Canadian Environmental Law Association
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January 21, 2018 **BY EMAIL & REGULAR MAIL**

Mr. Ken Peterson
Manager, Provincial Planning Policy Branch
Ministry of Municipal Affairs
777 Bay Street, 13th Floor
Toronto, Ontario
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Dear Mr. Peterson:

RE: CELA COMMENTS ON PROPOSED REGULATIONS UNDER BILL 139 (*Building Better Communities and Conserving Watersheds Act, 2017*) ENVIRONMENTAL REGISTRY NO. 013-1788; ENVIRONMENTAL REGISTRY NO. 013-1790; ONTARIO REGULATORY REGISTRY NO. 17-MAG-011

On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide CELA's comments on the initial regulatory proposals under Bill 139 (*Building Better Communities and Conserving Watersheds Act, 2017*).

At the outset, CELA notes that the above-noted postings merely contain high-level descriptions of the overall intent of the proposed regulations. However, the postings do not provide, or link to, the actual regulatory text that is under consideration at the present time.

In addition, no regulatory impact statements have been released in conjunction with the postings, although subsection 27(4) of the *Environmental Bill of Rights* clearly contemplates such statements in Environmental Registry postings in order "to permit more informed public consultation on the proposal." Moreover, my recent attempt to request an emailed copy of the draft regulations was unsuccessful.

In our view, the alarming lack of detail in these postings makes it exceptionally difficult (if not impossible) for CELA, other stakeholders and members of the public to carefully review and meaningfully comment upon the regulatory proposals. In fact, the Environmental Registry postings themselves concede that they only provide a "basic outline" of the regulatory proposals.

We presume that these proposals are intended to address the policy objectives reflected in Bill 139, but the actual language and implementation details in the regulations are of critical importance to CELA and our client community. Accordingly, CELA submits that the draft regulations should be immediately disclosed and re-posted in order to solicit public feedback.

CELA RECOMMENDATION: The regulatory proposals under Bill 139 should be re-posted for another 45 day comment period, and the three postings should contain links to the actual draft regulations under consideration.

Given the general (if not vague) language used in the above-noted postings, CELA's following comments are, of necessity, also framed at a general level. Once the actual text of the regulations becomes publicly available, CELA reserves the right to provide further submissions in this matter.

1. ER No. 013-1788

This posting advises that the Ontario government proposes to make a new regulation under Bill 139 in order to address various transitional matters.

According to the posting, this new regulation will specify when the new Bill 139 changes will begin to apply in relation to the following *Planning Act* matters:

- **Bill 139 removes the public right to appeal provincial approvals of official plans and official plan updates, including for conformity exercises to provincial plans**. The posting proposes that this change would apply to provincial decisions in respect of which notice is given after the Bill comes into force;

- **Bill 139 restricts the grounds of appeal of a decision on an official plan/amendment or zoning by-law/amendment to consistency and/or conformity with provincial and/or local plans**. The posting proposes that this change would apply to appeals of decisions on those matters in respect of which notice is given after the Bill comes into force (e.g. appeals made during appeal periods that begin after the Bill comes into force), and appeals of decisions made before proclamation in respect of:

  (i) complete applications made after Royal Assent;

  (ii) municipally-initiated official plan amendments that are adopted after Royal Assent; and

  (iii) municipally-initiated zoning by-law amendments that are passed after Royal Assent;

- **Bill 139 restricts the grounds of a non-decision appeal on an application for an official plan amendment or zoning by-law amendment to consistency and/or conformity with provincial and/or local plans**. The posting proposes that this change would apply to appeals of non-decisions made after the Bill comes into force, and appeals of non-decisions made before proclamation in respect of complete applications made after Royal Assent;

- **Bill 139 removes mandatory referrals of Minister's zoning orders**. The posting proposes that this change would apply to requests to refer made after the Bill comes into force;

- **Bill 139 removes appeals (other than by the province) of interim control by-laws when first passed (for a period of up to one year)**. The posting proposes that this change would apply to decisions made after the Bill comes into force;

- **Bill 139 restricts the ability to amend secondary plans for two years following their approval, unless allowed by municipal councils.** The posting proposes that this change would apply to applications for amendments to secondary plans that come into effect after the Bill comes into force;

- **Bill 139 extends decision timelines on applications for official plan amendments and zoning by-law amendments**. The posting proposes that this change would apply to complete applications submitted after Royal Assent, and that the extension for decision timelines for approval authorities on adopted official plans/amendments would apply to official plans/amendments adopted after Royal Assent.

