Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

October 17, 2016 **BY EMAIL & REGULAR MAIL**

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Program Support Coordinator
Ministry of the Environment and Climate Change
Operations Division
Environmental Approvals Access and Service Integration Branch
135 St. Clair Avenue West, Floor 1
Toronto, Ontario
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Dear Mr. Jenish:

RE: Consideration of Climate Change in Environmental Assessment in Ontario (August 2016 draft) - Registry Notice #012-5806

These are the submissions of the Canadian Environmental Law Association ("CELA") to the Ministry of the Environment and Climate Change ("MOECC") in relation to the proposed Guide entitled *Consideration of Climate Change in Environmental Assessment in Ontario* ("Guide"). These comments are being provided to you in accordance with the above-noted Registry posting.

For the following reasons, CELA concludes that the Guide falls considerably short of its intended purpose of ensuring that climate change considerations are properly incorporated and thoroughly addressed under Ontario's *Environmental Assessment Act* ("EA Act").

In our view, the fundamental inadequacy of the Guide arises primarily from three factors: (a) the Guide's unenforceable status; (b) the Guide's limited application and content; and (c) the numerous shortcomings of the current EA Act itself.

Accordingly, CELA recommends that the provincial government must take further and better steps to ensure that the climate change implications of undertakings (and classes of undertakings) are identified and assessed, at an appropriate level of detail, under the EA Act. As described below, this will require an integrated package of statutory, regulatory, policy and administrative reforms, rather than just the mere publication of another non-binding guidance document.

In summary, CELA submits that Ontario should not squander this important opportunity to strengthen and improve EA requirements in relation to climate change considerations. Instead, the province must commit to fully utilizing the EA Act as a key legal mechanism for implementing the province's Climate Change Strategy and facilitating the timely transition to a low carbon economy.

PART I – BACKGROUND AND OVERVIEW

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues, particularly in relation to environmental assessment ("EA") matters.

CELA agrees with the Ontario government that climate change is a matter of concern for all Ontarians, and that effective action is a public interest priority across the province:

> Climate change is a problem that is critically important and urgent. It needs to be fought around the globe, and it needs to be fought here in Ontario. Our actions on climate change are helping to secure a healthier environment, a more competitive economy, and a better future for our children and grandchildren.[1]

For these reasons, CELA has been supportive of the Ontario's government's forward-looking climate change initiatives, such as the new cap-and-trade regime,[2] the closure of coal-fired power plants,[3] and the passage of the *Green Energy and Green Economy Act*[4] to encourage renewable energy projects.

In addition to these important legislative developments, CELA and other commentators have long regarded EA as another potent legal mechanism for the purposes of anticipating and preventing adverse climate change impacts.[5]

For example, when properly interpreted and applied, robust EA requirements can be imposed upon a wide range of environmentally significant proposals which release greenhouse gas ("GHG") emissions and/or affect carbon storage by site alteration or vegetation removal. In this regard, CELA notes that Ontario's EA Act has been traditionally applied to waste disposal sites, provincial highways, electricity projects, and other undertakings that have climate change implications.

However, the overall state of Ontario's current EA regime has been sharply criticized by the Environmental Commissioner of Ontario ("ECO") in various annual reports filed with the Ontario Legislature over the years. For example, the ECO has identified various substantive and

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[1] Ontario's Climate Change Strategy (updated August 25, 2016).
[2] See, for example, CELA Submissions on Bill 172 (*Climate Change Mitigation and Low-Carbon Economy Act, 2016*), March 22, 2016. However, CELA remains concerned that the Bill 172 regime does not adequately address the needs of low-income and vulnerable communities in relation to climate change mitigation and adaptation.
[3] See the 2015 amendment to the *Environmental Protection Act*, which added Part VI.1 to prohibit the use of coal at electricity generating facilities in Ontario.
[4] S.O. 2009, c.12, Sched. A.
[5] In 2015, for example, the annual conference of the Ontario Association of Impact Assessors (OAIA) focused on how EA can be used as a critical tool for tackling climate change. An OAIA conference in 2008 addressed the same topic: see CELA, "Ontario's Climate Change Plan and Environmental Assessment: Legal Challenges and Opportunities" (November 19, 2008). See also Albert Koehl, "EA and Climate Change Mitigation" (2010), 21 JELP 181.

procedural problems within the Ontario's EA regime, and the ECO has called for a comprehensive public review of the EA Act and its regulations.[6]

To date, however, the Ontario government has not commenced, nor even committed to, a formal public review of the province's EA program. In the result, the EA Act, which was last amended over 20 years ago, remains highly problematic and generally ineffective, even without trying to superimpose a climate change lens on undertakings subject to the Act.

