Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

November 27, 2019 **BY EMAIL**

Ms. Goldie Ghamari, MPP
Chair, Standing Committee on General Government
99 Wellesley Street West, Room 1405
Whitney Block, Queen's Park
Toronto, Ontario
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Mr. Michael Helfinger
Senior Policy Advisor
Strategic and Corporate Policy Branch
Ministry of Economic Development, Job Creation and Trade
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Dear Ms. Ghamari and Mr. Helfinger:

RE: Bill 132 – *Better for People, Smarter for Business Act, 2019*
Environmental Registry No. 019-0774

On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide CELA's analysis, conclusions and recommendations regarding Bill 132 (*Better for People, Smarter for Business Act, 2019*).

For the reasons outlined below, CELA does not support the various Schedules within Bill 132 that propose to significantly amend Ontario's environmental legislation. In particular, CELA submits that Schedules 3, 8, 9 and 16 are unnecessary, unjustified and unacceptable from the public interest perspective.

Accordingly, CELA calls upon the Ontario government to immediately withdraw the above-noted Schedules from Bill 132.

CELA further submits that if the province believes that there is a compelling need to change Ontario's environmental protection and resource management statutes, then the government must meaningfully consult all persons interested in, or potentially affected by, such changes. Unfortunately, meaningful public and stakeholder consultation has not occurred to date in relation to omnibus Bill 132, which, in our view, is being rushed through the legislative process without adequate notice and comment opportunities.

PART I – GENERAL COMMENTS ON BILL 132

(a) Background

CELA is a public interest law group based in Toronto. For almost 50 years, we have provided legal services to low-income persons and vulnerable communities in all regions of Ontario. In the courts and before tribunals, our clients have used or relied upon many of the environmental laws that Bill 132 proposes to amend.

This is particularly true in relation to the environmental statutes administered by the Ministry of the Environment, Conservation and Parks (MECP) and the Ministry of Natural Resources and Forestry (MNRF). In addition, CELA is a current member of the Ontario Pesticides Advisory Committee, which Bill 132 proposes to abolish, as discussed below.

(b) The Unpersuasive "Red Tape" Rationale for Bill 132

Bill 132 is almost 100 pages long and contains seventeen Schedules that, if enacted, will change numerous statutes, such as:

- *Aggregate Resources Act;*
- *Crown Forest Sustainability Act, 1994;*
- *Environmental Protection Act;*
- *Fish and Wildlife Conservation Act, 1997;*
- *Lakes and Rivers Improvement Act;*
- *Mining Act;*
- *Nutrient Management Act, 2002;*
- *Oil, Gas and Salt Resources Act;*
- *Ontario Water Resources Act*;
- *Pesticides Act*;
- *Public Lands Act*;
- *Resource Recovery and Circular Economy Act, 2016*;
- *Safe Drinking Water Act, 2002*; and
- *Waste Diversion Transition Act, 2016*.

When introducing Bill 132, the Associate Minister of Small Business and Red Tape Reduction stated that the legislation is intended to improve "upon our open-for-jobs policy of making Ontario more competitive."[1] Similarly, during Second Reading debate, the Associate Minister claimed that "cutting red tape for businesses" is the goal of Bill 132.[2]

However, CELA's analysis of Bill 132 suggests that several Schedules are aimed more at revising, weakening or eliminating key environmental safeguards, rather than improving competitiveness

[1] Ontario, Official Report of Debates of the Legislative Assembly (Hansard), 42nd Parl, 1st Sess, No 118 (28 October 2019) at 5647 (Hon. Prabmeet Singh Sarkaria).
[2] Ontario, Official Report of Debates of the Legislative Assembly (Hansard), 42nd Parl, 1st Sess, No 121 (31 October 2019) at 5821 (Hon. Prabmeet Singh Sarkaria).

or removing unnecessary "red tape." For this reason alone, CELA recommends that Schedules 3, 8, 9 and 16 should not proceed in their present form.

(c) Inadequate Public Consultation on Bill 132

As noted above, Bill 132 proposes to change fourteen different environmental laws in one fell swoop. However, only a 30 day public comment period has been provided under the *Environmental Bill of Rights* (*EBR*) for all of these significant legislative changes affecting several different ministries and numerous stakeholders, non-governmental organizations, and members of the public.[3] Given the complexity of Bill 132, it is unclear to CELA why the Ontario government decided to utilize the minimum comment period available under the *EBR*.[4]

On this point, CELA notes that one of the overarching purposes of the *EBR* is to ensure meaningful public participation in environmental decision-making by the Ontario government.[5] CELA further notes that the MECP's Statement of Environmental Values (SEV) under the *EBR* acknowledges that public consultation is "vital to sound environmental decision-making," and commits the Ministry to providing opportunities for an open and consultative process when decisions are made that might significantly affect the environment."[6] An identical commitment is set out in the MNRF's SEV under the *EBR*.[7]

However, despite these important *EBR* purposes and clear SEV commitments, it appears that the Ontario government has decided to expedite the passage of Bill 132, rather than undertake all necessary steps to ensure meaningful public consultation on the environmental components of the Bill. CELA's consultation concerns are exacerbated by the fact that most of the environmental laws slated to be reformed by Bill 132 are, in fact, prescribed statutes under the *EBR* for various purposes.[8]

In these circumstances, CELA submits that the Ontario government should have provided a longer comment period under the *EBR* (e.g. 90 to 120 days) in order to facilitate informed public engagement on Bill 132. In fact, the *EBR* specifically enables comment periods longer than the 30 day minimum after considering various factors (e.g. complexity of the proposal, level of public interest in the proposal, etc.).[9] To our knowledge, there is no evidence indicating that government decision-makers directed their minds to the issue of whether the comment period should be extended in relation to Bill 132.

In addition, while the time-limited *EBR* consultation has been underway, the Ontario government has also taken ill-advised measures to dramatically shorten the legislative process for Bill 132. For example, the provincial government passed a controversial time allocation motion on November 6, 2019 that essentially limited Second Reading debate, referred Bill 132 to the Standing

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[3] See https://ero.ontario.ca/index.php/notice/019-0774.
[4] *EBR*, subsection 15(1).
[5] *EBR*, subsection 2(3) and section 3.
[6] See https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change.
[7] See https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-natural-resources-and-forestry.
[8] O.Reg. 73/94.
[9] *EBR*, section 17.

Committee for a small handful of public hearings, restricted the Standing Committee's clause-by-clause review to a single day, and required that Bill 132 must be reported back to the Ontario Legislature on the following day.

Given the nature, scale and significance of the proposed amendments to Ontario's environmental law framework, CELA concludes that fast-tracking Bill 132 in this manner is unwarranted, inappropriate and inconsistent with public participation rights entrenched in the *EBR* and applicable SEV commitments. We would further observe that the proliferation of overlapping and duplicative ERO notices about different components of the Bill 132 amendments tends to hinder – not help – soliciting public feedback on these alarming statutory changes.

PART II – SPECIFIC COMMENTS ON BILL 132

Given the highly compressed nature of the Bill 132 consultation process, it is beyond the scope of this submission to identify and respond to every proposed amendment contained in Bill 132. Accordingly, the following analysis is confined to the key aspects of Schedules 3, 8, 9 and 16 in Bill 132 that are of the greatest concern to CELA.

It should be further noted that CELA's lack of commentary on other aspects of Bill 132 should not be construed as our endorsement of, or support for, any provisions or Schedules that are not specifically addressed in this submission. Accordingly, CELA reserves the right to provide future comments on these other matters in the event that they are enacted and implemented through policy, regulations or other instruments.

For each of the above-noted Schedules in Bill 132, this submission provides a general description of the legislative proposal, and summarizes CELA's main concerns about the proposal from the public interest perspective of our client communities.

These numerous concerns are explained in more detail in the various appendices that are attached to this submission. These appendices have been prepared by CELA staff or other commentators, and they form an integral part of this submission.

(a) Schedule 3: Eliminating the Local Planning Appeal Support Centre

Schedule 3 of Bill 132 is intended to dissolve the Local Planning Appeal Support Centre and repeal the *Local Planning Appeal Support Centre Act, 2017*.

As explained in **Appendix A** below, this legislation was passed by the previous government in conjunction with sweeping changes to Ontario's land use planning and appeal system that were implemented under Bill 139. During its brief existence, the Support Centre provided useful and timely information to individual residents and non-governmental organizations about how to meaningfully exercise their participatory rights under the *Planning Act*.

At present, the Bill 139 reforms have now been superseded by more recent changes to the *Planning Act* which were contained in Bill 108, as enacted by the current provincial government earlier this year. Nevertheless, CELA concludes that there is still an ongoing public need for the professional

planning assistance and general information that had been previously provided by the Support Centre.

CELA therefore recommends that the Ontario government should reconsider the proposed repeal of the *Local Planning Appeal Support Centre Act, 2017*. In the alternative, the Ontario government should develop and fund an efficient substitute for the Support Centre and the important services that it provided to the people of Ontario.

(b) Schedule 8: Changing Closure Plans under the Mining Act

Schedule 8 of Bill 132 proposes to amend various provisions in Part VII of the *Mining Act* in relation to closure plans and amendments to closure plans.

As described in **Appendix B** below, CELA is primarily concerned about the proposed removal of the current requirement that the closure plan must be "certified" before it is submitted to the Ontario government.

In our view, the deletion of this key term injects ambiguity into the mine closure planning process, and appears to create discrepancies between the *Mining Act*, Ontario Regulation 240/00 and the Mine Rehabilitation Code.

Accordingly, CELA recommends that these amendments should be reconsidered and re-drafted for the purposes of greater clarity, certainty and accountability.

(c) Schedule 9: Amending Statutes Administered by the MECP

Schedule 9 of Bill 132 proposes to amend several statutes administered by the MECP. CELA's response to the most troubling aspects of the proposed amendments is set out below.

Environmental Protection Act

Schedule 9 proposes a wide-ranging series of amendments to the *Environmental Protection Act* (*EPA*), including: (i) revision of the main anti-pollution prohibition in section 14(1) of the *EPA*; (ii) repeal of provisions currently used to regulate motor vehicle emissions; and (iii) repeal of provisions addressing complaints that contaminants have caused economic loss or damage to livestock, crops, trees or other vegetation.

However, CELA's main concern arises from the proposed repeal of the current "environmental penalties" regime under the *EPA*, and replacing it with a new "administrative penalties" regime. This new regime provides the blueprint for including administrative penalties under three other statutes (e.g. *Nutrient Management Act*, *Pesticides Act*, and *Safe Drinking Water Act*), but suffers from several fundamental flaws.

In principle, CELA supports the use of administrative penalties as an alternative to prosecutions in appropriate cases. These types of monetary penalties have existed in the *EPA* and *Ontario*

Water Resources Act (*OWRA*) for years, and they have proven to be a useful compliance mechanism for holding polluters accountable without going to court.

Schedule 9 of Bill 132 now proposes to amend the penalty regime under the *EPA* and *OWRA*, and to extend the same basic regime to the three above-noted environmental laws. Nevertheless, CELA remains concerned that the proposed wording of the Schedule 9 amendments is counter-productive and will undermine the effectiveness of administrative penalties. In this regard, CELA fully adopts and commends the Ecojustice submission reproduced below as **Appendix C**.

For example, Schedule 9 proposes to change administrative penalties from a per diem penalty to a per contravention penalty. In our view, this is an undesirable rollback from current *EPA* and *OWRA* provisions, which state that environmental penalties can be imposed for **every day** that the offence continues. In our view, the current per diem approach should be retained since it can result in higher penalties for multi-day offences, which will have a greater deterrent effect on polluters.

Similarly, in cases where an administrative penalty is issued, CELA is concerned that Schedule 9 will make it easier for polluters to appeal the penalty by removing the reverse onus that currently exists in the *EPA*. This onus correctly puts the burden on polluters to prove on appeal that the alleged facts did not occur. However, Schedule 9 proposes to remove this evidentiary onus. In our view, this is a major step backwards, and should not be enacted.

For these and other reasons, CELA cannot support the proposed administrative penalty provisions contained in Bill 132. CELA submits that these reforms require serious re-thinking and complete re-drafting before they move forward.

This is particularly true in light of the MECP's related proposal to repeal all of the current MISA (Municipal Industrial Strategy for Abatement) wastewater regulations under the *EPA*.[10] These existing regulations establish sector-specific contaminant limits and monitoring/reporting obligations for various industries that discharge substances into Ontario's waterbodies. However, the MECP is now proposing to wholly repeal these regulations, and to incorporate their requirements into facility-specific Environmental Compliance Approvals (ECA) on a case-by-case basis.

For the reasons outlined in the attachment to Appendix C below, CELA strongly opposes this ill-conceived proposal, and calls upon the MECP to retain and update the critically important MISA regulations and wastewater ECAs. In our view, the Ontario government's proposal to transfer the requirements of MISA into the ECA process fundamentally weakens the regulatory framework governing water pollution, and re-creates the very problem that the MISA regulations were enacted to address in the first place.

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[10] See https://ero.ontario.ca/notice/019-0773.

Nutrient Management Act, 2002

Schedule 9 proposes to insert the revised administrative penalty regime into this legislation. CELA's concerns about the new regime are outlined in Appendix C below, and need not be repeated here.

Ontario Water Resources Act

Schedule 9 of Bill 132 proposes to insert the revised administrative penalty regime into the *OWRA*. CELA's concerns about the new regime are outlined in Appendix C below, and need not be repeated here.

Schedule 9 also proposes to exempt hydroelectric dams from having to obtain a Permit to Take Water (PTTW) under section 34 of the *OWRA*. Related amendments are also proposed in Schedule 16 of Bill 132 to amend the *Lakes and Rivers Improvement Act* (*LRIA*), which is administered by the MNRF.

As noted in **Appendix D** below, CELA does not support the proposed PTTW exception for waterpower projects. In our view, Ontario has a robust and well-developed PTTW regime under the *OWRA* that includes key regulatory provisions and detailed policy guidance which should continue to apply to waterpower projects in order to safeguard aquatic ecosystems, enable sustainable water management, and ensure equitable sharing of surface water resources for various beneficial uses.

In contrast, the proposed amendments to the *LRIA* would essentially require the MNRF to construct a whole new regulatory regime from scratch, and it is unknown whether – or to what extent – that this *LRIA* regime will adequately capture the matters currently addressed in the PTTW program. In short, the PTTW program is fundamentally sound, and there is no cogent evidence demonstrating a need to "fix" the PTTW program to benefit a particular energy sector through the proposed changes to the *OWRA* and *LRIA*.

Moreover, CELA submits that the provisions of existing Waterpower Class Environmental Assessment, or the proposed changes to the *LRIA* regarding water management plans, are not acceptable substitutes for the PPTW regime. In our view, there is no overlap or duplication between the PTTW regime under the *OWRA* and these other planning and approval processes since they essentially address different aspects of waterpower projects.

Appendix D also attaches a detailed submission prepared by the Ontario Rivers Alliance (ORA) in relation to the hydroelectric dam-related amendments proposed in Bill 132. CELA fully endorses and commends the ORA submission, and we concur with the ORA that "any significant impact of hydro operations on water quality, water quantity and aquatic life should be subject to the same obligations as all other water users."

Pesticides Act

Schedule 9 of Bill 132 proposes various amendments to the *Pesticides Act,* which is Ontario's primary law for regulating or prohibiting the use of pest control products. These products are specifically intended to kill living organisms, which is why pesticide applications must be strictly controlled under the Act.

However, for the reasons described in **Appendix E** below, CELA is concerned that the Schedule 9 amendments to the *Pesticides Act* may result in the expanded use of neonics within the agricultural sector, and the increased use of cosmetic pesticides for non-essential purposes. This is because Schedule 9 proposes to terminate the current classification system under the *Pesticides Act*, and to replace it with a discretionary bureaucratic list administered by an MECP Director.

CELA is especially concerned about the new criteria to be used by the Director when deciding, on case-by-case basis, whether additional pesticides should be allowed for cosmetic use in Ontario. In particular, the proposed criteria for deciding if more cosmetic pesticides should be added to the existing Class 11 list have clear potential to undermine the precautionary intent of Ontario's current ban, and to give the Director the ability to add previously banned pesticides to this list.

CELA is also strongly opposed to the Schedule 9 proposal to abolish the Ontario Pesticides Advisory Committee (OPAC), which has provided non-partisan expert advice directly to the Environment Minister since the 1970s.

On this point, we fully agree with the recent letter from the OPAC Chair to Premier Ford dated November 21, 2019, which is attached to Appendix E below. In particular, we concur with the OPAC Chair that there are no persuasive reasons to eliminate the current pesticide classification system entrenched by regulation in Ontario, or to terminate the OPAC and thereby deprive the Minister of independent science-based advice from the highly qualified members of the OPAC.

Therefore, CELA recommends that the amendments to the *Pesticides Act* proposed in Schedule 9 should not be adopted.