Aside from these broad statements of regulatory intent, the posting provides no further particulars in relation to transitional matters.

In general terms, it appears that most of the Bill 139 changes will not take effect until after the Bill comes into force. However, it remains unclear to CELA when Bill 139 will proclaimed into force. At a minimum, CELA submits that before the Bill comes into force, all aspects of the revised land use planning regime must be completely in place, including:

- the selection, appointment and training of Local Planning Appeal Tribunal (LPAT) members;

- the new LPAT rules of practice and procedure, which must be developed in an open and consultative manner; and

- the establishment, full staffing and sufficient funding of the Local Planning Appeal Support Centre.

Given the significant legal changes implemented by Bill 139, CELA further submits that prior to proclamation, it will be incumbent upon the Ministry of Municipal Affairs (MMA) and Ministry of the Attorney General (MAG) to undertake a variety of effective education/outreach activities across Ontario to ensure that all participants in the land use planning process (e.g. municipalities, developers, residents, citizens' groups, etc.) fully understand the revised appeal rights, timelines and LPAT procedures under the Bill 139 regime.

In relation to the specific transitional proposals outlined in the posting, CELA has no objection in principle to deferring most of the key changes until after Bill 139 is proclaimed in force. We note, however, that the posting describes the new grounds of appeal as being limited to "consistency and/or conformity with provincial and/or local plans." This is an incomplete or inaccurate description since it fails to mention or refer to the Provincial Policy Statement (PPS) under the *Planning Act*, which may also serve as the basis for an appeal to the LPAT if the impugned decision is inconsistent with PPS policies. CELA submits that this misleading description of appeal

grounds in the Environmental Registry notice should be rectified if the proposals are re-posted in accordance with CELA's above-noted recommendation.

2. ER No. 013-1790

This posting advises that the Ontario government proposes to "update" a number of existing regulations[1] under the *Planning Act* that prescribe the types of information that must be submitted with each land use planning application, and what information must be included in the record of materials sent to the Ontario Municipal Board (OMB) on an appeal.

According to the posting, this updating exercise will entail:

- Revising what information is to be included in the giving of notice (e.g. some decisions would be final and not subject to appeal);
- Revising what information and material is to be included in a complete application (e.g. to include how an application conforms with the relevant official plan);
- Revising what is required to be forwarded to the LPAT on an appeal (e.g. the municipal statement would need to indicate whether the decision conforms with the relevant official plan);
- Replacing references to OMB with LPAT; and/or
- Updating relevant legislative cross-references.

Interestingly, this posting contains helpful links to the current regulations that will be updated under this proposal. However, the posting provides no specific details on the new or revised requirements that will be set out in the amended regulations. Instead, the posting simply indicates that the purpose of this regulatory proposal is to "facilitate implementation" of Bill 139.

Since Bill 139 has received Third Reading and Royal Assent, CELA agrees that it has become necessary to substitute "LPAT" for "OMB" in the relevant *Planning Act* regulations. Similarly, we agree that legislative cross-references in the regulations will need to be updated in light of the new statutory regime established by Bill 139.

However, CELA submits that it is impossible to provide any detailed comments on the remainder of the posting's regulatory proposals since no particulars have been provided to describe the nature or scope of the revisions that are being contemplated in relation to current notice and information requirements under the *Planning Act*.

Furthermore, it is unclear what is meant by requiring the "municipal statement" to include an indication whether the decision conforms to the relevant official plan. For example, how does this apply to non-decisions that are appealed to the LPAT? In addition, it appears to CELA that asking the municipality for its own view on whether there is official plan conformity simply provides a platform for the municipality to provide a self-serving and untested opinion on the very issue in

[1] O. Reg. 543/06 "Official Plans and Plan Amendments"; O. Reg. 545/06 "Zoning By-Laws, Holding By-Laws and Interim Control By-Laws"; O. Reg. 544/06 "Plans of Subdivision"; O. Reg. 197/96 "Consent Applications"; O. Reg. 200/96 "Minor Variance Applications"; O. Reg. 549/06 "Prescribed Time Period – Subsections 17 (44.4), 34 (24.4) and 51 (52.4) of the Act"; O. Reg. 551/06 "Local Appeal Bodies"; and O. Reg. 173/16 "Community Planning Permits."

dispute. Whether or not there is conformity is the matter to be heard and determined by the LPAT after receiving submissions from all parties, not just the municipality.

