Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

May 24, 2019 **BY EMAIL**

Sharifa Wyndham-Nguyen
Client Services and Permissions Branch
Ministry of the Environment, Conservation and Parks
135 St. Clair Avenue West, 1st Floor
Toronto, ON
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Dear Ms. Wyndham-Nguyen:

RE: MODERNIZING ONTARIO'S ENVIRONMENTAL ASSESSMENT PROGRAM: DISCUSSION PAPER
ENVIRONMENTAL REGISTRY NO. 013-5101

These are the comments of the Canadian Environmental Law Association (CELA) on the Ontario government's Discussion Paper entitled *Modernizing Ontario's Environmental Assessment Program.* These comments are being forwarded to you in accordance with the above-noted Registry notice.

Part I of this submission provides CELA's general comments about the Discussion Paper and the unsatisfactory manner in which this public consultation is being carried out by the Ontario government. Part II reviews the main components of the current environmental assessment (EA) program that the Discussion Paper proposes to "modernize." Part III of this submission outlines CELA's specific comments in relation to the EA reforms proposed in the Discussion Paper, while Part IV sets out CELA's overall conclusions about next steps.

PART I – CELA'S GENERAL COMMENTS ABOUT THE REGISTRY POSTING

(a) Uncoordinated Consultation and EBR Non-Compliance

The Discussion Paper was first posted by the Ministry of the Environment, Conservation and Parks (MECP) on the Environmental Registry on April 25, 2019 for the minimum 30 day comment period under the *Environmental Bill of Rights* (*EBR*). In our view, given the environmental significance of the wide-ranging EA proposals outlined in the Discussion Paper, CELA concludes that a longer public comment period (e.g. at least 45 or 60 days) would have been more appropriate for facilitating meaningful public participation in this important matter.

On this point, we note that Ontario's recent proposal to amend Regulation 334 under the *Environmental Assessment Act* (*EAA*) triggered a 45 day comment period[1] although the narrow proposal only pertained to a single type of undertaking under a single Class EA (e.g. disposition

[1] See https://ero.ontario.ca/notice/013-4845. CELA's response to this proposed regulatory exemption is available at: https://www.cela.ca/publications/EA-exemptions-public-lands.

of government-owned property). In CELA's view, the broad scope of the Discussion Paper clearly warrants a longer public comment period, particularly in light of certain proposals that would fundamentally alter (if not rollback) Ontario's current EA program.

CELA further notes that the Discussion Paper proposes some "early actions" under the *EAA* in relation to Class EAs, Part II order requests, and reconsideration of previous EA approvals (see below). Inexplicably, these same proposals were described in a separate Registry notice (ERO 013-5102) that was posted on the same day as the Discussion Paper notice (ERO 013-5101) for the same 30 day public comment period. CELA recently filed submissions[2] on the separate Registry posting, but we remain unclear why the MECP decided to issue duplicative postings for the same set of proposals for the same inadequate comment period.

CELA's submissions on ERO 013-5102 also raised concerns that the MECP's meagre consultation efforts are contrary to Part II of the *EBR*, and are inconsistent with the MECP's Statement of Environmental Values under the *EBR*.[3] It is not necessary to repeat CELA's concerns again in detail in this brief, but suffice it to say that the MECP's suggested "early actions" have moved from being mere proposals under consideration by the Ontario government.

Instead, these "early actions" have now been introduced as statutory amendments in Schedule 6 of Bill 108, which was introduced on May 2, 2019 in the Ontario Legislature, approximately one week after the Registry notices were posted. Bill 108 is currently in Second Reading debate, and will soon be referred to the Standing Committee on Justice Policy. It therefore appears to CELA that despite section 35 of the *EBR*, the Ontario government has already made a decision to proceed with these "early actions" via statutory amendments even though the *EBR* comment period does not end until May 25, 2019.

In these circumstances, CELA concludes that this chronology of events impairs or inhibits the public's right under the *EBR* to not only file comments on the "early actions" outlined in the Discussion Paper, but also to have those comments seriously considered before the Ontario government decides whether – or how – these "early actions" should be implemented.

(b) Overview of the Discussion Paper

The Discussion Paper[4] solicits public comment on a number of potential changes to the province's EA program. These changes include (but are not necessarily limited to):

- removing EA requirements from projects that are deemed by the Ontario government to pose no (or low) risks to the environment;

- imposing time limits and specifying criteria for Ministerial decisions on public requests to elevate (or "bump up") particularly significant or contentious projects from a streamlined Class EA planning process to an individual EA under Part II of the *EAA*;

[2] See https://www.cela.ca/proposed-changes-Ontario-EA.
[3] *Ibid*, pages 1-3.
[4] The Discussion Paper is available through the Environmental Registry: see https://ero.ontario.ca/notice/013-5101.

- revising the current application of the *EAA* by creating a project list that identifies which types of projects will trigger EA requirements;
- eliminating alleged "duplication" between the *EAA* and other provincial or municipal planning and approvals processes; and
- reducing timelines for governmental reviews of EA documentation submitted by proponents.

However, the Discussion Paper fails to provide key implementation details on how and when these or other changes will be implemented. In addition, the Discussion Paper does not offer any compelling evidence-based reasons in support of the proposed changes. Similarly, in several instances, the Discussion Paper significantly misrepresents the current requirements of the EA program.

Most importantly, the proposals appear to be inconsistent with the public interest purpose of the *EAA* (see below). It is also abundantly clear that the Discussion Paper does not address the key EA reforms that have been identified in recent years by various stakeholders, advisory committees, the Auditor General of Ontario, and the Environmental Commissioner of Ontario.

Accordingly, CELA concludes that the Discussion Paper's vaguely defined changes should not be pursued as proposed. Instead, the Ontario government should publicly develop and widely consult upon the long-overdue reforms that are necessary to transform the province's EA program into a robust, credible and participatory regime.

