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CELEBRATING 50 Years 1970 - 2020 OF ENVIRONMENTAL PROTECTION

May 15, 2020 **BY EMAIL**

Resource Development Coordinator
Natural Resources Conservation Policy Branch - Resource Development Section
Ministry of Natural Resources and Forestry
300 Water Street
2nd Floor, South Tower
Peterborough, ON
K9J 3C7

Dear Sir/Madam:

RE: ERO # 019-1303 - PROPOSED AMENDMENTS TO ONTARIO REGULATION 244/97 AND THE PROVINCIAL STANDARDS UNDER THE *AGGREGATE RESOURCES ACT*

On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide our comments on proposed amendments to O.Reg.244/97 and the Provincial Standards under the *Aggregate Resources Act* (*ARA*). These comments are being provided to you in accordance with the above-noted Registry notice.

In general, CELA finds that many of the proposed amendments are industry-friendly changes that will likely expedite the proliferation of new or expanded pits and quarries across Ontario. At the same time, CELA submits that the proposed changes are inadequate for the purposes of protecting the environment and public health and safety against the adverse effects of aggregate operations.

CELA therefore concludes that the proposed changes are clearly intended to favour the interests of aggregate producers over those of local residents who will be unduly burdened with the environmental and socio-economic impacts of increased aggregate extraction.

Accordingly, for the reasons outlined below, CELA recommends that these revisions should not proceed as currently proposed by the Ministry of Natural Resources and Forestry (MNRF).

Instead, the provincial government should consult all Ontarians (not just industrial or municipal stakeholders) on appropriate statutory, regulatory and policy changes that, among other things, decrease aggregate demand, strengthen MNRF powers to protect the environment, and improve rehabilitation rates through better enforcement, as described in the 2017 report from the Environmental Commissioner of Ontario (see below).

I. CELA's Background, Experience and Perspective

For the past 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) 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 environmentally sound decision-making across Ontario.

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*. 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. We also responded to the 2019 "A Place to Grow" survey conducted by the Ontario Growth Secretariat in relation to aggregate resource policies. In addition, CELA appeared as a witness before the Standing Committee on General Government in November 2019 in relation to Bill 132, which included various amendments to the *ARA*.

On the basis of our decades-long involvement in aggregate matters at the local, regional and provincial level, CELA has carefully considered the proposed changes to O.Reg.244/97 and the Provincial Standards from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice. Our findings, conclusions and recommendations about the MNRF's most concerning proposals are set out below.

II. CELA's Comments on the Proposed Amendments

(a) Environmental Significance of Aggregate Operations

At the outset, it must be recalled that 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.

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 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.[1]

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.[2] The ECO's analysis also confirmed that even when public objections have resulted in referrals of licence applications to public hearings under the *ARA*, "approvals are rarely denied completely."[3]

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."[4] 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 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.[5]

Unfortunately, the regulatory 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 proposals are moving in the opposite direction of the ECO recommendations by proposing to modify or weaken key components of the current provincial framework that is in place to prevent, minimize or mitigate the adverse effects and environmental risks associated with aggregate production.

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[1] 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.
[2] *Ibid*, page 171.
[3] *Ibid*.
[4] *Ibid*, page 175.
[5] *Ibid*, pages 175 to 183.

(b) Aggregate Regulations and Provincial Standards are not "Red Tape"

CELA notes that the MNRF's discussion document[6] suggests that the proposed changes are aimed at reducing the "regulatory burden" upon the aggregate industry.[7] Similarly, the Registry notice acknowledges that "many of the proposed changes are intended to reduce burden, streamline approvals and add flexibility for new applicants and existing operators."[8]

Contrary to such claims, CELA submits that Ontario's existing regulatory safeguards are not "red tape," nor do they impose an undue burden upon the aggregate industry. In our view, the current regulatory framework does not unreasonably constrain aggregate extraction in the province. 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 2020 Provincial Policy Statement issued under the *Planning Act*.

Accordingly, CELA concludes that the MNRF has erroneously characterized the current *ARA* regime as "red tape", and has fundamentally failed to produce any persuasive evidence-based justification for rolling back or weakening the existing provisions of O.Reg.244/97 and the Provincial Standards.

