the EAA contains a number of other Parts regarding various implementation matters: Part II.2 (municipal waste dispo-

27 See also EAA, s. 16.

28 EAA, ss. 13 to 15.

sal);[29] Part III (ERT hearings and decisions);[30] Part IV (provincial officers);[31] Part V (administration);[32] and Part VI (regulations).[33]

3. RECENT TRENDS AND DEVELOPMENTS IN ONTARIO'S EA PROGRAM

(a) Evolution of the EAA

From 1975 to the mid-1990s, the EAA remained virtually unchanged, and only one general regulation was promulgated under the Act. During this time frame, however, there was periodic interest by the Ontario government in improving the EA process, and various provincial initiatives were undertaken to develop and consult upon legislative, regulatory and administrative reforms.

In 1988, for example, the province established the Environmental Assessment Program Improvement Project, which subsequently led to the formation of an EA Task Force in 1989. In 1990, the Task Force released a discussion paper on EA reform,[34] and public consultation on the Task Force's proposals was carried out by the Environmental Assessment Advisory Committee (EAAC), which had been established by Ontario's Environment Minister to provide advice on key EA and planning matters. In 1991 and 1992, the EAAC issued reports, which called for various changes to Ontario's EA program.[35]

In response to these reform proposals, the Ontario government released a report in 1993 that endorsed several of the EAAC's suggested administrative changes, but generally deferred further consideration of the EAAC's recommendations for amendments to the EAA.[36] In the same time frame, the quasi-judicial EA Board [now the ERT] consulted upon and implemented a number of changes to clarify and expedite its pre-hearing and hearing procedures under the EAA.[37]

Despite these incremental improvements, the Ontario government decided in 1996 to overhaul the EAA itself, and significant amendments to the EAA were enacted to establish new procedural and substantive requirements.[38] For example,

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29 EAA, s. 17.1.

30 EAA, ss. 18 to 23.1.

31 EAA, ss. 24 to 27.

32 EAA, ss. 27.1 to 38.

33 EAA, ss. 39 to 43.

34 EA Task Force, *Toward Improving the Environmental Assessment Program in Ontario* (Toronto: Queen's Printer for Ontario, 1990).

35 EAAC, *Report No. 47: Reforms to the Environmental Assessment Program* (Part 1: 31 October 1991; and Part 2: 27 January 1992).

36 Ministry of the Environment, *Environmental Assessment Reform: A Report on Improvements in Program Administration* (Toronto: Queen's Printer for Ontario, 1993).

37 See, for example, EA Board, *The Hearing Process: Discussion Papers on Procedural and Legislative Change* (1990).

38 These amendments are often referred to as the "Bill 76" changes. See the *Environmental Assessment and Consultation Improvement Act*, S.O. 1996, c. 27. See also Marcia Valiante, "Evaluating Ontario's Environmental Assessment Reforms" (1999) 8 J.E.L.P. 215.

the EAA was amended to create new steps in the individual EA process (*i.e.*, Terms of Reference), and to provide a firmer legislative basis for the large number of Class EAs, which had come into existence by that time. In addition, the statutory amendments created "scoped" or streamlined EA procedures, which dispensed with the long-standing requirement upon proponents to fully consider "need" and alternatives under the EAA. The 1996 amendments also imposed a mandatory duty upon proponents to undertake public consultation within EA processes, although consultation had already been widely regarded as an essential component of proper EA planning in Ontario. Other significant EA-related changes (*i.e.*, abolition of the EAAC and lapsing of the *Intervenor Funding Project Act*), were also undertaken by the Ontario government at this time. These extensive changes were pursued by the Ontario government despite objections from environmental groups.[39]

Despite these sweeping amendments, proponents, elected officials, and the public at large continued to express dissatisfaction with various aspects of Ontario's revised EA program. In 2004, this ongoing criticism prompted Ontario's Environment Minister to establish a multi-stakeholder Advisory Panel to develop recommendations to improve the EA program, particularly in relation to the energy, waste and transportation sectors.[40]

The EA Advisory Panel's two-volume report was released in 2005, and concluded that while Ontario's EAA "is fundamentally sound," there are "significant policy gaps, procedural inconsistencies, 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."[41] Accordingly, the EA Advisory Panel made 41 specific recommendations for legislative, regulatory, policy and administrative changes which were aimed at establishing an efficient and robust EA program based upon clear, consistent and transparent rules.[42]

After the release of the EA Advisory Panel report, the Environment Minister proposed certain EA "improvements" in 2006 to ensure "a faster 'yes' or a faster 'no' for applicants while completely protecting the environment."[43] In particular, the Minister committed to the following changes:

- streamlining the approvals process for transit projects;
- developing a new regulation to establish a new process for waste projects;

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39 See, for example, R. Lindgren, *Submissions of CELA to the Standing Committee on Social Development Regarding Bill 76* (July 1996). During the Standing Committee hearings on Bill 76 in August 1996, numerous concerns about the proposed statutory reforms were expressed by various municipal, industrial and environmental organizations. This CELA brief and others referenced in this paper are available online: <www.cela.ca>.

40 ECO, *Annual Report 2007-2008*, *supra* note 6 at 34.

41 EA Advisory Panel Report, *supra* note 6 at 3.

42 *Ibid.* at 7–14.

43 Ministry of the Environment, *News Release: Environmental Assessment Improvements will Protect the Environment; Save Time and Money* (6 June 2006).