(c) CELA's Background and Experience in EA Matters

CELA's comments on various aspects of the Discussion Paper are set out below. These comments are based on CELA's decades-long experience under the *EAA*, including:

- representing clients in individual EA processes for undertakings caught by Part II of the *EAA*;
- representing clients in Class EA processes, including making requests for Part II orders (also known as "elevation" or "bump-up" requests);
- representing clients in judicial review applications, statutory appeals and administrative hearings in relation to the *EAA*;
- filing law reform submissions on the *EAA* and regulations, including new or proposed regulatory exemptions for specific sectors, undertakings or proponents;
- participating in provincial advisory committees considering matters under the *EAA*; and
- conducting public education/outreach, and providing summary advice, to countless individuals, non-governmental organizations, Indigenous communities, and other persons interested in matters arising under the *EAA*.

Accordingly, CELA has carefully considered the Discussion Paper from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

PART II – OVERVIEW OF ONTARIO'S CURRENT EA PROGRAM

The *EAA* is one of the oldest and most important environmental laws in Ontario. This ground-breaking legislation was first enacted in 1975, but it was substantially amended by controversial reforms implemented by the provincial government in 1996.[5]

However, CELA hastens to add that the *EAA* should not be reformed simply because of its age, but because the 1996 amendments have resulted in a broken and dysfunctional EA program. Over the past 20 years, many commentators, stakeholders and independent officers of the Ontario Legislature have identified the structural improvements that are needed in the EA program in order to face the environmental issues and opportunities of the 21st century, as discussed below.

Unfortunately, the Discussion Paper neglects to discuss or even mention these key reforms, and instead focuses on quick-fixes that will likely make the EA program less robust, participatory and accountable to the people of Ontario.

(a) What is EA and Why is It Important?

In essence, EA is an information-gathering and decision-making process that includes opportunities for public/Indigenous engagement at key stages. The *EAA* is a "look before you leap" statute since the law generally requires a hard long look at the environmental pros/cons of a proposed undertaking (and its alternatives) in order to make an informed decision on whether the undertaking should be approved (or not), and what terms/conditions might be necessary to safeguard environmental and public health. In short, the *EAA* is intended to anticipate and prevent environmental harm arising from undertakings that are subject to the Act.

Notably, the stated purpose of the *EAA* is "the betterment of the people of Ontario... by providing for the protection, conservation and wise management of the environment."[6] Thus, the law is primarily intended to advance and protect the public interest, not private corporate interests.

To achieve this purpose, the term "environment" is defined broadly under the *EAA*. In effect, this means that if an EA is required for a particular undertaking, then the proponent's EA documentation must identify and evaluate not only ecological effects, but also potential impacts on the social, economic, cultural and built environments. Thus, the *EAA* has a broader scope than other regulatory or land use planning laws in Ontario, as discussed below.

(b) How does Ontario's EA Program Apply to Undertakings?

At present, the *EAA* establishes three different types of environmental review processes that are intended to be commensurate with the potential environmental risks of proposed projects:

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[5] For a critical review of the 1996 amendments, see http://www.cela.ca/publications/review-environmental-assessment-ontario and http://www.cela.ca/publications/environmental-assessment-ontario-rhetoric-vs-reality.
[6] *EAA*, section 2.

- individual EAs for major undertakings (e.g. large landfills, incinerators, new provincial freeways, etc.);

- streamlined Class EA planning processes for certain small-scale projects (e.g. municipal roads, water/wastewater infrastructure, etc.);

- simplified environmental screening processes for projects within certain sectors (e.g. electricity, transit, and waste management);

The general rule is that the *EAA* applies automatically to undertakings proposed by the public sector (e.g. provincial ministries or municipalities), unless they have been exempted by regulations, Ministerial declaration orders, or other legislative means. To date, there have been numerous exemptions granted under the *EAA* in relation to large, medium and small public projects (e.g. Darlington nuclear power plant, conservation authorities' water quality, flood-proofing or habitat management activities, municipal projects costing less than $3.5 million, etc.).

Conversely, undertakings proposed by private sector proponents (e.g. factories, mines, quarries, residential subdivisions, etc.) are generally not subject to the *EAA*, unless they have been specifically designated by Ministerial orders (or sectoral regulations) as undertakings to which the Act applies. To date, relatively few private undertakings have been designated under the *EAA*.[7]

PART III – CELA's SPECIFIC COMMENTS ON THE DISCUSSION PAPER

CELA's comments on the Discussion Paper are intended to identify the various shortcomings of the EA changes being proposed by the Ontario government. In the event that the Ontario government decides to proceed with these changes (particularly the ill-conceived components of the Discussion Paper's "vision" for a "modern" EA program), CELA reserves the right to file further and more detailed submissions in due course.

(a) Lack of Rationale for the Proposed Changes

The provincial government first flagged its intention to "modernize" the EA process in the "made-in-Ontario" Environment Plan released in late 2018 for public consultation. However, the single sentence in the Plan about EA "modernization" contained no details on how this objective would be accomplished by the Ontario government.

Unfortunately, the superficial Discussion Paper similarly lacks many critical implementation details (e.g. what specific timelines or deadlines are being contemplated?), and fails to specify what mechanisms will be used by the government to operationalize the changes (e.g. legislative changes, regulatory revisions, policy development, or administrative improvements?). Instead, the Paper solicits public feedback on certain high-level questions and general EA issues. In CELA's experience, this approach is problematic since "the devil is in the details" when it comes to EA reform.

Nevertheless, there are troubling aspects of the sparse Discussion Paper that warrant a response at this time. For example, the Discussion Paper includes partisan rhetoric that the *EAA* has

[7] Private proponents may voluntarily agree to have the *EAA* apply to their projects, but this occurs very infrequently.