(c) Summary of the MNRF's Proposed Changes

The Registry notice summarizes the proposed regulatory changes as follows:

For new pits and quarries:

- enhancing the information required to be included in summary statements and technical reports at the time of application;
- improving flexibility in how some standard site plan requirements can be implemented and modernizing how site plans are created;
- creating better consistency of site plan requirements between private and Crown land and better alignment with other policy frameworks;
- updating the list of qualified professionals who can prepare Class A site plans;
- updating the required conditions that must be attached to a newly issued licence or permit;
- adjusting notification and consultation timeframes for new pit and quarry applications;
- changing and clarifying some aspects of the required notification process for new applications;
- updating the objection process to clarify the process;
- updating which agencies are to be circulated new pit and quarry applications for comment.

[6] *Proposals to Amend O.Reg.244/97 and the Aggregate Resources of Ontario Provincial Standards under the Aggregate Resources Act* (February 2020). Online, https://prod-environmental-registry.s3.amazonaws.com/2020-02/Proposals_ARA_Reg_Standards%20FINAL.pdf.
[7] *Ibid*, page 6.
[8] See https://ero.ontario.ca/notice/019-1303.

For existing pits and quarries:

- making some requirements related to dust and blasting apply to all existing and new pits and quarries (requirements which were previously only applied to new applications);
- updating and enhancing some operating requirements that apply to all pits and quarries, including new requirements related to dust management and storage of recycled aggregate materials;
- providing consistency on compliance reporting requirements, while reducing burdens for inactive sites;
- enhancing reporting on rehabilitation by requiring more context and detail on where, when and how rehabilitation is or has been undertaken;
- clarifying application requirements for site plan amendments;
- outlining requirements for amendment applications to expand an existing site into an adjacent road allowance;
- outlining requirements for amendment applications to expand an existing site into the water table;
- setting out eligibility criteria and requirements to allow operators to self-file changes to existing site plans for some routine activities without requiring approval from the ministry (subject to conditions set out in regulation).

Allowing minor extraction for personal or farm use:

- outlining eligibility and operating requirements in order for some excavation activities to be exempted from needing a licence (i.e., if rules set in regulation are followed). This would be for personal use (max. of 300 cubic meters) or farm use (max. 1,000 cubic meters).[9]

It is beyond the scope of this submission to evaluate and respond to each of the numerous revisions that are being proposed by the MNRF at this time. Instead, CELA will focus our submissions on the most problematic proposals that are under consideration by the MNRF.

(d) CELA Comments on Key Regulatory Proposals

The ability of CELA, other stakeholders, and the public at large to provide feedback on the proposed changes would have been significantly enhanced if the MNRF had provided draft regulatory text for review and comment.

Instead, in many instances, the MNRF's discussion document merely provides high-level descriptions, various site photographs, and generalized statements of intent in relation to its regulatory proposals. Since the "devil is in the details" from a legal perspective, CELA submits that the MNRF's approach has not been conducive to meaningful public and Indigenous participation in this important standard-setting exercise.

In the absence of draft regulatory language, CELA is unable to accept the unduly optimistic conclusion of the MNRF's "regulatory impact analysis" that the environmental and social

[9] *Ibid.*

consequences of the proposed changes will be "positive."[10] In our experience (and from our clients' viewpoint), this questionable assertion strikes CELA as wishful thinking at best.

Nevertheless, despite the lack of sufficient particulars in the MNRF discussion document, CELA is concerned about several of the proposed amendments.

For example, in relation to Section 1 of the MNRF discussion document, CELA makes the following comments:

- despite the MNRF's proposed changes regarding the determination of the water table elevation and the preparation of hydrogeological reports, CELA anticipates that the nature and extent of quarrying impacts upon the quality and quantity of groundwater and surface water resources will remain as one of the most contentious issues for new site applications under *ARA*;
- it is unclear whether these groundwater-related changes have been developed in conjunction with the Ministry of the Environment, Conservation and Parks (MECP), which administers the Permit to Take Water (PTTW) program under the *Ontario Water Resources Act* (*OWRA*), and which may issue water-taking permits if a proposed quarry needs to be de-watered to enable below-water table extraction;
- across southern Ontario, there are municipalities where a number of existing aggregate sites are operating at the same time within the same general area, which raises concerns about the additive or synergistic effects of multiple pits and quarries. However, the MNRF's proposed changes do not appear to require hydrogeological reports to include a robust cumulative effects analysis;
- where an *ARA* application is referred by the MNRF to the LPAT, the evidentiary burden (and considerable cost) of assessing the completeness, soundness and veracity of the proponent's hydrogeological work often falls to site neighbours, residents' groups or non-governmental organizations, rather than the MNRF. In CELA's view, the fact that our clients must retain their own hydrogeologists (and other experts) to respond to proponents' reports underscores the public interest need to re-establish an intervener funding mechanism similar to the "proponent pays" model that previously existed under Ontario's *Intervener Funding Project Act*;
- the MNRF proposes that applicants should be required to report whether the new site is located in a Wellhead Protection Area (WPHA) that has been delineated in a source protection plan approved by the MECP under the *Clean Water Act*. Given the serious groundwater threats posed by aggregate operations (e.. lowering the water table, upwelling of non-potable aquifers, risk of fuel/oil spills, etc.), CELA submits that there is no compelling public policy justification for allowing a new aggregate operation within a WHPA. Instead, new pits and quarries should be strictly prohibited in WHPAs, and

[10] *Ibid*. For the same reason, CELA cannot endorse or support the "Regulatory Impact Assessment" set out in Section 5 of the MNRF discussion document, which purports to quantify the significant "cost savings" that the aggregate industry will derive from the proposed regulatory changes. CELA further notes that Section 5 does not attempt to identify or quantify the costs of aggregate-related impacts upon site neighbours or ecosystem features and functions. Accordingly, Section 5 should be viewed as a speculative, one-sided and ultimately unpersuasive collection of pro-industry claims.

aggregate extraction should be added to the provincial list of prescribed drinking water threats in O.Reg.287/07 under the *Clean Water Act*;

- the MNRF generally proposes – without elaboration – to "update" requirements pertaining to Natural Environment Reports so that they better "align" with provincial land use plans and the Provincial Policy Statement under the *Planning Act*. However, no details are provided to explain precisely how the current requirements will be revised. Moreover, CELA draws no comfort from this proposal since the current Provincial Policy Statement allows aggregate operations to potentially occur in or adjacent to certain natural heritage features, provided that the proponent's report demonstrates "no negative effects" upon the feature or its ecological functions;
- CELA continues to maintain that aggregate operations should not be permitted in sensitive natural heritage areas or features (e.g. significant wetlands, woodlands, valleylands, wildlife habitat and coastal wetlands, fish habitat, or habitat of endangered/threatened species). CELA submits that these natural heritage features should be off-limits to aggregate extraction in light of the invaluable ecological services and socio-economic benefits provided by these features. This is particularly true since these types of features are generally unable to be fully restored once physically impacted, altered or destroyed (e.g. by sizeable bedrock removal, interference with groundwater flow systems, etc.).
- CELA has similar concerns regarding the MNRF's proposal to require applicants to supply an Agricultural Impact Assessment if the proposed aggregate operation is located on private lands designated as prime agricultural areas in provincial plans. Given the ever-decreasing amount of prime agricultural areas in southern Ontario (e.g. due to urban sprawl, subdivision development, highway extensions, infrastructure expansions, etc.), CELA submits new aggregate operations should not be permitted in prime agricultural areas for food security reasons. Given the generally poor state of site rehabilitation in Ontario, CELA submits that it is erroneous to view aggregate extraction as an "interim use" that is invariably followed by full and ecologically complete restoration of the productive capacity of the pre-existing agricultural lands;
- CELA has been involved in various cases[11] where fly-rock and other blast-related impacts (e.g. structural damage) have occurred off-site due to aggregate operations, even if a blast design report has been previously submitted by the proponent as part of the *ARA* application. Fly-rock is of particular concern to CELA and our clients, especially since it poses a profound risk to public health and safety despite its low likelihood of occurrence. Unfortunately, aside from prescribing a 500 metre separation distance to nearby receptors, the proposed *ARA* changes provide little or no direction on how fly-rock incidents should be prevented (e.g. by identifying and avoiding karst features that may be present in bedrock);
- in CELA's experience, many typical *ARA* licence conditions are generic boilerplate provisions that do not necessary provide adequate site-specific protection of the environment or nearby residents. Far more prescriptive operational details are usually set out in site plans, which is an approach that CELA supports in principle. However, we do not support the MNRF's proposal to remove site plan notes or conditions that refer to approval requirements under other statutes (e.g. PTTWs under the *OWRA*, Environmental

[11] CELA also intervened in a Supreme Court of Canada case involving the ejection of fly-rock onto private property from roadside blasting operations: see *R. v. Castonguay* [2013] 3 SCR 323.

