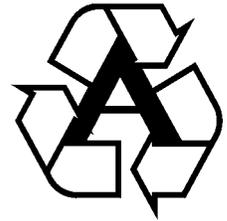




Association
of Municipal
Recycling
Coordinators



Environmental Assessment Advisory Panel's Report

A Municipal Position

June 2005

This position paper has been prepared by members of the Environmental Assessment (Transportation) Task Force and the Waste Management Task Force of the Association of Municipalities of Ontario (AMO), in conjunction with the Association of Municipal Recycling Coordinators of Ontario (AMRC).

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A Municipal Position

1.0 Introduction

This document presents a review of the recommendations made by the Executive Group of the Minister of the Environment's Environmental Assessment (EA) Advisory Panel, issued on March 2005. It represents a consensus position developed by municipal representatives from the transportation sector as well as members of the joint AMO-AMRC Waste Management Task Force.

The Minister of the Environment should be commended for initiating the EA reform process. It was initiated with an ambitious time frame and mandate, to address issues that many participants in the existing EA process have raised in the years since the *Act* was amended in 1996.

However, the time frame and methodology used by the Executive Panel to develop its framework for reform could have benefited greatly from opportunities for more fulsome participation and for greater opportunity for dialogue. Many of the recommendations clearly require extensive scrutiny prior to any change in the EA process. Thus, AMO supports the Establishment of Sector Working Groups as suggested in the report's fourth recommendation and for the consultation process that is currently taking place in regards to the proposed EA Reform framework. In addition to the proposed working groups for energy, transportation, and waste, it is imperative that other sectors that will be affected by the EA reform process (such as the water and wastewater sectors) are also represented as the Province moves forward with this initiative.

More critically, many of the recommendations presented by the Executive Committee will complicate and lengthen the EA process despite the stated goal of the review process being to streamline the process. The following sector-specific sections address this concern along with recommendations and issues of concern to practitioners in those sectors.

AMO is strongly opposed to those recommendations relating to intervenor funding, fees for applications, and anything else that will result in another unfunded download to municipal governments. EAs, and the goals which they achieve, are Provincial matters and as such, should be paid for by the Province.

AMO is also strongly opposed to the early use of a review tribunal as this would amount to unwelcome delays that may be unjustified by any recognized planning or environmental protection principles. Some opponents may seek to abuse this mechanism in an attempt to drive the time and costs of a project up so high so as to deter the proponent(s) from moving ahead with this project. Moreover, it would appear to disregard the principle of local autonomy as municipal councils would not be able to hear and make a decision on an application without first hearing from this tribunal.

2.0 General Comments and Recommendations

AMO fully supports encouraging a greater role for the MOE in providing stakeholder training in EA matters as well as efforts to enhance the MOE's quality of service in terms of response, tracking, and communications as long as they do not extend the already long timelines utilized by the MOE. We also support initiatives to develop an EA website provided that it is maintained appropriately and is always up to date. The cost and responsibility for maintenance of the website should rest with the MOE.

There are aspects of the 'Vision' proposed by the Executive Group, that are not shared by municipalities including:

- the policy framework developed by the Executive as set out in Volume II of the Panel report,
- the creation of a "Provincial Advisory Body",
- the use of fees to support EA activities other than those actively undertaken by the EAAB,
- and others as noted below.

EA Act Principles

The Executive Group report and recommendations are built upon several stated principles from which the Executive Group takes its reform positions. Guiding principles should be established through further consultation to avoid unintended consequences. It is possible that problems could arise from a broad/extreme interpretation of some of the proposed principles as they are currently stated. For example, the following three proposed principles are fine in theory but all could use clarification and/or might be problematic in implementation:

- The inclusion of "sustainability benefits" and the "precautionary principle" may be excellent ideals but it is unclear how these principles can be effectively applied to the EA process, as there is significant room to interpret what "sustainability benefits" and the "precautionary principle" mean when applied in an EA context.
- The "one project, one integrated process" principle suggests that all EAs should be commenced early in the planning process. This would work for Class EAs, however, while some individual EAs can be commenced early in the planning process, this principle does not recognise the significant amount of planning that is undertaken prior to commencing an individual EA to justify the decision that an undertaking that requires EA approval should be pursued.
- The principle related to "Environmental Protection" would be difficult to apply to many undertakings, for example, it would be difficult to demonstrate that a landfill site could meet all of the components of this principle such as the need to demonstrate that it reduces overall energy, water and other material demands upon Ontario's renewable and non-renewable resource base. While the principle uses the term "where applicable", who will decide which components of this principle will be applied?

Provincial Advisory Body

The proposed Provincial Advisory Body has the potential to place a significant additional financial burden on public sector proponents. A clear case has not been made as to how such a body would actually contribute to streamlining the EA process. Municipalities are already bearing the weight of the considerable costs required to ensure successful compliance with the *EA Act*. Adding to the cost, without specific value-added financial benefits, by way of a streamlined process and expedited approvals would only serve to complicate the process and add to the already difficult burden carried by proponents. In addition, this new body would compete for resources with the Environmental Assessment and Approvals Branch (EAAB) of the MOE, which should be the first priority because a functional EAAB is essential for a streamlined EA process. It is difficult to attribute any added value to the EA process from a municipal perspective for the proposed roles of the Provincial Advisory Body, which would provide it with a broad mandate. In particular, it would appear far more efficient if the EAAB of the MOE continues in its role to address designation, exemption and harmonization orders.

Fees

Recommendations 6, 7, 23, 24 and 25 appear to be an attempt to overcome years of provincial government downsizing of the bureaucracy by re-establishing high level policy resources within the Ministry – on the back of user fees from project proponents. While municipalities have long sought dedicated funding for such services as infrastructure, the user fee for EAs is inconsistent with the provincial government's approach to financing. The use of fees as a broader funding tool is not in the municipal interest and would exacerbate the financial burden placed on municipalities by the EA process to an unreasonable degree.

Green Projects

A clear definition of what constitutes a green project must be developed before moving forward with Recommendations 1 and 2, as there is a wide divergence of opinion on the definition of 'green projects'. For example, many jurisdictions (e.g. Sweden) consider that the utilization of residual wastes as a renewable "fuel" for waste-based thermal processing and energy-generation systems is a wise and sustainable use of this resource. Other jurisdictions, consider that this should simply be considered as a means of waste disposal and do not recognize any 'green' aspects of this waste management approach. If these projects are given priority, it should not come at the expense of projects already in the queue.

Harmonization

Addressing the desirability of harmonizing complementary legislative requirements and processes is a worthwhile endeavour, especially if it will harmonize the *Planning Act* and the *Environmental Assessment Act*, however, it does not recognize the fundamental difference of focus between the Provincial *Environmental Assessment Act* (EAA) and the

Canadian Environmental Assessment Act (CEAA). Recommendations 15 and 16 warrant further review by EA practitioners to ensure that there are no unexpected ramifications. However, Recommendation 17 is not warranted and is not in the municipal interest. The “EA exception” under the EBR is reasonable, given that EAA submissions are subjected to a very high standard of review prior to the determination to approve or exempt a proposal. If approval is granted for a proposal, a high standard continues to be imposed during the *Environmental Protection Act* (EPA) approvals process regardless of the fact that the proponent’s EPA application is not subject to an EPA hearing. The current regulatory framework supports the need for public consultation throughout an EAA and the need for the public to demonstrate that the proponent has not met the requirements of the EAA and/or the EA ToR for the undertaking thus demonstrating merit for an ERT hearing on the EA. This proposal, along with the recommendation to amend Regulations 206/97 and 207/97 raises the potential for multiple opportunities for hearing requests, such that the public may not have the incentive to fully participate EAA processes.