3. ORR No. 17-MAG-011

For the most part, this posting duplicates much of the same general language used in the two above-noted Environmental Registry postings.

However, this posting goes on to indicate that the MAG is proposing a new regulation that establishes timelines for LPAT hearings, imposes time limits on oral submissions by parties at LPAT hearings, and prohibits parties from examining any person or witness at LPAT hearings.

For the reasons stated in CELA's brief[2] on Bill 139, we continue to strongly object to imposing arbitrary time limits on public hearings or parties' submissions, and to prohibiting parties from examining (or cross-examining) witnesses. In our view, these proposed constraints on parties' existing procedural rights under the *Statutory Powers Procedure Act* (SPPA) are wholly unjustifiable, particularly if the LPAT is being relied upon by the Ontario government to make the best possible land use decision on the best possible evidence.

In short, if the LPAT is intended to serve as an independent and specialized "safety valve" for reviewing and reversing poor land use planning decisions, then the MAG proposals directly militate against achieving this objective, as described below.

(i) Timelines for LPAT Appeals

The MAG posting proposes six, ten or twelve month timelines for LPAT appeal proceedings involving land use planning matters, depending on the type of decision (or non-decision) under appeal. These timelines will begin to run as soon as the appeal is duly filed with the LPAT. However, any periods of time arising from adjournments granted by the LPAT, or from stays issued by the Divisional Court, will be excluded from the calculation of the relevant timeline.

CELA has a number of serious concerns about these proposed time limits. First, there is no evidence that faster LPAT decisions will be inherently better decisions. On this point, we acknowledge that the LPAT should strive to hear and decide land use appeals in an orderly, timely and efficient manner. We also agree that it is not in the public interest to allow protracted (and expensive) hearings to drag on for years.

On the other hand, passing provincial regulations that unilaterally dictate that the LPAT appeal process must finish by a prescribed deadline is, in our view, clearly inconsistent with the LPAT's status and mandate as an independent adjudicative body. Furthermore, imposing fixed deadlines creates the risk that the appeal process may be forced to gloss over the issues in dispute, ignore new or emerging information, encourage rushed decision-making, or otherwise run roughshod over parties' rights to a fair hearing. In our view, administrative expediency should not prevail over fairness considerations or the principles of natural justice.

[2] http://www.cela.ca/sites/cela.ca/files/Bill-139-cvr-ltr-and-submission.pdf

Second, we note that neither Bill 139[3] nor the MAG posting describes the legal consequences if the LPAT hearing process is not, for whatever reason, completed by the prescribed deadline. For example, if the LPAT renders a decision after the prescribed deadline, is the decision void or voidable? Similarly, if the allowable time has expired but the LPAT has not rendered a final decision, is the appeal automatically dismissed or allowed? Alternatively, is the subject matter of the appeal remitted back to the original decision-maker for further consideration? Does the "clock" get extended or re-set if the LPAT renders a decision by the prescribed deadline, but then a party brings a motion for reconsideration that results in a re-hearing (which is possible under current OMB rules[4])? These and other unaddressed procedural questions lead CELA to conclude that the crafters of the new LPAT appeal process (or the proposed regulations) may have not fully considered the practical implications of imposing deadlines for land use planning disputes that arrive at the LPAT.

Third, it is unclear how the proposed numerical timelines were derived by the MAG. Over the decades, CELA has been involved in a number of major land use planning appeals before the OMB which, for various reasons (e.g. legal/technical complexity, number of parties, nature of the issues in dispute, consolidation with appeals under other statutes, etc.), took more time from start to finish than the timelines now being proposed. We acknowledge that Bill 139 attempts to eliminate *de novo* hearings, which presumably may free up LPAT members to hear additional cases (provided, of course, that the LPAT is properly staffed and fully resourced). Nevertheless, we remain highly doubtful that the "one-size-fits-all" timeline proposals will be appropriate or workable for every LPAT appeal filed under the Bill 139 regime, particularly those involving large-scale, environmentally significant or highly controversial land use applications.