Compliance Approvals under the *OWRA* for wastewater discharges, local noise by-laws, etc.).

- in our view, it is helpful to incorporate or cross-reference these other requirements within the site plan to help ensure that proponents (and their successors) are aware of, and comply with, all applicable legal obligations. In addition, many residents (including our clients) often consult the approved site plan since it serves as a convenient compendium of the key requirements that pertain to the site design, operation, monitoring and mitigation. Therefore, the MNRF's proposal to remove non-*ARA* references from site plans will likely reduce public oversight and accountability for aggregate operations;
- CELA remains concerned that even after an LPAT hearing, licence conditions and site plan notes (including annual tonnage limits) can be changed with relative ease by the MNRF with little or no opportunities for meaningful public review and comment (other than a perfunctory Environmental Registry notice in some situations, which may or may not come to the attention of site neighbors). In our view, site plans are critically important documents that should be not amended at the stroke of the pen in the MNRF's discretion. Instead, appropriate public participation opportunities should be provided whenever post-approval changes to the site plan have been proposed by the proponent or contemplated by the MNRF;
- on this point, we note that Section 3.3.1 of the MNRF discussion document indicates that if site plan changes are proposed, then circulation of "the proposed amendment(s) to municipalities, other agencies and interested parties for comment may also be required (emphasis added)." In our view, public, agency and Indigenous consultation on the proposed changes must be mandatory, not optional in nature or dependent upon the whims of the MNRF;
- CELA also opposes the MNRF's proposal to allow operators to "self-file" certain site plan changes for a lengthy list of so-called "routine" matters (e.g. adding or moving portable asphalt or concrete plants) without MNRF review or approval. More fundamentally, site plans are legally binding statutory instruments, and we are aware of no other instances under Ontario's legislation where proponents of environmentally significant facilities can themselves make unilateral changes to a permit, licence or approval issued under provincial law; and
- from our clients' perspective, the current *ARA* consultation process is time-consuming, frustrating, costly if experts are retained, and usually unable to resolve legitimate comments about the proposed aggregate operations. Too often, our clients' concerns are met with non-responsive "answers" from proponents and their consultants. Unfortunately, we see nothing in the MNRF's proposed changes that will rectify this unfortunate situation, which inevitably leaves residents with no choice but to use the lengthy objections process in order to address their concerns at an LPAT hearing.

In relation to Section 2 of the MNRF discussion document, CELA makes the following comments:

- the MNRF has presented no evidentiary basis that demonstrates any public interest need to wholly exempt "minor" excavations from licencing requirements under the *ARA*;
- the basis and efficacy of the proposed MNRF criteria for its "permit-by-rule" approach for "minor" excavations has not been explained; and

- CELA questions whether – and to what extent -- the MNRF will review the accuracy of the information submitted by persons claiming the exemption for "minor" excavations;[12] and
- CELA is concerned about the institutional capacity of the MNRF to conduct timely inspection and enforcement activities in relation to "minor" excavations to ensure compliance with the proposed exemption criteria.

In relation to Section 3 of the MNRF document, CELA makes the following comments:

- for public safety reasons, CELA does not support the MNRF proposal to remove the general requirement for fencing the boundaries of pits and quarries located on private lands. In our view, the current standard should be left intact, rather than leaving it to residents or others to raise fencing as an issue during the *ARA* consultation process. We are also unclear why fencing remains optional for pits and quarries on Crown lands;
- in CELA's experience, serious off-site dust impacts continue to be caused by a number of pits and quarries approved under the *ARA*, including aggregate operations that claim to follow best management practices or adhere to a self-drafted Dust Management Plan. Dust is not only an annoyance or nuisance to neighbours, but the fine particulate matter suspended in ambient air blowing off-site may also pose health risks to nearby persons, particularly those who may already be experiencing respiratory issues;
- in CELA's view, the MNRF's proposal to require dust mitigation at all sites is well-intentioned and long overdue. However, as a practical matter, it is uncertain whether this stipulation will materially improve dust management and mitigation at pits and quarries across Ontario. We note, for example, that the MNRF's direction to apply dust suppressants (e.g. water) to on-site roads will not necessarily address voluminous amounts of dust emanating directly from on-site crushing or processing equipment while they are being operated;
- in our opinion, self-reporting by aggregate operators in relation to their compliance with *ARA* requirements has not been particularly effective or credible to date. For example, we are aware of situations where the operator has not reported any non-compliance, but then subsequent MNRF inspections (either on an annual or complaints-driven basis) have found non-compliant activities (which often result in warnings or directives to the operator, rather than prosecutions by MNRF staff). In our view, requiring operators to simply tick off "check boxes", or otherwise tweaking the MNRF form used by operators to file compliance reports, does not necessarily ensure compliance with *ARA* requirements. In short, this self-reporting mechanism cannot serve as an appropriate substitute for timely inspection and enforcement activities by MNRF staff;
- the MNRF's proposal to enhance operators' reporting on the status of progressive and final rehabilitation does not adequately address the serious concerns about long-standing deficiencies in rehabilitation efforts across Ontario, as described in the 2017 report by the ECO; and
- rather than just passively receive proponents' reports, CELA submits that it is far more important for the MNRF to proactively take all necessary compliance and enforcement

[12] The MNRF discussion document indicates that such persons must simply file a form that confirms they meet the conditions set out in the regulation.

steps to ensure that approved rehabilitation plans are actually being implemented in an effective and timely manner. This would address the ECO's finding that rehabilitation is often non-existent or of poor quality. This is particularly true in relation to the thousands of abandoned pits and quarries across Ontario that have never been rehabilitated to date, and may not be rehabilitated for many more decades (if at all), due to timing and cost considerations.

In relation to Section 4 of the MNRF discussion document, CELA does not support the transitional provisions which propose to phase-in the new regulatory requirements over a 1.5 year period. In our view, the above-noted proposals are plagued by serious shortcomings and should not come into effect at all in their present form.

Finally, the Registry notice states that no changes in aggregate fees are being proposed at the present time. In reply, CELA submits that such fees (and tonnage royalties) should be increased to better reflect the cost of Ontario's administration of the *ARA* regime, and to make recycled aggregate more cost-competitive with "new" aggregate, as recommended by the 2017 ECO report.

III. Conclusions

For the foregoing reasons, CELA concludes that the suggested changes to O.Reg.244/97 and the Provincial Standards should not be implemented as proposed by the MNRF. Instead, all such changes should be deferred by the MNRF until it undertakes comprehensive public and Indigenous consultation on how to overhaul the *ARA* regime in order to address the above-noted concerns in the ECO's 2017 report.

On this latter point, CELA is aware that the MNRF convened an "Aggregates Summit" in March 2019 that provided industry representatives an opportunity to propose their preferred changes to the *ARA* regime. Despite our extensive involvement in aggregate cases and law reform initiatives, CELA, other environmental and residents' groups, and leading farm organizations were not invited to participate in the Summit to identify outstanding issues, respond to industry allegations about "red tape", or make recommendations from a non-industry perspective.

Accordingly, to the extent that the current regulatory proposals flow, at least in part, from the closed-door Summit, they can only be viewed as one-sided attempts to appease the aggregate industry. In our view, the proposed changes do not constitute fair, balanced and effective measures that safeguard all public and private interests that may be affected by aggregate operations.

Accordingly, 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 released Provincial Policy Statement under the *Planning Act*.

From our public interest perspective, the changes to the *ARA* regime do not constitute sound environmental 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 a draft regulation (or sufficient particulars) about many of the proposed *ARA* changes makes it exceedingly difficult for CELA and other interested persons to provide meaningful feedback.

We trust that CELA's comments will be taken into account as the MNRF considers its next steps in relation to the proposed amendments. Please contact the undersigned if you have any questions or require further information about our position on the proposed changes.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Mr. Jerry DeMarco, Commissioner of the Environment