Public Participation

While the suggestions for improving the process of public participation contained within Recommendations 8 through 11 are worthwhile, buried in Recommendation 8 is the unacceptable concept of “intervenor funding”. To provide additional funding to project opponents would be redundant to proponent investments in the process and further increase the costs of already costly EA undertakings because extensive resources are already applied to contentious issues, including peer review funding, to seek resolution to these matters. The Executive does not make a sufficient case to support the concept of participatory rights, including the ‘seat at the table’ concept where participants participate in and affect decision-making. It is unclear how proponents could reasonably determine the participants who should ‘sit at the table’ in an EA process that often evolves from having broad public interest groups interested in the process at the outset, to having specific individuals that could be affected by the undertaking at the conclusion. It is also unclear why the Ministry would vest decision-making capability in an individual or group (not a municipality) that could not be held accountable by the public and who would not bear any responsibility for their decisions.

Alternative Dispute Resolution

Recommendations 13 and 14 suggest the creation of alternative dispute resolution processes. This conflicts with the greater goal of streamlining the EA process and should be discounted in place of more rigour to less parochially, more objectively, and more expeditiously resolve “bump-up” or “Part II Order” requests. This is partially addressed in Recommendations 18 and 19. The use of Alternative Dispute Resolution during an EA process should be left at the call of the proponent rather than being proscribed by the MOE. ADR can have its place in EA processes, particularly towards the conclusion of individual EA processes when negotiations with potentially affected persons are necessary, but it is unrealistic to assume that ADR can resolve all issues.

Hearings

It should not be assumed that just because there are unresolved public ‘controversies’ that a hearing is required by the ERT to approve an undertaking under the EAA. The public can often take positions in an EA process that cannot be influenced or resolved through consultation or ADR. For example, it is not uncommon for opponents of waste disposal undertakings to take the position that there is no ‘need’ for a disposal undertaking as a ‘zero waste’ philosophy will resolve the need for disposal capacity. The determination as to whether a hearing is required, should be based on the MOE review of the EAA documentation, and should be based on the determination of substantive concerns through the MOE and government review of the proposal..

Monitoring and Reporting

Recommendations relating to monitoring and reporting should not be applied, as they are unnecessary in this context. Monitoring and reporting is an enforcement function, which should remain within the auspices of the *Environmental Protection Act* (EPA) where the enforcement procedures are already established. These recommendations should not be supported as the existing monitoring and reporting process is functional and the changes proposed by the Executive Group would add unnecessary requirements, time, and expense for no real purpose. Requirements for third party audits and notification incorrectly imply that the MOE is not capable of this function. The MOE holds the requisite technical expertise, although certainly additional resources in the form of more staff should be considered for the MOE to continue in this function.

Transition

Once the transition to a new EA regime is in place, for undertakings that are “in the mill”, i.e. proposed but not yet approved or commenced, it is not reasonable to assume that procedural changes be immediately applicable, without distinguishing between EA studies that are substantially complete versus those that are being initiated. It is also not reasonable that the proposed Provincial Advisory Body play a significant role in supporting the EA reform initiative. The responsibility for the EA reform process should rest with the MOE through the Policy Branch and EAAB, and should be supported by the establishment of Sector Working Groups.

3.0 Comments on the applicability of the EA to Transportation Undertakings

AMO is encouraged by efforts to streamline the EA process and we welcome moves to ensure consistency of classes and schedules between the Ministry of Transportation, Ministry of the Environment, and other concerned agencies. We would also embrace efforts to integrate EAs into municipal master plans and other provincial legislation such as the *Places to Grow, Greenbelt, and Source Water Protection Acts*. Yet, there is considerable difference in opinion about how well the existing process is working, as many feel the original Class EA is flexible, caters to local needs, and also contains a valuable appeal mechanism that allows for public input and opposition. While AMO is supportive of the purposes of the review, many issues need clarification and/or modification if the EA process is to be actually improved.