Resource Recovery and Circular Economy Act, 2016* and *Waste Diversion Transition Act, 2016

Schedule 9 of Bill 132 proposes to amend the objects of the Resource Productivity and Recovery Authority under the *Resource Recovery and Circular Economy Act, 2016* (*RRCEA*), and to authorize the payment of funds from the Authority to the Crown in order to defray provincial costs incurred in administering the Act and regulations. In addition, the Schedule 9 amendments address the applicability of various inspection, compliance and enforcement provisions under Part V of the Act.

Schedule 9 also proposes to amend the *Waste Diversion Transition Act, 2016* (*WDTA*) in relation to the distribution of property to the Resource Productivity and Recovery Authority by an industry funding organization.

As described below in **Appendix F**, CELA remains concerned about ensuring public transparency in the Authority's activities and data/information collection, particularly if the Authority is directed by the Minister to address waste-related matters other than the forthcoming extended producer responsibility regime.

In particular, Schedule 9 proposes to delete the current requirement in section 24 of the *RRCEA* that the Authority must provide "to the public" information about its activities under the Act and regulations. In CELA's view, this important phrase must be restored in order to ensure transparency, accountability and unimpeded public access to all data and information held by the Authority.

Similarly, CELA is concerned that extensive Ministerial use of the new power to issue written directions to the Authority may displace or avoid the promulgation of key regulations under the Act, which will also undermine public transparency and accountability.

Safe Drinking Water Act, 2002

Schedule 9 of Bill 132 proposes to insert the revised administrative penalty regime into the *Safe Drinking Water Act, 2002*, which governs the treatment, distribution and testing of municipal drinking water. CELA's concerns about the new regime are outlined in Appendix C below, and need not be repeated here.

(d) Schedule 16: Amending Statutes Administered by the MNRF

Schedule 16 of Bill 132 proposes to amend several statutes administered by the MNRF. CELA's response to the most problematic aspects of the proposed amendments is set out below.

Aggregate Resources Act

Schedule 16 of Bill 132 proposes a number of sweeping changes to the *Aggregate Resources Act* (*ARA*), which governs the establishment, operation and rehabilitation of pits and quarries.

In CELA's experience, aggregate operations cannot be characterized as small-scale, temporary or environmentally benign land uses. To the contrary, the extraction, processing and transportation of aggregate materials (and other on-site ancillary activities such as dewatering, fuel storage or asphalt production) are significant, long-term and physically intrusive operations that can result in serious environmental and nuisance impacts.

Unfortunately, the proposed *ARA* amendments in Schedule 9 generally weaken or wholly remove some important safeguards that currently exist in Ontario law. Contrary to industry or governmental claims, CELA submits these existing protections are not "red tape," nor do they impose an undue burden to the aggregate industry by wholly preventing or unreasonably constraining aggregate extraction.

In addition, the *ARA* track record amply demonstrates that new or expanded aggregate operations are readily approvable in Ontario, particularly since they receive preferential treatment in the

Provincial Policy Statement issued under the *Planning Act*.[11] Accordingly, CELA concludes the Ontario government has fundamentally failed to produce any persuasive evidence-based justification for rolling back or weakening the existing provisions of the *ARA*.

In particular, Schedule 16 proposes to make municipal by-laws "inoperative" if they restrict the depth of aggregate extraction in order to protect groundwater. Schedule 16 also proposes to expand the ability of aggregate companies to self-file their own changes to site plans without Ministerial approval, thereby raising the prospect of "self-regulation" by the aggregate industry.

As more fully described in **Appendix G** below, these and other aggregate reforms proposed in Schedule 16 are undesirable and unnecessary, and CELA recommends that they should not be undertaken by the Ontario government. Instead, the Ontario government should develop and consult upon the long overdue *ARA* reforms recommended by the Environmental Commissioner of Ontario (ECO) in 2017:[12]

- decrease the demand for "new" or "virgin" aggregate (e.g. by increasing the use of recycled aggregate, wood building materials and green infrastructure);
- strengthen MNRF powers to update site-specific environmental requirements to ensure that long-operating pits and quarries continue to meet modern standards; and
- improve progressive and final rehabilitation rates through better compliance and enforcement by the MNRF, and through clearer timelines for rehabilitation.

Unfortunately, the *ARA* proposals in Schedule 16 are moving in the opposite direction of the ECO recommendations by proposing to modify (or remove) key components of the current provincial and municipal framework that attempt to prevent, minimize or mitigate the adverse effects and environmental risks associated with aggregate production.

In CELA's view, the proposed *ARA* changes in Bill 132 are short-sighted, counter-productive, and clearly intended to favour the interests of aggregate producers over those of local residents and municipalities that will be burdened with the environmental and socio-economic impacts of increased aggregate extraction.

Crown Forest Sustainability Act, 1994

Schedule 16 of Bill 132 proposes a number of different amendments to the *Crown Forest Sustainability Act, 1994* (*CFSA*). The *CFSA*'s purpose is to "provide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations."[13]

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[11] See CELA's recent submission on Ontario's proposed changes to the Provincial Policy Statement which assign even greater priority to aggregate production: https://www.cela.ca/planning-act-2019-pps-review.
[12] ECO, *2017 Annual Report: Good Choices, Bad Choices*, page 168. Online, http://docs.assets.eco.on.ca/reports/environmental-protection/2017/Good-Choices-Bad-Choices.pdf.
[13] *CFSA*, section 1.

In turn, “sustainability” is defined by the *CFSA* as “long term Crown forest health,”[14] which is determined under the Forest Management Planning Manual on the basis of the following two principles:

- Large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved.
- The long term health and vigour of Crown forests should be provided for by using forest practices that, within the limits of silvicultural requirements, emulate natural disturbances and landscape patterns while minimizing adverse effects on plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values.[15]

Among other things, Schedule 16 of Bill 132 proposes to amend the *CFSA* by creating a new permitting process that would allow proponents to remove Crown forests for non-forestry purposes. Alarmingly, Schedule 16 expressly exempts such permits from the sustainability requirements under the *CFSA*.

As discussed below in **Appendix H**, CELA is strongly opposed to these and other changes to the *CFSA*. In our view, sustainability is the paramount consideration under the *CFSA* to guide the management of forests located on the Crown lands of Ontario, and this critical factor should inform every statutory approval or instrument issued under the *CFSA*. In addition, CELA is not aware of any compelling evidence demonstrating that the MNRF must now be empowered to issue permits to allow unsustainable tree harvesting practices by private companies operating on Crown land.

Appendix H also sets out CELA’s concerns about other Schedule 16 proposals, including the removal of the current provision requiring Ministerial approval of annual work schedules, and the deletion of annual Ministerial reporting to the Ontario Legislature regarding forestry matters. CELA submits that the former proposal will inappropriately dilute the MNRF’s regulatory supervision and control over annual work schedules, while the latter proposal will sharply reduce legislative oversight and accountability for the management of Crown forests in Ontario.

Accordingly, CELA recommends that the Schedule 16 amendments to the *CFSA* should not be enacted.

Fish and Wildlife Conservation Act, 1997

Among other things, Schedule 16 of Bill 132 proposes to amend this legislation in order to enhance MNRF powers to monitor, control or eradicate wildlife diseases in Ontario.

As outlined in **Appendix I** below, CELA acknowledges the need for timely, effective and science-based actions to address wildlife diseases. However, it appears to CELA that the proposed amendments require further consideration and significant re-drafting in order to maximize their efficacy.

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[14] *CFSA*, subsection 2(1).
[15] *CFSA*, subsection 2(3).

For example, Schedule 16 includes new provisions that empower conservation officers to make seizures of "things" in order to prevent the inadvertent transport of wildlife diseases. However, these provisions do not expressly contemplate actions to study or prevent non-human pathways of disease transference. Aside from the potential spread of disease through the trade and transport of wildlife, disease transmission can also be caused by habitat loss and climate change -which are recognized as worsening the extent of and range of disease occurrence – are not considered.

Accordingly, CELA recommends that the Ontario government should use this opportunity to more fully develop and consult on proposed amendments that are effective and enforceable for the purposes of anticipating, preventing or mitigating wildlife diseases in the province.

Lakes and Rivers Improvement Act

Schedule 16 of Bill 132 proposes to amend the Minister's regulation-making authority under this legislation. CELA's concerns about this proposal are outlined in Appendix D below, and need not be repeated here.

PART III -- CONCLUSIONS

For the foregoing reasons, CELA concludes that the Bill 132 amendments to Ontario's environmental law framework are fundamentally flawed, plagued by interpretive difficulties, contain unjustifiable loopholes or exceptions, and do not reflect good public policy.

CELA suggests that these shortcomings are attributable, at least in part, to the Ontario government's inexplicable failure or refusal to undertake meaningful upfront consultations with interested or affected persons to help determine if statutory amendments are actually required, and if so, what the amendments should entail or address.

Instead, the statutory amendments were suddenly announced to Ontarians mere weeks ago when Bill 132 was first introduced in the Legislative Assembly, and the subsequent public "consultations" under the *EBR* and via the Standing Committee have been too rushed, circumscribed and inadequate.

Accordingly, CELA recommends that Schedules 3, 8, 9 and 16 be struck or withdrawn from Bill 132 at the earliest possible opportunity.

We trust that the Ontario government will consider and act upon this recommendation as it determines the next steps regarding Bill 132.

Please contact the undersigned if you have any further questions about CELA's position on Bill 132.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Mr. Jerry DeMarco, Commissioner of the Environment

APPENDIX A

CELA COMMENTS ON SCHEDULE 3 OF BILL 132: PROPOSED REPEAL OF THE *LOCAL PLANNING APPEAL SUPPORT CENTRE ACT, 2017*

Prepared by
Richard D. Lindgren, CELA Counsel

Schedule 3 of Bill 132 proposes to repeal the *Local Planning Appeal Support Centre Act, 2017* and to dissolve the Local Planning Appeal Support Centre.

This legislation was passed by the previous government in conjunction with sweeping changes to Ontario's land use planning and appeal system that were implemented under Bill 139. At the time, CELA expressed various concerns about several substantive aspects of the Bill 139 reforms.[1] However, we had no objection to the statutory creation of the Support Centre since it was intended to assist Ontarians who were involved in land use decision-making under the *Planning Act*, or who were participating in land use appeals to the Local Planning Appeal Tribunal.

During its brief existence, the Support Centre provided useful and timely information to individual residents and non-governmental organizations about how to meaningfully exercise their participatory rights under the *Planning Act*. From time to time, CELA referred members of the public to the Support Centre, and it is our understanding that these people were very satisfied with the assistance that they received from the planners and other staff at the Support Centre.

The Bill 139 reforms have now been superseded by more recent changes to the *Planning Act* which were contained in Bill 108 and enacted by the current provincial government earlier this year. CELA supported some – but not all – of these legislative changes,[2] and the net result is that for many Ontarians, the updated land use planning and appeal system remains as complex, daunting and confusing as the Bill 139 regime.

This is particularly true in relation to the application of the relevant transitional provisions between the former and current land use planning regime, and in relation to the recently proposed changes to the Provincial Policy Statement under the *Planning Act* which, in CELA's opinion, will likely continue – if not exacerbate – local land use planning disputes throughout Ontario.

Accordingly, CELA submits that there is still an ongoing public need for the professional planning assistance that had been previously provided by the Support Centre. CELA therefore recommends that the province should reconsider the proposed repeal of the *Local Planning Appeal Support Centre Act, 2017*, or in the alternative, the province should develop and fund an efficient substitute for the Support Centre and the important services that it provided to the people of Ontario.

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[1] See https://cela.ca/proposed-land-use-planning-reforms-in-ontarios-bill-139-a-public-interest-perspective/ and https://cela.ca/proposed-regulations-under-bill-139/.
[2] See https://cela.ca/submission-on-planning-act-bill-108/.

RECOMMENDATION 1: The provincial government should reconsider the proposed repeal of the *Local Planning Appeal Support Centre Act, 2017*. In the alternative, the provincial government should develop and fund an efficient substitute for the Support Centre and the important services that it provided to the people of Ontario.

November 2019

APPENDIX B

CELA COMMENTS ON SCHEDULE 8 OF BILL 132: PROPOSED AMENDMENTS TO THE *MINING ACT*

Prepared by
Kerrie Blaise, CELA Counsel

In a recent Environmental Registry notice,[1] the Ontario government proposed amendments to the *Mining Act* to clarify "confusing and inconsistent language that relates to the submission and filling of Closure Plans and Amendments" and set timeframes within which the Director must make a decision to file or return the Amendment.

As set out in *Bill 132, Better for People, Smarter for Business Act, 2019* (Bill 132), Schedule 8 makes various amendments in respect of Part VII "Rehabilitation of Mining Lands" in the *Mining Act*. Specifically:

> Amendments are made in several provisions to distinguish between the submission by a proponent and filing by the Director of a closure plan or an amendment to a closure plan. If a proponent submits an amendment to a closure plan in respect of advanced exploration or mine production, the Director is required to make a decision about filing the amendment no later than 45 days after the submission.

Among the proposed changes in Schedule 8, CELA draws the government's attention to section 9 which seeks to amend section 147(1) of the *Mining Act.* Accordingly, section 9 amends the Act by striking out "to file within the time specified in the order a **certified** closure plan to rehabilitate the mine hazard, and the proponent or prior holder shall file the **certified** closure plan" [emphasis added] to "to submit within the time specified in the order a closure plan to rehabilitate the site or mine hazard and the proponent or prior holder shall submit the closure plan" [certified removed].

CELA is concerned by the removal of the term "certified," which is not explained in Bill 132's Explanatory Note. In our view, the removal of this term introduces ambiguity regarding licensees' conformance with the *Mining Act's* mine closure regulation. According to the Ministry of Northern Development and Mines' guidance,[2] closure plans are to be "certified by company executives to ensure that they cover all of the conditions in the Mine Rehabilitation Code" (Code). The Code is set out in Schedule 1 of *O.Reg 240/00: Mine Development and Closure under Part VII of the Act*

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[1] See online: https://ero.ontario.ca/notice/019-0794
[2] Ministry of Northern Development and Mines, "Closure Plan," online: https://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/development/mine-development/closure-plan

and includes conditions related to closure plans, such as monitoring programs for water drainage (section 39) and remediation of aquatic life (section 40).

Schedule 8's removal of the term "certified" in s. 147, however, removes the requirement for conformance with the Code. Further, as Schedule 8 is silent on any changes to *O Reg 240/00* and the applicability of the Code, Schedule 8 makes it less clear what is required of proponents, in ensuring compliance with the regulations of the *Mining Act.* **Therefore, CELA recommends Schedule 8 be amended to remedy these discrepancies and should future amendments to the regulations be made, the effect of removing the term 'certified' reconsidered at that time.**

APPENDIX C

COMMENTS ON SCHEDULE 9 OF BILL 132:

PROPOSED ADMINISTRATIVE PENALTIES

Prepared by Ian Miron, Ecojustice Counsel

A. Summary and Recommendations

I write on behalf of Ecojustice concerning the above proposals to change administrative monetary penalty (**AMP**) regimes under five Ontario environmental statutes: the *Environmental Protection Act* (***EPA***), *Ontario Water Resources Act* (***OWRA***), *Nutrient Management Act, 2002* (***NMA***), *Pesticides Act*, and *Safe Drinking Water Act, 2002* (***SDWA***).

Ecojustice is Canada's largest environmental law charity. In Ontario, Ecojustice lawyers help community groups, environmental non-governmental organizations, Indigenous communities and individual Ontarians use the power of the law to defend nature, combat climate change and fight for a healthy environment.

In principle, Ecojustice strongly supports the use and expansion of AMPs as complementary environmental compliance tools. To be clear, AMPs should never completely replace prosecutions, particularly for more serious incidents. Nor can they reverse the negative compliance and enforcement impacts of Ministry budget cuts. However, AMPs are used across North America to supplement other compliance and enforcement tools, like prosecutions, in the environmental context and beyond.

AMPs "are generally seen as a quicker and less expensive option than court proceedings."[1] Since they provide regulators with a simpler, faster, and cheaper compliance tool, they can bolster the regulator's enforcement capacity and increase overall compliance action. By diverting compliance efforts from the court system and by lowering standards of proof, AMPs can increase overall compliance by increasing the likelihood that non-compliance will actually attract a penalty.

This proposal says it aims to hold polluters accountable by expanding the use of AMPs. According to the Ministry of the Environment, Conservation and Parks (**Ministry**), the proposed legislative changes are intended to "introduce, expand and/or clarify enabling authority to issue" AMPs under key environmental laws in order to "strengthen enforcement and compliance" with those laws.[2] Ecojustice strongly supports that goal.

However, Bill 132 will not accomplish that goal. Many of the proposed changes are permissive – they permit Cabinet to expand (or narrow, or maintain) AMP tools at some later date; they do not immediately expand those tools. Ecojustice understands that the Ministry intends to consult on and finalize regulations promptly in the fall and winter of 2019/2020, and that existing

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[1] Law Commission of Ontario, *Modernization of the Provincial Offences Act: Final Report* (August 2011), online: http://www.lco-cdo.org/wp-content/uploads/2011/10/POA-Final-Report.pdf.

