Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

CELEBRATING 50 Years 1970 - 2020 OF ENVIRONMENTAL PROTECTION

November 9, 2020 **BY EMAIL**

Sharifa Wyndham-Nguyen
Client Services and Permissions Branch
Ministry of the Environment, Conservation and Parks
135 St. Clair Avenue West, 1st Floor
Toronto, ON M4V 1P5

Dear Ms. Wyndham-Nguyen:

RE: PROPOSED PROJECT LIST UNDER THE AMENDED *ENVIRONMENTAL ASSESSMENT ACT* (ERO 019-2377)

Please be advised that CELA and all of the undersigned environmental lawyers, non-governmental organizations and Indigenous organizations have carefully reviewed the above-noted regulatory proposal. We conclude that the draft project list under the amended *Environmental Assessment Act* (*EAA*) is inadequate, incomplete and unacceptable.

Accordingly, we urge the Ministry to immediately withdraw and substantially revise the proposed project list to ensure that it fully implements the stated purpose of the *EAA*, namely, the betterment of the people of Ontario by providing for the protection, conservation and wise management of the environment.

The reasons for this request are outlined below, and may be summarized as follows:

1. The intent of the proposed list is to inappropriately restrict the application of Part II.3 of the *EAA* (Comprehensive EAs) to a relatively small number of major infrastructure projects, and to avoid non-existent "duplication" between the *EAA* and other provincial laws.

2. While the Ministry purported to apply certain environmental factors to develop the proposed list, the Ministry apparently relied upon its "experience" in selecting the listing candidates, and has provided no objective, persuasive, or evidence-based justification for the projects (or thresholds) that have been included (or excluded) from the proposed list.

3. The proposed list is not credible or transparent since it inexplicably omits too many environmentally significant projects that otherwise should trigger EA requirements.

Please note that these comments are without prejudice to our previously stated position that the Ministry's consultation on this regulatory proposal has been procedurally flawed and does not satisfy the requirements of Part II of the *Environmental Bill of Rights* (*EBR*). The basis for this

position has been described in earlier correspondence sent to you by Ecojustice and CELA on behalf of various environmental groups, and need not be repeated here.

1. The Questionable Intent of the Proposed List

In its public consultation slidedeck used during the October webinars, the Ministry expressly states that the government's intention to confine the new *EAA* list to "projects which demonstrate the potential for the highest degree of environmental impact."[1]

However, we note that this self-imposed policy constraint is neither mentioned nor mandated by the amended *EAA*. Moreover, this questionable attempt to restrict Part II.3 of the *EAA* to the "worst" projects is inconsistent with the broad public interest purpose of the *EAA*, as described above.

In particular, there is nothing in the *EAA*'s purpose that compels Ontario to limit the application of Part II.3 of the *EAA* to a handful of large-scale infrastructure projects. In our view, the province's current approach ignores or overlooks the fact that even small and medium-sized projects can cause significant adverse environmental effects, depending on the location, design and operation of the proposal. Accordingly, we submit that Ontario's project-listing exercise should not be undertaken in a narrow manner that thwarts or frustrates the overarching purpose of the *EAA* by focusing primarily on large projects.

In addition, we note that the Ministry's consultation materials do not precisely define the actual comparator or ranking system that was used to determine which project types satisfied (or did not satisfy) the "highest degree of environmental impact" criterion.

In these circumstances, we submit that there is no air of reality to the Ministry's claims that only the handful of projects on the proposed list have the greatest potential to cause significant adverse environmental effects, having regard for the broad definition of "environment" in the *EAA*. Conversely, no credence can be given to the Ministry's implicit position that all non-listed projects are environmentally benign undertakings that pose low (or no) risk to the environment, human health, or socio-economic and cultural conditions.

Moreover, we note that the Registry notice for this regulatory proposal asserts that the content of the proposed project list was guided by the government's desire to eliminate "duplication with other legislation, policies and processes."[2] However, the Ministry's consultation materials have not identified any actual instances of unnecessary overlap or duplication between the *EAA* and other statutory regimes.