Viewed in this larger environmental law and policy context, CELA concludes that the proposed Guide is not likely to make any material difference in EA practice in relation to climate change considerations. Moreover, the Guide *per se* is not likely to make any tangible progress in the achievement of provincial climate change objectives.

The specific basis for CELA's conclusions – and our accompanying recommendations for reform – are outlined below in Part II of these submissions.

PART II – CELA'S CONCERNS ABOUT THE PROPOSED GUIDE

(a) Unenforceable Status of the Guide

CELA's understanding is that the Guide is intended to provide general guidance on how proponents might elect to address climate change considerations in individual EAs, approved Class EAs, and environmental screening processes under sectoral exempting regulations[7] made under the EA Act. In other words, the Guide does not purport to make any substantive legal changes to the EA Act or the regulations thereunder.

The Guide itself confirms that it only contains certain "ideas" at a "generic" level to suggest how proponents might satisfy the MOECC's "expectations" on incorporating climate change considerations within EA planning processes.[8] The educational nature of the Guide is reinforced by the pervasive use of optional or non-peremptory words to describe the proponent's obligations, such as the proponent "should" (not "shall") consider the Guide,[9] or the proponent "could" (not "shall") consider various questions related to climate change.[10]

On this latter point, CELA notes that the Guide expressly refers to subsection 31(1) of the EA Act, which empowers the Minister to publish or disseminate "information" about EA in Ontario.[11]

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[6] ECO, "Environmental Assessment: A Vision Lost", *ECO Annual Report, 2007-08* (Toronto, ON: Environmental Commissioner of Ontario), pp. 28-48; ECO, "Restoring a Vision Lost: Reforming Ontario's Environmental Assessment Act", *ECO Annual Report, 2013-14* (Toronto, ON: Environmental Commissioner of Ontario), pp. 132-139.

[7] O.Reg.116/01 (Electricity Projects); O.Reg. 101/07 (Waste Management Projects); O.Reg. 231/08 (Transit Projects and Metrolinx Undertakings).

[8] Guide, pp. 2 and 6.

[9] Guide, p. 4.

[10] Guide, p. 10.

[11] Guide, preface.

The Guide further acknowledges that it is intended to serve as a "companion" document to the other non-binding Codes of Practice which have been promulgated by the MOECC under the EA Act. Although well-intentioned, these Codes of Practice – and the Guide thereunder – are not legally enforceable in and of themselves. Moreover, at the present time, there is no explicit reference to climate change mitigation or adaptation anywhere in the EA Act's statement of purpose[12] or the list of prescribed EA content requirements.[13]

In our view, the Guide's unenforceable nature and vague wording are significant obstacles to requiring any serious or credible examination of climate change considerations within EA planning processes in Ontario.

If, for example, a proponent balks at incorporating a meaningful climate change assessment in the Terms of Reference for an individual EA, or if a proponent ultimately carries out a speculative or perfunctory analysis of climate change considerations in the EA documentation, the legal consequences remain uncertain in the absence of a mandatory statutory provision that expressly requires climate change consideration. Thus, it is unclear whether the Minister would be politically willing or legally able to refuse to grant approval to proceed under the EA Act on the grounds that the proponent, at least in the opinion of MOECC staff, has not addressed climate change in accordance with the Guide's non-binding suggestions.

For the purposes of greater certainty and clarity, CELA submits that the EA Act should be amended to include new purposes and provisions which require an in-depth assessment of climate change considerations. By way of comparison, we note that the EA Act now expressly mandates public consultation,[14] and there is a specific Code of Practice to advise proponents on how to meet this legal requirement. Similarly, the EA Act now contains an obligation upon proponents to prepare Terms of Reference,[15] and again there is a specific Code of Practice that addresses this topic.

Accordingly, CELA sees no compelling legal reason why the EA Act cannot be amended to include an express obligation to consider climate change mitigation and adaptation. If the EA Act is amended to include climate change provisions, then an expanded and more detailed version of the Guide (or perhaps a new Code of Practice) can be developed (with public input) to provide more concrete direction on how to meet the climate change requirements imposed under the EA Act.

