



Darlene Dove
Lands and Waters Branch, Policy and Program Advisor
300 Water Street
PO Box 7000
Peterborough, Ontario K9J 8M5

January 8, 2010

RE: Draft MNR Policies and Procedures for CA Plan Review and Permitting Activities (EBR#010-8243)

Dear Ms. Dove,

This submission is being made on behalf of our 36 member Conservation Authorities (CAs) and is based upon written comments received from 26 CAs which were reviewed by the 10 Conservation Ontario representatives and alternates to the provincial Conservation Authority Liaison Committee (CALC).

In general, we are supportive of the creation of this chapter of the Ministry of Natural Resources' (MNR) Policies and Procedures Manual. This chapter will provide greater clarity regarding the role of CAs in planning and permitting activities, as well as promoting a greater consistency between CAs in the delivery of these activities and improved transparency.

Major Concerns – Factors for Success

Notwithstanding our general support for the above noted reasons, the Conservation Ontario representatives to the CALC have consistently communicated that successful implementation ultimately will rely upon a willingness on the part of the Province to resolve some key issues. Ultimately, strong provincial program support including funding, technical guidelines and legislative amendments are required.

Provincial Funding Required

Although not embedded in the *CA Act*, the Content Regulation (O.R. 97/04) or the individual Section 28 Regulations, the document promotes a timing and decision framework around the processing of Section 28 permits, similar in principle to the application process under the *Planning Act*. The section attaches timelines that may or may not be realistic, depending on the resources, capacity and work load of an individual CA. This especially will be the case in areas of substantial development pressure where the volume of permits has increased and in areas where there is limited staff. For example, workload related to permits fluctuates seasonally and staffing cannot be adjusted accordingly; timelines that may be reasonable in the winter may not be appropriate in the summer months.

Although it is recognized that Section 9.0 encourages a CA to charge fees to recover costs, the reality is that fees are not recovering costs of program delivery, particularly with regard to the plan review function. Additional and consistent provincial funding to CAs is required to ensure sufficient and qualified staff are available to meet these timelines and the increased administrative demands (e.g. policy development/review, public consultation) suggested in these policies and procedures in support of Ontario Regulations under the *CA Act*. An example of an additional administrative demand is that CAs will need to ensure that their policies and procedures address issues that have been created by the chapter such as the administrative review by the CA Board of Directors when an applicant is dissatisfied with CA staff service delivery with regard to meeting timelines for assessment of complete application (8.3.4) and for staff recommendations for a Board decision on an application (8.4.2).

Given that the Board of Directors is also the Hearing Board for Section 28 permit application appeals (unless delegated to an Executive Committee), involving the Board of Directors in an administrative review presents a risk that could jeopardize the hearing process set out in the *Conservation Authorities Act Hearing Guidelines* (MNR/CO, October 2005). It is imperative that the impartiality of the Hearing Board (i.e. CA Board or Executive Committee) to review a staff recommendation for refusal of a permit is not compromised by policies 8.3.4 and 8.4.2. Clear CA policies and procedures will be necessary for the Boards with regard to the importance of focusing on administrative aspects with no discussion of technical aspects of an application.

Recommendation:

Clarity should be provided as to the scope of an administrative review through the addition of the following sentence at the end of 8.3.4:

8.3.4

“...This review will be limited to a Complete Application policy review and will not include review of the technical merits of the application to avoid any potential for the “apprehension of bias” later in the permit application process.”

Provincial Technical Guidelines Required

As noted throughout the CALC process, development of Authority approved policies and procedures and guidelines is one half of the equation. It is also necessary for MNR to develop and update provincial technical guidelines for minimum standards (e.g. geotechnical studies, hydrological analysis for interference with wetlands, update to flood access and egress standards, etc) to facilitate timely decision-making.

