APPLICATION FOR REVIEW
Filed pursuant to Section 61 of the *Environmental Bill of Rights, 1993*
RE: *Environmental Assessment Act*, R.S.O. 1990, c.E.18;
Regulation 334 (General), R.R.O. 1990; O.Reg.206/97;
O.Reg.616/98; O.Reg.116/01; O.Reg.101/07; and O.Reg.231/08

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I hereby declare I am a full-time resident of Ontario and have been since 1960.

December 27, 2013

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SUBJECT-MATTER OF REQUESTED REVIEW

The Applicants hereby request a review of an **existing** Act and several **existing** regulations, namely:

- *Environmental Assessment Act,* R.S.O. 1990, c.E.18, as amended; and

- Regulation 334 (General), R.R.O. 1990; O.Reg.206/97; O.Reg.616/98; O.Reg.116/01; O.Reg.101/07; and O.Reg.231/08

Subsection 61(1) of the *Environmental Bill of Rights* ("EBR") provides that an Application for Review may be filed where the Applicants believe that an existing Ontario law or regulation "should be amended, repealed or revoked in order to protect the environment." The *Environmental Assessment Act* ("EA Act") and the above-noted regulations are prescribed for the purposes of Applications for Review under Part IV of the EBR: see O.Reg.73/94, subsections 3(1), 6(1), 7(1) and 7(2.1).

For the reasons set out below, the Applicants submit that it is in the public interest to review and revise the EA Act and the six EA-related regulations because the current legislative and regulatory regime governing EA in Ontario is incomplete, outdated and inadequate to protect the environment.

REASONS FOR REQUESTED REVIEW

1. Background: Description of the Applicants

The Applicants are lawyers with the Canadian Environmental Law Association ("CELA"). In recent decades, the Applicants and other CELA staff members have been actively involved in various activities pertaining to the EA Act, including:

- representing CELA clients in individual EA processes for undertakings caught by the EA Act;

- representing CELA clients in Class EA processes, including making requests for "Part II orders" (also known as "elevation" or "bump-up" requests);

- representing CELA clients in judicial review applications, statutory appeals and administrative hearings in relation to the EA Act;

- filing law reform submissions on the EA Act and regulations, including new or proposed regulatory exemptions for certain sectors;

- participating in provincial advisory committees considering matters under the EA Act; and

- conducting public education/outreach, and providing summary advice, to countless individuals, communities, First Nations and other persons interested in matters arising under the EA Act.

As a result of this extensive involvement in provincial EA matters, the Applicants conclude that the EA Act and EA-related regulations warrant a comprehensive public review in order to identify and implement the numerous reforms that are urgently needed to strengthen and improve Ontario's EA regime.

2. Rationale for Reforming the EA Act and EA-Related Regulations

The Applicants' overall position is that the Ministry of the Environment ("MOE") should undertake the requested review and revision of the EA Act and EA-related regulations in order to better protect the environment.

The Applicants' main concerns about the EA Act and EA-related regulations may be summarized as follows:

- there is an excessive number of environmentally significant undertakings (and proponents) which have been unjustifiably exempted from the EA Act, thereby undermining the scope and effectiveness of the Act;

- the sectoral exempting regulations promulgated under the EA Act for the electricity, waste and transit sectors are plagued by various documentary and consultation shortcomings;

- there is inadequate monitoring and reporting under the EA Act to ensure that EA terms/conditions are effective in protecting the environment, and are being complied with by proponents;

- there has been a persistent, inexplicable and unacceptable refusal by the Minister of the Environment (or his/her designate) to refer matters to public hearings under the EA Act, even where the public has requested hearings in relation to controversial or large-scale undertakings which may cause adverse ecological, socio-economic or cultural impacts;

- the nature, scope and utility of individual EAs under the EA Act has been compromised by the overuse of "focused" Terms of Reference which wholly exclude key EA planning matters (eg. need, alternatives to, and alternative sites) from the EA process;

- the widespread use of approved Class EA's under the EA Act has been accompanied by well-founded public concerns about the adequacy of the notification, documentation and consultation steps being taken by proponents under these Class EAs;

- the consideration of cumulative effects assessment has been superficial, inadequate or non-existent in both individual EAs and Class EAs;

- the infamous "EA exception" under section 32 of the EBR has effectively blocked Ontarians from meaningfully reviewing or commenting upon the critically important details of undertakings that are subject to the EA Act but also require technical approvals under other statutes;

- there is a profound lack of integration between the EA Act and land use planning decisions being made under other statutes;

- there is an immediate need to update the purposes and principles underlying the EA Act, and to develop appropriate sector-specific policies to direct EA decision-making; and

- certain legislative and regulatory changes are needed to facilitate consolidated hearings involving undertakings subject to the EA Act.

Each of these matters are described below in more detail in Section 2.3 of this Application for Review.

In recent years, various commentators – including CELA, the Environmental Commissioner ("ECO") and other stakeholders – have provided detailed recommendations for the necessary EA reforms to address the foregoing problems. However, not only have most of these recommendations not been acted upon to date, but they have also not even been formally or adequately responded to by the Ontario government.