- integrating the EA process with planning processes under other provincial laws;
- ensuring projects receive a level of review appropriate to their environmental impact; and
- improving education and guidance to eliminate "confusion and false starts."[44]

Subsequent to these announcements, certain "Codes of Practice" were promulgated by the Ministry of the Environment to provide direction on key components of the EA program (*e.g.* terms of reference, consultation, mediation, and Class EAs).[45] As anticipated, new regulations were also passed under the EAA, which streamlined certain waste[46] and transit[47] planning procedures. However, the Ministerial promise of better integration of the EA program with other provincial planning regimes is unfulfilled at the present time. Similarly, most of the EA Advisory Panel's wide-ranging recommendations have not been implemented (or have only been partially implemented) to date.

In any event, the first few years of experience under the revamped EA regime in Ontario revealed that many lingering problems were either unresolved or compounded by the 1996 reforms. In 2001, for example, one commentator concluded that Ontario's EA program had taken a major step backwards:

> What emerges from this review is the perception that apart from the Class EA System (a complex area which requires far more study and independent evaluation), the Ontario government has retained an environmental assessment program in name only. It appears that EA in this province has, after years of development and evolution, reverted from a progressive, open and environmentally enlightened planning and decision-making process to a narrow approach, one that focuses solely on identifying and mitigating the adverse biophysical effects of individual projects . . .
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> *The result is little more than a project approval regime involving an overabundance of direct political intervention in both process and outcomes. Most key aspects of the EA program have been gutted, especially those components designed to promote transparency and accountability to the public* (emphasis added).[48]

Similarly, Ontario's Environmental Commissioner correctly observed in 2008 that "we have lost the old vision for EA; a new vision is urgently needed."[49]

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44 *Ibid.*

45 These and other EA guidance documents, online: Ministry of the Environment <www.ene.gov.on.ca>.

46 See O. Reg. 101/07 (Waste Management Projects).

47 See O. Reg 231/08 (Transit Projects and Greater Toronto Transportation Authority Undertakings).

48 Alan Levy, *supra* note 3 at 181-82.

49 ECO, *Annual Report 2007-2008*, *supra* note 6 at 28.

(b) Current Issues and Concerns under the EAA

Ten illustrative examples which substantiate the above-noted concerns about the current state of Ontario's EA program are briefly summarized below.

(i) General Regulatory Exemptions

For many years, the General Regulation under the EAA has exempted a wide variety of proponents and undertakings from being subject to EA requirements.[50] Among other things, this regulation exempts a dozen provincial ministries, municipal undertakings costing less than $3.5 million, drainage works, certain waste disposal sites (including pilot projects and mobile PCB destruction facilities), subdivision agreements, various undertakings by conservation authorities, financial assistance programs, and "research undertakings."[51] In addition, there is a lengthy list of project-specific regulations, which exempt numerous other municipal and provincial undertakings from EAA coverage,[52] including a controversial regulation, which exempts Ontario's proposed long-term electricity supply plan (the Integrated Power System Plan) from the EAA.[53]

In light of continuing public concern over such exemptions, the Environment Minister's EA Advisory Panel recommended in 2005 that these general regulatory exemptions be revisited in order to enhance clarity and ensure overall consistency within Ontario's EA program.[54] However, this recommendation has not been acted upon by the Ontario government, and there remains concern that the pervasive list of exemptions undermines the public interest purpose of the EAA.

(ii) Sectoral Regulatory Exemptions

In recent years, the Ontario government has demonstrated considerable interest in passing sectoral regulations, which conditionally exempt broad classes of environmentally significant undertakings from individual EA requirements.

The precedent for this approach is the *Electricity Projects Regulation*[55] under the EAA, which sets out different levels of assessment for certain public and private electricity projects in Ontario. Depending on fuel type, capacity and potential for significant environmental effects, this regulation specifies which projects are wholly exempted from the EAA, subject to a streamlined Environmental Screening

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50 R.R.O. 1990, Regulation 334, as amended.

51 *Ibid.*, ss. 5, 6, 8, 9, 11, 11.1, 12, 14, and 15.

52 The current list of exempting regulations under the EAA is available online: <www.e-laws.gov.on.ca>.

53 O. Reg. 276/06. The passage of this exempting regulation was strongly criticized by Ontario's Environmental Commissioner: see ECO, *Annual Report 2007-2008*, *supra* note 6 at 38. See also ECO, *News Release: Third Decision on Government's Electricity Plan Evades Environmental Bill of Rights, says Environmental Commissioner* (19 June 2006); and *supra* note 7 at 84–86.

54 EA Advisory Panel Report, *supra* note 6 at Recommendations 38 and 39. See also the EA Advisory Panel's Volume II Report, at 24–30.

55 O. Reg. 116/01. See also the MOE's *Guide to Environmental Assessment Requirements for Electricity Projects* (2001).

Process (ESP), or remain subject to the individual EA requirements under Part II of the EAA. Proponents, which are obliged to follow the ESP, must consult with interested persons and prepare a Screening Report (or, in some instances, a more extensive Environmental Review Report) to address environmental impacts and mitigation measures. As in the Class EA model, it is possible under the ESP for members of the public to request that a particular project be "elevated" (or "bumped up") to the more rigorous review of an individual EA. To date, however, it appears that few, if any, elevation requests have been granted under the regulation since it was passed in 2001.

Despite concerns about the *Electricity Projects Regulation* expressed by the Environment Minister's EA Advisory Panel,[56] it appears that this regulation has recently served as the template for two other exempting regulations. In 2007, for example, the Ontario government passed the *Waste Management Projects Regulation*[57] under the EAA, which designates and exempts public and private sector waste management projects from individual EA requirements. For certain projects, this exemption is conditional upon the proponent's completion of the streamlined ESP (which is substantially similar to the ESP established under the *Electricity Projects Regulation*), and includes a procedure for making elevation requests. When the *Waste Management Projects Regulation* was first proposed, environmental groups raised a number of objections, particularly in relation to the province's proposal that certain landfills and energy-from-waste projects should be subject only to the ESP rather than individual EA requirements.[58] Nevertheless, the regulation was passed with conditional exemptions for these and other facilities.