Legislative Impediments Must be Removed

Regulatory barriers to timely decisions also need to be addressed, for example, efficiencies in the permitting process are impeded because Conservation Authorities are unable to legally delegate responsibility for permit approval to the Conservation Authority’s Executive Committee and/or staff. While the *Conservation Authorities Act* (Section 28 (2)) provides for such delegation, it has not been enabled through the Content Regulation (O.R. 97/04) or the individual regulations administered for Section 28 approvals by CAs. It would be necessary to amend the O.R. 97/04 (and subsequently the individual CA regulations) to allow delegation of permit approvals to the CA’s Executive Committee and/or staff. Such a delegation would be subject to “limitations and requirements that may be set out in the

regulation” [Section 28(2) of *Conservation Authorities Act*]. In the meantime, approval of an application by the Board is dependent on the frequency of Board meetings. Many Boards meet once per month or less often, so depending on the timing of the review – the opportunity of taking the permit to the Board is dependent on the next available meeting date.

Recommendation:

Further to all of the above points, it should be clarified that MNR will audit effectiveness of the policies and procedures and provide support in the form of technical guidance, funding and training in a framework of continuous improvement. A review of effectiveness would enable MNR to establish gaps in policies, procedures and guidelines prepared by MNR to assist with implementation of provincial policies and protection of the provincial interest. The following amendment is suggested:

10.0 ADHERENCE TO POLICIES, Policy 10.2

“MNR reserves the right to audit CAs for adherence to these policies and procedures and to review the effectiveness of the policies and procedures with regard to implementation of provincial policies and protection of the provincial interest and to determine what assistance could improve their effectiveness.”

Clarity around Decision Timelines

The relationship between the timelines and delays caused by the need for the applicant to correct errors or gaps in information submitted needs to be clarified. Without the clarification, the timelines may force a “decision” by the CA staff to recommend refusal due to insufficient technical information. Such an approach will likely create more delays.

Recommendations:

The following **new** policy should be added to accommodate for the above scenario and it should be noted in **the flowchart in Appendix 2c that an “Agreement to Defer Decision” may interrupt the timeline indicated:**

8.4.3

Per 8.3.5, it is recognized that delays may occur due to CA requests for additional information to address errors or gaps in information submitted for review. Thus, an application can be put “on hold” or returned to the applicant pending the receipt of further information. If necessary, this could be confirmed between both parties as an “Agreement to Defer Decision”.

Additionally, the following text clarifies that which is detailed in the schematics in the Appendices:

8.4.2

“After a complete application has been received and acknowledged and if a decision (i.e. recommendation to approve or referred to a Hearing) has not been rendered by the CA within the timeframe (i.e. 30 days for minor applications / 90 days for major applications) the applicant can submit a request for administrative review...”

Note that the decision “referred to a Hearing” is indicated **above** because a 30 or 90 day timeline for a refusal decision cannot be guaranteed while still providing a fair timeframe for the applicant and per the *Conservation Authorities Act Hearing Guidelines* (MNR/CO, October 2005). **This needs to be reflected in the flowchart in Appendix 2c as well.**

Major Concerns – Integrity of Legislative Authority

There are a number of sections in the document that require further consideration by the Ministry of Natural Resources as they affect the integrity of the legislative authority granted under Sections 28 and 21 of the *Conservation Authorities Act*.

PART B – POLICY, 4.0 GENERAL, Policy 4.4

The statement, “Policies developed by CAs are advisory only unless they are incorporated into an Official Plan” is specifically relevant under the Planning Act and is consistent with decisions before the Ontario Municipal Board. For clarity to CA staff and to ensure that this section is not used before the Mining and Lands Commissioner on appeals under the Section 28 regulation, it is critically important for this statement to be clearly linked to **the Planning Act**. The final product from this review will be an MNR policy document and the combination of the original statement with the final sentence in this section (which references our other roles) creates unacceptable ambiguity. CA policies which we have the mandate under the *CA Act* to create are not considered advisory before the Mining and Lands Commissioner (MLC) (see recent MLC decision Russell vs. TRCA File No.CA 003-05) and, in fact, are very important in the MLC consideration of an appeal of a CA Board decision to establish conditions on or to refuse a permit under Section 28 of the *CA Act*.