In our view, there is no legislative overlap between the *EAA* and other provincial laws. This important fact has been recognized by the Auditor General of Ontario, who has correctly pointed out that "while many other regulatory approvals for private-sector projects – such as mines, quarries, manufacturing plants and refineries – consider the natural environment, they do not

[1] MECP, *Modernizing the Environmental Assessment Program: Proposed Comprehensive Environmental Assessment Project List* (Stakeholder Engagement Sessions: October 2020), page 4.
[2] See https://ero.ontario.ca/notice/019-2377

include all key elements of an environmental assessment."[3] On this point, we note these kinds of industrial and resource extraction projects are, in fact, caught by EA requirements in several other provinces, but are not found on the proposed *EAA* project list.

Accordingly, we conclude that the Ministry's consultation materials improperly conflate EA processes with regulatory requirements established under other provincial laws. In our view, the Ministry's misguided blurring of these two distinct legislative processes goes a long way in explaining the fundamental inadequacy of the proposed project list.

2. Erroneous Application of Environmental Factors to Develop the Proposed List

The Registry notice suggests that in determining the project categories and thresholds in the proposed list, the Ministry considered a number of factors to determine environmental significance (e.g. the magnitude, duration, frequency and geographic extent of potential impacts).[4]

However, these specific factors do not actually exist in the amended *EAA*, which gives the Ontario Cabinet virtually unfettered discretion under the Act when determining which projects should – or should not – be added to the list.

Similarly, it is unclear to us whether these factors were all given equal weight by the Ministry, or whether some were deemed to be more important than others. In addition, the Ministry's purported application of these factors during the listing exercise was solely based on the government's self-proclaimed "experience," rather than any rigorous and evidence-based scientific or technical review.

In addition, we remain highly concerned that the Ministry's consultation materials do not disclose why each of the proposed project types (or thresholds) on the list meet the above-noted factors, or why other potential candidates (e.g. sewage treatment plants, quarries, fracking, oil/gas refineries, intra-provincial pipelines, forestry operations, pulp mills, smelters, etc.) do not meet the factors and were excluded from the draft project list.

We further note that the Ministry's identified factors do not appear to expressly include climate change considerations (e.g. greenhouse gas emissions), the potential for transboundary impacts in other jurisdictions, the risk of accidents or malfunctions, or the claimed efficacy of mitigation measures used by proponents.

In any event, since the evidentiary basis for applying the Ministry's factors has not been publicly disclosed, we conclude that the proposed categories/thresholds simply reflect the value judgments or subjective views of the provincial officials who drafted the project list proposal under the *EAA*.

In our view, the Ministry's closed-door deliberation (and reliance upon its professed "experience") is not transparent or persuasive, and the resulting project list proposal has not been accompanied by any compelling evidence or analysis to justify the proposed categories/thresholds.

---

[3] See https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf
[4] See https://ero.ontario.ca/notice/019-2377

At the same time, we must point out that the Ministry's Statement of Environmental Values (SEV) under the *EBR* contains a number of relevant principles and commitments (e.g. precautionary, science-based approach; cumulative effects analysis; ecosystem approach, etc.) that the Ministry is supposed to consider when developing new regulatory proposals. However, the SEV is not discussed or even mentioned in the Registry notice or the Ministry's consultation materials. Similarly, there is no evidence demonstrating that the SEV principles were duly taken into account when the proposed project list was being developed by the Ministry.

In summary, we conclude that the Ministry's environmental factors have not been applied in a robust, traceable and objective manner. In our view, the Ministry's superficial approach likely explains why mines have not been clearly proposed at the outset for inclusion on the *EAA* project list. Instead, the Ministry's consultation materials contain no firm commitment to designate certain types of mines (or production thresholds) under Part II.3 of the *EAA*. In short, the Ministry merely invites public input on the long overdue need to extend the *EAA* to the mining sector in this province. Our additional comments about mines and other excluded projects are set out below.