"discouraged job creators from coming to Ontario."[8] If this claim is intended to serve as the underlying rationale for the proposed changes, then it is undermined by a complete lack of supporting evidence or references. Indeed, contrary to the Discussion Paper's claim, readily available financial information indicates that foreign direct investment in Ontario has increased in recent years, and that the province is viewed as a top jurisdiction for investment purposes.[9]

More alarmingly, the Discussion Paper appears to equate EA requirements with "red tape."[10] CELA submits that this view reflects a profound misunderstanding of the importance of robust EA planning, and does not bode well for the pending reforms that may be rolled out by the provincial government.

From the public interest perspective, EA is not red tape. Instead, EA is supposed to be a rigorous process for screening out and rejecting harmful projects, (e.g. landfills at hydrogeologically unsuitable locations), while allowing necessary and environmentally sustainable projects to proceed, subject to effective and enforceable approval conditions that deliver long-lasting societal benefits and that prevent adverse impacts.

In summary, CELA finds that the Discussion Paper is largely premised upon questionable anecdotes, overgeneralized claims, and erroneous descriptions of the existing EA program. CELA therefore concludes that the Discussion Paper fundamentally fails to justify the proposed EA changes on any persuasive legal, jurisdictional, technical or financial grounds. As described below, CELA submits that there is no doubt that Ontario's EA program requires various revisions, but not the regressive changes that are being proposed in the Discussion Paper.

(b) Mistaken Description of Alternatives Analysis

The systematic comparison of a reasonable range of alternatives is the cornerstone of a sound EA program. By evaluating the environmental effects of a proposed project against other alternatives (including the "do nothing" alternative), standard EA methodology and meaningful public participation can help identify an environmentally preferable option that meets the public interest purpose of the *EAA*.

Accordingly, the *EAA* properly requires individual EAs to describe:

- the undertaking, alternative methods of carrying out the undertaking, and alternatives to the undertaking;
- the potential environmental effects (and any necessary preventative or mitigation measures) of the undertaking, alternative methods of carrying out the undertaking, and alternatives to the undertaking; and

[8] Discussion Paper, page 1.
[9] See https://www.investinontario.com/spotlights/ontario-canada-top-3-destination-capital-investment.
[10] Discussion Paper, page 1.

- the environmental advantages/disadvantages of the undertaking, alternative methods of carrying out the undertaking and alternatives to the undertaking.[11]

In light of the central importance of alternatives analysis in Ontario's EA program, it is astounding to CELA that the Discussion Paper's attempted explanation of "alternatives to" and "alternative methods" is incorrect and misleading.[12] All of the options used in the Discussion Paper to explain these distinct types of alternatives are, in fact, merely variations of the same alternative -- building a road.

In EA practice, an "alternative to" is a functionally different way of achieving the need/purpose of the undertaking, while "alternative methods" are various means to carry out a preferred "alternative to." Thus, to utilize the Discussion Paper's road example, if the purpose of the undertaking is to facilitate the movement of people/goods between Point A and Point B, then the "alternatives to" would include roads, rail, transit, demand management and other transportation options (or combinations thereof). If a road emerges as the preferred option, then the "alternative methods" to be considered would include different routes/locations, road width/lane structures and other road construction/design options.

In CELA's view, the fact that the Discussion Paper fails to correctly articulate the critical planning differences between "alternatives to" and "alternative methods" does not inspire much public confidence in the proposed EA changes.

(c) Failure to Ensure Meaningful Public and Indigenous Participation

The Discussion Paper acknowledges the importance of public and Indigenous consultation in the provincial EA process.[13] Consultation is a basic legal requirement in the *EAA*, which imposes a mandatory duty upon proponents to "consult with such persons as may be interested" when EAs and terms of reference are being prepared.[14]

Unfortunately, the *EAA* is otherwise silent on what constitutes **meaningful** public/Indigenous participation, and General Regulation 334 under the Act does not prescribe a detailed set of procedural requirements or minimum standards for EA consultation programs. Accordingly, there have been countless complaints over the years about the lack of adequate consultation in individual EAs and Class EA processes (e.g. inadequate or jargon-laden notices, unduly short comment periods, difficulty in obtaining timely access to all relevant documents, etc.).

Unfortunately, the Discussion Paper simply refers to and relies upon the MECP's existing – and unenforceable – guidance materials regarding EA consultation.[15] Thus, the Discussion Paper does

[11] *EAA*, subsection 6.1(2). However, the Terms of Reference approved for the EA can focus upon (or exclude) certain alternatives where appropriate: *EAA*, subsections 6(2)(c) and 6.1(3).
[12] Discussion Paper, page 5.
[13] *Ibid*, pages 6 and 25.
[14] *EAA*, section 5.1.
[15] For public consultation, see https://www.ontario.ca/page/consultation-ontarios-environmental-assessment-process. For Indigenous consultation, see https://www.ontario.ca/page/environmental-assessments-consulting-indigenous-communities.

not propose any specific legal measures to address the above-noted (and long-standing) barriers to meaningful public and Indigenous engagement in Ontario's EA program.

(d) Refusal to Reinstate Intervenor Funding in Ontario

It has long been recognized that the public/Indigenous right to participate in the EA process is hollow unless participants receive funding assistance so that they can retain the technical, scientific and legal expertise needed to effectively review and comment on the EA documentation submitted by proponents.

For a number of years, Ontario's highly regarded *Intervenor Funding Project Act*[16] ensured that eligible participants in EA hearings would receive funding assistance payable by the proponent. However, a previous Ontario government allowed this law to expire in 1996, and intervenor funding legislation has never been re-introduced despite widespread calls for its return. Again, the Discussion Paper fails to mention or remedy this fundamental problem.

At the same time, participant funding has long been available to the public and Indigenous communities under the federal EA process,[17] and such funding would continue to be provided under the proposed *Impact Assessment Act* (Bill C-69) if enacted. Interestingly, the Discussion Paper proposes to align the Ontario process more closely with the federal EA regime[18] to implement a "one project, one assessment" approach.

Presumably, this alignment might also enable Ontario to take advantage of the federal "substitution" provisions which allow provincial EA processes to substitute for the federal assessment process in certain cases. If so, then the Ontario EA process must reinstate an intervenor funding program entrenched in law, and must satisfactorily address other EA requirements that are currently set out in federal EA law (e.g. cumulative effects analysis) but are absent from the provincial *EAA*.