The following edits are recommended to provide clarity: **“In addition to CAs’ legislative requirements and mandated responsibilities under the CA Act, Section 28 regulations, and Section 3.1 of the PPS, the CAs’ role as watershed based, natural resource management agencies also allows Authorities to review policies, planning documents and applications pursuant to the Planning Act as a commenting agency as outlined in the CO/MNR/MMAH Delegated Responsibilities MOU (Appendix 1). To inform their review of Planning Act planning documents and planning applications, under the Planning Act, CAs may develop ... government. Policies developed by CAs for their responsibilities under the Planning Act are advisory only unless they are incorporated into an Official Plan. When providing comments to municipalities/planning approval authorities, CAs should identify the role and/or legislative authority under which they are doing so (e.g. PPS, 2005, CA Act Section 28 regulations, Fisheries Act, advisory etc.)”**

4.0 GENERAL, Policy 4.8

This section relates to historical planning approval decisions that were made in the absence of current technical information which could now preclude permission under the CA Act regulations. It is recommended that the last sentence “If an issue remains unresolved, the CA should work with the proponent to arrive at a resolution.” be replaced with the following **“In these situations, innovative efforts may be necessary to address the site constraints and accommodate the development or approval should not be granted.”** This would acknowledge that there may be situations where the ‘resolution’ may be a recommendation for denial.

7.0 PLAN REVIEW, Policy 7.9

It is correct that CAs work with their municipal partners on matters of ‘local interest’ with respect to natural heritage however this work is not limited to the existence of a service agreement with their member municipalities. Through their responsibilities as a watershed management agency and as per Section 21 of the *CA Act*, CAs Boards may decide that such an initiative is a watershed program priority. The reference to ~~“Under service agreements with their member municipalities, ...”~~ should be deleted.

General Comments

MNR is encouraged to provide additional language to the policies and procedures that balances a CA's responsibility for timely review and decision making with the applicant's responsibility to have experienced, professional, qualified agents to respond to CA requests in a timely manner.

Specific Comments

Many of the additional edits described in Attachment 1 are in response to comments received from CAs requesting clarification on the "intent" of these sections. As a policies and procedures document it is important that the intended audience can interpret it consistently and edits have been requested accordingly. Attachment 2 contains edits to which MNR had previously confirmed with the CA Liaison Committee and which are not reflected in the current document.

We look forward to continuing to work closely with the Province and our non-governmental partners to develop policies that will provide a clear articulation of the roles and responsibilities of CAs in the development process and which will facilitate a consistent approach to the permitting function undertaken by CAs under the *Conservation Authorities Act*. If you have any questions regarding the above comments please contact myself at (905) 895-0716 ext. 231 or Bonnie Fox at ext.223.

Sincerely,



Don Pearson
General Manager

c.c. All Conservation Authorities General Managers/CAOs

Attachment 1 – Specific Edits for Clarity of Intent

PART A – BACKGROUND

1.0 Description of Activities

Paragraph i:

Last sentence: “Section 28 grants the power to CAs to create regulations...**and to establish fees for the provision of certain service.**”

Paragraph iv:

It’s requested that the following text be added: “CAs may perform a.... matters related to **policy, the assessment or analysis of water quality and quantity**, environmental impacts...”

2.0 LEGISLATION

Another Act that should be referenced is the Green Energy Act – recent regulations make reference to mandate and permit requirements under Section 28 for renewable energy projects that impact regulated areas.