In his recent review of the *Waste Management Project Regulation*, Ontario's Environmental Commissioner identified a number of serious deficiencies:

> Without such a [waste] policy framework developed in consultation with the public, the ECO believes it was premature for the government to develop a new Screening Process that promotes certain types of waste facilitates, and eliminates the requirement to assess "need" and "alternatives."
>
> The waste sector Screening Process retains only a few vestiges of the spirit and intent of the EAA, even though it is being used as a proxy for the full EA process. There is no requirement to consider "need" or "alternatives"; there is no requirement for formal approval; and a recommendation in the guide directs proponents to seek other project approvals while conducting the Screening Process. Based on these shortcomings, the Screening Process appears to be just another means of planning out the details of the proposed project, rather than a comprehensive assessment of *if* (and how) a project should proceed — as intended by the EAA.[59]

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56 EA Advisory Panel Report, *supra* note 6 at Recommendations 18, 19 and 36.

57 O. Reg. 101/07. See also the MOE's *Guide to Environmental Assessment Requirements for Waste Management Projects* (2007).

58 See, for example, A. Lintner *et al., Response of Sierra Legal, CELA, Northwatch and Great Lakes United to Proposed EA Changes for Ontario's Waste Sector* (March 2007).

59 ECO, *Annual Report 2007-2008*, *supra* note 6 at 40-41.

In 2008, the Ontario government passed the Transit Projects and Greater Toronto *Transportation Authority Undertakings Regulation*[60] under the EAA, which exempts certain public transit projects from the EAA, and subjects other transit projects to a streamlined planning process that is analogous to the above-noted ESPs. Under this new process, transit proponents are required to undertake public consultation, evaluate and mitigate environmental impacts, and prepare an Environmental Project Report (EPR). Upon completion of the EPR, members of the public may file an "objection" on limited grounds (*e.g.* adverse effects upon aboriginal rights or matters of provincial interest), and the Minister is empowered to require further study, allow the project to proceed, or require the preparation of an individual EA. When the transit regulation was first proposed, environmental groups generally supported the principle of facilitating properly located and well-designed public transit projects, but raised numerous concerns about the procedural and substantive aspects of the transit planning process.[61] However, the regulation is now in force, and, in October 2009, the Environment Minister conditionally approved a controversial diesel train project that links downtown Toronto to the Pearson international airport.[62]

In his 2008-2009 Annual Report, the Environmental Commissioner scrutinized the new transit regulation under the EAA, and questioned whether the "faster" process is necessarily a "better" process:

> The ECO views increased public transit as a highly desirable goal. There are, however, two concerns that the ECO has with O. Reg. 231/08. One is that various components of traditional environmental assessments are removed by O. Reg. 231/08 . . . O. Reg. 231/08 explicitly limits the grounds upon which public concerns will trigger government intervention. This is of significant concern to the ECO, as social and economic considerations are often key issues that local citizens raise in opposition to proposed transit projects . . .
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> The second concern is that O. Reg. 231/08 adopts a "one size fits all" approach. Accordingly, large projects such as the Georgetown South Expansion and Union-Pearson Rail Link are subject to the same assessment process as much smaller projects with fewer potential impacts. Unlike the streamlined environmental assessment processes that MOE introduced for electricity in 2001 and waste projects in 2007, no "classification" or categorization scheme is included within O. Reg. 231/08 based on the type or size of the project or the scale of potential environmental impacts.
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> Accordingly, while O. Reg. 231/08 has removed some key requirements of the EA process, such as the requirement to consider both the "need" for and the potential "alternatives" to a particular project, the ECO hopes that the

60 O. Reg. 231/08. See also Ontario's *Transit Project Assessment Guide* (2009) and *Transit Priority Statement* (2008).

61 See, for example, R. Lindgren & K. Mitchell, *Response by CELA to Draft Regulations under the EAA for Public Transit Projects and the Draft Transit Priority Statement* (May 2008); and R. Lindgren, *Response by CELA on the Interim Guide: Ontario's Transit Project Assessment Process* (August 2008).

62 See *Minister's Notice to Proceed with Transit Project Subject to Conditions: Metrolinx* (5 October 2009).

> planning processes used by all proponents will still include these considerations.[63]

(iii) Inadequate Monitoring and Enforcement Under the EAA

The foregoing concerns about regulatory exemptions are accompanied by long-standing unease about the institutional capacity of the Ministry of the Environment to effectively monitor proponents' compliance with procedural or substantive requirements imposed by exemptions, Class EAs or individual EAs. In 2004, for example, the Ontario's Environmental Commissioner reported to the Legislature that:

> 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 followup . . .
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> 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.[64]

Similarly, in 2005, the EA Advisory Panel made the following findings:

> [T]he 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 whether 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 followup did occur, it was likely to be complaints-driven rather than an integral part of annual work plan inspections by MOE staff.[65]

Accordingly, the EA Advisory Panel made several recommendations aimed at strengthening compliance monitoring and enforcement activities under the EAA.[66]

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63 ECO, *Annual Report 2008-2009* (Toronto: Queen's Printer for Ontario, 2009), at 80-81.

64 ECO, *Annual Report 2003-2004* (Toronto: Queen's Printer for Ontario, 2004), at 57, 150.

65 EA Advisory Panel Report, *supra* note 6 at 109-10.

66 *Ibid.*, Recommendations 26–31.