(e) "Early Actions" Premised on Misunderstanding of Class EA Processes

The Discussion Paper claims that "low risk" projects, such as snow-plowing and de-icing operations, must always go through an EA in Ontario.[19] This claim is patently untrue. Low risk projects have never triggered individual EA requirements under Part II of the *EAA*, which typically applies to the largest, costliest and risk-laden undertakings (unless exempted).

However, some lower risk activities may be subject to streamlined Class EA planning procedures, but Class EAs typically have schedules that wholly exempt certain projects that truly pose no or very low risk. In such cases, these projects do not require detailed environmental study reports before they may be undertaken.

For example, the Municipal Class EA (which, among things, governs the planning of municipal roads) contains Schedule A and Schedule A+ lists of normal operational or maintenance activities, and "plowing", "sanding", and "de-icing materials" are specifically listed under these Schedules.

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[16] RSO 1990, c.I.13.
[17] *Canadian Environmental Assessment Act, 2012*, SC 2012, c.19.
[18] Discussion Paper, pages 17-18, 23-24.
[19] *Ibid*, page 10.

However, the Municipal Class EA is abundantly clear that these activities are pre-approved and can be undertaken by municipalities without following Class EA planning procedures. In short, the mere fact that they are mentioned in schedules to the Municipal Class EA does not mean that an EA is required.

Similarly, the Class EA for Provincial Transportation Facilities contains a Group D list of "routine maintenance activities, and "snow-plowing, "salting" and "sanding" are included in this list. Again, however, there is no requirement to conduct an individual EA, and there is no requirement under the Class EA for a project-specific study, report or consultation before these road maintenance activities may be undertaken.

Accordingly, it appears to CELA that the Discussion Paper reflects a profound misunderstanding of how these routine matters are actually addressed under the *EAA*. For the reasons outlined in our submissions[20] on ERO 013-5102, CELA concludes that it is unnecessary to amend the *EAA* itself to ensure that routine projects do not trigger individual or Class EA requirements.

(f) Some Lower Risk Projects may be Impactful

CELA acknowledges that under normal circumstances, some types or categories of small-scale undertakings may only pose low or moderate risks. However, this is not always the case, which is why numerous requests for Part II orders (bump up requests) are filed by Ontarians each year under Class EAs.

On this point, CELA submits that the nature, extent, frequency, magnitude and duration of environmental impacts is greatly dependent on the site-specific location, technology choice or design of the particular project. For example, a proposed activity or facility may be low-risk at certain settings (e.g. an extended or widened municipal road in an urbanized area), but the same proposal in a rural setting (e.g. a new road through or near provincially significant wetlands, important woodlands, or habitat for species at risk) may indeed pose serious risks that should be identified, avoided or mitigated in an appropriate EA process. In short, until an individual project is proposed at an actual location (and until the requisite studies are completed), it is often difficult to pre-determine the significance of the potential impacts in advance on a purely hypothetical basis.

In CELA's view, this potentially variable range of environmental impacts is precisely why Class EAs appropriately take a precautionary approach by including lower risk projects in the schedules, groups or categories in the Class EAs.

CELA further observes that the notification, consultation and documentation requirements in Class EA processes are relatively streamlined and straightforward compared to individual EAs. Therefore, CELA does agree with the Discussion Paper's suggestion that it is too onerous for proponents to successfully get lower risk projects through the Class EA planning process (which, if completed properly, does not even require Ministerial approval to proceed with the project).

[20] See https://www.cela.ca/proposed-changes-Ontario-EA.

(g) Expediting and Constraining Part II Order Requests

The Discussion Paper deals with the timeliness of Part II order decisions[21] when members of the public have asked the Minister to elevate (or bump-up) particularly significant or controversial projects from a Class EA to an individual EA under Part II of the *EAA*.

CELA agrees with the Discussion Paper's statement that these requests often take too long for the Minister to decide, and that most of the time, the requests are refused. In CELA's experience, this has been a long-standing problem under Ontario's EA program. However, CELA submits that the Discussion Paper offers the wrong solutions to this problem (e.g. by imposing arbitrary time limits and implying that only "directly affected" Ontarians should be able to file such requests).

In CELA's view, the existing Part II order process has become non-credible and over-politicized, largely because the requests are determined behind closed doors by the Environment Minister, not independent experts. As explained in CELA's submissions[22] on ERO 013-5102, similar concerns about the Part II decision-making process have also been raised by the Auditor General of Ontario and the Environmental Commissioner of Ontario.

To remedy this situation, the Environment Minister's EA Advisory Panel recommended years ago that in order to restore public trust and credibility in the Class EA process, two key reforms are necessary:

- during the Class EA planning process, there should be an expedited mechanism to allow the parties to seek rulings or directions from the independent Environmental Review Tribunal (ERT); and

- if there are any outstanding disputes at the end of the Class EA planning process, then Part II order requests should be adjudicated in writing by the ERT, not the Minister.

Unfortunately, these sound recommendations have not been adopted by the Ontario government to date. This inaction has left the Part II decision-making process intact as a contentious "black box" in which legitimate public requests go to the Minister, but they are almost always rejected, often for specious reasons.

This unsatisfactory arrangement will not be fixed by the Discussion Paper's proposals to simply speed up Ministerial decision-making, restrict who may file Part II requests, or limit the grounds for such requests. In fact, given that virtually all Part II order requests are rejected by the Minister in any event, CELA sees no persuasive reason for imposing any of these new restrictions in the Part II decision-making process. Instead, CELA submits that the EA Advisory Panel's above-noted recommendations should be developed and implemented forthwith by the Ontario government.