2.1.2

While the listing of the relevant components of Section 21 of the CA Act related to this chapter is quite comprehensive, it is suggested that **21(p) to cause research to be done** be considered for inclusion. This work in conjunction with the provisions of 21(a) informs the development of CA policies

2.1.3

For accuracy the following amendments should be made to the first sentence: “Pursuant to Section 28 ~~Regulations~~ of the *CA Act*, under Ontario Regulation 97/04 “**Content of Conservation Authority Regulations under Subsection 28(1) of the Act: Development, Interference with Wetlands, and Alterations to Shorelines and Watercourses**” (i.e. Generic or Content Regulation), subject to the approval of the Minister, each CA has developed individual regulations

Following the first paragraph, add the following to introduce the excerpt from Section 28:

“Section 28(1) of the *Conservation Authorities Act* states the following:”

The last sentence of the excerpt from Section 28 should be italicized, to be consistent with the rest of the text.

2.1.4

Edits for clarity: “Note: This definition for “development” differs from the definition that is contained in the *PPS, 2005* (see Section 2.2.5);. The ~~relevant~~ **relevant** definition needs to be applied to the appropriate process.

2.2.1

First paragraph, fifth line: For clarity, the line should be revised to read as “...have been delegated to CAs to ensure that **decisions on** development applications ~~decisions by~~ **planning approval bodies** made pursuant to...”.

2.2.2

Appendix 3 does not include ‘the listing’ of provincial plans and dates as referenced in this section and as also referenced in 7.8.

2.3.3 Environmental Assessment Act

It is recommended that the following text be added after the first sentence: “**CAs bring local environmental and watershed knowledge into the review and assessment process.**” And that the following be added at the end of the section: “The purpose of the EA Act is the...in Ontario of the environment. **MOE is the approval authority for the EA Act.**”

2.3.4 Aggregate Resources Act

First sentence: “**Areas licenced for aggregate extraction under the ARA are exempt from CA permitting activities (see CA Act Section 28(11) for details) however, CAs may bring local environmental and watershed knowledge into the review process.** CAs may review ~~proposals~~ **applications** for **licensing** aggregate activities and comment in an advisory capacity to ~~municipalities~~ **the MNR** for making decisions ~~on application approvals~~ **under the ARA. The Authority may also provide advice to the municipality under a planning application associated with a proposed aggregate operation.** The purposes of this Act are to provide...aggregate operation.”

3.0 MEMORANDUM OF UNDERSTANDING

Reference to the PPS 2005 here is not really correct – the MOU was signed in 2001. The MOU needs to eventually be updated but in the meantime, this document and, particularly the first two paragraphs of this section, could simply refer to PPS without including a date.

PART B – POLICY

4.0 GENERAL

4.2

To clarify that the Special Policy Areas designation is not simply administrative, but rather that strict, prescribed criteria must be met satisfactory to two Provincial ministers, it is recommended that the following text be added to the end of the first sentence: “...under Section 3.1.3 of the Provincial Policy Statement, 2005, **where such designations are feasible.**”

4.6

Further clarification is needed in this section to explain what is meant by ‘future environmental analysis’ in service agreements.

4.8

First sentence: “The “principle of development” **may be** ~~is~~ established through...”

First paragraph, second last sentence: “*Conservation ~~Authority~~ Authorities Act* regulations.”

PART B – POLICY

For clarity and consistency, it is felt that this title should read “Policy **and Procedures**” per the title of the document.

7.0 PLAN REVIEW

7.1

It is unclear as to the intent of the first sentence of this policy. In particular, the statement that ‘it is a CA’s responsibility to weigh a property owner’s interests against the public interest as it relates to flooding, erosion, dynamic beaches, pollution and the conservation of land’. Legally, CAs implement technical standards to meet requirements under Section 28 permits as they relate to the control of flooding, erosion, dynamic beaches, pollution and the conservation of land following guidelines developed by the Ministry of Natural Resources. Although each individual CA may vary in detailed requirements such as permissions for additions and setback requirements based on watershed specific characteristics, it is misleading to suggest these are based on a property owner’s interests versus the general public. For clarity, the **first sentence**, “~~While it is...implications.~~” **should be deleted**. The second sentence should be clarified as follows: “CAs ~~should~~ **may** develop watershed plans...”