Fourth, while the regulatory proposal purports to exclude adjournment periods from the timeline calculation, it is unknown whether the OMB's current rules regarding adjournments will be maintained or revised under the Bill 139 regime. Accordingly, it remains uncertain whether – or how often – adjournment requests will be granted by the LPAT, whether on consent or upon motion by the parties.

Fifth, by excluding *de novo* hearings, CELA understands that Bill 139 is aimed at establishing an appeal process that more closely resembles court appeals or judicial review proceedings (e.g. by restricting the appeal record to the materials placed before the original decision-maker below). In our view, Bill 139's attempt to emulate the judicial appeal process is both misplaced and inappropriate, and it fails to recognize the fundamental differences between court appeals and administrative appeals. For example, court appeals typically lie against trial judgments where the evidence was adduced (and cross-examined) by parties in the traditional adversarial manner before an impartial judge subject to strict rules of evidence. In contrast, land use planning appeals typically arise from decisions (or non-decisions) of municipal councils or approval authorities that are not adjudicative bodies, and that do not receive evidence under oath or subject to cross-examination (see below).

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[3] Subsection 38(3) of the *LPAT Act, 2017* simply provides that appeals must "adhere" to timelines prescribed by regulations under the Act.

[4] See OMB Rules 110 to 119.

Sixth, CELA points out that there are no regulations under the *Courts of Justice Act* (CJA) that impose overall time limits on proceedings in the appellate courts of Ontario. In particular, the Ontario government has not purported to place a mandatory legal duty on appellate courts to hear and decide an appeal within six months of filing (or any other fixed timeline), as this would clearly be an unwarranted intrusion upon judicial independence, and would significantly interfere with the courts' ability to control its own process. While the *Rules of Civil Procedure* generally prescribe timelines for each of the interlocutory steps involved in a court appeal, there is no regulatory standard that sets an ultimate deadline for the appeal to be decided by the court.

Thus, in a typical court appeal, the appellant files its notice of appeal, the parties' materials get prepared and exchanged in due course, motions (if any) are brought, and the matter proceeds to hearing as quickly as the court docket permits. The Registrar selects the hearing date(s) after receiving input from the parties' counsel, who indicate how many days may be required for the oral hearing. In short, there is no attempt to rush judicial appeal proceedings just to meet predetermined deadlines established by provincial regulation. In this regard, the MAG proposal to impose a deadline on LPAT appeal proceedings has no counterpart in the judicial context, despite the claim that Bill 139 is intended to create a process analogous to a court appeal.

In summary, CELA does not support the establishment of binding time limits on LPAT appeal proceedings. Instead, a case-specific timetable for the conduct of *Planning Act* appeals should be negotiated between the parties, or, if no agreement can be reached, then an appropriate timetable should be crafted and ordered by the LPAT on a case-by-case basis after receiving submissions from the parties.

(ii) Time Limits on Parties' Submissions at LPAT Hearings

In addition to imposing overall timelines for LPAT appeal proceedings, the MAG posting also proposes to significantly restrict the parties' ability to make oral submissions to the LPAT.

Alarmingly, the MAG posting proposes the following time limits on parties' submissions where the LPAT holds an oral hearing:

- Each party will have a maximum of 75 minutes to make submissions in appeals under subsection 38(1) of the *LPAT Act, 2017* against a decision of a municipal or approval authority in relation to an official plan or zoning by-law;

- Each party will have a maximum of 75 minutes to make submissions in appeals under subsection 38(2) of the *LPAT Act, 2017* against an approval authority's failure to make a decision in relation to an official plan or plan of subdivision, and persons granted participant status by the LPAT would each have a maximum of 25 minutes to make submissions; and

- The LPAT member hearing an appeal would have discretion to increase these limits where he/she opines that doing so "is necessary for a fair and just determination of the appeal."

CELA has a number of objections to these sparse and unreasonable time limits, and submits that there is no public interest justification for them.