More generally, CELA concludes that the numerous Part II order requests filed every year by concerned citizens suggests that there is a high level of public dissatisfaction with the current state of Class EA planning processes. Accordingly, CELA submits that it would make more sense for the Ontario government to systematically review and address the root causes of elevation requests,

[21] Discussion Paper, page 12.
[22] See https://www.cela.ca/proposed-changes-Ontario-EA.

rather than try to expedite or constrain the Ministerial decision-making process in the manner suggested by the Discussion Paper.

(h) Inadequate "Vision" for "Modernizing" Ontario's EA Program

After proposing the above-noted "early actions," the Discussion Paper sets out its "vision" for a "modern" EA program in Ontario.[23] Some of the underlying principles are unobjectionable, such as ensuring that the level of assessment is commensurate with the environmental risks posed by the proposed undertaking. However, the Discussion Paper is largely unclear (if not inconsistent) on precisely how this principle will be operationalized by the Ontario government, as discussed below.

Similarly, the Discussion Paper correctly endorses the "one project, one assessment" approach for projects that trigger both the provincial and federal EA processes.[24] However, the Discussion Paper takes a partisan shot at the federal government's proposed overhaul of its current EA process. In CELA's view, it would behoove the Ontario government to focus on fixing its own broken EA program, rather than aim political criticism at the federal government for taking steps to reform the national EA process. In this regard, CELA submits that there is considerable room for improvement in both the federal and provincial EA processes.

In any event, the overarching "vision" that emerges from the Discussion Paper simply appears be an EA program that features faster and less robust EA processes which will apply to significantly fewer projects than the current regime, and which will be plagued by ongoing barriers to meaningful public/Indigenous participation. In CELA's view, this is not an acceptable proposal for "modernizing" Ontario's EA program. In essence, the Discussion Paper is calling for a rollback of current EA requirements, rather than implementing progressive measures that strengthen and improve the EA program.

At the same time, CELA notes that the Discussion Paper's "vision" lacks any references to, or endorsements of, key environmental planning principles that should be driving the EA program, such as sustainability, ecosystem approach, precautionary principle, and inter-generational equity. Similarly, the "vision" lacks any tangible targets or timeframes for utilizing the EA program in a manner that effectively addresses climate change, which, in CELA's view, constitutes the single greatest challenge for Ontarians in the 21st century.

On this point, CELA notes that the Environmental Commissioner of Ontario has lamented the demise of Ontario's EA program as a "vision lost."[25] Unfortunately, the Discussion Paper does not regain, restore or enhance the original "vision" of the *EAA* drafters, but instead places it further and further behind in the rear-view mirror. This is particularly true in relation to the Discussion Paper's proposal to create a new "projects list" for the purposes of triggering EA requirements under the *EAA*.

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[23] Discussion Paper, pages 15-29.
[24] *Ibid*, page 17.
[25] ECO Annual Report 2013-14, at pages 132-39: see http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf

(i) Ill-Advised "Project List" Approach

The Discussion Paper notes that some other Canadian jurisdictions use project lists to determine when EA requirements apply – or do not apply – to particular undertakings.[26] The Discussion Paper states that by adopting a listing approach in Ontario, the EA process will be "focused" on "major projects" that can cause "significant harm to the environment."

In CELA's opinion, there is nothing in the public interest purpose of the *EAA* that supports the Discussion Paper's contention that EA requirements should only apply to the "worst" projects that pose the greatest or most profound adverse effects upon the environment. In our experience, small and medium-sized projects may also directly, indirectly or cumulatively pose environmental, socio-economic and cultural impacts which should be evaluated and mitigated in an appropriate EA planning process.

In addition, CELA notes that the Discussion Paper fails to disclose the proposed list of project types/thresholds that will trigger the application of the *EAA*, and does not even offer illustrative examples of "major" undertakings that will remain subject to the *EAA*. Similarly, the Discussion Paper goes on to suggest that developing the list under the *EAA* "may also identify projects that should be excluded from the program, based on their associated level of risk."[27] In CELA's view, such comments in the Discussion Paper clearly signal the Ontario's government's intention to massively reduce the number and nature of undertakings that will trigger EA requirements under the "modernized" *EAA*.

Moreover, the Discussion Paper goes on to indicate that project listing decisions will be based on the "type, size and location" of undertakings,[28] but does not define or explain these potential listing criteria or the vague phrase "significant harm to the environment." In addition, the Discussion Paper does not mention whether the listing criteria will be codified in the *EAA*, regulations, or guidelines, or whether the listing exercise will be largely left to Ministerial or bureaucratic discretion.

To rationalize the project list proposal, the Discussion Paper claims that "in Ontario, environmental assessments are required for virtually all public sector projects."[29] This claim is manifestly false. As a matter of law, countless public sector undertakings (including large-scale provincial plans and programs) have been wholly exempted from the *EAA* over the past four decades under Regulation 334, declaration orders, legislative exemptions under other statutes, and schedules to Class EAs which specify types of undertakings for which no EA requirements are applicable.

On this latter point, the Discussion Paper vaguely suggests that the Ontario government "could consider how to incorporate streamlined processes into a project list."[30] No additional information is provided to explain this cryptic statement, or to demonstrate why this new approach is suddenly necessary and how it would be implemented in conjunction with Part II.1 of the *EAA*. In CELA's view, since the current suite of Class EAs already contain well-defined project categories or

[26] Discussion Paper, page 15.
[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*, page 16.

listings, the Discussion Paper's proposal to merge streamlined Class EA requirements into a project list is inappropriate, unwieldy and ultimately unjustified.

The Discussion Paper also refers to other provincial jurisdictions that use a "tiered" project list approach, and recognizes that since "not all projects require the same level of assessment," it is important to "tailor" EA requirements.[31] In CELA's view, this commentary overlooks the fact that Ontario's EA program already uses a tiered approach to tailor EA requirements in at least two key ways: (i) the distinction between individual EAs and the streamlined procedures found in Class EAs and sectoral screening processes; and (ii) the different types of planning requirements found within Class EAs for various categories of projects. Thus, it is highly misleading for the Discussion Paper to suggest or imply that Ontario's EA program does not align the level of assessment with the environmental risks associated with proposed undertakings.