In 2008, Ontario's Environmental Commissioner again concluded that:

> For local citizens, these conditions are often the only tangible evidence of the "betterment" alluded to in the purpose of the EAA. Despite this, MOE has traditionally done little or no monitoring to check if these conditions are being adhered to and, instead, has relied on complaints from vigilant observers. MOE has now committed to supporting a single compliance officer, based in the EA Branch, to audit selected individual EA projects for compliance with approval conditions. Whether this nod towards compliance will be adequate to deal with the large number of approved individual EAs is open to question. It will certainly not address the need for monitoring of thousands of projects proceeding province-wide through various Class EA procedures.[67]

Accordingly, the Environmental Commissioner called upon the Ministry of the Environment to become "an effective regulator, with compliance and enforcement capacity, to protect the quality and integrity of EA processes."[68] Similar recommendations were repeated in the Environmental Commissioner's latest Annual Report:

> These observations suggest that MOE does not have sufficient resources to properly monitor the large number of Class EA approvals being issued under the *EAA*, and that MOE staff need better training and information about the nuances of the MCEA and other Class EAs. This review also demonstrates that MOE continues to rely on a complaint-based compliance model, and the ministry is reluctant to prosecute proponents for failures to comply with the terms of approvals under Class EAs and the *EAA*. The ECO urges MOE to develop an enforcement policy that applies to alleged contraventions of the *EAA*.[69]

(iv) No Public Hearings Under the EAA

Ontario's EAA has long provided for public hearings before an independent, quasi-judicial body (*i.e.*, the ERT) to assess the adequacy of EA documentation or the acceptability of a particular undertaking. As noted by the Environment Minister's EA Advisory Panel, "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."[70]

In the past, public hearings have been held under the EAA in relation to high-profile undertakings such as landfills, incinerators, highways, transmission lines, hazardous waste facilities, timber management on Crown lands, and a provincial energy demand-supply plan. In some hearings, the EAA applications were rejected or withdrawn, but, in most cases, the proposed undertakings were conditionally approved after due consideration of the evidence and submissions adduced by the hearing parties.

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67 ECO, *Annual Report 2007-2008*, *supra* note 6 at 46.

68 *Ibid.* at 47.

69 *Supra* note 63 at 36-37.

70 EA Advisory Panel Report, *supra* note 6 at 81.

At the present time, the EAA empowers the Environment Minister to refer an application (*e.g.* individual EA or Class EA), in whole or in part, to the ERT for a public hearing and decision.[71] For example, where a member of the public requests referral to the ERT, the Minister "shall" make the referral, unless the Minister opines that: (i) the hearing request is frivolous or vexatious; (ii) a hearing is unnecessary; or (iii) a hearing may cause "undue delay."[72]

Despite such provisions, it appears that since 1996, only two matters (both landfill proposals) have been referred to the ERT for public hearings, and all other hearing requests have been refused by the Minister. Thus, at the present time, virtually all EAA applications are being decided (and typically approved) by the Minister without any hearings whatsoever. When analyzing this "no hearing" trend, the EA Advisory Panel found that "the ongoing absence of hearings under the EA Act is both ironic and perplexing,"[73] particularly, since the Bill 76 amendments specifically gave the Minister more control over the nature, scope and timing of ERT hearings held under the EAA.[74]

More recently, Ontario's Environmental Commissioner correctly noted that under the current EA program, "'no' is rarely an option" and "the EA process seems to lead inexorably towards the approval of projects" due to "several entrenched barriers," including: piecemealing of projects; allowing key decisions to precede the EA process; and scoping EA terms of reference to exclude key considerations such as "need."[75] The Environmental Commissioner also lamented the loss of public hearings under the EAA:

> With the virtual elimination of hearings since 1996, the important role of reviewing the sufficiency of EA studies by the Board [now ERT] was lost. The responsibility for quality control for EA studies has come to rest overwhelmingly with MOE, but MOE's reviews of EA studies submitted by proponents often seem to rely on a checklist approach, with little guidance or critical oversight. As a result, EA studies remain prone to weak methodology, and are a source of frustration to stakeholders.[76]

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71 EAA, ss. 9.1 and 9.2.

72 EAA, ss. 9.3.

73 EA Advisory Panel Report, *supra* note 6 at 82.

74 For example, the Minister may prescribe hearing deadlines and limit which issues are to be considered by the ERT: see EAA, ss. 9.1(5) and 9.2(6). These new Ministerial powers have been criticized as unnecessary constraints which undermine the independence and utility of ERT hearings: see Alan Levy, *supra* note 3 at 259–61. See also Alan Levy, "Scoping Issues and Imposing Time Limits by Ontario's Environment Minister at Environmental Assessment Hearings — A History and Case Study" (2000) 10 J.E.L.P. 147.

75 ECO, *Annual Report 2007-2008*, *supra* note 6 at 41.

76 *Ibid.* at 44-45.

(v) Scoped Individual EAs

When the Bill 76 amendments to the EAA were introduced, the Environment Minister repeatedly assured Ontarians that comprehensive EAs (with an emphasis on alternatives analysis) would still be required under the legislation:

> A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, [and] the role of the Environmental Assessment Board as an independent decision-maker.[77]

Accordingly, the Bill 76 amendments left intact the individual EA content requirements that have been in place since the EAA was enacted. In particular, s. 6.1(2) of the EAA provides, among other things, that individual EAs 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 alternate methods of carrying out the undertaking.