[2] Ministry of the Environment, Conservation and Parks, "Holding polluters accountable by expanding the use of administrative monetary penalties for environmental contraventions" (28 October 2019), online: https://ero.ontario.ca/notice/019-0750.

regulations under the *EPA* and *OWRA* will continue in force in the meantime.[3] Ecojustice looks forward to commenting on proposals for such regulations in short order and hopes to be able to support such proposals.

Therefore, Ecojustice recommends **that Ontario publicly commit, through its response to ERO comments, to consult the public and finalize strong regulations to implement new AMP regimes for each statute as soon as possible.**

More problematically, Bill 132 will actively undermine the Ministry's existing AMP tools in several ways. If enacted, these specific changes will hamper enforcement and compliance efforts and decrease polluter accountability, contrary to the government's stated goal.

To ensure that Bill 132 can accomplish the government's stated objective of strengthening compliance by expanding tools to hold polluters accountable, Ecojustice therefore recommends it be amended to:

1) **Expand the required minimum content of annual AMP reports to include all of the information suggested by the Canadian Environmental Law Association in its May 30, 2019 letter to André Martin.**

2) **Retain existing *EPA* and *OWRA* reverse onus clauses for appeals, and introduce similar reverse onus clauses into the *NMA*, *Pesticides Act*, and *SDWA*.**

3) **Retain existing *EPA, OWRA*, and *NMA* per diem penalties for multi-day or continuing contraventions, and introduce per diem penalties into the *Pesticides Act* and *SDWA*.**

4) **Eliminate proposed Cabinet powers to limit the Ministry's ability to prosecute a polluter for an offence if the polluter pays an AMP.**

5) **Maintain the Ministry's current ability to issue an AMP for *EPA* section 14 contraventions where a discharge <u>may</u> cause an adverse effect, instead of narrowing that power to circumstances where the adverse effect is <u>likely</u>.**

6) **Retain existing mandatory five year reviews of AMPs under the *EPA* and *OWRA*, and introduce similar review requirements for the *NMA*, *SDWA*, and *Pesticides Act*.**

A. Bill 132's permissive changes may permit the future expansion of, but do not immediately expand, AMP tools

Bill 132 will replace existing AMP tools in the *EPA*, *OWRA*, and *NMA*, and will introduce new AMP tools into the *Pesticides Act* and *SDWA*. Ecojustice supports, in principle, the use of AMPs under these statutes (although the specific regimes introduced in Bill 132 are flawed). Ecojustice also supports, subject to the significant caveats below, the potential increase in *EPA* and *OWRA* maximum penalty amounts, from $100,000 to $200,000.

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[3] Meeting with Ministry staff (14 November 2019); *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 52(6).

However, Ecojustice believes that the new and modified regimes suffer from serious flaws, as set out in this and the following sections. Importantly, critical components of each AMP regime will require Cabinet to make regulations in order to become operational:

- The *NMA*, *Pesticides Act*, and *SDWA* AMP regimes will not operate unless and until Cabinet makes regulations setting out contraventions that attract AMPs;[4] and
- The existing *EPA* and *OWRA* AMP regimes will continue largely unchanged unless and until Cabinet updates the AMP regulations under these statutes, including maintaining current maximum penalties of $100,000 or less;[5]
- A power to impose AMPs on corporate officers/directors may expand current tools, but will not exist unless and until Cabinet makes regulations allowing it;[6] and
- The ability for provincial officers to impose AMPs (a power currently reserved, for the most part, to higher-level Directors) will not exist unless and until Cabinet makes regulations allowing it.[7]

At the same time, Bill 132 does not significantly expand existing powers to designate the categories of persons to whom the Ministry can issue an AMP, nor does it significantly expand the categories of violations that can attract an AMP.

Currently, a Director can only issue *EPA* and *OWRA* AMPs to "regulated persons."[8] Although Bill 132 will permit Directors to issue AMPs to "persons" instead of "regulated persons," this change was not needed to broaden the class of persons who can be subject to an AMP. Cabinet can already expand the definition of "regulated persons" in regulations,[9] and so could expand the scope of the existing *EPA* and *OWRA* regimes without any legislative amendment. Cabinet has chosen not to do so. Instead, Cabinet has chosen to maintain regulatory restrictions that narrow

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[4] Bill 132, *Better for People, Smarter for Business Act, 2019*, 1st Sess, 42nd Parl, Ontario, 2019, Sch 9, cls 28, 50, 68 ["*Bill 132*"]. This corresponds to proposed new sections 40(2) of the *Nutrient Management Act, 2002*, SO 2002, c 4 ["*NMA*"], 41.1(2) of the *Pesticides Act*, RSO 1990, c P.11, and 121(2) of the *Safe Drinking Water Act, 2002*, SO 2002, c 32 ["*SDWA*"].

[5] *Supra*, note 3; see also *Environmental Penalties*, O Reg 222/07 ["*EPA* Regulations"] and *Environmental Penalties*, O Reg 223/07 ["*OWRA Regulations*"]. The maximum penalties currently available under these statutes, as limited by regulations, will be further limited by Bill 132's removal of per diem penalties, as discussed below.

[6] *Bill 132*, Sch 9, cls 16, 28, 38, 50, 64, corresponding to proposed new sections 182.1(5) of the *Environmental Protection Act*, RSO 1990, c E.19 ["*EPA*"], 40(5) of the *NMA*, 106.1(5) of the *Ontario Water Resources Act*, RSO 1990, c O.40 ["*OWRA*"], 41.1(5) of the *Pesticides Act*, and 121(5) of the *SDWA* (from here, footnotes will refer only to the proposed *EPA* change unless different changes are proposed for the other statutes). Currently, Ministry policy indicates that it will not issue AMPs under the *EPA* and *OWRA* to corporate directors or officers: Ontario, *Guideline for Implementing Environmental Penalties (Ontario Regulations 222/07 and 223/07)*, online: https://www.ontario.ca/page/guideline-implementing-environmental-penalties-ontario-regulations-22207-and-22307, s 1.3.

[7] *Supra*, note 4.

[8] *EPA*, s 182.1(1); *OWRA*, s 106.1(1). AMPs under the *NMA* can be issued against any "person."

[9] In particular, Cabinet can designate as a "regulated person" any class of persons who must hold an environmental compliance approval or other authorization under the *EPA* or *OWRA* – i.e., any potential polluter: *EPA*, s 1(1) "regulated person"; *OWRA*, s 1(1) "regulated person". The default definition of "regulated person" includes those who must register to an Environmental Activity and Sector Registry (rather than operate under an ECA), but Cabinet has chosen to exclude such persons from the current AMP regime – again, by regulation: *EPA Regulations*, ss 3, 4; *OWRA Regulations*, ss 3, 4.

the default class of "regulated persons."[10] As the existing regulations will continue in force, so will these existing restrictions.

Similarly, while Bill 132 permits Cabinet to designate contraventions that can attract an AMP, this new power does not significantly expand existing AMP regimes.[11] The *EPA*, the *OWRA*, and the *NMA* currently explain that almost any contravention of the statutes, the regulations, or orders/approvals issued under the statutes can attract an AMP, although regulations under the *EPA* and *OWRA* narrow this.[12] Bill 132 will not lift the restrictions from those regulations. It will change the current model (which makes AMPs available by default and requires Cabinet to "opt out" if it does not wish AMPs to be available) to an "opt in" model that will require Cabinet to take action to make AMPs available.

For these reasons, Bill 132 does not significantly expand existing AMP tools at this time. Bill 132 enables Cabinet to modify existing AMP regimes, which could eventually lead to expansion (or narrowing) of existing tools. The eventual impact will depend heavily on the content of future Cabinet regulations.

At the same time, Ecojustice is concerned that parallel changes, such as the proposed repeal of the MISA regulations that currently limit industrial wastewater pollution, will indirectly narrow existing AMP tools.[13] While Ontario proposes to transfer these regulatory requirements to environmental compliance approvals (contravention of which would still currently attract similar AMPs), one of the stated reasons for doing so is to permit facilities to make changes that would "eliminate or lessen" requirements that the regulations currently impose.[14] Changes like this may weaken compliance and enforcement by lowering compliance standards, even if changes to the AMP regimes aim to accomplish the opposite.

Recommendation: *Ontario publicly commit, through its response to ERO comments, to consult the public and finalize strong regulations to implement new AMP regimes for each statute as soon as possible.*

B. Bill 132 helpfully clarifies that monetary benefit can be added to maximum penalty amount and imposes reporting requirements for all AMP regimes

[10] *Ibid*.

[11] For example, the *EPA* currently permits the Director to impose AMPs for almost any contravention of the act, its regulations, or orders/approvals issued under it (subject to regulations that further constrain this power): *EPA*, s 182.1(1). Only contraventions of cost recovery orders and obstruction provisions cannot attract an AMP: *EPA*, s 182.1(2). Bill 132 will permit Cabinet to subject the latter two categories of contraventions to AMPs, but will otherwise not significantly expand AMP availability: *Bill 132*, Sch 9, cl 16, corresponding to new s 182.1(3).

[12] *EPA*, s 182.1(1); *OWRA*, s 106.1(1); *NMA*, s 40(1). The *EPA Regulations* and *OWRA Regulations* constrain AMP availability under their respective statutes.

[13] https://ero.ontario.ca/notice/019-0773.

[14] *Ibid*: "With the existing regulations in place, changes like this often cannot be approved through an ECA amendment for a regulated facility because an ECA: can only impose requirements that are in addition to or more stringent than the regulatory requirements; cannot eliminate or lessen regulatory requirements."

Ecojustice supports the change to clarify that any monetary benefit a polluter accrues from non-compliance may be added on top of the maximum penalty amount.[15] This change does expand current AMP tools and gives effect to the polluter pays principle.

Ecojustice also supports the changes that require the Minister to report annually to the public on AMPs issued under all five statutes.[16] The Ministry's most recent five year review of AMPs recommended maintaining monitoring and reporting requirements.[17] Comprehensive annual reporting is necessary to ensure accountability, transparency, and consistency, and helps drive compliance by demonstrating that non-compliance has a price and that polluters must pay when they do not comply with environmental laws.

Recommendation: *Expand the required minimum content of annual AMP reports to include all of the information suggested by the Canadian Environmental Law Association in its May 30, 2019 letter to André Martin.*[18]

C. Bill 132 undermines certainty and effectiveness by making AMPs far easier to appeal

Under the *EPA* and *OWRA*, polluters who appeal an AMP must discharge a reverse evidentiary onus. This onus requires the polluter to show, on a balance of probabilities, that elements of the contravention did not occur.[19]

Bill 132 will delete this important requirement – a change that will frustrate the stated objective of expanding AMPs to improve compliance. If enacted, this change will capitulate to a long-standing industry demand: industry lobbied strenuously – but unsuccessfully – to remove the reverse onus when it was first introduced in the 2005 Spills Bill.[20] The Ministry has provided no evidence to the public that this clause is ineffective or unfair to industry, despite 14 years of experience to draw upon.

The reverse onus currently acts as a disincentive to appeal an AMP; removing it removes that disincentive. By imposing a high bar on would-be appellants, the reverse onus currently contributes to the overall certainty of AMPs and helps ensure that AMPs function as intended: as a swift, less costly tool for the Ministry to drive compliance in circumstances that do not warrant the time and expense of a prosecution. That disincentive will become even more important if Cabinet eventually raises maximum penalty amounts, because polluters will doubtless be more motivated to appeal stronger penalties.

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[15] E.g., *Bill 132*, Sch 9, cl 16, corresponding to new *EPA* ss 182.1(7), (8).

[16] *Bill 132*, Sch 9, cl 18, corresponding to new *EPA* ss 182.3(1), (2).

[17] Ontario, *Environmental Penalties Five Year Review: January 2012-December 2015*, online: https://www.ontario.ca/page/environmental-penalties-five-year-review#section-4 ["*Penalties Review*"].

[18] Letter from Ramani Nadarajah to Andre Martin (30 May 2019), online: https://cela.ca/wp-content/uploads/2019/07/1269-AdministrativeMonetaryPenalties.pdf.

[19] *EPA*, s 145.5; *OWRA*, s 102.2. Ordinarily, the Ministry would have to show, on a balance of probabilities, that the contravention did occur.

[20] Bill 133, *Environmental Enforcement Statute Law Amendment Act, 2005*, 1st Sess, 38th Parl, Ontario, 2005, online: https://www.ola.org/en/legislative-business/bills/parliament-38/session-1/bill-133. See the Hansard debates for this bill.

The absolute liability nature of AMPs complements, but does not replace, the reverse onus. In imposing absolute liability, the AMP regimes simply eliminate due diligence and mistake of fact as defences to an AMP.[21] Thus, a polluter cannot overturn an AMP on appeal by pointing to due diligence or mistake of fact.

The reverse onus adds an additional level of certainty to AMPs: once the Ministry has decided that the contravention has occurred after considering any information the polluter has provided, the burden to disprove the contravention shifts to the polluter. Thus, a polluter cannot overturn an AMP on appeal unless it proves that elements of the contravention did not occur.

To be clear, this reverse onus appropriately balances fairness to polluters with environmental compliance and protection goals. Under the current rules, the Ministry must have some basis to issue the AMP, and must clearly set out that basis in a notice to the polluter. The polluter has an opportunity to submit additional information and ask for a review of the proposed AMP. The Ministry can only issue the AMP if, after complying with these procedural safeguards, it is still satisfied that the contravention has occurred.[22] An appeal can only occur after this due process unfolds, and only then will the onus shift to the polluter to demonstrate that it did not commit the contravention. This makes sense from a policy perspective. It also makes sense from a practical perspective: the polluter will have the best evidence to prove that the contravention did not happen, if any exists.

By doing away with the reverse onus, Bill 132 will seriously undermine existing AMP tools. It will incentivize AMP appeals, decreasing certainty, accountability and overall effectiveness. Increasing the chances of successful appeals will also likely disincentivize the Ministry from using AMPs where they might otherwise be appropriate.

Recommendation: *Retain existing EPA and OWRA reverse onus clauses for appeals, and introduce similar reverse onus clauses into the NMA, SDWA, and Pesticides Act.*

D. Bill 132 undermines deterrence by eliminating per diem penalties for continuing contraventions

As noted above, Ecojustice supports increasing maximum penalties for environmental contraventions, and urges Cabinet to make regulations increasing maximum penalties under the *EPA* and *OWRA* to $200,000 as soon as possible.[23] However, Bill 132 eliminates existing rules that permit the maximum penalty to be imposed for each day of a continuing contravention.[24]

By eliminating per diem penalties, Bill 132 may undermine compliance efforts. Even if Cabinet increases existing maximum penalties, serious ongoing contraventions may be subject to lower total penalties without per diem penalties. Capping maximum penalties at a fixed amount,

[21] Note that the *EPA* and *OWRA* regimes still permit polluters to rely extensively on due diligence as a way to reduce the amount of a penalty.
[22] E.g., *EPA*, s 182.1(3), *EPA Regulations*, ss 5, 6.
[23] As permitted by, e.g., *Bill 132*, Sch 9, cl 16, corresponding to new *EPA* s 182.1(7).
[24] *EPA*, s 182.1(5), *OWRA*, s 106.1(5), *NMA*, s 40(3). Admittedly, the *EPA Regulations* and *OWRA Regulations* impose lower maximum penalties for some contraventions.

regardless of how many days a contravention lasts, may reduce or eliminate an AMP's intended financial compliance incentive.

While the Ministry should continue to address very serious pollution incidents by prosecution, rather than AMPs, the removal of per diem AMPs may nevertheless further limit current AMP tools if Cabinet exercises its new powers to shield polluters who pay an AMP from prosecution, as discussed below.

Recommendation: *Retain existing EPA, OWRA, and NMA per diem penalties for multi-day or continuing contraventions, and introduce per diem penalties into the Pesticides Act and SDWA.*

E. Bill 132 introduces new Cabinet powers to shield polluters from prosecution

AMPs can provide the Ministry with important complementary compliance tools to augment other compliance tools – including, for serious incidents, prosecution. They cannot entirely replace those other tools without undermining the overall compliance and enforcement framework.

Under the *EPA* and *OWRA*, the Ministry can currently prosecute a polluter for an offence, even if the polluter pays an AMP related to the same contravention.[25] Under the *NMA*, paying an AMP shields the polluter from prosecution.[26]

Bill 132 will bring in a single regime that, by default, allows the Ministry to prosecute a polluter even if the polluter pays an AMP and remedies the contravention. However, Bill 132 will give Cabinet the power to make regulations that shield polluters from prosecution if they pay an AMP and remedy the contravention.[27]

The current *EPA* and *OWRA* rules ensure that the Ministry has the full suite of compliance tools available to it. Regulations shielding polluters from prosecution could fetter the Ministry's enforcement capabilities. For instance, such regulations could frustrate compliance objectives by immunizing a polluter from prosecution upon payment of a less stringent AMP. Should new evidence become known within the relevant limitation period suggesting that the contravention was more serious than initially thought, the Ministry would not be able to prosecute the polluter. This type of immunity could incentivize underreporting and disincentivize full cooperation with Ministry inspectors, further undermining compliance efforts.