3. Unjustifiable Exclusion of Environmentally Significant Projects from the Proposed List

(i) Improper Exclusion of Governmental Plans and Programs

The amended *EAA* now includes a new definition of "project":

> "project" means one or more enterprises or activities or a proposal, plan or program in respect of an enterprise or activity (emphasis added).

However, no "proposals, plans or programs" have been included in the proposed project list. Instead, only a relatively small number of physical works or activities have been tentatively prescribed on the draft list as "projects" for the purposes of Part II.3 of the *EAA*.

On this point, the Registry notice claims that the former Act's automatic inclusion of governmental plans under the *EAA* resulted in the so-called "need" to exempt such plans from EA coverage. A similar claim is made in the MECP's consultation materials.[5]

In response, we submit that there is no compelling "need" to exempt environmentally significant public sector plans (i.e. long-term energy plans, climate change plans, provincial land use plans, etc.) from the *EAA*. Instead, these contentious *EAA* exemptions were primarily made for reasons of political expediency, and they simply reflect policy choices made by the Ontario government rather than any binding legal or jurisdictional constraints.

In our view, the proposed project list's deliberate omission of environmentally significant proposals, plans or programs does not constitute "EA modernization." To the contrary, it is a significant rollback that substantially narrows (if not undermines) the application, value and utility of the *EAA*. More importantly, this exclusion is inconsistent with the widely held consensus among

[5] MECP, *Modernizing the Environmental Assessment Program: Proposed Comprehensive Environmental Assessment Project List* (Stakeholder Engagement Sessions: October 2020), page 8.

EA practitioners that higher-order governmental plans and programs which drive individual projects at the local level should themselves be subject to EA requirements.

For example, the Auditor General of Ontario has noted that "the impact of government plans and programs can have a broader and longer-term impact compared to individual projects, and therefore warrant a thorough assessment beyond that which is possible for individual projects."[6] The Auditor General's report further stated:

> Best practices highlight the need to carry out environmental assessments of government plans and programs. The International Association for Impact Assessment – a leading organization in best practices related to environmental assessments – calls for strategic assessments of energy plans, transportation plans, urban expansion plans, climate change strategies, and "actions that will affect large numbers of people."[7]

Accordingly, we conclude that if the Ministry is truly committed to applying Part II.3 of the *EAA* to the most environmentally significant undertakings that affect the greatest number of people, then governmental plans and programs should be at the top of the proposed project list, not omitted entirely.

(ii) Arbitrary Basis for Designated Projects and Prescribed Thresholds

We are also concerned about the arbitrary – and stale-dated – thresholds used to delineate the size, scale or capacity of the infrastructure projects that may be designated under Part II.3 of the *EAA*.

For example, the proposed project list simply brings forward several types of electricity infrastructure projects that have been traditionally subject to *EAA* requirements. At the same time, the Ministry is claiming that it is maintaining the "existing thresholds" for such projects (e.g. new 115 to 500 kilovolt transmission lines longer than 50 km; new transmission lines carrying greater than 500 kilovolts and longer than 2 km; etc.).

In response, we note that the Ministry's consultation materials do not include any empirical evidence that justifies these thresholds or explains how these were derived. We further note that these thresholds were first established almost 20 years ago when the Electricity Projects Regulation[8] was first made under the *EAA*. However, the Ministry's consultation materials contain no information or analysis indicating that these decades-old thresholds are still valid and should be left intact.

In addition, we are concerned about the short list of waste management projects that are proposed for inclusion on the designated projects list under the *EAA*. In particular, the Ministry is again suggesting that it is maintaining the application of Part II.3 of the *EAA* to large-scale waste disposal facilities (e.g. landfills, certain thermal treatment sites, etc.), and to utilize the same thresholds or triggers for such projects (e.g. landfills with total waste disposal volume greater than 100,000 cubic metres).

---

[6] See https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf
[7] *Ibid.*
[8] O.Reg. 116/01.