In summary, CELA concludes that the Discussion Paper's ill-advised "project list" concept under the *EAA* is particularly alarming, and represents a clear step backwards from the "all in unless excluded" approach that currently exists within the Act in relation to public sector undertakings. The question of how to trigger the application of the *EAA* was the subject of a major public and political battle back in the 1970s when the Act was first drafted and debated. To its credit, the provincial government of the day correctly decided against using a project list approach (or discretionary case-by-case designations), and instead opted to use the inclusive approach that currently serves as the principled basis of the EA program.

CELA acknowledges that some other jurisdictions have opted to use project lists to trigger EA requirements, but the Discussion Paper neglects to mention that this approach has frequently spawned intractable battles over which projects should be on (or off) the list. Invariably, some environmentally significant projects have been left off the project lists entirely, often for economic or political considerations rather than environmental reasons. In other instances, the production thresholds (e.g. mega-watt output, tonnage capacity, length of road or transmission line, etc.) found in project lists are set so high that proponents have no problem crafting project descriptions that conveniently fall just below the prescribed threshold, which means that EA requirements are avoided entirely or circumvented by project-splitting.

CELA further notes that this acrimonious debate is currently playing out in the context of the draft project list that has been proposed in conjunction with the new federal EA legislation (Bill C-69). Not surprisingly, some environmentally significant projects (e.g. certain nuclear reactors, decommissioning of nuclear facilities, specific types of oil/gas activities, etc.) have been omitted from the draft federal list, which has prompted vigorous opposition[32] from concerned citizens, communities, non-governmental organizations, and Indigenous representatives. Accordingly, CELA submits that it would be a mistake to replicate this kind of project listing debacle in Ontario, as suggested by the Discussion Paper.

In the event that Ontario moves to a project list (despite CELA's caution against this approach), then clear listing criteria must be publicly developed, clearly entrenched in the *EAA*, and consistently applied in an open and transparent manner. More importantly, the project entries and thresholds reflected in the list must be science-based rather than be premised on the subjective

[31] *Ibid*, page 15.
[32] See https://naturecanada.ca/news/press-releases/federal-impact-rules-would-exempt-major-oil-and-gas-projects/.

views, value judgments or wishful thinking of provincial officials as to which public and private undertakings are environmentally significant enough to warrant inclusion on the project list. The list must also be subject to periodic public review, and the Minister or Cabinet must retain the residual authority under the *EAA* to order EAs of projects that are not caught by the project list.

(j) The Myth of "Duplication" between the EAA and Regulatory Requirements

The Discussion Paper asserts that there is "duplication" between the EA program and other provincial planning and approvals regimes.[33] This is an incorrect assertion. No other provincial statute requires proponents to demonstrate need/purpose, consider alternatives, and systematically evaluate ecological, socio-economic or cultural impacts of proposed undertakings.

For example, regulatory statutes (e.g. *Environmental Protection Act*, *Ontario Water Resources Act*, etc.) tend to deal with technical details of proposed facilities or equipment (e.g. final design specifications). In contrast, only the *EAA* requires a comprehensive assessment of the ecological, socio-economic and cultural effects of an undertaking and its alternatives. Similarly, only the *EAA* addresses the "big picture" environmental planning questions that typically do not get asked or answered under regulatory statutes (e.g. capacity of renewable resources to meet the needs of present and future generations).

In her 2016 Annual Report, the provincial Auditor General also dispelled the myth that other regulatory requirements are duplicative of EA requirements:

> **4.1.3 Other Regulatory Processes No Substitute for Environmental Assessment**
>
> Private-sector projects may require other types of municipal, provincial or federal approvals and permits to begin operations. However, even though many of these are also meant to protect the environment, we noted that, even collectively, they do not result in the same level of comprehensive evaluation as an environmental assessment…
>
> While many other regulatory approvals for private-sector projects—such as mines, quarries, manufacturing plants and refineries—consider the natural environment, they do not include all key elements of an environmental assessment. For example, while operators of chemical manufacturing plants must obtain an environmental approval from the Ministry to emit contaminants into the land, air and water, the approvals do not consider the social, cultural and economic impacts of the emissions.[34]

In addition, CELA notes that most commentators and EA participants have no objection in principle to the "one project, one assessment" approach espoused by the Discussion Paper. In our view, there have been a number of past examples where "harmonized" (or joint) federal/provincial EA processes have worked reasonably well in evaluating major projects that are subject to both regimes. However, for harmonized EAs to work properly under the current federal and provincial regimes, Ontario will have to significantly upgrade (not rollback) the EA program so that it better

[33] Discussion Paper, pages 17, 19.
[34] See http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf.

dovetails with key components of the federal EA process (e.g. participant funding, cumulative effects, etc.).

It should also be recalled that in order to coordinate EA requirements with other public hearing requirements under Ontario law, the province's *Consolidated Hearings Act* (*CHA*) has long existed to enable the establishment of joint boards (e.g. ERT and Local Planning Appeal Tribunal) to adjudicate all relevant appeals and approval applications for an individual project in a single proceeding. This common sense approach avoids a multiplicity of proceedings, prevents inconsistent results, and contributes to efficient decision-making under Ontario's environmental law framework. In CELA's view, however, this important procedural mechanism under the *CHA* has been underutilized in recent years. We further note that the Discussion Paper fails to mention the *CHA* at all, and neglects to identify options for making the *CHA* more readily available.

(k) Faster EA Decisions are not Necessarily Better Decisions

The Discussion Paper states that in some cases, the individual EA process can become slow, complex and uncertain.[35] To address such concerns, the Discussion Paper proposes to "find efficiencies" in the EA process in order to "shorten the timelines from start to finish."[36] As noted above, an important efficiency measure that is currently available – the *CHA* process – is not even mentioned in the Discussion Paper.