CELA RECOMMENDATION #1: The EA Act should be amended to include a positive duty upon proponents to fully identify and assess all relevant climate change considerations related to proposed undertakings.

We hasten to add that any new legal obligation imposed upon proponents to assess climate change considerations should not be subject to the discretionary Ministerial power to approve Terms of Reference which "scope" or exclude subsection 6.1(2) environmental factors from the EA

[12] EA Act, section 2.
[13] EA Act, subsections 6.1(2) and 14(2)
[14] EA Act, subsection 5.1.
[15] EA Act, section 6.

process.[16] In CELA's view, it would be counterproductive to amend the EA Act so as to expressly require the consideration of climate change issues, but then to allow the Minister, on a case-by-case basis, to approve "focused" Terms of Reference which narrow, vary or dispense with this important consideration.

CELA RECOMMENDATION #2: The EA Act should be amended to prohibit the Minister from approving Terms of Reference that narrow or exclude the legal obligation upon proponents to address climate change considerations within the EA process.

(b) Application and Content of the Guide

CELA has a number of concerns about the limited application and content of the Guide.

For example, we note that the Guide is primarily addressed to proponents preparing EA documentation.[17] CELA agrees that from a public interest perspective, it is both necessary and appropriate to require proponents to consider climate change implications of proposed undertakings.

However, EA preparation is just one of several key steps, milestones or decision points under the EA Act. Accordingly, CELA submits that the consideration of climate change should occur not just at the initial Terms of Reference stage or at the EA preparation stage. To the contrary, the EA Act should be amended to specify that climate change considerations shall be taken into account during all forms of governmental decision-making under the EA Act, including:

- whether a proposed undertaking should be approved, rejected or referred to the Environmental Review Tribunal ("ERT") upon completion of the individual EA process;[18]

- whether a Class EA project should be "elevated" or "bumped up" by a Part II order to require an individual EA;[19]

- whether a private sector proposal should be designated as an undertaking to which the EA Act applies;[20]

- whether a declaration order or regulation should be made to exempt an undertaking (or classes of undertakings) from the EA Act;[21] and

- whether a previously issued approval should be reconsidered by the Minister or ERT.[22]

[16] EA Act, subsections 6(3) and 6.1(3).
[17] Guide, Table 1.
[18] EA Act, sections 9, 9.1, 9.2, and 9.3.
[19] EA Act, section 16.
[20] EA Act, subsection 3(b).
[21] EA Act, section 3.2 and subsection 39(f).
[22] EA Act, subsection 11.4.

CELA RECOMMENDATION #3: The EA Act should be amended to impose a positive duty upon the Ontario Cabinet, the Minister and his/her delegates to consider climate change whenever exercising statutory powers of decision or making regulations under the Act.

Aside from its narrow application to proponent-driven EAs, there are other problematic aspects of the Guide which should be reconsidered by the MOECC.

For example, the Guide indicates that an "outcome" of climate change consideration is an EA that has considered "alternative methods" of reducing GHG emissions or negative impacts upon carbon sinks.[23] CELA is unclear why the Guide has chosen to restrict itself to alternative means of carrying out the proposed undertaking, particularly when the EA Act also requires upfront consideration of the "purpose" of, and "rationale" (e.g. "need") for, the undertaking, as well as "alternatives to" the undertaking. Indeed, it does not appear that the threshold issues of "need" and "alternatives to" are discussed or even mentioned in the Guide.

In our view, EA is not simply an exercise in impact mitigation. Instead, EA is intended, *inter alia*, to carefully consider the alleged "need" for, and the reasonable "alternatives to", the undertaking so that an informed decision can be made on whether approval should be granted to the proponent in light of the societal "betterment" purpose of the EA Act.[24] If, for example, a proponent cannot prove that there is a demonstrable public need for a preferred undertaking that poses climate change risks, then that undertaking should not receive approval to proceed under the EA Act. In short, if an undertaking is not needed, then it is not in the public interest to incur the risk.

CELA RECOMMENDATION #4: The Guide should be amended to direct proponents to fully canvass the issues of "need" and "alternatives to" (not just "alternative methods") when assessing climate change considerations in EA processes.

CELA further notes that the Guide seems somewhat inconsistent with other Codes of Practice, which generally acknowledge the importance of "need" and "alternatives to" analysis (including the null or "do nothing" alternative) within EA processes in Ontario.[25] However, we also acknowledge that these key planning considerations are often excluded by "focused" or "scoped" Terms of Reference approved under the EA Act, particularly in relation to waste disposal sites. For undertakings involving climate change implications, proponents must be required to fully address "need" and "alternatives to" within provincial EA processes.