Existing regulatory provisions ensure that good actors are treated fairly despite potential exposure to both AMPs and prosecution. For instance, when a polluter is prosecuted and convicted of an offence, the sentencing judge must consider whether the polluter has already paid an AMP; if so, this is a mitigating factor and may permit the judge to issue a fine lower than the statutory minimum.[28]

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[25] *EPA*, s 182.1(11); *OWRA*, s 106.1(11).
[26] *NMA*, s 40(8).
[27] E.g., *Bill 132*, Sch 9, cl 16, corresponding to new *EPA* ss 182.1(11), (12).
[28] E.g., *EPA*, s 188.1(6).

Recommendation: *Eliminate proposed Cabinet powers to limit the Ministry's ability to prosecute a polluter for an offence if the polluter pays an AMP.*

F. Bill 132 makes it more difficult to issue *EPA* AMPs for adverse effects

The Ministry can currently impose an *EPA* AMP for a discharge of a pollutant to land or water that causes or may cause an adverse effect (i.e., a contravention of section 14(1) of the *EPA*).[29] By contrast, the Ministry can only prosecute a polluter under section 14(1) (or take other regulatory action) if the discharge causes or is likely to cause an adverse effect.[30]

Bill 132 will raise this threshold for AMPs. Now, section 14(1) of the *EPA* will only prohibit discharges that cause or are likely to cause an adverse effect – including for AMPs. By raising the threshold from "may" to "likely," Bill 132 will narrow the Ministry's ability to use AMPs for section 14 contraventions.

Raising the threshold will likely undermine the effectiveness of the *EPA*'s compliance and enforcement regime. In particular, raising the threshold undermines the precautionary principle: the Ministry will no longer be able to use AMPs to regulate discharges that may cause an adverse effect, but where evidence does not conclusively demonstrate this causal relationship.

Significantly, the *Ontario Water Resources Act* already imposes a "may" standard for water pollution incidents, as do many environmental laws in other Canadian provinces.[31] There is no reason to introduce a different standard for air and land pollution, or to depart from a standard that applies across the country.

It is particularly concerning that this change, like the repeal of the reverse onus, effectively gives industry what it strenuously lobbied for when Ontario first introduced AMPs into the *EPA*,[32] despite no apparent evidence in the intervening 14 years to suggest the provision resulted in unfair treatment for industry.

Recommendation: *Maintain the Ministry's current ability to issue an AMP for EPA section 14 contraventions where a discharge may cause an adverse effect, instead of narrowing that power to circumstances where the adverse effect is likely.*

G. Bill 132 weakens transparency and accountability by eliminating a mandatory five year program review

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[29] *EPA*, ss 14(1), 182.1(1)(a)(i), *EPA Regulations*, ss 4, Table 2, item 1.
[30] E.g., *EPA*, ss 7(1.1), 186(1.1), 194(1.1).
[31] *OWRA*, s 30(1). As for other jurisdictions, this includes, but is not limited to: *Environment Act*, SNS 1994-95, c 1, s 67(1), *Environmental Protection Act*, SNL 2002, c E-14.2, s 7(1), *Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, s 8(1).
[32] *Supra*, note 22.

The *EPA* and *OWRA* currently require the Ministry to conduct a review of the AMP programs at least once every five years.[33] That review must consider the effect of AMPs on prosecutions, and must include recommendations about what types of contraventions should attract AMPs.

Bill 132 eliminates that requirement. In so doing, Bill 132 undermines transparency and accountability in the overall AMP regime. The Ministry itself recently recommended continuing to monitor the effect of AMPs on prosecutions.[34] Such active monitoring and reporting is even more important in light of the numerous changes Bill 132 proposes to existing regimes – not least of which are the potential changes to double jeopardy rules that directly relate to prosecutions.

Nor are voluntary or public-driven reviews adequate replacements for the mandatory five year review. In particular, the *Environmental Bill of Rights* application for review process, which could be used to request a review of the penalties regime every five years, cannot adequately replace a mandatory five year review. First, the Minister does not have to agree to such a request. Second, this would unreasonably shift the onus to ensure transparency and accountability from the Ministry to the public. Third, this government has decreased transparency and accountability under the *EBR* process itself through changes it made to the Environmental Commissioner's role and office in past omnibus legislation.[35]

Furthermore, maintaining the five year mandatory review requirement will allow Ontario to continue acting on a recommendation from the Auditor General. To ensure that AMPs are effective and timely compliance tools with appropriate deterrent effect, the Auditor General recommended that Ontario "assess, as part of its ongoing reviews of its penalties program, how effective its penalties are in discouraging individual emitters from being non-compliant with environmental regulation."[36]

Recommendation: *Retain existing mandatory five year reviews of AMPs under the EPA and OWRA, and introduce similar review requirements for the NMA, SDWA, and Pesticides Act.*

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[33] *EPA*, s 182.1(20); *OWRA*, s 106.1(20).

[34] *Penalties Review.*

[35] *Restoring Trust, Transparency and Accountability Act, 2018*, SO 2018, c 57, Sch 15.

[36] Office of the Auditor General of Ontario, *Annual Report 2018: Follow-Up Report on 2016 and Prior Audit Recommendations* (Vol 2), online: http://www.auditor.on.ca/en/content/annualreports/arreports/en18/2018AR_v2_en_web.pdf at 80.

APPENDIX C - ATTACHMENT

CELA COMMENTS ON PROPOSAL TO REVOKE MISA REGULATIONS AND TO TRANSFER REQUIREMENTS INTO ENVIRONMENTAL COMPLIANCE APPROVALS (ERO 019-0773)

Prepared by Ramani Nadarajah, CELA Counsel
Amanda Montgomery, CELA Student-at-Law

Introduction

As part of its ongoing efforts to "cut red tape" and reduce "regulatory burden," the Ontario government recently posted a proposal on the Environmental Registry of Ontario (ERO) to change how it regulates pollution released by industrial facilities into the province's waterways. If implemented, the proposal would revoke the Municipal Industrial Strategy for Abatement (MISA), a province-wide program that has regulated industrial effluent discharges from certain sectors for decades. Instead, the government would regulate all industrial effluent discharges on a site-by-site basis through Environmental Compliance Approvals (ECAs).

The ERO proposal claims that the change will not affect the current level of environmental oversight for regulated facilities. However, CELA believes that the proposal to revoke the MISA program would, in fact, make Ontario's water bodies extremely vulnerable to toxic pollution from industrial facilities.

What is the MISA Program?

The MISA program was introduced in the 1980s to reduce the flow of toxic chemicals from specific industries into Ontario's waterways. The ultimate goal of MISA is "the virtual elimination of persistent toxic contamination"[1] in Ontario's lakes and rivers, a goal the Ministry of the Environment stated was necessary "to reduce the risk of damage to the ecosystem and to protect public health by minimizing the presence of toxics in drinking water, fish and wildlife."[2]

To meet this goal, the MISA program sets sector-specific effluent standards for nine different industrial sectors.[3] These regulations limit industrial pollution in two different ways: (1) setting a maximum allowable *concentration* of contaminants (i.e. pollutant per volume of water) that a particular facility can discharge into nearby waterways; and (2) setting the maximum *load* or amount of a pollutant that can be discharged into a given watercourse from any regulated facility in a defined period of time. These limits were set based on the best available technology economically available (BATEA) and the original intention was to progressively decrease the

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[1] Municipal-Industrial Strategy for Abatement (MISA): *A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges into Surface Water*, ISBN 0-7729-7200-1, (Toronto: Queen's Printer for Ontario at p. 7.

[2] *Ibid*.

[3] These sectors are: electric power generation, inorganic chemical, industrial minerals, iron and steel manufacturing, metal casting, metal mining, organic chemical manufacturing, petroleum, and pulp and paper.

maximum limits on the discharge of contaminants as technologies improved. Each sector-specific regulation also contains requirements for sampling, monitoring and reporting.

Since they came into effect, the MISA regulations have been successful in decreasing the discharge of toxic pollution into water. However, improvements to the program, including an update of the legal limits for toxic industrial discharges, are long overdue.[4]

What is the proposed change?

The government proposes to eliminate the MISA program and, instead, to regulate all industrial effluent through Environmental Compliance Approvals. Currently, MISA-regulated facilities are also required to have an ECA under the *Ontario Water Resources Act*, which permits the facility to discharge contaminants into a water body. According to the ERO proposal, facilities currently subject to MISA regulations would have the requirements under these regulations transferred to their individual ECAs. The MISA regulations would then be revoked.

What would be the implications of this change?

The government's proposal to transfer the requirements of MISA into the ECA process fundamentally weakens the regulatory framework governing water pollution and creates the very problem that the MISA regulations were enacted to address.

Prior to MISA, the Ministry of Environment, Conservation and Parks ("Ministry) approach to water protection was undertaken through the approvals process on a "case-by-case basis through negotiations between local ministry staff and the industry concerned."[5] This resulted in highly variable limits, in terms of both the concentration and types of chemicals, which could be discharged by industrial facilities operating in Ontario.[6] According to legal experts, the previous approach led to "[d]ischarge objectives for specific pollutants" not being included on a "consistent basis" in the approvals issued by the Ministry to industrial facilities.[7] The Ministry was also criticized for ignoring a "wide range" of toxic chemicals, and focusing only on "conventional pollutants, such as suspended solids, some heavy metals and a limited group of organic pollutants.[8]

The MISA regulations were enacted precisely to avoid these flaws in the Ministry's approvals process, which has led to highly inconsistent and unpredictable standards for water protection in the province. A major achievement of the MISA program, therefore, was that it removed the establishment of ad-hoc discharge limits for individual facilities by Ministry officials, and instead ensured effluent standards were set by regulations which applied province-wide, ensuring consistency and predictability in the regulatory framework governing water protection in Ontario.

As the government notes in the ERO proposal, under the current regulatory framework the Ministry can only make an ECA amendment for a regulated facility which impose requirements that are "in addition to or more stringent" than the MISA requirements. The owners of MISA

[4] See Environmental Commissioner of Ontario, *Back to Basics Clean Water* Vol 2 (Toronto: Environmental Commissioner of Ontario, 2018) at 85.

[5] David Estrin and John Swaigen, *supra* note 16 at 546.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

facilities are currently not allowed to make to make any changes to production processes, production rates, the use of raw materials or changes to wastewater treatment processes, if the changes result in greater discharges than those allowed under MISA. By revoking the MISA regulations, the Ministry will be able to allow discharges that are greater than those that are permitted by MISA. In fact, in the ERO proposal, the government essentially admits that the underlying rationale for the proposed change is precisely to allow the Ministry to impose less stringent requirements than those established under MISA.

CELA is of the view that the proposal to transfer the requirements of MISA into the ECA process is wholly misguided and will seriously undermine environmental protection in Ontario. The government's proposal to repeal the MISA regulations will terminate a program that has played a vital role in protecting Ontario from toxic contamination caused by discharges from major industrial facilities. Therefore, CELA strongly recommends that the existing regulatory framework under the MISA program be retained. Furthermore, CELA recommends that the Ministry adopt and implement the Environmental Commissioner of Ontario's recommendations regarding MISA. These include the need to update the discharge limits in the MISA regulations and environmental compliance approvals, require industries to use the best available technology to minimize toxic substances discharged into Ontario waters, and to virtually eliminate the discharge of persistent toxic substances.

Recommendations :

CELA recommends that:

- **(1) The MISA regulations not be revoked;**
- **(2) The industrial discharge limits in the MISA regulations and the ECAs be strengthened and updated; and**
- **(3) industries be required to make use of the best available technologies and work towards virtually eliminating the discharge of harmful chemicals into Ontario's waterways.**

APPENDIX D

CELA COMMENTS ON SCHEDULES 9 AND 16 OF BILL 132: PROPOSED AMENDMENTS TO THE *ONTARIO WATER RESOURCES ACT* AND THE *LAKES AND RIVERS IMPROVEMENT ACT*

Prepared by
Anastasia M Lintner, Special Projects Counsel, Healthy Great Lakes, CELA

In a recent Environmental Registry notice,[1] the Ontario government proposed amendments to the *Ontario Water Resources Act* and the *Lakes and Rivers Improvement Act* (within Schedules 9 and 16 of Bill 132, respectively), the purpose of which is:

> The proposed *Better for People, Smarter for Business Act, 2019* is the third in a series of bills through Ontario's Open for Business Action Plan. The bill introduces new measures to further ease the regulatory burden to help businesses, people, schools, hospitals and municipalities.

The specific proposed amendments to the *Ontario Water Resources Act* and the *Lakes and Rivers Improvement Act* are aimed at providing waterpower approvals with a streamlined, one-window approach[2]:

> There is duplication and overlap of approvals between the Ministry of the Environment, Conservation and Parks and the Ministry of Natural Resources and Forestry for waterpower facilities. We are reducing this regulatory burden and streamlining processes by moving towards a one-window approvals system for the industry through the latter ministry.

An exemption from requirements to obtain a permit to take water under the *Ontario Water Resources Act* is proposed to be replaced with amendments that, if passed, will[3]:

> Create a new Minister's regulation-making authority in the *Lakes and Rivers Improvement Act* to allow the Minister to require some owners of electricity-producing dams to, where necessary, assess, monitor and report on methyl mercury related impacts to water and fish.

CELA and many of the organizations that we advise and support are opposed to these amendments. As outlined in the attached submission authored by the Ontario Rivers Alliance, which CELA has endorsed, the streamlining process proposed has the potential to cause harm to waterways in Ontario.

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[1] See online: https://ero.ontario.ca/notice/019-0774
[2] See online: https://ero.ontario.ca/notice/019-0545
[3] See online: https://ero.ontario.ca/notice/019-0732

CELA particularly is concerned that oversight of water management, that is currently under the Ministry of the Environment, Conservation and Parks (MECP), will be transferred to another Ministry without ensuring that human and ecosystem health are prioritized. The proposals do not adequately outline how the current water management guiding principles, including the ecosystem approach and cumulative impacts, will be applied by the Ministry of Natural Resources and Forestry (MNRF). The proposed new regulatory powers for MNRF are accompanied by a vague description in Environmental Registry of Ontario notice. Only monitoring of methyl mercury is mentioned. Without clear descriptions or, preferably, draft language of the proposed new regulation, it is not possible to assess whether the proposed streamlined approach will provide equal protection under the *Lakes and Rivers Improvement Act* as is currently the case for permits to take water under the *Ontario Water Resources Act*.

Further, the proposed revocation power for MECP under the *Ontario Water Resources Act* is not limited to waterpower. The proposed provision (s 76.1) would read:

> The Minister may make regulations deeming a permit or all permits in a specified class to be revoked on a specified date, where the permit or permits in the class relate to water takings that are exempted from subsection 34 (1).

CELA is concerned that this broad expansion of revocation power could be used by any government at any future time and thereby undermine water conservation and management in Ontario. It is not necessary to provide the MECP with this broad power, as there is already an ability to revoke permits.

Given the inadequate information provided and the extremely short public consultation timeline, **CELA recommends the amendments in Schedules 9 and 16 relating to waterpower be removed, until such time as detailed information about the proposed streamlined scheme are made public and meaningfully consulted upon**.

ONTARIO RIVERS ALLIANCE

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22 November 2019

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Re: ERO-019-0774 – Bill 132, Better for People, Smarter for Business Act, 2019
ERO-019-0545 - Waterpower Exemption from Permits to Take Water
ERO-019-0732 – Proposal to Amend the Lakes and Rivers Improvement Act to Give Authority to the Minister to make a Regulation to Assess and Monitor Methylmercury

Dear Sirs and Madam:

The Ontario Rivers Alliance (ORA) is a Not-for-Profit grassroots organization with a mission to protect, conserve and restore healthy riverine ecosystems. Underlining indicates emphasis.

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Executive Summary

The changes to 14 different Acts being proposed in omnibus Bill 132, Better for People, Smarter for Business Act, 2019, are sweeping and their potential consequences are highly concerning. The full impact and unintended consequences of this Bill on Ontario riverine ecosystems and communities are beyond anyone's ability to fully calculate, but it is fair to say they could be severe. With such a short comment period for so many pieces of legislation, ORA's main focus in this document will be the proposed exemption of waterpower from the requirement to obtain a Permit to Take Water (PTTW), and the associated amendments to the *Lakes and Rivers Improvement Act* (*LRIA*).

With approximately 224 hydroelectric facilities in Ontario, and many more associated control dams, the environmental, social, cultural and economic impacts of these proposals would be widespread and significant.

In Ontario, hydroelectric schemes are offered lucrative peaking bonuses to produce more power during peak demand hours. This encourages operators to hold water back in headponds during off-peak hours so they can generate maximum power and profits during peak hours. The temptation is great to sacrifice fish, habitat and healthy waters for increased profits. The impacts of the unfair sharing of water and irresponsible ramping rates are well known.