First, it is unclear how these specific time limits were calculated by MAG, or why they were adjudged to be adequate for the purposes of ensuring fairness and facilitating informed decision-making by the LPAT. By way of comparison, CELA notes that the province's Environmental Review Tribunal (ERT) is not subject to any regulations imposing explicit time limits on parties' submissions at appeal hearings under the *Environmental Protection Act*, *Ontario Water Resources Act*, or other environmental statutes. Instead, the order and length of oral submissions is usually negotiated by the parties, or decided by the ERT, on a case-by-case basis. This approach has also been traditionally used at OMB hearings under the *Planning Act*, and we see no compelling reason to depart from this standard practice in forthcoming LPAT appeal hearings.

Second, it must be recalled that there is no regulation under the CJA that unilaterally imposes time limits on the oral submissions made by appellants or respondents during a court appeal. Instead, time allocations are usually determined on a case-by-case basis in court proceedings, and parties' counsel usually split the available time evenly, subject to the concurrence of the court. We hasten to add that it is not uncommon for an appellate court to provide direction to the parties on which issues should be addressed (or not) during oral argument. Nevertheless, the MAG proposal to "micro-manage" the duration of oral submissions at LPAT hearings stands in stark contrast to long-standing court and administrative tribunal practice. In our view, the LPAT should remain the master of its own process (including determining the appropriate length of oral submissions), without being subject to arbitrary regulatory constraints dictated by the province.

Third, CELA notes that the MAG's proposed time limits only apply when the LPAT is holding an oral hearing. However, in light of various provisions within Bill 139,[5] we anticipate that the LPAT may also hold written hearings in respect to certain appeals. Unfortunately, the MAG posting does not explain when – or on what basis – some appeals will trigger oral hearings and which ones will not. Similarly, for written hearings by the LPAT, the posting does not explain whether specific limits will be imposed on written submissions, or what those limits might entail. In our view, this lack of clarity creates undue confusion and uncertainty, particularly if the province intends to create a two-track appeal process that streams land use planning appeals into either oral hearings or written hearings.

Fourth, CELA draws no comfort in the MAG's attempt to confer discretion upon the LPAT to increase the prescribed time limits where appropriate. For example, the MAG posting fails to set out any criteria, factors or considerations that explain when it is "fair and just" to increase the time limits. Similarly, it is unclear whether the LPAT would exercise this discretion on its own initiative or upon motion by one or more parties.

Fifth, while the MAG proposal describes the time limits as "maximum" in nature, it is unclear whether parties are automatically entitled, as of right, to 75 minute submissions in every oral hearing, or whether the LPAT may, in its discretion, reduce the allowable timeframes to 60 or less

[5] See section 42 of the *LPAT Act, 2017*.

minutes. If this option is being contemplated, then the MAG proposal should have expressly addressed this possibility and solicited public comment.

In summary, CELA submits that the provincial attempt to prescribe regulatory limits on parties' oral submissions at LPAT hearings is unprecedented and unacceptable in the land use planning context. In our view, the LPAT, like other tribunals and courts, should be empowered, on a case-by-basis, to determine what timeframes are fair, sound and reasonably necessary to enable parties to make full submissions at oral hearings.

(iii) No Examination of Parties or Witnesses

The MAG posting provides no other information on the intended practice and procedure before the LPAT, but does state that there shall be no examinations of parties or other persons, except by the LPAT itself.

CELA acknowledges that this statement is consistent with Bill 139's attempt to move away from *de novo* hearings in which parties adduce evidence and examine witnesses. In our view, however, the MAG proposal raises more questions than it answers, and should be seriously reconsidered if not withdrawn.

First, it is unclear whether the LPAT member is entitled to question parties or persons on his/her own initiative, or upon motion by the parties, or both. Moreover, the MAG posting provides no criteria that explain the circumstances under which the LPAT member may elect to exercise this sole authority to pose questions. Similarly, it is unclear whether the LPAT will need to issue a summons to compel the attendance of the person to be questioned; if so, then we note that the posting does not specify who will be paying the fees or disbursements of any expert witnesses whom the LPAT member wishes to examine. In addition, it is unknown whether this witness, if summoned, will be required to prepare and file a witness or will-say statement in advance of his/her attendance before the LPAT. In addition, it is unclear whether the LPAT's prospective examination of witnesses can occur in both oral and written hearings. Finally, it is unknown whether it is open to the LPAT to issue interrogatories to a party or witness instead of orally posing questions at a public hearing. These and other crucial implementation details are conspicuously absent from the MAG's simplistic one-sentence discussion of the LPAT's power to examine persons.