CELA RECOMMENDATION #5: The MOECC should discontinue its practice of approving Terms of Reference which exclude "need" and "alternatives to" from being considered in EAs, particularly in relation to undertakings which may release GHGs or affect carbon storage.

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[23] Guide, pp. 3, 10-11.
[24] Alan Levy, "A Review of Environmental Assessment in Ontario" (2001), 11 JELP 173, at pp. 181-82.
[25] See, for example, MOECC, *Code of Practice: Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario* (January 2014), pp. 12, 27-39; MOECC, *Code of Practice: Preparing and Reviewing Environmental Assessments in Ontario* (January 2014), pp. 9, 23-24.

While the Guide offers some generic advice, CELA finds that the Guide fails to provide any detailed particulars or illustrative examples of the type or level of "consideration" of climate change that will suffice under the EA Act. For example, is it adequate for proponents to merely turn their minds to climate change issues, or will empirical evidence, credible modelling or rigorous scientific analysis be required?

While it may be difficult for the Guide to prescribe the precise methodology to be used in all cases, CELA submits that the Guide, at a minimum, should strongly stipulate that the proponent's climate change analysis and related EA decision-making should be robust, replicable, traceable and evidence-based. Otherwise, CELA anticipates that some proponents' examination of climate change implications will amount to little more than self-serving self-assessments marred by speculative claims, unsubstantiated conclusions and subjective opinions dressed up as "facts." This is true regardless of whether the proponent opts to conduct a qualitative or quantitative analysis, as suggested by the Guide.[26]

CELA RECOMMENDATION #6: The Guide should clarify that the proponent's information-gathering and EA decision-making about climate change considerations must be robust, replicable, traceable and evidence-based.

In CELA's view, one of the most significant omissions in the Guide's text is its lack of any reference to the critically important need for EAs to identify and evaluate the "upstream" climate change implications of proposed undertakings. CELA agrees with the Guide that proponents should assess the climate change impacts that may be directly caused by the project itself, such releasing GHG's or reducing carbon storage. However, it is beyond dispute that the climate change implications of undertakings are not necessarily limited to the footprint of the facility or the on-site activities being proposed by the proponent.

For example, if a proponent wants to establish a new industrial mill to process or refine natural resources extracted elsewhere, then the resulting EA should consider not only the direct GHG emissions of the mill construction, operation and decommissioning, but should also take into account the upstream GHG emissions of the resource extraction or transportation activities that are undertaken in order to get the raw materials to the mill.

Similarly, in the landfill context, buried organic wastes will generate methane, the on-site diesel machinery and vehicular traffic will emit carbon dioxide, and the site design will usually involve the loss or displacement of trees or other vegetative cover. According to the Guide, these direct impacts should be considered by the proponent in the EA process. At the same time, it is unclear whether the landfill proponent would be obliged to assess other "upstream" activities which facilitate, or are related to, the proposed undertaking, and which may also release GHGs into the atmosphere (e.g. the generation, collection, storage or long-range transportation of waste to the site).

At the federal level, the Government of Canada has recently addressed the issue of upstream impacts by establishing "interim" climate change measures for certain projects (e.g. mines,

[26] Guide, pp.12-14.

pipelines, oilsands development, etc.) being assessed under the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012").[27] In particular, Principle 5 of this interim measure requires an assessment of the direct and upstream GHG emissions "linked" to the project. In CELA's view, similar direction is required both in the Guide as well as the EA Act in order to ensure that the full range of climate change considerations – not just a sub-set thereof – are fully assessed in relation to undertakings subject to Ontario's provincial EA processes.

CELA RECOMMENDATION #7: Both the EA Act and the Guide should be amended to stipulate that proponents must assess the direct and upstream climate change impacts of all physical works or activities that facilitate, or are linked to, proposed undertakings.

In addition, CELA remains highly concerned about the sparse treatment of cumulative effects within the Guide and, more generally, within the EA program as a whole.

For example, the Guide suggests that climate change considerations can be simply tacked on to typical EA chapters dealing with baseline conditions, environmental effects, or cumulative effects "where applicable." However, the Guide fails to define cumulative effects or describe when the obligation to conduct cumulative effects assessment is "applicable" under the EA Act. In addition, the Guide does not provide sufficient direction on how to assess the additive or synergistic climate-related impacts of proposed undertakings in conjunction with other past, present or reasonably foreseeable activities or projects occurring in the same geographic region or timeframe.