In order to maintain a healthy riverine ecosystem, it is crucial that adequate flow levels and variability in rivers are regularly monitored, assessed and reported. There must also be meaningful consequences when hydro operators disregard the fair sharing of water for aquatic ecosystems and communities dependent upon these resources.

The Ministry of the Environment, Conservation and Parks (MECP) is an independent agency that administers a Permit to Take Water (PTTW), serving to ensure the fair sharing of water, that there is enough water available for the aquatic ecosystem and for other water users, it requires annual monitoring and reporting to ensure water quality and water quantity, proper mitigation of any impacts, and a review is required every 10 years. A PTTW also provides an appeal process, proper engagement opportunities for stakeholders and a Duty to Consult with Indigenous peoples.

On the other hand, the Water Management Plan (WMP) is the most likely instrument that would be used if responsibility for methylmercury is transferred to the Ministry of Natural Resources and Forestry (MNRF) under *LRIA*. However, the WMP is prepared by the industry for the industry. The WMPs developed under *LRIA* are prepared by the facility owner, not regularly reviewed by the MNRF, with no public engagement or appeal process after the WMP is developed, and not all waterpower facilities are required to have one. Most WMPs that have been approved are now 10 years or older and balances environmental concerns with the economic concerns of the Industry. As a result, they vary significantly in objectivity, data/information and the consideration of environmental matters which are key issues of interest in the PTTW. In addition, MNRF has since directed that no new WMPs need to be prepared.

It is clear that the functions of a PTTW are in no way similar to a WMP under the *Lakes and Rivers Improvement Act* (*LRIA*).

Those proposing these “red tape” cuts are not considering the value and essential benefits that healthy rivers bring to the people of this Province, versus the extent of the environmental costs if this waterpower exemption to a PTTW is approved. The effects of waterpower facilities on fish populations and fisheries have been well documented over the past century and include the loss or serious decline of many iconic fish species, which are renewable resources of importance to Ontario's economy, biodiversity, and natural and cultural heritage.

There has also been insufficient consultation on a Bill that would have such sweeping and insufficiently considered consequences. The economic, environmental, social and cultural impact of these proposals would be devastating and long-lasting to water quality and fisheries and will be most acutely felt in Indigenous communities and the northern regions of the Province.

Cutting “red tape” in the ways proposed in Bill 132 and especially the exemption of waterpower from requiring a PTTW, will have widespread and unintended negative consequences on communities and on lakes and rivers all across Ontario. It is a reckless move and the ORA is strongly opposed.

Therefore, the ORA recommends that the proposed PTTW exemption for hydroelectric be rejected in full and that the MECP continue to require hydroelectric facilities to obtain a PTTW under the *OWRA*. The ORA also recommends that the MECP undertake a full cost-benefit analysis to determine the full ecosystem services and value of a healthy riverine ecosystem as it exists today under the current PTTW program, versus the value of the trade-offs or costs that would be incurred if these protections are removed. There are other aspects of Bill 132 that are deeply concerning; therefore, ORA recommends that submissions of other individuals and organizations be meaningfully considered (i.e. CELA’s ARA submission[1]).

Overview of Bill 132:

Under ERO-019-0774, the government is proposing omnibus Bill 132, Better for People, Smarter for Business Act, 2019. The Bill proposes sweeping cuts to 14 Acts, reflecting legislation across several Ministries, for the stated purpose “*to further ease the regulatory burden to help businesses, people, schools, hospitals and municipalities*”. These environmental laws have taken decades to carefully develop and enact, most of which are intended to protect public health and safety, and ensure the equitable and sustainable sharing, protection and conservation of Ontario’s natural resources.

Under ERO-019-0545, the province is proposing to exempt waterpower from having to obtain a **Permit to Take Water** (PTTW). Additionally, **under ERO-019-0732**, the Ministry of Natural Resources (MNRF) is proposing an amendment to the *Lakes and Rivers Improvement Act* (*LRIA*) to give authority to the Minister to make a regulation to assess and monitor methylmercury. The ERO posting explains that this is in pursuit of moving towards a one-window approvals system with cost savings for facilities while maintaining environmental protections. However, methylmercury is only one environmental issue of the many aspects covered by a PTTW, under the *Ontario Water Resources Act* (*OWRA*).

In fact, the purpose of the *OWRA* “*is to provide for the conservation, protection and management of Ontario’s waters and for their efficient and sustainable use, in order to promote Ontario’s long-term environmental, social and economic well-being.*(s 0.1) - an important

reminder of a purpose that must not be lost with regard to any exemptions or amendments relating to hydroelectric facilities.

The ORA submits that these pieces of legislation are not “red tape”, it is in support of the Ministry of the Environment, Conservation and Parks’ (MECP) Statement of Environmental Values (SEV), and in pursuit of its vision of “*an Ontario with clean and safe air, land and water that contributes to healthy communities, ecological protection, and environmentally sustainable development for present and future generations*”[2].

The MECP has committed to applying the purposes of the *Environmental Bill of Rights* (*EBR*) when decisions that might significantly affect the environment are being made. As it develops Acts, regulations and policies, the Ministry is to apply a long list of principles and values, some of which are:

- An ecosystem approach to environmental protection and resource management;
- A precautionary science-based approach in its decision making to protect human health and the environment;
- A strategy to place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment;
- Encourage increased transparency, timely reporting and enhanced engagement with the public as part of environmental decision making;
- Decisions that reflect the above principles, etc…

The ORA submits that some of the proposals contained within Bill 132 are in contravention of the commitment and responsibilities that MECP made in its SEV and are at odds with its purposes as set out in the *EBR*.

Due to the short comment period, there is no way we could possibly research and comment on all of the proposed changes contained within Bill 132. Therefore, the ORA will more specifically speak to two Environmental Registry of Ontario (ERO) proposals included in this omnibus Bill, which could have devastating and far reaching impacts on Ontario Rivers and the communities that rely on them.

Permit to Take Water:

The MECP’s water quantity management policy is to ensure the fair sharing, conservation and sustainable use of the waters of the Province, and consistent with that policy the Ministry has adopted several principles, such as:

- Principle #1: The Ministry will use an ecosystem approach that considers both water takers’ reasonable needs for water and the natural functions of the ecosystem.
- Principle #2: Water takings are controlled to prevent unacceptable interference with other uses of water, wherever possible, and to resolve such problems if they do occur.
- Principle #3: The Ministry will incorporate risk management principles into the permit application/review process.
- Principle #4: The Ministry will consider cumulative impacts of water takings.
- Principle #5: The Ministry will incorporate risk management principles into the permit application review process.

These are all essential principles that ensure that waterpower is sustainable and environmentally responsible.

Some of the more serious risks that waterpower generation is prone to result in are ones that the Director of the PTTW Program addresses when considering a PTTW application, such as:

- Issues relating to the need to protect the natural functions of the ecosystem, including,
    - The impact or potential impact of the water taking on the natural variability of water flow or water levels, high and low stream flow and habitat protection
    - Minimum stream flow, and
    - Habitat that depends on water flow variability or water levels
- Issues relating to water availability and the impact of the water taking
- Low water conditions, if any
- Water quality and quantity
- Water conservation
- Other issues including the interests of other persons who have an interest in the water taking

Hydroelectric power generation is determined to be a Category 3 water taking, which has "*a greater potential to cause adverse environmental impact or interference*"[3], and requires scientific studies and technical screening and evaluation carried out by the Ministry. The scientific studies are used to determine the potential impact of the proposed water taking on the aquatic ecosystem and other established in-stream uses and how the proposed taking should be designed and controlled to prevent or minimize the impact.

Transferring only the responsibility for methylmercury accumulation to MNRF under the *LRIA* is totally insufficient. This is over and above the fact that all the major scientific expertise in this area has always been with the Ministry of Environment (now MECP), and the scientists in MNRF are not experts in this field of science. Methylmercury is just one of the many environmental impacts that must be considered in addressing hydroelectric power generation. There must also be environmental considerations for aquatic life, habitat, stream flows, water levels, availability and temperature – all are crucial to ensure riverine ecosystems remain healthy and viable. Water balance and sustainability, as well as cumulative environmental impacts of water takings and shared uses within a watershed, are crucial.

The PTTW has been an important part of the checks and balances to ensure that the Operating Plan, as set out in the permit, is adhered to for the sustainable operation of hydroelectric facilities and the fair sharing, conservation and sustainable use of the waters of the Province.

***Lakes and Rivers Improvement Act* (*LRIA*):**

"*The LRIA provides the Minister of Natural Resources and Forestry with the legislative authority to govern the design, construction, operation, maintenance and safety of dams in Ontario*.[4]
"*Section 23.1 of the LRIA provides the Ministry with the authority to require a dam owner(s) to prepare a plan for the operation of a dam, or require that an amendment be prepared for an existing plan for the operation of a dam. WMPs prepared under LRIA Section 23.1 are the Ministry's primary tool for ensuring that operations of waterpower facilities and their associated water control structures provide for the purposes of the Act, and that there is a long-term mechanism in place for adaptive management*."[5]

A complex WMP has generally been prepared for rivers with multiple waterpower facilities or control structures with significant control over water levels and flows, and more simplified WMPs

were prepared for sections of rivers where there are one or more hydroelectric facilities with limited control over water levels and flows. WMPs are a long-term resource management and regulatory document that will not have an expiration date or a mandatory review of a plan term. However, the 2016 WMP Technical Bulletin indicates that new hydroelectric facilities are not required to prepare a WMP, but instead are required to prepare an Operating Plan through the Class EA for Waterpower process. It also appears that not all facilities under a WMP have to collect and report data when it reads, "*Where a simplified or complex WMP details specific commitments for monitoring as part of a data collection program and/or an effectiveness monitoring program, those requirements continue to apply*"[6]. This indicates that not all facilities under a WMP are required to monitor, collect data or do effectiveness monitoring. There are also some facilities that are not covered by an approved WMP or an Operating Plan. Therefore, there seems to be significant gaps in data collection and reporting under the *LRIA*, and cumulative effects are not even considered under *LRIA*.

Additionally, WMPs do not regulate ramping rates, peaking operations, timing or environmental flows - these have traditionally been managed through the PTTW. This is a problem when "*Resource managers believe that ramping rate restrictions mitigate the negative effects associated with dam operation, including habitat degradation and reduction of downstream diversity.*"[7] If not properly regulated these aspects can result in some of the more severe environmental impacts.

Impacts of Hydroelectric Operations:

Methylmercury accumulation is not the only environmental risk with hydroelectric operations. While hydroelectric facilities have contributed to our power grid for over 100 years, a very high environmental and socio-economic price has been paid in terms of losses to valued natural resources. In the past, narrow one-off approaches to approvals have ignored waterpower's potentially significant cumulative effects on the environment, ecology and biodiversity. Unless carefully identified and mitigated, significant cumulative and ongoing effects from waterpower will occur at the watershed, regional and/or provincial scale.

An Environment Canada report describes the impact of dams, diversions and climate change: *Most of our current knowledge of the impacts of hydrological changes on water quality is based on studies of the effects of Canada's more than 600 dams and 60 large interbasin diversions, which makes the nation a world leader in water diversion*[8]. *Most Canadian dams store water during peak flow periods and release flow to generate power during winter, and/or low-flow periods. Such changes to water quantity also modify various water quality parameters within the reservoir and downstream, the effects decreasing with distance from the impoundment. Major examples include: thermal stratification within the reservoir and modification of downstream water temperatures; eutrophication; promotion of anoxic conditions in hypolimnetic water and related changes in metal concentrations in outflow; increased methylation of mercury; sediment retention; associated changes in total dissolved solids, turbidity and nutrients in the reservoir and discharged water; increased erosion/deposition of downstream sediments and associated contaminants. For impoundments used for drinking water, intra-storage processes also have serious implications for the quality of drinking water.*[9]

The simple obstruction of a dam on a free-flowing stream changes the basic hydrological characteristics of a watercourse, reducing flow velocity and causing subsequent changes in temperature, turbidity and water quality. These affects are only amplified by a hydroelectric

facility, especially when water is held back in reservoirs/headponds to generate power for peak demand. These modifications affect fish and other aquatic fauna directly and indirectly to varying degrees, depending on the species. The period of storage will, to some degree, modify temperature, dissolved gases and suspended solids in the water. In short, dams and waterpower facilities radically alter the ecology of rivers by changing the volume, quality and timing of downstream water flows.[10]

The effects of dams and waterpower facilities on fish populations and fisheries have been well documented over the past century and include the loss or serious decline of many iconic fish species, which are resources of importance to Ontario's economy, biodiversity, and natural and cultural heritage.

Ontario fisheries are a valuable and ecologically sensitive resource that contributes substantially to Ontario's economy, with recreational and commercial fishing valued at more than $2.5 billion. This includes:

- 41,000 person years of employment;
- more than 1.2 million residents and non-resident anglers, who contribute $2.2 billion annually to the Ontario economy;
- a driving force for Ontario's tourism industry and a key economic component in many communities, particularly in Northern Ontario with 1600 licensed tourist operators generating hundreds of millions of dollars in revenues annually;
- more than 500 active commercial fishing licenses, contributing more than $230 million dollars to the Ontario economy; and
- 1200 commercial bait fishing licenses issued annually, with $17 million in direct sales of live bait.[11]

Do we really want to place this valuable resource at increased risk for the sake of reducing regulatory burden, streamlining important processes and increasing dam owners' profits? The PTTW program is not perfect; however, it has been working quite well to protect the environment and stakeholders for decades.

Lack of Transparency:

It is important to point out that it is unacceptable that this posting is so vague, with few specifics about the extent of the changes, and little background information made available to explain the purposes of the PTTW as it relates to hydroelectric operations, or what socio-economic or environmental protection/benefits might be in jeopardy. The background information links made available in the posting made no mention of hydroelectric or waterpower. It was only through reaching out to the ERO contact that we received the links to the relevant information.

All we know through these postings is that waterpower would be exempted from requiring a PTTW, and that methylmercury assessment and management would be moved from the authority of the MECP to the MNRF's authority through a complementary amendment to the *LRIA*. However, where are the details? What would happen to the many other functions that the PTTW process provides to protect the environment and the sharing of water - would they be lost? All these details should have been included within the ERO postings.

Unanswered but Vital Questions:

With the major changes being proposed and the minimal amount of information provided in the two ERO proposals, it leaves many questions unanswered, for example:

1. **How exactly would waterpower facilities be regulated under the *LRIA*?**
   The WMPs developed under *LRIA* are prepared by the facility owner, not regularly reviewed by MNRF, and there is no public engagement process after the Plan is developed. It is a water management process for waterpower facilities by waterpower facilities. These WMPs, most now 10 years or older, balanced environmental concerns with the economic concerns of the Industry. As a result, they vary significantly in objectivity, data/information and the consideration of environmental matters which are key issues of interest in the PTTW. In addition, MNRF has since directed that no new WMPs need to be prepared.[12] Some waterpower facilities have been in operation for years without a WMP.

2. **Would MNRF be making changes to ensure Dam Operating Plans and WMPs are up to date and commitments apply during critical low water periods?**
   A 2016 *LRIA* Technical Bulletin states that the provisions of WMPs do not apply in the event of a 'declared flood, low water condition or emergency situation'[13]; therefore, any protections for ecosystems, fish or endangered species in WMPs or Dam Operating Plans do not apply during drought. The PTTW has no such gap.

3. **How would the *LRIA* approvals cover issues dealt with in a PTTW for the construction phase of a waterpower facility?**
   - **How does *LRIA* provide for the protection of water resources during the construction of a dam?**
   - **How would the *LRIA* ensure interference with other water users, or impacts to natural ecosystems or nearby infrastructure would not occur while facilities are being constructed?**
   - **What does constructing include?**
     These short-term PTTW are issued for the construction phase of dam building/ repairs/ expansions to ensure water removed for construction purposes and discharged back to the river don't contain sediment, metals or contaminants (mercury, PCBs, etc.).
   - **How would the *LRIA* be adapted to ensure pollutants don't travel downstream or are re-suspended in the reservoir contaminating the fish population and those of us that eat and are dependent on those fish?**
   - **Would a discharge plan for treatment and release of water back to the river be included, and include the ability for the Ministry to audit for compliance**?

   These are all aspects of the PTTW for "Construction". If the MNRF approvals under the *LRIA* are not adapted to meet these needs, MECP should require these waterpower facilities undergoing these types of activities to apply for an Environmental Compliance Approval.

4. **Without the PTTW, how would the MECP track the implementation of actions and commitments made in the Class Environmental Assessment for Waterpower to "*prevent, change, mitigate or remedy potential environmental effects of the undertaking*"[14]?**

This includes commitments made in relation to water quality, zone of influence, ramping rates and peaking effects to water levels and downstream river flows, as well as public and Indigenous engagement, which are often left to the PTTW to enforce. If these facilities no longer require a PTTW then MECP should revise its Class EA process to include the ability to track the status of commitments made during the planning stage of building, repairing or expanding waterpower facilities.