7.6 / 7.7

CAs have entered into plan review and technical advisory MOUs with Regional municipal partners and lower-tier municipalities. Other municipalities prefer to work informally with CAs for the provision of similar planning and technical advisory services as part of the CA approved program service, consistent with Section 2 of the CO/MNR/MMAH MOU. It is recommended that these sections contain the wording to the effect “**it is best practice for CAs to establish formal agreements; in absence of a formal service agreement, CAs will operate in accordance with the provisions of this chapter**’, in order to allow some flexibility in the arrangements between CAs and their municipal partners. In some instances municipal partners have opted for a Development Review Committee process in lieu of a formal MOU.

Policy 7.8 should indicate:As part of the CA commenting function, some CAs identify natural heritage features **and/or systems** through the initial plan review process.

8.0 SECTION 28 PERMITTING

8.1 Background Information

8.1, first paragraph: Consistent with Section 2.1.3 the following edit is recommended for accuracy: “Pursuant to Section 28 ~~Regulations~~ of the *CA Act*, under Ontario Regulation 97/04 “**Content of Conservation Authority Regulations under Subsection 28(1) of the Act: Development, Interference with Wetlands, and Alterations to Shorelines and Watercourses**” (i.e. Generic **or Content** Regulation), each CA has developed individual regulations that ~~identifies~~ **identify** and ~~regulates~~ **regulate**...and hazardous lands²...”

8.2.4

“In order to determine complete application requirements, applicants should ~~provide a minimum amount of information~~ **submit in writing adequate information for pre-consultation**, such as property information...”

8.2.5

First sentence: “**Where a pre-consultation meeting has been held for a major application**, CAs should identify/confirm complete...”

8.3.5

The last sentence is unclear as to the intent and could be interpreted to mean that it is the CA's responsibility to a) assist in producing or paying for the information (e.g. flood plain mapping for the subject property) and/or b) monitor the timelines for the provision of this information. The last sentence should be deleted. "During the review of a 'complete application', a CA may request additional information if the CA deems a permit application does not contain sufficient technical analysis. ~~The CA should make every effort to work with the applicant in obtaining the required information in a timely manner.~~"

8.7 Permit Approvals

The content and title of this section refer to permit "approvals" only; however, these same criteria also apply to applications being reviewed but then permission is denied. While in approving or refusing permission, CAs must follow the requirements of the CA Act and the hearing procedure protocol, during the review stage the application should still be considered in accordance with Section 8.7.2 of this chapter even in those cases where "approval" eventually isn't granted. It is recommended that for clarity, the section be renamed "**CA Review Procedures**" and that reference to "approval procedures" be edited to indicate "**review procedures**".

Appendix 2(a), 2(b) and 2(c) – Flow Charts:

It could be interpreted that the "fulfillment of other delegated responsibilities" is a reason to delay the decision on the CA permit. It is recommended that this be modified to "**undertake** other..." and that the following note (per section 2.3 in the document) be added to all the flowcharts: **NOTE: A CA Section 28 permission, if granted for work, does not exempt the applicant from complying with any or all other approvals, laws, statutes, ordinances, directives, regulations, etc. that may affect the property or the use of same.**

Appendix 2(a) and (b)

Important to specify that CA comments to the municipality may include recommendation for denial, where it contravenes the PPS and/or where Section 28 permission under the CA Act can not be supported.

The CA review box should be structured to include the four roles of CAs as per the CO/MNR/MMAH MOU, in addition to the delegated responsibility for Natural Hazards. As described in Section 1.0 of the document, and consistent with CO's MOU with the Province, CA's have 4 basic roles as it relates to plan review/plan input programs affecting Planning Act matters – CA's as watershed based resource management agency; planning advisory services to municipalities; CAs as landowners; and CA's regulatory responsibilities (CA Act regulations and other delegated or assigned regulatory/approval responsibilities). The information provided in the Box titled 'CA Review' (large box highlighted in green) does not appear to be consistent with those responsibilities previously stated. Rather than trying to summarize in five words the meaning of the roles of CAs which leaves it open to misinterpretation, it is recommended that the chart indicate the review roles with a cross reference to the section in the chapter that explains the role [similar to approach taken to the timeline in Appendix 2(c)].