Moreover, the Discussion Paper's vague proposals about adopting a "one window" approach seem to rely heavily upon the promulgation of deadlines that are even shorter than those that currently exist under the *EAA*. Similarly, the Discussion Paper vaguely hints at "streamlining" permitting requirements under provincial statutes. However, the Discussion Paper does not actually explain why current EA deadlines are unworkable, nor specify what the revised timelines will entail, nor identify which statutory approvals, licences or permits will be "streamlined" (or how).

CELA also points out that in light of the current "exception to public participation" provisions in section 32 of the *EBR*, statutory instruments that are needed to implement undertakings that have been approved or exempted under the *EAA* do not have go through the public notice/comment requirements under Part II of the *EBR*. In these circumstances, CELA is unconvinced that any further "streamlining" of permitting requirements is required. To the contrary, CELA and other commentators have long maintained that the section 32 exception should be revised or removed from the *EBR*, as noted below.

In addition, the Discussion Paper's musings about the "one window" suggests that this arrangement does not currently exist within the MECP. In fact, MECP staff at the EA and Permissions Division already serve as the "single point of access"[37] for EA matters, and they centrally coordinate governmental and public reviews of the proponent's EA materials.[38] However, given the recent provincial budget's substantial reduction in the MECP's operating expenses,[39] it

[35] Discussion Paper, pages 22, 27.
[36] *Ibid*, page 22.
[37] See http://www.infogo.gov.on.ca/infogo/home.html#orgProfile/152574/en.
[38] See sections 7, 7.1 and 7.2 of the *EAA*.
[39] See https://www.ontario.ca/page/expenditure-estimates-ministry-environment-conservation-and-parks-2019-20.

is unclear to CELA how MECP staff will be able to implement a new time-limited "service standard"[40] for delivering faster (or better) EA reviews despite decreased institutional capacity.

CELA also questions why the Discussion Paper does not refer to the existing timeframes under Ontario Regulation 616/98, which sets strict deadlines (measured in weeks, not months or years) for governmental decision-making in relation to terms of reference and individual EAs under Part II of the *EAA*. Significantly, this regulation imposes no actual deadlines upon proponents to prepare and submit EA documentation. In CELA's experience, proponent-related problems (e.g. filing deficient documentation or failing to respond to information requests) are often the cause of prolonged delays in the conduct and completion of EA processes.

In addition, since EA processes are intended to be iterative and participatory in nature, it is not uncommon for the proponent's EA reports (or public or agency comments thereon) to identify new or unanticipated issues that may require additional field work or analysis. Therefore, in some instances, extra time may be needed to duly complete the EA process and to reach a credible, evidence-based outcome that achieves the purpose of the *EAA*.

CELA submits that this is also true in relation to the province's legal duty to consult and accommodate Indigenous communities, as it may take additional time to properly perform this duty in the EA context. In CELA's opinion, governmental or proponent attempts to "fast-track" Indigenous consultations in order to meet arbitrary EA timelines is an inappropriate and perilous approach that will inevitably trigger judicial review opportunities by aggrieved members of Indigenous communities. The possibility of litigation clearly creates more uncertainty and will substantially delay the overall timeline for implementing proposed undertakings.

To avoid such problems, the Discussion Paper suggests that MECP will "clarify" its "expectations" of proponents in relation to consultation, impact assessment, and other key aspects of the EA process.[41] As an example of "clearer guidance" that could be forthcoming from the MECP, the Discussion Paper refers to the current guideline for considering climate change in the EA program.[42]

Leaving aside the substantive shortcomings of this guideline, CELA submits that relegating such an important matter to non-binding and unenforceable guidance material is a sure-fire way to ensure that this topic will rarely (if ever) be rigorously addressed by proponents.[43] If the MECP truly wants climate change mitigation and adaptation to be examined in a robust, traceable and accountable manner during EA processes, then the essential elements of this obligation need to be entrenched in the *EAA* and fleshed out in regulations. This is also true of the MECP's "expectations" in relation to public consultation, Indigenous engagement, terms of reference preparation, and other key EA matters. In short, the EA process needs more rule-based decision-making – and less "guidance" or "expectations" – in order to achieve the purpose of the *EAA*.

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[40] Discussion Paper, page 27.
[41] *Ibid*, page 25.
[42] See https://www.ontario.ca/page/considering-climate-change-environmental-assessment-process.
[43] See https://www.cela.ca/using-EA-to-address-climate-change.

The Discussion Paper also proposes the development of "sectoral" terms of reference to guide individual EAs,[44] but fails to identify which sectors would be candidates for this unprecedented approach. In general terms, Minister-approved terms of reference are the legal roadmap for the conduct and content of an individual EA (e.g. by specifying which issues shall be examined, prescribing methodology for evaluating and ranking environmental impacts, providing direction on public consultation, etc.). In theory, the terms of reference mechanism was one of the few amendments to the *EAA* in 1996 that actually made sense from a practical and legal perspective.[45]

However, the 1996 amendments went on to undermine the utility of this mechanism by empowering the Minister to approve terms of reference that "focus" (or scope out) EA content requirements that are otherwise mandatory under the *EAA*. Given that this scoping power has been extensively used by the Minister since 1996, CELA sees no compelling need for "sectoral" (or one-size-fits-all) terms of reference for undertakings whose potential impacts are significant enough to warrant individual EAs.

(l) Online Registries do not Ensure Meaningful Public Participation

The Discussion Paper proposes the creation of an electronic registry that would enable the uploading and sharing of digital EA submissions.[46] In CELA's view, this would be a helpful reform for proponents and other participants in Ontario's EA process, and we note that an online registry has existed under the federal EA regime for years. We further note that recommendations to significantly upgrade the MECP's EA website were made almost 15 years ago by the EA Advisory Panel, but very little progress has been made to date on this matter.