Again, we submit that the capacity-based thresholds *per se* – which were developed over 13 years ago when the Waste Management Projects Regulation[9] was first issued – have little or no bearing on a waste facility's potential to create adverse effects, which typically depend more on the proposed location, design and operation. Similarly, we find that the waste thresholds are unduly convoluted and difficult to interpret. Finally, we submit that the proposed project list must clearly designate all forms of thermal treatment (including all energy-from-waste facilities) in light of their environmental and human health significance.

In relation to transportation projects, the Ministry is proposing to only apply Part II.3 of the *EAA* to intra-provincial railways greater than 50 km, and to new/extended provincial freeways or municipal expressways that are greater than 75 km. No environmental rationale or evidence has been offered to justify either of these linear thresholds, although the Ministry's consultation materials state that both the 50 and 75 km distances are intended to "align" the *EAA* with the federal *Impact Assessment Act*. However, the Ministry has not provided any cogent evidence demonstrating that only 75+ km roadways and 50+ km railways have the potential to produce significant adverse environmental effects in Ontario.

The Ministry's proposed project list also suggests that "major flood, erosion control and associated conservation projects" will be subject to Part II.3 of the *EAA*. In principle, this appears to be a step in the right direction, except that the Ministry has failed to define the term "major" and has only proposed some vague "criteria" that may (or may not) be used to identify such major projects in the future. We further note that this category appears to be limited to just those projects "that facilitate or anticipate development." Accordingly, we submit that there is an alarming lack of clarity, predictability or certainty about which conservation projects are – or are not – caught by this proposed category.

Surprisingly, the Ministry has not actually specified any particular types (or sizes) of mines that will be included on the project list and made subject to the requirements of Part II.3 of the *EAA*. However, as noted above, the Ministry is simply soliciting public input on whether mines should be subject to the *EAA* at all, and if so, which mines should be designated. On this point, CELA and other non-governmental organizations[10] have long supported the long-overdue application of the *EAA* to the mining sector in Ontario.

This view has also been expressed by other commentators, including the Auditor General of Ontario, whose 2015 annual report[11] observed that "Ontario is the only province in Canada that does not require a provincial environmental assessment to be performed for mining projects."

Assuming that mining projects may now be designated under the *EAA*, we caution the province against simply adopting the numerical mining thresholds prescribed under the federal project list. This is particularly true since the *Impact Assessment Act* thresholds were designed to capture mining projects that may impact areas of federal jurisdiction (e.g. fish, migratory birds, aquatic species at risk, etc.). Therefore, it is open to Ontario to prescribe lower production thresholds that designate a wider range of mining projects (and ancillary infrastructure or activities) that may

[9] O.Reg. 101/07.
[10] See https://cela.ca/need-for-environmental-assessment-reform-for-ontario/
[11] See https://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.11en15.pdf

affect areas of provincial interest (e.g. natural resources within the province, property and civil rights, etc.).

***

For the foregoing reasons, CELA and the undersigned organizations recommend that the Ministry should immediately withdraw and substantially revise its proposed project list to not only include a broader range of project types under Part II.3 of the *EAA*, but also to ensure that environmentally significant proposals, plans and programs are also designated on the list.

In our view, this re-consideration process should involve meaningful public participation (not just another one-hour webinar or sparse discussion paper), and must be accompanied by the public release of the actual text of the draft *EAA* regulation being considered by the Ministry.

We trust that these comments will be taken into account and acted upon by the Ministry as it ponders its next steps regarding the proposed project list.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Mr. Jerry DeMarco, Commissioner of the Environment/Assistant Auditor General
EA Modernization Team, MECP

Anastasia M Lintner, PhD, LLB
Principal
Lintner Law

Andrew McCammon
Executive Director
Ontario Headwaters Institute

Angela Bischoff
Director
Ontario Clean Air Alliance

Anna Baggio
Conservation Director
Wildlands League

Annette Gibbons
Committee Member
Biodiversity and Climate Action Committee – Niagara