5. **How would the *LRIA* approvals adapt to the expected impacts of the extremes of climate change?**
   There are numerous waterpower facilities located on crown land in northern Ontario, where the effects of a warming climate are expected to be most acutely felt, and many of these facilities are located in areas of high biodiversity with multitudes of endangered or threatened species. However, as stated above, WMPs do not apply during critical environmental conditions such as drought or emergency situations. This a concern because hot and dry conditions are when operators would be incentivized to generate the most energy possible.

   It is unacceptable to allow waterpower facilities to operate with disregard for the needs of environmental protection and other water users/stakeholders, especially during times of critical importance to the survival of water dependent ecosystems, including threatened or endangered species.

6. **How would MNRF Approvals under the *LRIA* incorporate restrictions on rapid changes in lake water levels and stream flows upstream and downstream of the dam?**
   LRIA approvals and plans do not require waterpower facilities to control the rate of water released through the turbines. *LRIA* does not appear to incorporate controls for ramping (rapid rates of change of water flow through turbines) and peaking (operating a facility so water is released in relation to energy demand). These operational methods increase energy production but can have devastating effects on water dependent ecosystems. For these types of facilities, the PTTW includes conditions of approval to restrict peaking and ramping while still allowing the facility to meet peak power demands. The purpose of the PTTW restrictions are to minimize the erosion of river and lakeside properties above the dam, as well as reducing erosion of the stream banks and sediment inundation of spawning grounds below the dam.

   The *LRIA* approvals seem to focus on seasonal water levels under normal conditions; however, it is impossible to capture these types of day-to-day rapid changes in water release looking at seasonal averages.

   Protecting critical ecosystems and biodiversity while maintaining steady water levels in the reservoir and downstream should be a priority when updating approvals and plans under the *LRIA*.

7. **How would approvals under the *LRIA* consider ecosystem and water user needs?**
   LRIA does not require waterpower facilities to sustain water dependent ecosystems or consider the needs of other water users. However, the PTTW requires waterpower facilities to allow enough water to pass through the dam to maintain protective amounts of stream flow downstream of the facility. The amount is determined based on the needs of the downstream ecosystem and water use. Downstream water uses can

include drinking water supply for humans and wildlife. It can also include wastewater or mining operations that depend on a river flow being available to assimilate pollution discharge.

The majority of Dam Operating Plans and WMPs approved under the *LRIA* do not include maintaining adequate downstream river flows that consider site specific ecosystem needs and downstream water use.

8. **How would the public be consulted and engaged under *LRIA* on changes to a waterpower facility's operation?**
The PTTW process provides concerned citizens and Indigenous communities the right to appeal a PTTW decision to the Environmental Review Tribunal. Permits are currently issued for a maximum of 10-years and allow for changes or updates to be incorporated into the permit upon renewal or amendment.

   Consultation must be meaningful and inclusive, with open and transparent communication that allows generous time for stakeholders to be consulted and engaged (unlike what is happening in this instance).

9. **How would Indigenous Communities be consulted and engaged under *LRIA* on changes to a waterpower facility's operation?**
Indigenous inherent rights are protected and embodied by section 35(1) of the Canada Constitution Act, 1982, and the Supreme Court of Canada has ruled that the Crown has a legal obligation and duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. The PTTW is a legal instrument that can trigger the Duty to Consult.

   ORA is concerned that the government's obligations to Indigenous people are not being respected, as has been stated by potentially impacted communities.

   It is evident by these statements by Matawa Chiefs and leaders from across Nishnawbe Aski Nation that the Indigenous peoples have not been adequately consulted on these major changes proposed in Bill 132:

   > *"Our First Nations* [Matawa Chiefs] *are not 'red tape or regulatory burdens' but Treaty partners in this country with rights and jurisdiction that pre-date any new proposed laws including this proposed bill. Any regulatory environment in Ontario must ensure our pre-existing rights are accurately reflecting Canada's Supreme Court decisions".*[15]

   > *"First Nation leaders from across Nishnawbe Aski Nation have declared their resolve to assert their rights and jurisdiction over their traditional lands by rejecting omnibus legislation being fast-tracked by the provincial government and controlling development in the Far North."*[16]

10. **Would *LRIA* ensure that reporting of diversions and in-stream hydroelectric water use are still reported to the Great Lakes Regional Water Use Database as per the Great Lakes St. Lawrence River Basin Sustainable Water Resources Agreement?**

11. **How would oversight and monitoring of transfers and diversions out of the Great Lakes Basin be reported and monitored under *LRIA*?**

12. **Would MNRF be provided with sufficient funding to take on these critical responsibilities?**

Conclusions:

It is no longer acceptable to trade valued ecosystem resources such as clean water, fisheries, wetlands and healthy lake and river ecosystems for power generation without effective mitigation, monitoring and reporting, and without clear and transparent public and Indigenous consultation on what these trade-offs would entail.

ORA recommends the Province undertake a cost-benefit analysis to determine the ecosystem services that a healthy river ecosystem provides, and the value of the trade-offs or costs that would be incurred if these proposals move forward. We must take into consideration that a PTTW functions to protect healthy freshwater ecosystems which is the foundation for a lucrative recreation and tourism industry, providing healthy drinking water and abundant fisheries. This must be the foundation for responsible and sustainable waterpower generation. Maintaining adequate flow levels and variability in rivers is essential to ecosystem health, and the PTTW program is best positioned to achieve this.

A PTTW ensures there is enough water available for the aquatic ecosystem and other water users, requires annual monitoring and reporting to ensure water quality and water quantity, proper mitigation of any impacts, and a review is required every 10 years. It provides an appeal process and proper engagement opportunities for stakeholders and a Duty to Consult with Indigenous peoples.

It is important that hydroelectric facilities continue to be assessed, monitored and reported through the PTTW policy by MECP. The MECP has the specific expertise, experience and mandate to manage water quality and water quantity, as set out in the MECP's SEV under the *EBR*. Having more than one ministry responsible for this important oversight is not efficient, would be cause for confusion, and would not be able to meet the purpose of the *OWRA*.

ORA strongly objects to this wholesale exemption for hydroelectric projects from the PTTW program. We consider any significant impact of hydro operations on water quality, water quantity and aquatic life should be subject to the same obligations as all other water users.

The economic, environmental, social and cultural impact of this proposal to fragment key freshwater protection policy could be devastating and long-lasting to water quality and fisheries and will be most acutely felt in Indigenous communities.

What is at stake if hydroelectric is exempted from the PTTW program:

- Extirpation of a number of endangered species
- Fisheries decline
- Degraded water quality
- Water quantity issues
- Shoreline erosion
- Dried-up riverbeds

- Wetland destruction
- A loss of clean drinking water for communities
- A loss of fish as a main source of sustenance for Indigenous communities
- Unbalanced and inequitable sharing of water

With climate change impacts bearing down on us, decision makers have a responsibility to ensure the resiliency of our freshwater resources. If this proposal moves forward it will be a precipitous turning point for our future with freshwater in Ontario and beyond.

ORA Recommendations:

1. The proposed PTTW exemption for hydroelectric be rejected in full.
2. MECP continue to require hydroelectric facilities to obtain a PTTW under the *OWRA*.
3. A full cost-benefit analysis be undertaken to determine the full ecosystem services and value of a healthy riverine ecosystem as it exists today under the current PTTW program, versus the value of the trade-offs or costs that would be incurred if these protections are removed.
4. There are other aspects of Bill 132 that are deeply concerning; therefore, ORA recommends that submissions of other individuals and organizations be meaningfully considered (i.e. CELA's ARA submission[17]).

Thank you for this opportunity to provide comments!

Respectfully,

Linda Heron
Chair, Ontario Rivers Alliance
(705) 866-1677

Cc: The Honourable Minister Jeff Yurek, MECP – Minister.MECP@Ontario.ca
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15 *Matawa Chiefs Statement on Bill 132 – Better for People, Smarter for Business Act*
16 *Nan Chiefs reject omnibus Bill 132 Tactics, Assert Rights over Traditional Lands, 14 November 2019.*
17 *https://cela.ca/proposed-changes-to-the-aggregate-resources-act-and-ontario-regulation-244-97/*

APPENDIX E

CELA COMMENTS ON SCHEDULE 9 OF BILL 132: PROPOSED AMENDMENTS TO THE *PESTICIDES ACT* (ERO #019-0481)

Prepared by Theresa McClenaghan, Executive Director and Counsel
Richard D. Lindgren, Counsel
Kathleen Cooper, Researcher and Paralegal

While pesticides are reviewed and registered under the federal *Pest Control Products Act*, the provincial government utilizes the *Pesticides Act* to regulate (or prohibit) the use of pesticides within Ontario.

The *Pesticides Act* is administered by the Minster of Environment, Conservation and Parks (MECP), and there are presently 12 different classes of pesticides that are available for use in Ontario. In general, Ontario's 12 classes expand upon the four existing federal classes, and accomplish several important objectives:

- influencing training and other requirements to address occupational, environmental, and human health risks for higher hazard products;
- restricting purchasing access for domestic products depending on package size and product risk;
- specifying the list of pesticides that are banned for cosmetic use (currently Class 9) and the list of those that can be used as low-risk options for cosmetic use (currently Class 11); and
- specifying certain neonicotinoid-treated corn and soybean seeds as targets for use reductions to protect pollinators.

However, Schedule 9 of Bill 132 now proposes various changes to the Ontario's *Pesticides Act*. According to the Environmental Registry notice[1] for these changes, the purpose of the amendments is to "reduce complexity and modernize pesticide management in Ontario while ensuring human health and environment continue to be protected." An identical statement has been offered in a related consultation regarding proposed changes to pesticide regulations,[2] to which CELA will respond under separate cover.

Despite the government's debatable claims about safeguarding human health and the environment, CELA submits that the Schedule 9 amendments will likely result in an increase in the use of pesticides that are applied for non-essential "cosmetic" purposes. The term "cosmetic" primarily refers to use on lawns and gardens. The existing ban on cosmetic pesticides lists the permitted substances (and exempted uses) in the general regulation[3] under the *Pesticides Act*.

However, the proposed change to section 7.1 of the *Pesticides Act* (and related regulatory proposals) will effectively move this list out of the regulation, and instead leave it to the Director

[1] See https://ero.ontario.ca/notice/019-0481 .
[2] See https://ero.ontario.ca/notice/019-0601.
[3] Ontario Regulation 63/09.

(an MECP official) to develop the list, and to amend it from time to time. CELA objects to this significant change because it provides considerably less protection to the public and the environment.

On this point, it is CELA's understanding that the Ontario government is insistent that the ban on cosmetic pesticides will be maintained. This is a laudable position, but CELA remains concerned that the new process for deciding on the list of pesticides allowed for cosmetic use (e.g. Class 11) could undermine the original precautionary intent of the ban when it was first established. In short, the precautionary choice was correctly made by Ontario to avoid needless public exposure to pesticides, regardless of their federal regulatory status or their pest control applications under other circumstances.

CELA is especially concerned about the new criteria to be used by the Director when deciding, on case-by-case basis, whether additional pesticides should be allowed for cosmetic use in Ontario. In particular, the criteria for decisions about adding to the existing Class 11 list have clear potential to undermine the precautionary intent, and to give the Director the ability to add previously banned pesticides to this list.

The criteria currently used to add pesticides to Class 11 are contained in the Pesticide Classification guideline, which will be eliminated along with the abolition of the classification system if the proposed Bill 132 amendments and regulatory changes are enacted. Instead, a modified version of these criteria will move into the general regulation, and the criteria will include key additions or revisions that are highly problematic.

For example, the proposed new criteria will enable the Director to consider additions to the list from **any** federally registered pesticide product. In contrast, previous criteria refer to only including pesticides that the federal Pest Management Regulatory Agency considers to be a "biopesticide" or "low-risk." Thus, the above-noted change will allow industry to apply to the Director to have **any** pesticide added to the list allowed for cosmetic use. This opens to door to allowing many more, notably higher risk pesticides that are not currently candidates for inclusion in Class 11.

At the same time, CELA is concerned about the wording of the revised criteria for cosmetic pesticides. In our view, the revised criteria propose to include more subjective language in several areas that will give the Director too much latitude in responding favourably to industry requests to add pesticides to the list.

For example, it is proposed that the Director can consider a federally regulated pesticide as "appropriate" for cosmetic use if the pesticide product is "unlikely to be used in a manner that is likely to cause significant exposure to humans." CELA submits that not only is this language highly subjective, (appropriate, unlikely, likely, significant), but it also undermines the precautionary intent of banning cosmetic use of higher risk pesticides in the first place.

We further note the federal registration process already makes a determination of allowing pesticide use that is supposed to avoid significant exposure. In our view, the critical difference between the proposed criteria and the policy foundation underlying the existing Ontario cosmetic

ban (and municipal bans elsewhere) is that the current ban takes a precautionary approach that rejects any unnecessary exposure to higher risk pesticides when their purpose is for purely cosmetic reasons.

In addition, the proposed criteria will enable the Director to add a pesticide to the list allowed for cosmetic use if it is "widely available and has a history of safe use." The previous criteria referred to pesticides that "have been widely available to the public for other uses for some time." However, this "wide and longstanding availability" prior use had more to do with people being able to use benign products such as vinegar for weed control.

In contrast, the new proposed language could allow industry to argue that federal approval of long-used pesticides "with a history of safe use" would justify additions to the list of cosmetic pesticides. Again, this revised criterion removes what had been a reference to well-known non-toxic uses, and replaces it with vague language that the pesticide industry can use to refer to pesticide products that have long been on the market.

Moreover, CELA submits that use of the word "safe" in reference to pesticide use is highly objectionable. The federal registration process is a determination of "acceptable risk" for pesticide use. It is not a determination of the "safe" use of pesticides.

Finally, the new procedure for adding to the list of pesticides allowed for cosmetic use will be a closed door exercise between pesticide registrants and the Director. If the Director adds pesticides to the list, such additions will be posted to the Environmental Registry for public review/comment. Accordingly, the public will have to closely monitor the Environmental Registry for additions of higher risk pesticides to this list that previous criteria would not have allowed.

CELA also objects to the Schedule 9 proposal to terminate the long-standing Ontario Pesticide Advisory Committee. In our view, the Committee is an extremely useful and credible mechanism under which independent expert advice on technical and scientific matters may be provided directly to the Ontario government in relation to classification of pesticides for use in the province. If the proposed abolition of the Committee proceeds, CELA submits that there will likely be increased risks to environmental and public health arising from the classification and application of pesticides within the province.

While the Committee provides advice on pesticides classification in the province, it has been CELA's experience that the Committee itself is not responsible for alleged delay in getting pesticides onto the Ontario market. In our view, any such delays have little or nothing to do with Committee and everything to do with a combination of inadequate expertise, limited staff and bureaucratic foot-dragging in the MECP's Pesticides Branch.

Accordingly, CELA concludes that the proposed changes to the *Pesticides Act* found in Schedule 9 of Bill 132 should not proceed, and submits that this entire Schedule should be withdrawn by the Ontario government.

In the alternative, if Schedule 9 is retained in Bill 132, then the specific sections that give effect to the proposed disbanding of the Ontario Pesticides Advisory Committee, and that terminate the

requirement that pesticides utilized for cosmetic purposes be defined in regulation, should be deleted. These sections include: subsection 43(3); section 44; section 45; section 46; and section 49.

November 2019

The Honourable Doug Ford,
Premier of Ontario
Legislative Building
Queen's Park
Toronto ON M7A 1A1

VIA EMAIL

November 21, 2019

Dear Premier Ford,

I am writing today in my role as the Chair of the Ontario Pesticides Advisory Committee (OPAC) to respond to your proposed amendments to the Ontario *Pesticides Act* and O. Regulation 63/09. The proposals are intended to support your *Better for People, Smarter for Business Act*, and include elimination of Ontario's unique classification system for pesticides and eradication of OPAC, which is designed to provide expert advice directly to the Minister, Environment, Conservation and Parks.

In 1971, the Conservative government of the day recognised that a non-partisan, highly-qualified, external committee of science-based, pesticide professionals would provide necessary expertise while helping to keep the government lean. The Pesticides Act established OPAC with a simple, four-part mandate and a direct line of reporting to the Minister. The mandate, as written in the Act, states that OPAC will:

(a) review annually the content and operation of this Act and the regulations and recommend changes or amendments therein to the Minister;

(b) inquire into and consider any matter the Committee considers advisable concerning pesticides and the control of pests, and any matter concerning pesticides and the control of pests referred to it by the Minister, and report thereon to the Minister;

(c) review publications of the Government of Ontario respecting pesticides and the control of pests, and report thereon to the Minister; and

(d) perform such other functions as the regulations prescribe. R.S.O. 1990, c. P.11, s. 10.

The current rationale given for opening the Act is to eliminate duplication caused by the Ontario-based classification system. Yet, you will note from the above mandate that classification was not the intended purpose of OPAC. In fact, the proposed changes to O. Reg. 63/09 place undue reliance on discretionary decisions of the Director, supported by a greatly-reduced staff who could not possibly be expected to have a full understanding of pesticide-related research, Integrated Pest Management (IPM), forestry, agriculture, human and environmental toxicology, structural/indoor

pest management, public health, environmental law, pesticide fate, invasive species and climate change.