The inadequate consideration of cumulative effects under the EA Act has been a long-standing problem identified by various commentators[28] over the years, and cannot be rectified by a few brief references in the Guide. More fundamentally, the MOECC has previously opined that it has no jurisdiction to compel proponents to consider cumulative effects in an individual EA or in the environmental screening process under the Electricity Projects Regulation.[29] Presumably, this opinion is based on the fact that unlike federal EA legislation,[30] Ontario's EA Act does not expressly mention or include the term "cumulative effects."

In any event, CELA submits that the easiest way to address this jurisdictional gray area is to amend the EA Act in order to impose a clear requirement upon proponents to address cumulative effects, particularly from a climate change perspective. Once this amendment is in place, then the MOECC can provide more detailed direction in the Guide (or a new Code of Practice) to explain how this requirement can be satisfied in provincial EA processes.

CELA RECOMMENDATION #8: Both the EA Act and the Guide should be amended to stipulate that proponents must assess cumulative climate change impacts that may be caused by the undertaking in conjunction with other past, present or reasonably foreseeable activities or projects occurring in the same geographic region or timeframe.

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[27] News Release: Natural Resources Canada, "Government of Canada Moves to Restore Trust in Environmental Assessment" (January 27, 2016).
[28] See, for example, Richard Lindgren and Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs. Reality" (2010), 21 JELP 279, at pp. 297-98.
[29] *Ibid*.
[30] CEAA 2012, subsection 19(1)(a).

When considering climate change, the Guide correctly suggests that it would be advisable for proponents to engage indigenous persons and communities in the EA process in order to obtain traditional ecological knowledge and to develop appropriate mitigation and adaptation measures.[31] However, the Guide fails to specify how this can be done, particularly in light of the financial and technical barriers that often confront indigenous communities if they choose to participate in an EA process. Other local residents, stakeholders and members of the public often encounter similar financial and technical obstacles when attempting to participate in provincial EA processes.

While "interested persons" have the right to be consulted under the EA Act,[32] it appears to CELA that this right is hollow if such persons have no financial capacity to retain technical and scientific expertise in order to review and respond to voluminous, jargon-laden EA documents, including those related to climate change. After the pioneering *Intervenor Funding Project Act* was allowed to expire in 1996, the provincial government has failed or refused to enact replacement legislation (or to make corresponding amendments to the EA Act) in order to ensure that proponent-paid funding assistance is made available to persons interested in, or potentially affected by, proposed undertakings.

In CELA's view, provincial action is urgently required to address this situation, particularly in light of the importance, value and utility of public and indigenous input into EA planning and decision-making. If, as a matter of law, interested persons are entitled to engage meaningfully in provincial EA processes, then it is imperative for Ontario to develop a new statute-based participant funding program to ensure that this actually occurs.

CELA RECOMMENDATION #9: Both the EA Act and the Guide should be amended to include more prescriptive requirements aimed at ensuring meaningful participation by the public and indigenous communities in provincial EA processes, including the development of an appropriate participant funding program under the EA Act.

While interested persons can (and often do) request that EA applications be referred, in whole or in part, to the ERT for a public hearing and decision, the unfortunate reality is that virtually no hearing requests have been granted in Ontario since the late 1990s. This practice has continued despite the mandatory language of section 9.3 of the EA Act, which provides that the Minister "shall" refer EAs to the ERT upon request, unless certain conditions apply.[33]

As noted in the 2005 report prepared by the Environment Minister's EA Advisory Panel (of which CELA was a member), public hearings "are important mechanisms for gathering information, testing evidence, weighing competing interests and making informed decisions about particularly significant or controversial undertakings."[34] In CELA's view, the intense public scrutiny provided by a hearing before the expert, quasi-judicial and independent ERT is tailor-made for critically

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[31] Guide, pp. 10-11.
[32] EA Act, section 5.1.
[33] The Minister has broadly worded discretion to refuse to refer an EA application to the ERT if the hearing request is deemed to be frivolous or vexatious, if the hearing is "unnecessary", or if the hearing may cause "undue delay" in determining the application: EA Act, subsection 9.3(2).
[34] Minister's EA Advisory Panel, *Improving Environmental Assessment in Ontario: A Framework for Reform* (2005), Vol. I, p. 81.

evaluating the soundness and credibility of proponents' claims about climate change considerations.