The report appears to be preoccupied with individual EAs despite the fact that 95% of EAs, in the transportation sector, are Class EAs. Moreover, the report often lumps in both types of EAs although some recommendations are clearly meant to apply only to individual EAs. The report should be modified to clearly distinguish between those recommendations that relate to Class EAs and those that relate to individual EAs. The purpose of the five proposed classes is unclear as are the details set out in the table provided. For example, it seems very unreasonable to suggest that public notice be given whenever a road is cleared of snow or salted for ice.

The following sections are an attempt to deal with issue-related groupings of the other recommendations put forth by the Executive Committee.

Specific EA Terms of Reference

Recommendation 5 recognizes the need to tailor terms of reference for certain project complexities. Such tailoring would correlate degree of rigour with extent of environmental impact and level of benefit to society overall. Recognizing that this could be an onerous Sector-specific undertaking, it suggests that interim revisions to terms of reference be initiated soon. This is seen as a positive recommendation.

MEA "Class EA's" and Transit

Recommendation 37 promotes collaboration between MOE and the Municipal Engineers Association to revise the "Class EA" process to harmonize transit and road undertakings. This is in direct support of the Transportation Sector's recommendation and duly supported.

Local EA Advisory Committees

Recommendation 40 promotes local or regional municipal EA advisory and/or liaison committees. This is supported, providing that their focus is process oriented rather than creating another bureaucratic, project specific screening body. Yet, it remains unclear how these committees would function and contribute to the EA process. For example, what is their mandate? Would they report to council?

4.0 Comments on the applicability of the EA to Waste Undertakings

The current regulatory environment, as set out in MOE regulations and guidelines, which governs the issuance of approvals for waste management undertakings:

- discriminates between disposal and diversion undertakings, such that most diversion undertakings are not subject to the EAA, but virtually all disposal undertakings are subject to EAA approval. The Ministry has historically applied a trigger that if a processing facility generates more than 200 tonnes per day for disposal (the theoretical equivalent of 73,000 tonnes of waste per year), the Minister would recommend that the project be designated under the EAA unless the proponent can justify otherwise.
- discriminates between types of disposal undertakings such as landfilling and incineration. According to current guidelines, incineration facilities that accept less than 100 tpd of municipal waste (equivalent to the waste generated by a population less than 36,500 people), do not require EAA approval, but municipal landfill facilities that accept waste from a population equivalent of 1,500 people or more, do require EAA approval.
- does not discriminate between the establishment of new disposal sites or the alteration, enlargement or extension of existing sites.

There are potential environmental implications (in the broad sense that includes both social and economics) for both disposal and diversion undertakings. The potential environmental implications related to the establishment of new disposal facilities have been demonstrated to be more significant than those associated with the alteration/extension of existing facilities.

The EA Reform process for waste management undertakings should have used as its basis a review of the way the EAA and EPA are currently applied to various undertakings, such that the EA would focus on those proposals that should require an EAA due to their nature and scale. As stated by the Waste Sector Table, the “*Environmental Protection Act* (sections 30 and 32) and the *Environmental Assessment Act* (should) 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 landfill and thermal treatment) are subject to the appropriate level of assessment and review using these two *Acts*.” AMO supports the use of the chart developed by the Waste Sector Table for determining when the EAA should be applied:

Establishment of a Landfill or Thermal Processing Site	Approval under the EAA required. Regulations under subsection 6 (2) (b) of the EAA are needed to proscribe EA ToR requirements for public sector undertakings (note requirements for small scale undertakings should be less than larger scale) and private sector undertakings.
Enlargement of a Landfill or Thermal Processing Site	Approval under the EAA required depending on the scale/nature of the undertaking

<p>Enlargement being defined as an increase in the capacity of the facility whether it be an annual capacity increase in the case of a thermal processing site, or an increase in the total fill area for a landfill.</p>	<p>Scale: based on percentage of existing capacity</p> <p>Nature: in regards to landfills, to differentiate between upward expansions and expansions of footprint</p> <p>Regulations under subsection 6 (2) (b) of the EAA to proscribe EA ToR requirements related to proposed expansions, the intent being to reduce or eliminate requirements to consider 'alternatives to', however, alternative methods would still need to be addressed.</p>
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The chart proposed that the remainder of waste management undertakings would be addressed by the EPA, and also proposed some adjustments to the EPA approvals process.