OPAC has typically been a robust committee comprised of scientists from all of these relevant disciplines, government liaison personnel from related provincial ministries responsible for Agriculture, Natural Resources, Labour and Health as well as Health Canada, and stakeholders including agricultural producers and other industry representatives. Annual committee honorariums cost less than a single full-time employee salary, and much of the work of the committee is completed pro bono.

To eliminate access to the robust expertise needed for wise management of pesticide-related matters in no way improves life for the citizens of our Province, nor the competitiveness of companies that will conduct business here.

Recent interactions between OPAC and the Minister's office have been extremely limited, suggesting that the Minister is not familiar with the tremendous potential of a non-partisan, external expert committee. OPAC has to date received no response to repeated requests to meet with the Minister, nor to the July 25th submission of the annual report, and hence is concerned that Minister Yurek may not have a clear understanding of the role of the committee.

I welcome the opportunity to speak with your office directly to clarify OPAC's current role and explore ways to optimize the Committee's multi-stakeholder expertise to better serve the needs and priorities of the people of Ontario.

Respectfully yours,

Susan Wood-Bohm, PhD
Chair, OPAC

On behalf of OPAC members:
Al Hamill, Teri Yamada, Erica Phipps, Kathleen Cooper and Caroline Granger

Cc to:
James Wallace, Chief of Staff to the Premier
Hon. Jeff Yurek, Minister, Environment, Conservation and Parks
Alison Pilla, ADM, Environmental Policy Division, MECP

APPENDIX F

CELA COMMENTS ON SCHEDULE 9 OF BILL 132: PROPOSED AMENDMENTS TO THE *RESOURCE RECOVERY AND CIRCULAR ECONOMY ACT, 2016* AND THE *WASTE DIVERSION TRANSITION ACT, 2016*

Prepared by
Richard D. Lindgren, CELA Counsel

Schedule 9 of Bill 132 proposes certain amendments to the *Resource Recovery and Circular Economy Act, 2016* (*RRCEA*) and to the *Waste Diversion Transition Act, 2016* (*WDTA*).

(a) Proposed Changes to the RRCEA

Many of the proposed changes to the *RRCEA* pertain to the Resource Productivity and Recovery Authority established under the Act. For example, Schedule 9 proposes to amend the objects of the independent Authority, and to authorize the payment of funds from the Authority to the Crown in order to defray provincial costs incurred in administering the Act and regulations. In addition, the Schedule 9 amendments address the applicability of various inspection, compliance and enforcement provisions under Part V of the Act.

More specifically, Schedule 9 adds a new object for the Authority that requires it to perform duties and exercise powers in programs related to resource recovery or waste (e.g. registration, information management, reporting, fee collection and related matters), as may be specified by the Minister in a written direction. These Ministerial directions are to be web-posted on the public Registry established under section 50 of the *RRCEA*.

However, it is unclear how or when the Minister intends to utilize this broader power to issue written directions to the Authority on a wider range of topics, but CELA has no objection in principle to this new provision. Nevertheless, CELA is concerned that extensive Ministerial use of this wide-ranging power to issue written directions may displace or avoid the promulgation of key regulations under the Act, which will inevitably undermine public transparency and accountability.

In addition, CELA remains concerned about ensuring public transparency in the Authority's activities and data/information collection, particularly if the Authority is directed by the Minister to address matters other than the forthcoming extended producer responsibility regime.

In particular, CELA notes that section 24 of the *RRCEA* currently frames the Authority's objects as follows:

> 24(1). The Authority's objects are,
>
> (a) to perform the duties and exercise the powers given to the Authority under this Act or any other Act; and
>
> (b) to provide information to persons involved in activities that relate to resource recovery or waste reduction in Ontario **and to the public about this Act, the regulations, and**

> **activities** carried out under this Act or any other Act under which the Authority has powers or duties.

However, in the Schedule 9 revision of section 24, the above-noted phrase (in boldface) has been inexplicably deleted. At the very least, CELA submit this important phrase must be restored in order to ensure transparency, accountability and unimpeded public access to all data and information held by the Authority.

Schedule 9 also proposes to expand the cost recovery provisions currently set out in section 40 of the *RRCEA*. For example, the proposed amendments would empower the Minister to issue an order fixing the amount of money to be paid by the Authority to the Crown in relation to the actual or projected expenses involving the following matters:

- costs that are attributable to the oversight of the Authority under the Act, including costs associated with appeals to the Environmental Review Tribunal of orders issued under Part V of the *RRCEA*;
- costs relating to policy development, program implementation, compliance and enforcement; and
- costs in respect of any other prescribed objects.

At this time, CELA has no comment on the expanded cost-recovery mechanism under the *RRCEA*, but will closely monitor its implementation if Schedule 9 is enacted and proclaimed into force.

(b) Proposed Changes to the WDTA

Schedule 9 amends the *WDTA* in relation to the distribution of property to the Resource Productivity and Recovery Authority by an industry funding organization (IFO).

In particular, Schedule 9 proposes to add the following provisions to section 35 of the *WDTA*:

> (5) If an industry funding organization develops a plan under section 14 with respect to a waste diversion program, nothing in this section prohibits the plan from providing for the distribution to the Authority by the industry funding organization, or a liquidator of the industry funding organization, of any property of the industry funding organization related to a designated waste or the program that remains after all liabilities of the industry funding organization in respect of the designated waste or the program have been satisfied.
>
> (6) If a distribution is made under subsection (5), the Authority shall use the property it receives to cover costs of the Authority under the *Resource Recovery and Circular Economy Act, 2016* related to the designated waste in respect of which the program was operated.

Given the transitional and time-limited nature of the *WDTA*, CELA takes no position on this proposed addition to the Act.

November 2019

APPENDIX G

CELA COMMENTS ON SCHEDULE 16 OF BILL 132: PROPOSED AMENDMENTS TO THE *AGGREGATE RESOURCES ACT*

Prepared by
Richard D. Lindgren, CELA Counsel

In a recent Environmental Registry notice,[1] the Ontario government has indicated that statutory changes to the *Aggregate Resources Act* (*ARA*) are being proposed in order to "reduce burdens for business while maintaining strong protection for the environment and managing impacts to communities."

However, CELA concludes that the proposed amendments to the *ARA* are unlikely to maintain "strong" environmental protection or result in appropriate management of community impacts. More fundamentally, CELA objects to the erroneous characterization of current *ARA* requirements as burdensome "red tape" that should be cut in order to benefit aggregate producers across Ontario.

Accordingly, for the reasons outlined below, CELA recommends that the *ARA* proposals in Schedule 16 of Bill 132 should not proceed in their current form. Instead, Schedule 16 should be withdrawn in its entirety from Bill 132, and the Ontario government should develop and meaningfully consult upon amendments that better safeguard the environment and public health and safety from the adverse impacts that can arise from aggregate operations.

PART I – GENERAL COMMENTS ON AGGREGATE EXTRACTION

(a) Background

For almost 50 years, CELA lawyers have represented low-income persons and vulnerable communities in public hearings under the *ARA*, *Planning Act* and other applicable statutes. In some cases, CELA's clients are objectors to *ARA* licence applications for new or expanded aggregate operations. In other cases, CELA's clients are added by the Local Planning Appeal Tribunal (LPAT) (formerly the Ontario Municipal Board) as parties or participants in response to appeals or objections filed by other persons.

The overall objectives of CELA's clients in quarry hearings under the *ARA* typically include: conserving water resources and sources of drinking water; protecting local air quality, wildlife habitat and ecosystem features/functions; preserving prime agricultural lands; safeguarding public health and safety; and facilitating meaningful public participation to ensure good land use planning and environmentally sound decision-making across Ontario.

[1] See https://ero.ontario.ca/notice/019-0556. This appendix is a condensed version of the detailed brief that CELA submitted in relation to this Environmental Registry notice: see https://cela.ca/proposed-changes-to-the-aggregate-resources-act-and-ontario-regulation-244-97/.

Aside from our case work, CELA has also been involved in various provincial reviews of the *ARA* regime in recent years. For example, CELA testified before the Standing Committee on General Government during its 2012 review of the *ARA*.[2] Similarly, CELA participated in the numerous meetings of the *ARA* Multi-Stakeholder Working Group in the fall of 2014, and provided comments on the MNRF's 2016 *Blueprint for Change* regarding the aggregate sector.[3] We also responded to the 2019 "A Place to Grow" survey conducted by the Ontario Growth Secretariat in relation to aggregate resource policies.[4]

On the basis of our decades-long involvement in aggregate matters at the local, regional and provincial level throughout Ontario, CELA has carefully considered the proposed changes to the *ARA* from the public interest perspective of our client communities. Our findings, conclusions and recommendations are set out below.

(b) Environmental Significance of Aggregate Production

In CELA's experience, aggregate operations (e.g. pits and quarries) cannot be characterized as small-scale, temporary or environmentally benign land uses. To the contrary, the extraction, processing and transportation of aggregate materials (and other on-site ancillary activities such as dewatering, fuel storage or asphalt production) are significant, long-term and physically intrusive operations that can result in serious environmental and nuisance impacts (e.g. noise, dust, increased truck traffic, and adverse effects upon water resources, wildlife habitat, and agricultural lands).

Similar views have been expressed by the former Environmental Commissioner of Ontario (ECO) in her annual reports to the Ontario Legislature. For example, in her 2017 environmental protection report, the independent ECO found that:

> The process of both siting and approving the operation of pits (sand and gravel) and quarries (solid bedrock material such as limestone and granite) is often highly controversial and divisive for many local communities. Few people want to live beside an aggregate operation or its haul roads as they typically generate dust and noise and increase truck traffic.
>
> Aggregate operations can also impact local water systems, wildlife, natural habitats, and farmland. In addition, as pits and quarries often cluster together in groups – where nature deposited the most desirable types of rock – cumulative environmental effects can arise.[5]

This ECO report noted that there are over 6,000 approved pits and quarries across the province, most of which are concentrated on private lands in southern Ontario where the most aggregate is consumed and where land use development pressures are the greatest.[6] The ECO's analysis also

[2] See https://www.cela.ca/publications/submissions-aggregate-resources-act.
[3] See https://www.cela.ca/aggregates-resources-2015.
[4] See https://www.cela.ca/Survey-A-Place-to-Grow.
[5] ECO, *2017 Annual Report: Good Choices, Bad Choices*, page 168.
[6] *Ibid*, page 171.

confirmed that even when public objections have resulted in referrals of licence applications to public hearings under the *ARA*, "approvals are rarely denied completely."[7]

More importantly, despite the revisions to the *ARA* regime made in 2017, the ECO identified the need to undertake further measures to "lighten the environmental footprint of aggregates in Ontario."[8] In particular, the ECO made three main recommendations to the Ontario government:

- decrease the demand for "new" or "virgin" aggregate (e.g. by increasing the use of recycled aggregate, wood building materials and green infrastructure);
- strengthen Ministry of Natural Resources and Forestry (MNRF) powers to update site-specific environmental requirements to ensure that long-operating pits and quarries continue to meet modern standards; and
- improve progressive and final rehabilitation rates through better compliance and enforcement by the MNRF, and through clearer timelines for rehabilitation.[9]

Unfortunately, the *ARA* changes now being proposed by the Ontario government are not aimed at addressing the ECO's well-founded concerns and sound recommendations for long overdue reform. Instead, the current *ARA* proposals are moving in the opposite direction of the ECO recommendations by proposing to modify (or remove) key components of the current provincial and municipal framework that attempt to prevent, minimize or mitigate the adverse effects and environmental risks associated with aggregate production.

Contrary to industry or governmental claims, CELA submits these existing safeguards are not "red tape," nor do they impose an undue burden to the aggregate industry by wholly preventing or unreasonably constraining aggregate extraction. In fact, the record amply demonstrates that new or expanded aggregate operations are readily approvable in Ontario, particularly since they receive preferential treatment in the Provincial Policy Statement issued under the *Planning Act*.[10] Accordingly, CELA concludes the Ontario government has fundamentally failed to produce any persuasive evidence-based justification for rolling back or weakening the existing provisions of the *ARA*.

RECOMMENDATION 1: The provincial government should immediately withdraw Schedule 16 from Bill 132.

RECOMMENDATION 2: The provincial government should develop and consult Ontarians on appropriate *ARA* changes that decrease aggregate demand, strengthen MNRF powers to protect the environment, and improve rehabilitation rates through better enforcement, as described in the 2017 ECO report.

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[7] *Ibid*.
[8] *Ibid*, page 175.
[9] *Ibid*, pages 175 to 183.
[10] See CELA's recent submission on Ontario's proposed changes to the Provincial Policy Statement which assign even greater priority to aggregate production: https://www.cela.ca/planning-act-2019-pps-review.

PART II – SPECIFIC COMMENTS ON THE PROPOSED *ARA* CHANGES

(a) Overview of Proposed ARA Changes

The Environmental Registry notice[11] articulates the Ontario government's intentions as follows:

> We are proposing to make amendments to the *Aggregate Resources Act*, while continuing to ensure operators are meeting high standards for aggregate extraction, that would:
>
> - strengthen protection of water resources by creating a more robust application process for existing operators that want to expand to extract aggregate within the water table, allowing for increased public engagement on applications that may impact water resources. This would allow municipalities and others to officially object to an application and provide the opportunity to have their concerns heard by the Local Planning Appeal Tribunal;
> - clarify that depth of extraction of pits and quarries is managed under the *Aggregate Resources Act* and that duplicative municipal zoning by-laws relating to the depth of aggregate extraction would not apply;
> - clarify the application of municipal zoning on Crown land does not apply to aggregate extraction;
> - clarify how haul routes are considered under the *Aggregate Resources Act* so that the Local Planning Appeal Tribunal and the Minister, when making a decision about issuing or refusing a licence, cannot impose conditions requiring agreements between municipalities and aggregate producers regarding aggregate haulage. This change is proposed to apply to all applications in progress where a decision by the Local Planning Appeal Tribunal or the Minister has not yet been made. Municipalities and aggregate producers may continue to enter into agreements on a voluntary basis;
> - improve access to aggregates in adjacent municipal road allowances through a simpler application process (i.e. amendment vs a new application) for an existing license holder, if supported by the municipality; and
> - provide more flexibility for regulations to permit self-filing of routine site plan amendments, as long as regulatory conditions are met.

While these proposals have been framed at a high-level without including key implementation details, Schedule 16 of Bill 132 provides additional information on how the Ontario government intends to amend the *ARA*.

(b) CELA Comments on Proposed ARA Changes

CELA's concerns about the above-noted statutory amendments may be summarized as follows:

1. While the ERO notice proposes to "strengthen" groundwater protection through a more "robust" application process for aggregate extraction below the water table, it appears to CELA that there is little or nothing in Schedule 16 of Bill 132 that actually implements this commitment. For example, Schedule 16 proposes to expand the regulation-making authority under the *ARA* to enable the provincial Cabinet to define the term "below the

[11] *Supra*, footnote 1.

water table,"[12] but no proposed definition has been offered. Moreover, while Schedule 16 adds or amends provisions regarding licence/permit applications, licence/permit conditions, and site plans,[13] there seems to be no material change in the application process used to review and approve these items. Indeed, several of these proposed changes are not new at all, but are instead lifted directly from the 2017 amendments to the *ARA* that were made by the previous government, but which have not yet been proclaimed into force.

2. Schedule 16 proposes a new section 13.1 in the *ARA* to address situations where an operator of an above-water table pit or quarry wants to extract aggregate from below the water table.[14] However, CELA notes that there are no substantive safeguards in this new provision that expressly protect groundwater quantity or quantity. In theory, effective and enforceable controls on below-water table extractions could be imposed through new regulatory standards under the *ARA*, but unless and until these standards are promulgated, CELA is unable to agree with the Ontario government's claim that the new application process will better protect groundwater. CELA further notes that section 13.1 itself does not establish a new application process; instead, it simply provides that the existing process will continue to apply unless a new one is prescribed by regulation (which has not happened yet). Therefore, the current status quo remains in effect, which CELA would not characterize as "robust" for the purposes of groundwater protection.

3. Alarmingly, Schedule 16 purports to remove municipalities' authority to protect groundwater resources through zoning by-law restrictions on the depth of extraction.[15] In CELA's view, making zoning by-laws inoperative in this manner weakens – not strengthens – groundwater protection, and unduly interferes with the municipalities' duty to identify and protect water resources in accordance with the Provincial Policy Statement issued under the *Planning Act*. Moreover, we are unaware of any compelling jurisdictional, legal or technical reasons why the *ARA* amendments should strip away the existing municipal right to utilize zoning restrictions that safeguard groundwater quantity and quality, especially in the numerous communities across Ontario that are wholly dependent on aquifers for drinking water supply purposes.