CELA RECOMMENDATION #10: The Minister should refer EA applications to the ERT for public hearing and decision whenever there is public controversy, uncertainty and/or unresolved concerns about the climate change impacts of proposed undertakings.

If the Minister starts referring EA applications to the ERT, then CELA recommends the issuance of "policy guidelines" under section 27.1 of the EA Act to provide binding directions to the ERT on the matters addressed in such guidelines. While the authority to issue policy guidelines has existed in the EA Act for over two decades, it appears that no policy guidelines have ever been released, presumably because no EA applications are being referred to the ERT.

However, as compared to an unenforceable Guide, it appears to CELA that a section 27.1 policy guideline offers a better opportunity for the Minister to provide clear and concise direction on how the ERT should review information and make decisions about the climate change impacts of proposed undertakings. In particular, section 27.1 states that the ERT "shall" consider policy statements issued by the Minister. Accordingly, CELA submits that a climate change policy guideline should be developed by the Minister with timely opportunities for public input.

CELA RECOMMENDATION #11: The Minister should develop (with public input) policy guidelines under section 27.1 of the EA Act to provide detailed direction to the ERT on climate change mitigation and adaptation.

(c) Need for an Integrated Package of EA Reforms

As described above, there is a widespread consensus among many EA practitioners, academics, stakeholders and the public at large that the current EA regime in Ontario is deficient and in dire need of sweeping reforms.[35] In these circumstances, CELA submits that the mere publication of an unenforceable Guide will not remedy the fundamental problems that continue to plague the province's EA processes.

Accordingly, the Ontario government should commit to an immediate public review of the EA Act in order to make the legislation more effective, efficient and equitable, particularly in the climate change context. The overall objective of the EA Act review should be to identify and implement an integrated package of statutory, regulatory, policy and administrative reforms that are necessary to meet the climate change realities and challenges facing Ontarians in the 21st century.

While it is beyond the scope of these submissions to identify all of the EA reforms that are necessary, CELA submits that the starting point should be a firm provincial commitment to review all aspects of Ontario's EA program, and to pursue all necessary revisions that are identified over the course of the review. On this point, we note that the federal government has recently established an Expert Panel to conduct public and indigenous consultation, and to review and

[35] See, for example, the two-volume 2005 Report of the Minister's EA Advisory Panel. Very few, if any, of the Panel's 41 detailed recommendations have been fully implemented to date by the provincial government.

report on necessary changes to federal EA processes. CELA strongly recommends that Ontario should follow the federal lead, and should immediately begin a comprehensive public review of provincial EA processes.

CELA RECOMMENDATION #12: The Ontario government should immediately commence a comprehensive public review of provincial EA processes currently established under the EA Act and the regulations.

Some of CELA's suggested statutory reforms have been outlined in the foregoing discussion, but there are other EA Act amendments that, if implemented, can assist in ensuring that climate change is properly considered within provincial EA processes.

In recent years, for example, the application of the EA Act has been largely confined to physical works or site-specific projects, rather than higher-order land use plans, long-term energy plans or resource management programs.[36] In this regard, we note that the definition of "undertaking" under the EA Act includes not only "an enterprise or activity" but also "proposals, plans or programs" in respect of enterprises or activities.

However, the Ontario government has systematically exempted the Integrated Power System Plan, the Long-Term Energy Plan, and several provincial land use plans from EA Act coverage, despite the fact that all of these plans and programs have considerable potential to affect (and be affected by) climate change. In CELA's view, if the Ontario government is serious about optimizing opportunities for climate change mitigation and adaptation, then strategic-level EA of provincial plans and programs should be undertaken forthwith.

Since strategic EA has not routinely occurred under the EA Act to date, it appears to CELA that further statutory amendments are required. On this point, we note that the federal Commissioner of the Environment and Sustainable Development recently reported[37] that leaving strategic EA to a Cabinet directive (rather than entrenching mandatory obligations into law) has meant that few federal ministries or agencies have fully considered the environmental implications of governmental plans, programs or policies. CELA reasonably anticipates that a similarly disappointing track record will occur at the provincial level unless the EA Act is amended to establish legal obligations to conduct strategic EAs in Ontario.

CELA RECOMMENDATION #13: The EA Act should be amended to impose a positive duty upon provincial ministries and agencies to assess the climate change implications of governmental "proposals, plans or programs" which may release GHGs or affect carbon storage.