Despite these assurances, it now appears that the Minister enjoys — and has frequently exercised — considerable discretion under the Bill 76 reforms to approve "scoped" Terms of Reference which exclude consideration of key EA planning matters, such as the rationale (or "need") and "alternatives to."[78] If such matters are scoped out of the EA process, then "the proponent need not consider them and they are not open to debate or challenge if the project were to go to a hearing."[79] The legality of the Minister's authority to approve scoped Terms of Reference has been confirmed by the Ontario Court of Appeal,[80] but it remains unclear whether (or to what extent) the Minister will decide to include — or exclude — "need" or "alternatives" on a case by case basis.

For example, it has been readily apparent that the Minister has been willing to approve scoped Terms of Reference in the context of waste disposal activities. In 2005, the EA Advisory Panel found that "some landfills are subject to full EAs while others are subject to scoped EAs,"[81] but the overwhelming trend was Ministerial approval of scoped Terms of Reference in respect of waste-related undertak-

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77 *Hansard* (June 13, 1996): Minister's Statement on Environmental Assessment (Bill 76).

78 EAA, ss. 6(1)(c) and 6.1(3). See also Alan Levy, *supra* note 3 at 224–26. When the Bill 76 reforms were enacted in 1996, the Minister was prohibited from delegating the statutory power to approve Terms of Reference. A further amendment to the EAA in 2001 removed this prohibition, and now this approval power can be delegated to designated Ministry staff: see EAA, ss. 31(3).

79 ECO, *Annual Report 2007-2008*, *supra* note 6 at 43.

80 *Sutcliffe v. Ontario (Minister of the Environment)* (2004), 9 C.E.L.R. (3d) 1 (Ont. C.A.).

81 EA Advisory Panel Report, *supra* note 6 at 41.

ings.[82] Even after passage of the *Waste Management Projects Regulation*, it is reasonable to anticipate that this scoping trend will continue in relation to large landfill undertakings, which may still require an individual EA.

In 2007, the Ministry of the Environment finalized a "Code of Practice" for preparing and reviewing Terms of Reference. In essence, however, this Code contains only general and unenforceable direction on Terms of Reference content and process, and it does not adequately address the Advisory Panel's concerns about inconsistency and uncertainty regarding scoping.

In his recent review of this Code of Practice, Ontario's Environmental Commissioner concluded that "the new guidance on scoping remains ambiguous," and that the "scoping provision is used fairly often."[83] Accordingly, the Environmental Commissioner recommended during the next round of EA reform, the MOE should "give renewed weight to upfront questions of 'need' and 'alternatives' for projects."[84]

(vi) Extensive Use of Class EAs

Although public and political attention is often focused upon individual EAs, the practical reality is that most undertakings under the EAA are processed under the 10 approved Class EAs now in force in Ontario. In fact, "by 1993, 90% of the undertakings subject to the EAA had obtained streamlined approvals through the Class EA process,"[85] although the legal basis for Class EAs was not fully entrenched into the EAA until the Bill 76 changes in 1996.

Given the proliferation of approved Class EAs in Ontario, commentators have raised various concerns about public participation, piecemeal planning, and cumulative effects.[86] It appears, however, that courts are reluctant to judicially review Ministry refusals to "bump up" projects to individual EA,[87] or proponents' decisions as to which Class EA category or schedule is applicable to their projects.[88]

Similarly, the EA Advisory Panel concluded that there were no meaningful mechanisms under the existing Class EAs for effectively resolving "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

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82 *Ibid.* at 52. The EA Advisory Panel found that of the 23 Terms of Reference for waste EAs approved since 1997, 19 were "scoped" and only four were not.

83 ECO, *Annual Report 2007-2008*, *supra* note 6 at 43.

84 *Ibid.*, Recommendation 1.

85 *Ibid.* at 30.

86 See, for example, the authorities cited in Alan Levy, *supra* note 3 at 228. One commentator has correctly characterized Ontario's Class EA regime as an "EA-lite approach": see Conor Mihel, "Why We Can't Save this Forest" in *ON Nature* (Autumn 2009) at 19.

87 *Hollinger Farms No. 1 Inc. v. Ontario (Minister of Environment)* (2007), 229 O.A.C. 303 (Div. Ct.).

88 *Ibid.* See also *William Ashley China Ltd. v. Toronto (City)* (2008), 39 C.E.L.R. (3d) 306 (Ont. Div. Ct.) and *South Etobicoke Residents & Ratepayers Assn. Inc. v. Ontario Realty Corp.* (2004), 181 O.A.C. 303 (Div. Ct.); affirmed (2005), 75 O.R. (3d) 641 (C.A.).

with the parent Class EA."[89] In such circumstances, the only remedy available to concerned stakeholders is to file "bump up" requests upon completion of the project planning process. However, virtually no "bump up" requests have been granted in recent years, and there have been vigorous complaints by proponents and stakeholders about the time-consuming and non-transparent manner in which "bump up" requests are decided by the Ministry of the Environment.[90]

To address these issues, the EA Advisory Panel recommended the creation of new procedures which would enable an independent adjudicator (the ERT) to provide interim directions or summary rulings on Class EA planning disputes, and to expeditiously decide "bump up" requests filed at the end of Class EA planning processes.[91] To date, however, the Ministry of the Environment has not amended the current Class EAs to give effect to these recommendations.