There is a strong need for sector-based policy. There is currently no overarching policy for waste management that addresses the need for different types of waste management activities, particularly the need for waste disposal capacity in the Province. Issues such as rationale, alternatives and the public interest need to be clearly articulated in provincial policy so that it can form the basis for evaluating waste management proposals. To serve the municipal interest, the Province should use as the foundation for further work on the development of Sector Specific Policy for waste, the methodology proposed by the Waste Sector Table, as set out in Recommendation #2 of their submission to the Executive Panel.

AMO has reservations about the policies outlined in Volume II of the Executive Panel's report because it remains questionable as to whether these policies reflect the types of policy and guidelines that proponents, reviewers, and the public require. For example, it would be close to impossible for waste disposal undertakings to meet the requirement of contributing towards the achievement of Ontario's goal of 60% or higher diversion from disposal.

In regards to the proposed EA procedures the methodology outlined by the Executive Group in Recommendation No. 5 and in Volume II is not in the municipal interest. This methodology and procedures were not supported by the municipal stakeholders in the EA reform process, and should not be used as a foundation for EA reform in their current form. These procedures require significant further consultation with affected parties to create a workable process that will achieve the stated aims of this EA Review initiative. In their present form, they may, in fact, hinder and further delay process rationalization.

For example the framework suggested by the Executive Panel:

- implies that all waste undertakings should be subject to the EAA, and only after review of 'benefits' and 'risks' would a determination be made that an undertaking could be exempt if it were a 'category 1' project. To require paperwork and notification for projects exempt from the EAA as suggested does not make sense.

- would require local council approval for 'category 2' projects, which could be a significantly difficult proposition in areas where jurisdiction for waste management responsibility rests within an upper tier municipal jurisdiction in a two-tier municipal environment where politics at a lower tier level could obstruct the ability of the upper tier to proceed with necessary waste infrastructure.
- implies that hearings by the ERT be required following mediation for projects of 'category 3' and up, and furthermore, for 'category 5' projects require ERT hearings during an EA process after major phases such as the identification of 'need'.
- requires participant funding and mandatory Alternative Dispute resolution for projects of 'category 3' and up.

It is not appropriate that the MOE revise the draft ToR guideline to ensure consistency with the report of the Executive Group. It is also not appropriate that the proposed approach as set out in the draft charts be used as a 'solid starting point' for further discussions. Instead, AMO suggests that the Province should give serious consideration to adopting the 'rationalization' process developed by the Waste Sector Table, as set out in appendix II of the Waste Sector Table's report to the Executive Panel.

Research Undertaking

This recommendation does address the need to review and revise the 'research' exemption under the EAA. The only component of the recommendation that bears further review and discussion is the proposed requirement to share monitoring results with a community group, established to participate in the evaluation of research results. This may be reasonable in some contexts, but not in others, and should not be a requirement but an option that could be pursued by proponents of research undertakings.

5.0 Conclusion

This review of the Executive Group Report presents specific opinions and constructive comments on its content. Many of the Executive Group's recommendations, if implemented without further, more objective consideration, will only serve to complicate an already difficult and complex approvals process.

The EA reform process did not provide sufficient time and opportunity for discussion between the Sector Tables and the Executive Group and for sufficient consultation with municipal EA practitioners. Had opportunities been available, it is likely that many of the concerns could have been resolved through further discussion. These discussions must take place, with an expanded group of stakeholders in each of the critical areas affected by this EA reform initiative before the Executive Group's recommendations are adopted.