Arlene Slocombe
Executive Director
Wellington Water Watchers

Bryan Smith
Chair
The Oxford Coalition for Social Justice

Bryan Smith
President
Gravel Watch Ontario

Carol Steuri
Executive Director
Green Communities Canada

Cassie Barker
Executive Director
Women's Healthy Environment Network

Charles Hookimaw
Director of Lands and Resources
Attawapiskat First Nation

Cheryl Connors
President
Palgrave Residents Association

Clyde Robinson
Lead Steward
Ashbridge's Bay Nature Stewards

Brennain Lloyd
Project Coordinator
Northwatch

Gloria March
Executive Director
York Region Environmental Alliance

Hilary Chambers
Director
Ontario Wildlands Conservancy

Ian Munro
Chair
Concerned Citizens Committee of Tyendinaga and Environs

Jamie Kneen
Co-Manager
MiningWatch Canada

Jan Leroux
Manager – Lands, Estates & Membership
Algonquins of Pikwakanagan First Nation

Janet McKay
Executive Director
Local Enhancement and Appreciation of Forests

Jeff Whan
Communications
Chair
Concerned Citizens Committee of Tyendinaga and Environs

Joan Kuyek
Co-Chair
Ontarians for Just, Accountable Mineral Strategy

John Bossons
Co-Chair
Midtown Ravine Group

John Jackson
Coordinator
Citizens' Network on Waste Management

Judith Grant
Director
Federation of Tiny Township Shoreline Associations

Judy Mabee
President
Belfountain Community Organization

Keith Sayers
Lands and Resources Manager
Mississauga First Nation

Kerrie Blaise
Legal Counsel
Kerrie Blaise Professional Corporation

Laura Hamilton
Founding Member
Divest Waterloo

Lawrence Gunther
Director
Blue Fish Canada

Lenka Holubec
Member
ProtectNatureTO

Linda Heron
Chair
Ontario Rivers Alliance

Lino Grima
Campaign Lead
Sierra Club Ontario

Liz Benneian
Executive Director
Ontariogreen Conservation Association

Margaret Casey
Chair External Affairs
Lake of Bays Heritage Foundation

Margaret Prophet
Executive Director
Simcoe County Greenbelt Coalition

Megan Myles
Councillor
Municipality of Northern Bruce Peninsula

Peter Krats
President
Ingersoll District Nature Club

Peter Miasek
President
Transport Action Ontario

Richard Berry
President
York Simcoe Nature Club

Robert Gibson
Chair
Ontario Public Interest Research Group of Peterborough

Robert Nakogee
Chief
Fort Albany First Nation

Samantha Lernout
President
Citizens for Safe GroundWater Inc.

Sandra Bray
Board Member
Assuring Protection for Tomorrow's Environment

Sarah Labrie
Planning Ecologist
Credit Valley Conservation

Stefan Wiesen
President
Green Party – Dufferin-Caledon

Susan Bryant
Steering Committee Member
Grand River Environmental Network

Tim Gray
Executive Director
Environmental Defence Inc.

Valerie George
Consultation Officer
Chippewas of Kettle and Stony Point First Nation

Addison Clermont
Provincial Liaison
Ontario Public Interest Research Group of Peterborough

Terry Rees
Executive Director
Federation of Ontario Cottagers' Associations

Randy Restoule
Consultation Coordinator
Dokis First Nation

R. Donald Maracle
Chief
Mohawks of the Bay of Quinte

Priyanka Vittal
Legal Counsel
Greenpeace Canada

Rupert Kindersley
Executive Director
Georgian Bay Association

Terry Little
Secretary/Treasurer
Ontario Rivers Alliance

Constance O'Connor, PhD
Ontario Northern Boreal Landscape Lead
Wildlife Conservation Society Canada

Becca Spence
Planning Ecology Technician
Credit Valley Conservation Authority

Gail Krantzberg
Professor
McMaster University

Ian C. Attridge
Barrister and Solicitor, and Associate
Trent University, School of The Environment

Katie Krelove
Ontario Campaigner
Wilderness Committee

Morten Siersbaek
Lawyer
Siersbaek Law P.C.

Rizwan Khan
Counsel
Viridius Lex LLP