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[36] However, the Class EA for Timber Management on Crown Lands has now been transformed into a declaration order that conditionally exempts this program under the EA Act, even though timber management activities (e.g. access roads, clearcutting, renewal, and maintenance) typically involve GHG emissions from heavy equipment and create large-scale disturbances of forested landscapes which store vast quantities of carbon. While the Guide (pp. 32-34) provides "case studies" purporting to explain how the Ministry of Natural Resources and Forestry can "account for" climate change in certain Class EAs, timber management is conspicuously absent from this explanation.

[37] Commissioner of the Environment and Sustainable Development, *2016 Fall Report 3: Departmental Progress in Implementing Sustainable Development Strategies*, paragraphs 3.13 to 3.22.

PART III – CONCLUSION AND SUMMARY OF RECOMMENDATIONS

In closing, CELA commends the Ontario government for its apparent interest in using the EA Act as a mechanism for addressing climate change mitigation and adaptation.

However, for the reasons outlined above, CELA concludes that the publication of an unenforceable Guide will not ensure that climate change considerations are adequately addressed within provincial EA processes. Accordingly, CELA calls upon the provincial government to expeditiously pursue a comprehensive EA reform agenda that will better achieve Ontario's climate change objectives.

CELA's specific recommendations may be summarized as follows:

CELA RECOMMENDATION #1: The EA Act should be amended to include a positive duty upon proponents to fully identify and assess all relevant climate change considerations related to proposed undertakings.

CELA RECOMMENDATION #2: The EA Act should be amended to prohibit the Minister from approving Terms of Reference that narrow or exclude the legal obligation upon proponents to address climate change considerations within the EA process.

CELA RECOMMENDATION #3: The EA Act should be amended to impose a positive duty upon the Ontario Cabinet, the Minister and his/her delegates to consider climate change whenever exercising statutory powers of decision or making regulations under the Act.

CELA RECOMMENDATION #4: The Guide should be amended to direct proponents to fully canvass the issues of "need" and "alternatives to" (not just "alternative methods") when assessing climate change considerations in EA processes.

CELA RECOMMENDATION #5: The MOECC should discontinue its practice of approving Terms of Reference which exclude "need" and "alternatives to" from being considered in EAs, particularly in relation to undertakings which may release GHGs or affect carbon storage.

CELA RECOMMENDATION #6: The Guide should clarify that the proponent's information-gathering and EA decision-making about climate change considerations must be robust, replicable, traceable and evidence-based.

CELA RECOMMENDATION #7: Both the EA Act and the Guide should be amended to stipulate that proponents must assess the direct and upstream climate change impacts of all physical works or activities that facilitate, or are linked to, proposed undertakings.

CELA RECOMMENDATION #8: Both the EA Act and the Guide should be amended to stipulate that proponents must assess cumulative climate change impacts that may be caused by the undertaking in conjunction with other past, present or reasonably foreseeable activities or projects occurring in the same geographic region or timeframe.

CELA RECOMMENDATION #9: Both the EA Act and the Guide should be amended to include more prescriptive requirements aimed at ensuring meaningful participation by the public and indigenous communities in provincial EA processes, including the development of an appropriate participant funding program under the EA Act.

CELA RECOMMENDATION #10: The Minister should refer EA applications to the ERT for public hearing and decision whenever there is public controversy, uncertainty and/or unresolved concerns about the climate change impacts of proposed undertakings.

CELA RECOMMENDATION #11: The Minister should develop (with public input) policy guidelines under section 27.1 of the EA Act to provide detailed direction to the ERT on climate change mitigation and adaptation.

CELA RECOMMENDATION #12: The Ontario government should immediately commence a comprehensive public review of provincial EA processes currently established under the EA Act and the regulations.

CELA RECOMMENDATION #13: The EA Act should be amended to impose a positive duty upon provincial ministries and agencies to assess the climate change implications of governmental "proposals, plans or programs" which may release GHGs or affect carbon storage.

We trust that CELA's recommendations will be taken into account and acted upon as the MOECC determines its next steps regarding the consideration of climate change implications under the EA Act. If requested, we would be pleased to meet with you or other MOECC staff to elaborate upon the findings and recommendations contained within these submissions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. The Hon. Glen Murray, Minister of the Environment and Climate Change
Dr. Dianne Saxe, Environmental Commissioner of Ontario