In 2008, Ontario's Environmental Commissioner summarized public concerns about Class EAs as follows:

> Class EA approaches were intended for projects that occur frequently, with generally predictable ranges of effects and relatively minor environmental impacts. But critics have long argued that too many large and environmentally significant projects have been inappropriately slipped into the Class EA fast track . . .
>
> Under the Class EA process, public concerns abound. A "no" decision is not a possible outcome. The ministry can only elevate the status of the project to an individual EA or impose conditions. Frustrated members of the public invoke the available appeal mechanism (a request for a "bump up" to an individual EA, also known as a "Part II order") about 60 to 70 times in a typical year, but to the ECO's knowledge, the ministry has not granted one such request. The minister does, in some cases, respond to bump-up requests by imposing conditions on proponents. But the conditions are often soft measures, such as additional consultation through liaison committees, rather than what is most sorely needed: stronger mitigation measures.[92]

In 2009, the Environmental Commissioner also raised concerns about the delayed development of a Class EA in respect of mining activities in northern Ontario:

> The ECO also believes that MOE has yet to hold MNDM [Ministry of Northern Development and Mines] properly to account for the environmental assessment process related to mineral development. MNDM has an interim Declaration Order allowing it to dispose of Crown resources, such as issuing mining licences and administering the *Mining Act*, without being required to conduct individual environmental assessments. Originally approved as a one-year interim order in 2003, it has been extended numerous times and now expires in December 2012. It is not reassuring that MOE has repeatedly extended this interim Declaration Order based on MNDM's failure to prepare the required class EA.[93]

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89 EA Advisory Panel Report, *supra* note 6 at 91.

90 *Ibid.*

91 *Ibid.*, Recommendations 18-19.

92 ECO, *Annual Report 2007-2008*, *supra* note 6 at 30, 42.

93 ECO, *Supplement to Annual Report 2008-2009*, *supra* note 63 at 132.

(vii) Inadequate Consideration of Cumulative Effects

Ontario's Ministry of the Environment recently revised its *Statement of Environmental Values* (SEV) under the *Environmental Bill of Rights, 1993* (EBR), which commits the Ministry to a number of important principles, including the ecosystem approach and consideration of cumulative environmental effects.[94] The current SEV further provides that these principles will be reflected in the Ministry's decisions respecting laws, regulations and policies.[95] To date, however, there is little evidence demonstrating that cumulative effects are being adequately addressed in Ontario's EA program.

For example, the vast majority of undertakings subject to the EAA are now being processed through approved Class EAs rather than individual EAs, as noted above. However, the EA Advisory Panel questioned whether the cumulative effects of these thousands of projects are being properly monitored by proponents or the Ministry of the Environment:

> Concerns have 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).[96]

It would appear that such concerns are also applicable to the numerous projects which are subject to the streamlined procedures under the sectoral regulatory exemptions described above.

The Ministry of the Environment also appears to have jurisdictional doubts whether cumulative effects analysis can even be required under the EAA, presumably because this phrase does not expressly appear within the legislation.[97] For example, in rejecting public requests under the *Electricity Projects Regulation* for elevation of a proposed windfarm to individual EA, the Acting Director of the Ministry's EA and Approvals Branch opined as follows:

> As Ontario's EAA does not require consideration of cumulative effects through either the ESP or an individual EA, the ministry will not be requiring CREC [the proponent] to further address cumulative effects. Federal EA legislation, however, does require consideration of cumulative effects and therefore, I will defer any decision making about the quality of the cumula-

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94 MOE SEV (October 2008), s. 3.

95 *Ibid.* However, the ERT and the Ontario Divisional Court have held that SEV principles should also be considered when the Ministry is making decisions as to whether to issue environmentally significant approvals: see *Dawber v. Ontario (Director, Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 (Ont. Environmental Review Trib.); affirmed (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.); leave to appeal refused (November 26, 2008), File No. M36552 (Ont. C.A.).

96 EA Advisory Panel Report, at 109.

97 In contrast, consideration of "cumulative environmental effects" is expressly required in federal EAs: see *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, ss. 16(1)(a).

> tive effects assessment in the ERR to federal colleagues at Natural Resources Canada, as the lead responsible authority for federal processes.[98]

Given the broad definition of "environment" under the EAA, and given proponents' general duty under the EAA to identify and evaluate baseline conditions as well as the "direct and indirect" impacts of the undertaking (and alternatives) upon the environment, there can be little doubt that cumulative effects can and should be considered in Ontario's EA program. However, the Director's above-noted comments suggest that if this matter is legally unclear to the Ministry of the Environment, then it is imperative to amend the EAA in order to ensure that cumulative effects are duly considered by proponents and EA decision-makers.

(viii) Barriers to Meaningful Public Participation

One of the more positive Bill 76 changes to the EAA was the creation of a new mandatory duty upon proponents to consult "interested persons" when preparing Terms of Reference or EA documentation.[99] However, the EAA fails to define or provide specific direction on what constitutes meaningful consultation, or on which persons are sufficiently "interested" to be consulted. Although the Ministry of the Environment has developed a non-binding Code of Practice regarding consultation, serious concerns remain about the adequacy of public participation opportunities under the EAA.

For example, the EA Advisory Panel reviewed the rationale for, and benefits of, ensuring effective public consultation, but found that several daunting problems were often encountered by persons attempting to participate in EA processes in Ontario:

> However, serious concerns have been repeatedly expressed by First Nations, aboriginal communities and various stakeholders (referred to collectively as participants) that they cannot participate in the planning, approval and monitoring of undertakings subject to the EA Act. They claim that the 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 necessary to meaningfully participate in the EA process.[100]

Accordingly, the EA Advisory Panel made several recommendations aimed at improving public participation in Ontario's EA program (including provision of participant funding by proponents),[101] but few of these recommendations have been fully implemented to date.

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98 Letter dated 28 March 2008 to Lake Ontario Waterkeeper from Agatha Garcia-Wright, Acting Director of the MOE's EA and Approvals Branch.