Second, it must be recalled that prior to the LPAT hearing, there will likely be little or no testing of the planning and/or technical evidence presented to municipalities or approval authorities by developers, residents or other interested persons or agencies. Even where the mandatory public meeting is held under the *Planning Act*, the evidence is not tendered under oath, the authors of supporting documents are not subject to cross-examination or expert qualification, and the opportunities to make deputations are often subject to very short timelines. Thus, if an appeal is filed, the LPAT hearing theoretically offers the first – and only – meaningful opportunity to test the evidence or opinions for and against the land use application. However, if hearing parties cannot examine witnesses, and if the LPAT member declines to do so, then the soundness or credibility of the resulting decision may be highly suspect if the appeal record contains errors, omissions or misstatements that are left unchallenged or uncorrected by *viva voce* testimony or

documentary evidence presented at the LPAT hearing. This is particularly true if the appeal is subject to a written hearing rather than an oral hearing.

Third, the MAG proposal is silent on whether LPAT parties will be able to bring motions to present fresh evidence that post-dates the land use planning decision under appeal. In this regard, CELA notes that parties in court appeals may seek leave to present new evidence (e.g. affidavits, oral testimony, etc.) in order to enable the court to determine the appeal.[6] A similar opportunity for parties to seek leave to file new evidence also exists in ERT appeals under environmental statutes.[7] In CELA's view, given that material evidence can become available after the notice of appeal has been filed under the *Planning Act*, the LPAT rules of practice should include provisions for receiving fresh evidence by the parties in appropriate cases.

Fourth, CELA respectfully suggests that the MAG's proposed prohibition appears to be predicated on the erroneous view that OMB hearings have become unduly lengthy or costly because examinations are conducted by parties rather than OMB members. In our experience, OMB members have not been reluctant to impose reasonable limits on lines of questioning that are irrelevant, or that do not otherwise assist the OMB in understanding and adjudicating the issues in dispute. Similarly, it has been our observation over the years that OMB members do not sit passively or silently as the parties examine and cross-examine witnesses in public hearings. To the contrary, OMB members have often been willing to intervene and pose questions to expert witnesses in order to clarify their opinions or to elicit the evidentiary basis for them. Accordingly, it is our conclusion that the MAG's proposal is a solution in search of a problem.

In summary, CELA strongly opposes the ill-conceived prohibition against parties presenting evidence or examining witnesses during LPAT hearings. In our view, the parties' examination and cross-examination of witnesses is the *sine qua non* for informed decision-making in land use planning appeals.

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In conclusion, it appears that CELA's concerns about the regressive nature of Bill 139 have been affirmed by the above-noted regulatory proposals put forward by the MMA and MAG.

By any objective standard, these proposed regulations represent a significant rollback of parties' procedural rights and substantive protections within the current land use planning system. In addition, these proposals undermine, or directly conflict with, the important procedural safeguards entrenched in the SPPA.

At the same time, the profound lack of detail in the above-noted postings makes it very difficult to comment on the regulatory proposals at this time, and there is considerable uncertainty as to how these broad approaches may be implemented in practice. This is particularly true since these proposals have been presented in a fragmented or piecemeal manner, and it is unclear how these

[6] See section 134(4)(b) of the *Courts of Justice Act* and Rule 61.16(2) of the *Rules of Civil Procedure*.
[7] ERT Rules 233 to 234.

discrete proposals fit in with other regulations or LPAT rules of practice that have not yet been publicly released for review/comment.

For the foregoing reasons, CELA recommends that the MMA and MAG should immediately disclose the full text of all regulations (or LPAT rules of practice) currently under consideration, and should re-post these proposals for another 45 day public comment period.

However, prior to re-posting their proposals, the MMA and MAG should review and revise the proposals in accordance with the findings and conclusions contained within this submission by CELA.

Please contact the undersigned at your earliest convenience if you require any additional information about CELA's position on these regulatory proposals under Bill 139.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Dr. Dianne Saxe, ECO