However, CELA submits that not everyone interested in, or potentially affected by, proposed undertakings has access to a computer or broadband service (especially in rural or remote communities), and that not everyone speaks English as a first language. Therefore, CELA submits that the creation of an electronic registry cannot displace other traditional forms of public consultation in local communities (in appropriate languages and formats). Simply put, meaningful public/Indigenous participation under the *EAA* requires much more than simply having a time-limited opportunity to skim voluminous online documents and to provide emailed comments within a relatively short timeline.

(m) EA Reforms Missing from the Discussion Paper

There is a general consensus among environmental groups, EA practitioners, academics and stakeholders that Ontario's EA program needs to be substantially improved in order to meet the environmental and societal challenges that confront Ontarians in the 21st century. However, it is readily apparent that the Discussion Paper does not address (or even mention) these larger concerns.

For example, the *EAA* still does not prescribe a climate change test for undertakings that may cause or contribute to greenhouse gas emissions, or that may adversely affect carbon storage by

[44] Discussion Paper, page 26.
[45] See https://cela.andornot.com/archives/media/docs/FONDS%20CELA/SOUS-FONDS%20Publications/SERIES%20Other/FILE%20CELA%20briefs%20and%20responses%20to%20government%20consultations%20Other/ITEM%20Bill%2076/Bill%2076.pdf.
[46] Discussion Paper, page 28.

tree/vegetation removal. Similarly, the *EAA* does not expressly require consideration of cumulative effects from different projects in the same geographic region. Unfortunately, these and other types of overdue reforms are conspicuously absent from the Discussion Paper.

In light of these continuing gaps in the current EA program, there has been a widespread recognition that Ontario's EA program needs to be renewed, revised and revitalized. Thus, important recommendations for critically needed EA reforms have been offered over the years by CELA,[47] other environmental groups,[48] the Environment Minister's EA Advisory Panel,[49] the Auditor General of Ontario,[50] and the Environmental Commissioner of Ontario.[51]

It is beyond the scope of CELA's submissions on the Discussion Paper to describe in detail the various EA reforms that are overdue in Ontario, such as:

- updating and improving the purposes and principles of the *EAA* to reflect a sustainability focus;
- ensuring meaningful opportunities for public participation in individual EAs and Class EAs;
- enhancing consultation requirements for engaging Indigenous communities in a manner that aligns with the United Nations Declaration on the Rights of Indigenous Peoples, including the right to free, prior and informed consent;
- reinstating "proponent pays" intervenor funding legislation to facilitate public participation and Indigenous engagement;
- entrenching a statutory climate change test to help *EAA* decision-makers to determine whether particular undertakings should be approved or rejected in light of their greenhouse gas emissions or carbon storage implications;
- curtailing the ability of the Minister to approve Terms of Reference that narrow or exclude the consideration of an undertaking's purpose, need, alternatives or other key factors in individual EAs;
- extending the application of the *EAA* to environmentally significant projects within the private sector (e.g. mines);
- requiring mandatory and robust assessment of cumulative effects;
- facilitating regional assessments for sensitive or vulnerable geographic areas;

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[47] See http://www.cela.ca/publications/application-review-environmental-assessment-act-and-six-associated-regulations.
[48] See http://www.cela.ca/publications/briefing-note-need-environmental-assessment-ontario.
[49] *Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Recommendations 1-41: see https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1.
[50] See http://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html.
[51] See http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf and http://docs.assets.eco.on.ca/reports/environmental-protection/2007-2008/2007-08-AR.pdf.

- ensuring strategic assessments of governmental plans, policies and programs;
- referring individual EA applications to the ERT for a hearing and decision upon request from members of the public;
- reviewing and reducing the lengthy list of environmentally significant undertakings that have been exempted from the *EAA* by regulation, declaration orders, or legislative means; and
- removing or revising section 32 of the *EBR*, which currently exempts from the *EBR*'s public participation regime any licences, permits or approvals that implement undertakings that have been approved or exempted under the *EAA*.

Until these and other key reforms are implemented, CELA fully agrees with the 2014 commentary by the Environmental Commissioner of Ontario that the province's current EA program is a "vision lost":

> Given the unaddressed concerns and unfulfilled recommendations of the EA Advisory Panel, the ECO and many observers and stakeholders, the ECO believes a comprehensive and public review of the *EAA* is long overdue. The ECO also believes that MOE should conduct such a review with an open mind, listening to concerns from all sectors and utilizing the consultative power afforded by the Environmental Registry.[52]

Unfortunately, the above-noted reforms are not proposed in the Discussion Paper. Rather than tackling the serious systemic problems in Ontario's EA program, the Discussion Paper merely proposes questionable "efficiency" measures (e.g. exemptions, deadlines, etc.). In CELA's view, this narrow approach falls considerably short of the mark if the Ontario government is interested in pursuing appropriate EA reforms that benefit all Ontarians, not just proponents or their shareholders.

PART IV - CONCLUSIONS

For the foregoing reasons, CELA does not support the Discussion Paper's suggested "early actions" which propose to amend the existing Class EA regime to exempt certain undertakings, and to unduly constrain the process for filing and deciding Part II order requests.

In addition, CELA concludes that the Discussion Paper's "vision" for "modernizing" the EA program is short-sighted, misguided and unjustified. In our view, the Discussion Paper fundamentally fails to describe the types of structural *EAA* reforms that are needed to make the EA program more effective, enforceable and equitable.

CELA's overall conclusion is that a broader range of serious EA reforms (not just "streamlining" or "efficiency" measures) are long overdue in Ontario in order to fulfill the public interest purpose of the *EAA*. To the extent that these matters are not addressed adequately (or at all) by the

[52] ECO Annual Report 2013-14, at pages 132-39: see http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf.

Discussion Paper, this latest consultation exercise appears to CELA to be another squandered opportunity to get the EA program back on track in Ontario.

We trust that that CELA's comments on the Discussion Paper will be considered and acted upon as the Ontario government determines its next steps in relation to the EA program. If requested, CELA would be pleased to meet with provincial staff to further elaborate upon the numerous concerns raised in these submissions.

Yours truly,

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