4. New subsection 13.1(4) in Schedule 16 specifies that municipalities or members of the public may file objections to new below-water table extraction at existing sites, and the Minister may, in his/her discretion, refer such objections (or just certain issues) to the LPAT for a hearing. In CELA's opinion, this is merely a refinement of existing objection/referral rights under the *ARA*,[16] and does not represent a bold new step to protect groundwater from impacts arising from deepened aggregate extraction. In addition, it is unclear to CELA why the onus of protecting groundwater falls by default to municipalities or concerned citizens, who must expend time, money and effort in appealing matters to the LPAT. Instead, CELA submits that it is the primary responsibility of Ontario government

[12] Bill 132, Schedule 16, subsection 18(1).
[13] *Ibid*, sections 4 to 6.
[14] *Ibid*, subsection 6(1).
[15] *Ibid*, section 3.
[16] *ARA*, subsection 11(5).

at first instance to set and enforce clear, comprehensive and effective standards for protecting groundwater resources from extraction-related impacts.

5. Schedule 16 clarifies that an *ARA* licencee is not entitled to an LPAT hearing if the Minister adds or varies licence conditions in order to implement source protection plans approved under the *Clean Water Act* (*CWA*).[17] CELA supports this provision, although we note that it flows directly from the mandatory *CWA* requirement[18] that prescribed instruments – such as *ARA* licences for pits and quarries[19] – must be amended to conform to policies in source protection plans that address significant drinking water threats.

6. Schedule 16 stipulates that zoning by-laws are "inoperative" if they include prohibitions against the establishment of pits and quarries on Crown land.[20] CELA presumes that this provision is intended to serve as a legislative response to an Ontario court decision[21] which held that third parties operating on Crown land are subject to applicable zoning by-laws. However, no rationale has been provided by the Ontario for ousting municipal by-laws in this manner under the *ARA*. In short, this provision seems to be a solution in search of a problem.

7. The *ARA* currently identifies various factors that the Minister or the LPAT are to take into account when making decisions about licence applications, including "the main haulage routes and proposed truck traffic to and from the site."[22] However, Schedule 16 adds a new provision that would prohibit these decision-makers from considering "road degradation that may result from proposed truck traffic to and from the site."[23] If enacted, this prohibition would apply to all pending and future licence applications.[24] CELA does not support this provision since road damage and wear-and-tear from high-volume truck traffic is an important consideration, particularly for residents living along haul routes and for smaller municipalities with numerous aggregate operations and limited funds for road repair and maintenance.

8. Schedule 16 proposes to make it easier for licenced site boundaries to be expanded to include adjoining road allowances, provided that "prescribed conditions, if any, are satisfied."[25] However, since the proposed regulatory conditions (or the proposed "simplified process") have not been disclosed by the provincial government to date, CELA is unable to comment further on this provision.

9. Schedule 16 proposes to expand the Cabinet's regulation-making authority under the *ARA* in relation to site plan amendments.[26] Currently, this authority only permits regulations that

[17] Bill 132, Schedule 16, subsection 5(5).
[18] *CWA*, section 43.
[19] O.Reg.287/07, subsection 1.0.1.
[20] Bill 132, Schedule 16, section 11.
[21] *Glaspell v. Ontario*, 2015 ONSC 3965 (Ont SCJ).
[22] *ARA*, subsection 12(h).
[23] Bill 132, Schedule 16, section 2.
[24] *Ibid*.
[25] *Ibid*, section 7.
[26] *Ibid,* subsection 18(2).

address "minor" site plan amendments that can be made without the Minister's approval. However, Schedule 16 proposes to delete the word "minor," which potentially allows proponents to make even major changes without Ministerial approval, provided that the prescribed regulatory requirements are met. Since the Ontario government has not identified the types of "self-filed" site plan amendments that will be permissible, and has not released draft regulatory language on this matter, CELA cannot support this *ARA* amendment.

For the foregoing reasons, CELA recommends that if Schedule 16 is not withdrawn from Bill 132, then the Ontario government should not proceed with the proposed *ARA* amendments in relation to road degradation (section 2), exclusion of municipal zoning by-laws to aggregate extraction depths (section 3) or Crown land (section 11), and amendments to site plans without Ministerial approval (section 18(2)).

RECOMMENDATION 3: In the event that Schedule 16 is not withdrawn from Bill 132, the proposed *ARA* amendments contained in sections 2, 3, 11 and 18(2) of Schedule 16 should not be enacted by the Ontario Legislature.

CELA further notes that the Ontario government has not substantiated the alleged need for its proposals by providing credible, objective and evidence-based justification for these controversial legislative and regulatory changes. However, CELA anticipates that the underlying rationale for these industry-friendly changes is to supply even larger tonnages of new aggregate materials for the additional urban sprawl that is likely to be facilitated by the government's recently proposed changes to the Provincial Policy Statement issued under the *Planning Act*.

From our public interest perspective, these changes do not constitute sound environmental or land use planning policy, and they virtually guarantee the continuation – if not intensification – of intractable land use disputes over new or expanded aggregate operations and their attendant impacts, particularly in relation to water resources.

Moreover, the Ontario government's failure to provide sufficient particulars about how the proposed *ARA* changes will be implemented by the MNRF makes it exceedingly difficult for stakeholders to provide feedback. Similarly, the Ontario's government's apparent decision to proceed with the statutory changes (e.g. by introducing Schedule 16 in Bill 132 in the Ontario Legislature while the public comment period is still underway) is contrary to the public participation rights under Part II of the *EBR*.

In conclusion, CELA makes the following recommendations in relation to the *ARA* amendments proposed in Schedule 16 of Bill 132:

RECOMMENDATION 1: The provincial government should immediately withdraw Schedule 16 from Bill 132.

RECOMMENDATION 2: The provincial government should develop and consult Ontarians on appropriate *ARA* changes that decrease aggregate demand, strengthen MNRF powers to

protect the environment, and improve rehabilitation rates through better enforcement, as described in the 2017 ECO report.

RECOMMENDATION 3: In the event that Schedule 16 is not withdrawn from Bill 132, the proposed *ARA* amendments contained in sections 2, 3, 11 and 18(2) of Schedule 16 should not be enacted by the Ontario Legislature.

November 2019

APPENDIX H

CELA'S COMMENTS ON SCHEDULE 16 OF BILL 132: PROPOSED AMENDMENTS TO THE *CROWN FOREST SUSTAINABILITY ACT, 1994*

Prepared by
Kerrie Blaise, CELA Counsel

The government of Ontario has proposed amendments to a number of statutes administered by the Ministry of Natural Resources and Forestry (MNRF), including significant changes to the *Crown Forest Sustainability Act, 1994* (*CFSA*). As a recent Environmental Registry[1] notice sets out:

> The proposed amendments would support changes to the forest management policy framework to reduce burdens to industry and streamline delivery by government. The proposed amendments would, if passed:
> - enable the issuance of a "permit" to allow a person to remove forest resources from a Crown forest for non-forestry purposes (e.g., roads, mining, utility corridors).
> - modernize the requirements for annual work schedules by removing the requirement for MNRF approvals.
> - enable the Minister to extend a Forest Management Plan.

The proposed amendments to the *CFSA* are further detailed in Schedule 16 of *Bill 132, Better for People, Smarter for Business Act, 2019* (Bill 132). For the reasons set out below, CELA strongly objects to Schedule 16's amendments to the *CFSA* and ask they be withdrawn from Bill 132.

SPECIFIC COMMENTS ON THE PROPOSED *CFSA* CHANGES

(a) Revisions to Forest Management Plan Work Schedules

Currently, the *CFSA* provides that the Minister may revise a work schedule previously approved within a Forest Management Plan (FMP).[2] However, subsection 21(2) of Schedule 16 amends this provision by introducing the ability of "a holder of a forest resource licence" to revise their work schedule in accordance with the FMP.

CELA objects to this amendment as it would reduce the oversight of licensee activities from the Ministry's view. While the proposed provision obligates licence holders to ensure consistency with the FMP, there is no longer any requirement for Ministerial approval.

[1] Online: https://ero.ontario.ca/notice/019-0732
[2] *CFSA,* s 17(4).

RECOMMENDATION 1: Section 21, which allows forest resource licence holders to revise work schedules within a Forest Management Plan, should be removed from Schedule 16.

(b) Sustainability Requirement Exemption

Schedule 16, section 28 introduces an exemption for permits made to persons who remove Crown forest from the requirement that they "provide for the sustainability of a Crown forest." CELA strongly objects to this proposed amendment as it overrides the fundamental purpose of the *CFSA*, which is to:

> [P]rovide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations.[3]

If permitted, section 28 of Schedule 16 would also allow the issuance of forestry permits absent considerations of the Act's stated principles to conserve large, healthy, diverse and productive Crown forests and protect their long term health and vigour.[4] CELA submits these amendments may be viewed as *ultra vires* under the Act because they are not directed at achieving the purpose of sustainability within Ontario's Crown forests.

RECOMMENDATION 2: Provisions to exempt permits from the *CFSA's* purpose of providing for the sustainability of Crown forests, as proposed in Schedule 16's section 28, should be removed in full.

(c) Removal of Provisions Requiring Reporting to Ontario Legislature

In a number of instances, Schedule 16 also removes the current requirement that reports related to the Minister's 5-year review of the state of Crown forests and the Forest Renewal and Forest Futures' trusts be provided to Cabinet and tabled in the Legislature (amending sections 22(2), 48(7) and 51(10) of the current *CFSA,* respectively). In place, Schedule 16 contemplates these reports will be "available to the public on a publicly accessible website."

CELA opposes these amendments which represent a loss of important legislative oversight and public accountability, and recommends these amendments to the *CFSA* be removed from Schedule 16.

RECOMMENDATION 3: Provisions amending sections 22, 48 and 51 of the *CFSA,* which removes the requirement for the Ministry to provide reports to the Ontario Legislature

[3] *CFSA,* s 1

[4] *CFSA,* s 2(3)

related to the state of Crown forests and the forest renewal and futures trusts, should be removed from Schedule 16.

CONCLUSION

In conclusion, CELA makes the following recommendations and requests that Schedule 16's amendments to the *CFSA* be withdrawn from Bill 132.

> **RECOMMENDATION 1: Section 21, which allows forest resource licence holders to revise work schedules within a Forest Management Plan, should be removed from Schedule 16.**
>
> **RECOMMENDATION 2: Provisions to exempt permits from the *CFSA's* purpose of providing for the sustainability of Crown forests, as proposed in Schedule 16's section 28, should be removed in full.**
>
> **RECOMMENDATION 3: Provisions amending sections 22, 48 and 51 of the *CFSA,* which removes the requirement for the Ministry to provide reports to the Ontario Legislature related to the state of Crown forests and the forest renewal and future trusts, should be removed from Schedule 16.**

APPENDIX I

CELA COMMENTS ON SCHEDULE 16 OF BILL 132: PROPOSED AMENDMENTS TO THE *FISH AND WILDLIFE CONSERVATION ACT, 1997*

Prepared by
Kerrie Blaise, CELA Counsel

The Ontario government has proposed amendments to a number of statutes administered by the Ministry of Natural Resources and Forestry (MNRF), including the *Fish and Wildlife Conservation Act, 1997* (FWCA).

As set out in *Bill 132, Better for People, Smarter for Business Act, 2019* (Bill 132), Schedule 16 amends the *FWCA* and introduces provisions allowing for the designation of wildlife disease control and surveillance zones, and restricts activities within these areas to assist in the prevention, control and eradication of wildlife diseases. Further provisions are also introduced which define 'wildlife disease' and provide for regulation making powers in respect thereof.

Specifically, Bill 132 frames the amendments to the *FWCA* as follows:

> The *Fish and Wildlife Conservation Act, 1997* is amended to provide the Minister with the power to issue an order establishing wildlife disease control and surveillance zones to assist in controlling or eradicating wildlife diseases that may have serious adverse impacts on wildlife or minimizing the impacts of those diseases in Ontario. The order will set out requirements, restrictions or prohibitions that apply within the zones such as prohibitions or restrictions against hunting, trapping or possession of wildlife within the zone as well as requirements to submit information. The Lieutenant Governor in Council is also given a new regulation making power respecting wildlife diseases.

While the spread of disease is an important consideration in overseeing wildlife populations in Ontario, this high-level framing, unfortunately, does not provide insight into the rationale for these amendments nor wildlife populations, diseases or geographic areas which may be of particular concern.

CELA is also of the view that Schedule 16's amendments could more effectively advance the aims of disease prevention, control and eradication if they required Ministerial decision-making to be based on credible scientific information and sought to remedy existing gaps in wildlife health and disease knowledge. Accordingly, we recommend Schedule 16 of Bill 132 be amended in accordance with our recommendations set out below.

SPECIFIC COMMENTS ON THE PROPOSED *FWCA* CHANGES

(a) Wildlife Disease Control and Surveillance Zones

Schedule 16 amends the *FWCA* by introducing a definition for wildlife disease[1] and new Ministerial authority to designate 'wildlife disease control and surveillance zones' to assist in eradicating or minimizing diseases which pose a serious threat to wildlife populations, or adverse ecological, social or economic impacts in Ontario.[2]

In CELA's opinion, the provisions pertaining to 'wildlife disease control and surveillance zones' proposed in section 40 should be amended to include a reference to the basis upon which a Minister may designate a control and surveillance zone. Currently, it reads:

> 47.1(1) If the Minister believes that a wildlife disease has been detected or is reasonably believed to be present in Ontario or in another jurisdiction and there is a risk it could enter Ontario, the Minister may by order establish a wildlife disease control and surveillance zone […]

Accordingly, we recommend this provision be amended to read 'a wildlife disease control and surveillance zone may be established by the Minister, if they are of the opinion based on credible scientific information, designation is appropriate to safeguard biological diversity.'

RECOMMENDATION 1: The proposed section 47.1 in Schedule 16 should be amended to read "If the Minister believes, based on credible scientific information, designation is appropriate to safeguard biological diversity that a wildlife disease has been detected or is reasonably believed to be present in Ontario […]"

(b) Disease Detection and Monitoring

While Schedule 16's *FWCA* amendments contemplate actions to prevent, control and eradicate wildlife diseases, we recommend that the government also include provisions aimed at improving capacity to study, detect and monitor disease. In CELA's view, the efficacy of efforts to prevent, control and eradicate wildlife diseases will be determined by the availability of information about species, their habitat, and the pathology of wildlife diseases and transference.

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[1] Schedule 16, s. 39 amends s. 1(1) of the *FWCA* by adding the definition of wildlife disease "a disease or condition impacting wildlife caused by an infectious agent, including but not limited to a virus, prion, bacterium, protozoan, viroid, fungus or metazoan parasite."

[2] Schedule 16, s. 40

Without dispute, the impact of diseases can be devastating to wildlife populations and threaten their ability to either recover or survive. This is particularly evident in the white-nose syndrome which has caused severe declines in Ontario's bat species. However, without adequate resources, for instance to track and monitor bats, study their habitat and understand their maternity roosts and winter hibernacula, the ability of Ontario to fully and effectively respond to wildlife diseases is constrained.

Therefore, CELA recommends the priority "to study and increase knowledge of" wildlife diseases be included alongside the new provisions' goals of controlling and eradicating wildlife diseases.

RECOMMENDATION 2: A new provision setting out a priority "to study and increase knowledge of" wildlife diseases should be added to the Schedule 16's purposes of controlling and eradicating wildlife diseases.

(c) Transport of Disease

Schedule 16's new provisions related to the *FWCA* contemplate powers for conservation officers pertaining to the seizure and safeguarding of any 'thing' which may transfer wildlife diseases. However, the amendments do not expressly contemplate actions to prevent non-human pathways of disease transference. That is, in addition to prohibiting the purchase, sale or disposition of wildlife to control disease, other sources of disease transfer such as habitat loss and climate change – which are recognized as worsening the extent of and range of disease occurrence – should be considered.

Thus, we recommend new subsections be added to the proposed sections 47.1 and 47.2 of the *FWCA* setting out the objective "to study and monitor the effects of climate and environmental conditions on wildlife diseases and transference."

RECOMMENDATION 3: Recognizing that habitat loss and climate change can worsen the effects of and range of diseases, the proposed sections of 47.1 and 47.2 of the *FWCA* should be amended to include as an objective "to study and monitor the effects of climate and environmental conditions on wildlife diseases and transference."

CONCLUSION

In conclusion, CELA makes the following recommendations in relation to the *FWCA* amendments proposed in Schedule 16 of Bill 132:

RECOMMENDATION 1: The proposed section 47.1 in Schedule 16 should be amended to read "If the Minister believes, based on credible scientific information, designation is appropriate to safeguard biological diversity that a wildlife disease has been detected or is reasonably believed to be present in Ontario [...]"

RECOMMENDATION 2: A new provision setting out a priority "to study and increase knowledge of" wildlife diseases should be added to the Schedule 16's purposes of controlling and eradicating wildlife diseases.

RECOMMENDATION 3: Recognizing that habitat loss and climate change can worsen the effects of and range of diseases, the proposed sections of 47.1 and 47.2 of the *FWCA* should be amended to include as an objective "to study and monitor the effects of climate and environmental conditions on wildlife diseases and transference."