99 EAA, s. 5.1.

100 EA Advisory Panel Report, *supra* note 6 at 71. See also Alan Levy, *supra* note 3 at 239–43.

101 EA Advisory Panel Report, *ibid.* at Recommendations 8–11.

In 2008, Ontario's Environmental Commissioner reported that:

> The ECO regularly hears from members of the public who find EA consultation processes unduly complex and opaque. They find the system weighted in favour of proponents, and are frustrated by MOE's evident inability or unwillingness to insist on fairness in consultation and in process. A frequent concern is the public's inability to access key documents and technical studies in a timely manner . . . Public unhappiness with weak consultation is often exacerbated by related failings, such as flawed EA studies, and blocked public input on front-end questions such as need or back-end technical details in permits and approvals.[102]

Accordingly, the Environmental Commissioner has called for renewed "emphasis on transparency and credibility in public consultation," and he specifically recommended that Ontario's EA program be reformed in order to ensure "an effective engagement of the broader public in all aspects, but including big and medium picture planning, as well as post-approval technical issues."[103]

(ix) EA Exception Under the EBR

As noted above, virtually all applications under the EAA are currently being decided (and usually approved) by the Environment Minister without EA hearings. In addition, it should be noted that the Ontario government has passed regulations to preclude ERT hearings under other environmental statutes for certain undertakings which are subject to the EAA.[104] While the EA Advisory Panel recommended certain revisions of these regulations,[105] they remain intact at the present time. The net result is that under the EAA, interested persons are usually invited by proponents to comment upon the conceptual or general design of these undertakings, but the critically important technical or operational details are being shielded from scrutiny in public hearings before an independent tribunal established for that very purpose.

This systemic problem has been compounded by the Ontario government's increasingly frequent reliance upon the "EA exception" in s. 32 of the EBR. In essence, this section provides that the mandatory public participation rights found in Part II of the EBR (*i.e.*, notice, comment, and third-party appeal) do not apply to statutory permits or approvals which implement undertakings that have been approved (or exempted) under the EAA. From the public interest perspective, the main concern is that the s. 32 "EA exception" has been used to prevent meaningful public notice, comment or appeal of technical instruments issued (without hearings) in relation to EA-approved (or exempted) undertakings.

In 2005, the EA Advisory Panel recommended that s. 32 should be revised to ensure that public notice is provided on the EBR Registry in relation to such instru-

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102 ECO, *Annual Report 2007-2008*, *supra* note 6 at 46.

103 *Ibid.* at 47.

104 See, for example, O. Reg. 206/97(no hearings under the *Environmental Protection Act* in relation to waste disposal sites or waste management systems subject to the EAA); and O. Reg. 207/97 (no hearings under the *Ontario Water Resources Act* for sewage works subject to the EAA).

105 EA Advisory Panel Report, *supra* note 6 at Recommendation 35.

ments, and to enable residents to utilize the third-party appeal mechanism under the EBR in situations where the undertaking has been approved under the EAA without a public hearing.[106]

Ontario's Environmental Commissioner has also been sharply critical of the s. 32 "EA exception" to public participation:

> Though often a source of intense public interest and concern, many technical decisions . . . tend to be pushed beyond the back-end of the EA process, to be covered by permits and approvals under a variety of other legislation. And perversely, an exemption under the EBR allows proponents to obtain all permits and approvals arising from EA processes without being subject to public comment or appeal rights. Both the ECO and the EA Advisory Panel have recommended that this notorious "section 32" exemption needs amendment because it inappropriately shrouds environmentally significant decisions from public scrutiny.[107]

The Ontario Legislature has not acted upon such recommendations.

(x) Lack of Integration Between EA and Land Use Planning

Many undertakings subject to the EAA may require rezoning or official plan amendments under the *Planning Act*,[108] or may require approvals under other provincial statutes which govern land uses or activities upon private and public lands across Ontario. The need to more effectively integrate Ontario's EA program with municipal and provincial land use planning regimes has been recognized and supported by many observers and stakeholders since the late 1980s.[109] While there has been occasional government interest in "greening" the province's land use planning regime,[110] little tangible progress has been achieved under the EAA in addressing this long overdue need for integration.

In 2005, the EA Advisory Panel reviewed the "disconnect" between the EA program and land use planning, and made several recommendations intended to better integrate the EAA and the *Planning Act*.[111] For example, the Advisory Panel recommended that the current Provincial Policy Statement under the *Planning Act* should be adopted and applied under the EAA, and that appropriate means should be developed to coordinate municipal master plans (*e.g.* infrastructure) with the EA program.[112]

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106 *Ibid.* at 89-90 and Recommendation 17.

107 ECO, *Annual Report 2007-2008*, *supra* note 6 at 44. See also *supra* note 64 at 53–57.

108 R.S.O. 1990, c. P.13.

109 See, for example, EAAC, *Report No. 38: The Adequacy of the Existing Environmental Planning and Approvals Process at the Ganaraska Watershed* (1989); EAAC, *Report No. 41 (Part 2): Environmental Planning and Approvals in Grey County* (1990); Stephen Garrod *et al.*, "Land-Use Planning" in Swaigen & Estrin, eds., *Environment on Trial* (3d ed.) (Toronto: Emond Montgomery Publications Ltd., 1993).

110 See, for example, Commission on Planning and Development Reform in Ontario, *New Planning for Ontario* (1993).

111 EA Advisory Panel Report, *supra* note 6 at 84–88.

112 *Ibid.*, Recommendations 15 and 41.