Appendix 2(a)

Currently, it appears that the OMB only approves applications; for clarity, needs to include indication that **OMB can support refusal of an application.**

Appendix 2(b):

Note: “** Under legislation, CA permits cannot be issued or re-issued for extensions for periods longer than 24 months. If a ~~developer~~ **an applicant** has not ~~acted on the application~~ **completed the permitted works** within 24 months of the issuance of a permit, they must reapply and delays in approval may result.”

The following edit is recommended: **Where planning decisions preceded current technical information, innovative efforts may be necessary to address the site constraints and accommodate the development or permission should not be granted.**

Currently, it appears that the MLC only approves applications; for clarity, needs to include indication that **MLC can support refusal of a permit application.**

Appendix 2(c):

In box that starts with “Circulation of application to various CA technical staff...” please change “technical” to “technically”.

“Note: Under the legislation, CA permits cannot be issued for periods longer than 24 months. If a ~~developer~~ **an applicant** has not completed the works covered by the application within 24 months of the issuance of a permit, he/she must reapply **for a new permit** and delays in approval may result. ~~Typically~~ The policies in place at the time of ~~the new reapplication~~ will apply **as appropriate.**”

The following edit is recommended in the timeline: “**CAs to render decision or referral to a Hearing within...**”.

The following note is recommended to the timeline per our proposed new Section 8.4.3: **NOTE: An “Agreement to Defer Decision” may interrupt the timeline indicated.**

Appendix 3: Information Requirements – Section 28 Regulation Application

For both the examples provided, it needs to be clearly stated that complete applications include: **Submission of the prescribed fee set by the CA for review of an application**

Attachment 2 – Previously Agreed Upon Edits with CA Liaison Committee (Oct 14/09)

PART A – BACKGROUND

1.0 DESCRIPTION OF ACTIVITIES

Subsection v) is being interpreted to mean that we have regulatory/approval responsibilities under the *Fisheries Act* which is incorrect; for clarity the following is suggested: “Individual CAs may...regulatory/approval responsibilities **and/or reviews (e.g. septic system approvals under the Ontario Building Code; reviews under *Fisheries Act* Section 35).**”

8.0 SECTION 28 PERMITTING

8.1 Background Information

2nd paragraph: “An application for a permit is made, ~~usually~~ by the landowner or their authorized agent and ~~the regulations set out certain~~ information required to support an application ~~as is outlined~~ in Appendix 3.”

Appendix 3: Information Requirements – Section 28 Regulation Application

For accuracy, the first sentence should be amended as follows: “~~As set out in the Section 28 (Generic) Regulation,~~ Specific information is required from the applicant in support of a **permit** application.”

8.2 Preconsultation on Permit Applications, Policy 8.2.4

This Section should be amended to include additional information that allows a determination of whether or not technical studies will be required: “In order to determine complete application requirements, applicants should provide ... township, etc.), **a concept plan of the proposed development which shows the property limit,** and a description”

8.5 Hearings and Appeals

The last paragraph in this Section is incomplete because there is no reference to permissions for alteration to watercourses or interference with wetlands. To simplify this section, it is suggested that the incomplete reference be deleted as follows:

“The OMLC has been assigned the authority...regarding a refusal to grant permission to a property owner ~~for the development of lands within floodplains, hazardous lands, dynamic beaches and wetlands~~ or with respect to conditions imposed on a permission granted by the CA.”

9.0 SERVICE DELIVERY ADMINISTRATION

It should be clear that any fees collected are permitted under the *Conservation Authorities Act*, that is, fees for planning services are collected under the *CA Act*, not the *Planning Act*. As such, Section 9.2.1 should be amended to indicate:

9.2.1 Fees for planning services should be developed in conjunction with the appropriate planning authorities, and are set to recover but not exceed the costs associated with administering and delivering the services on a program basis.