In 2008, Ontario's Environmental Commissioner similarly observed that there is "poor integration between EA and the land use planning process,"[113] and further commented on the problematic relationship between the EA program and municipal master plans:

> Municipalities are expected to consult with the public on Master Plans, but Master Plans do not require approval under the EAA — only specific projects within a Master Plan are subject to EA. Thus, in spite of the warning against piecemealing and the encouragement to think long-range, the approach tends to lead to fragmented decision-making. For example, the York Durham Sewer System was assessed as 14 different Class EA projects, despite broad regional implications; the construction phase alone has required a massive dewatering effort, removing vast amounts of water from aquifers in York Region.[114]

Recently, however, some degree of integration is being implemented in the context of energy infrastructure planning under Ontario's *Green Energy and Green Economy Act, 2009*.[115] For example, the Ministry of the Environment has established a "Renewable Energy Facilitation Office," and the Ministry is now empowered to issue renewable energy approvals (REAs) for prescribed types of renewable energy production (*e.g.* wind turbines, solar farms, waterpower projects, biomass facilities, etc.).

Among other things, the REA process is intended to merge current EAA requirements with other provincial permits and rules (including setback standards and noise limits) into a single streamlined approvals process under Part V.0.1 of the *Environmental Protection Act*. Subject to certain exceptions, renewable energy facilities will not be subject to *Planning Act* instruments (*e.g.* zoning by-laws).[116] Since this REA reform just came into force in September 2009, it remains to be seen whether this approach will expedite the appropriate siting, construction and operation of renewable energy facilities, and whether the REA regime should be used as a template for achieving integration between the EAA and other statutory regimes governing other sectors in Ontario.

4. CONCLUSIONS

The recent evolution of Ontario's EA program has been correctly characterized as follows:

> [T]he EA program in Ontario no longer appears to involve a full EA process, the examination of alternatives, participant or intervener funding, significant public accessibility and participation, resolution of public concerns, or public hearings . . .
>
> The findings from this review of contemporary EA in Ontario reveal that much of the approach taken to reforming the program, which has been underway since 1995, is quite flawed. The principal reason for this may be that the package of reforms implemented by the Government was not designed

113 ECO, *Annual Report 2007-2008*, *supra* note 6 at 38.

114 *Ibid.* at 42.

115 S.O. 2009, c. 12.

116 *Ibid.*, Schedule K (amendments to the *Planning Act*).

> with the goal of enhancing environmental protection, even though this is identified in EAA s. 2 as the legislation's sole purpose. Rather, the evidence suggests that its purpose appears to have been perceived barriers to economic growth, financial prosperity and individual liberty or autonomy. Paradoxically, it is questionable whether these values have been advanced as a result.[117]

Despite these and other concerns, it seems that the only noteworthy (and rather ironic) amendment to the EAA over the past decade was an exemption of "traffic calming measures" (speed bumps) from EAA coverage.[118] Not even the three modest legislative amendments suggested by the EA Advisory Panel have been enacted to date.[119]

Instead, the Ontario government has attempted to implement piecemeal EA reforms in recent years through regulatory exemptions, guidance materials, and administrative changes. Measured against the public interest purpose of the EAA, it can only be concluded that these non-statutory reforms have fallen considerably short of the mark, and have not resulted in a "revitalized, rebalanced, and refocused"[120] EA program in Ontario. Similarly, these recent changes have not resulted in "strategic" EA (or sustainability-based assessments) of major governmental policies, plans or programs which drive the individual undertakings or projects that are subject to the EAA.[121]

Accordingly, Ontario needs to publicly develop and quickly implement an integrated EA reform package which must necessarily include statutory amendments. As noted by the former Environment Minister when Bill 76 was being debated:

> The problem with administrative change, though, is that it can only go so far . . . To modernize the process, you need to get inside the process.[122]

It may be argued that it is potentially risky to reopen the EAA itself during the current fiscal climate, especially since legislators may be tempted to further reduce or eliminate EA requirements in order to spur economic growth. While this risk certainly exists, it is equally clear that Ontario's EA program remains highly unsatisfactory to many observers and stakeholders, and, more importantly, the *status quo* is unlikely to ensure the "betterment" of Ontarians or to secure long-term environmental sustainability. Thus, while there may be risk associated with subjecting the EAA to renewed legislative debate, there appears to be far greater risk in refusing to do so as soon as possible.

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117 Alan Levy, *supra* note 3 at 271, 280-81.

118 EAA, s. 3.3.

119 EA Advisory Panel Report, *supra* note 6 at 39 (policy guidelines), Recommendation 23 (fees), and Recommendation 27 (inspection/enforcement).

120 EA Advisory Panel Report, *supra* note 6 at 16.

121 Paul Muldoon *et al.*, *supra* note 11 at 136–38.

122 Proceedings of the Standing Committee on Social Development (7 August 1996) (Presentation by the Hon. Brenda Elliot).

Appendix A — Approved Class Environmental Assessments in Ontario

CLASS ENVIRONMENTAL ASSESSMENTS: STATUS UPDATE (As of February 2010)		
NAME	**DATE APPROVED**	**PROPONENT**
Municipal Class Environmental Assessment-amended	October 2000 Amended September 2007	Municipal Engineers Association
Class Environmental Assessment for Provincial Transportation Facilities	December 1997 and July 2000	Ministry of Transportation
GO Transit Class Environmental Assessment Document	December 2003	GO Transit
Class Environmental Assessment for Minor Transmission Facilities	April 1992	Hydro One
Class Environmental Assessment Process for Management Board Secretariat & Ontario Realty Corporation	April 2004	Ontario Realty Corporation
Class Environmental Assessment for Remedial Flood and Erosion Control Projects	June 2002	Conservation Ontario
Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects	March 2003	Ministry of Natural Resources
Class Environmental Assessment for Provincial Parks and Conservation Reserves	December 2004	Ministry of Natural Resources
MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71) Amending Declaration Order MNR 71/2	June 2003 Amended March 21, 2007	Ministry of Natural Resources
Class Environmental Assessment for Waterpower Projects	October 2008	Ontario Waterpower Association