Accordingly, the Applicants submit that it is now timely and appropriate to publicly and systematically review the EA program in order to recapture the important public interest vision for EA that has been lost or impaired by the legislative and regulatory rollbacks that have occurred since 1996.

2.1 The Importance of Effective, Equitable and Enforceable EA Requirements

The Supreme Court of Canada has described EA as "a planning tool that is now generally regarded as an integral component of sound decision-making", and that has both an information-gathering and decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development."[1]

As noted by a leading text, the primary advantage of EA over traditional regulatory approaches is that EA generally requires a broader and more integrated examination of

[1] *Friends of Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 at para.103; see also *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans),* 2010 SCC 2.

potential ecological, socio-economic and cultural implications of proposed undertakings before a decision is made on whether to allow such undertakings to proceed:

> Environmental assessment law began as an attempt to prevent, or at least minimize, environmental damage by changing the nature of project planning, design and implementation. The central idea was that proponents of environmentally significant undertakings should take environmental considerations into account in the same way as they already took financial and technical matters into account…
>
> Environmental assessment is essentially a form of logical step-by-step deliberation and decision-making that investigates the likely environmental effects of a proposal. It also tries to ensure that the knowledge gained is incorporated effectively into the selection, design and implementation of the proposal. Accordingly, laws establishing assessment processes set out the logical decision-making steps in ways that try to ensure that environmental considerations get serious attention and that the results get into overall planning and approvals.[2]

Ontario's EA Act was first enacted in 1975, and the stated purpose of the Act is the "betterment of the people of Ontario" by providing for the "protection, conservation and wise management" of the environment.[3] To achieve this public interest objective, the EA Act requires proponents to carefully examine the environmental advantages and disadvantages of their proposals (as well as a reasonable range of alternatives) in an open, transparent and timely manner.

In addition, Ontario's EA program is intended to be anticipatory and preventative in nature, as proponents cannot proceed with their projects unless they have conducted comparative assessments of various options, and can demonstrate that their selected alternative is environmentally preferable and needed to address the stated problem or opportunity identified in the EA documentation.[4]

The EA Act has been used to establish various environmental planning procedures, consultation obligations, and documentary requirements (eg. individual EA, Class EA, environmental screening process, etc.) which are intended to be commensurate with the environmental significance of the undertaking being proposed.

For example, proponents of major or complex undertakings which may pose serious risks to the environment or public health (eg. large landfills or hazardous waste facilities) are generally required to perform more detailed and rigorous studies under the EA Act than

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[2] Paul Muldoon et al., *Environmental Law and Policy in Canada* (Toronto: Emond Montgomery Publications, 2009), at 124, 127 ["Paul Muldoon et al."].

[3] EA Act, s.2.

[4] Paul Muldoon et al., *supra*, at 132-33. See also Michael I. Jeffrey, *Environmental Approvals in Canada: Practice and Procedure*, Issue 29 ed. by Peter Pickfield, looseleaf (Markham: Butterworths, 2002).

those required for small-scale, frequently occurring projects with minor and mitigable impacts (eg. municipal road widenings or sewer projects).

Over the past four decades, the EA experience in Ontario and other jurisdictions have confirmed that in order to be effective and credible, EA requirements should include the following elements and characteristics:

- *Mandatory and codified obligations*, reflected in increased adoption of law-based processes, further specification of requirements, and reduction of discretionary provisions;

- *Wide application*, covering small as well as large capital projects, continuing activities as well as new initiatives, developments in whole sectors and regions as well as single proposals, and strategic as well as project-level undertakings;

- *Initiation early in planning*, beginning with purposes and broad alternatives for action and sometimes starting even earlier with the driving policies, programs and plans;

- *Open and participatory process*, involving not just proponents, government officials and technical experts, but also communities, public interest organizations and interested residents;

- *Comprehensive attention to all environmental concerns*, including socio-economic, cultural and community effects, biophysical and ecological effects, and regional and global as well as local effects;

- *Integrative approach*, considering cumulative and systemic effects rather than just individual effects;

- *Acceptance of different kinds of knowledge and analysis*, including informal, traditional and Aboriginal knowledge as well as conventional science, and public preferences as well as "facts";

- *Close monitoring*, with courts monitoring application of the law, informed civil societies and government auditors checking compliance with assessment obligations, and scientists and stakeholders comparing assessment predictions with the actual effects of approved undertakings;

- *Humility*, recognizing needs to respect and address uncertainties, and to adopt precautionary approaches;

- *Sensitivity to efficiency concerns*, considering how best to focus resources, avoid unnecessary delays, and build mutually strengthening relations with other evaluation and decision-making processes;

- *Adoption beyond formal environmental assessment regimes*, through laws for particular resources and industrial sectors, land use planning, and market-driven corporate initiatives;

- *Ambitious criteria for evaluations*, aiming for overall biophysical and socio-economic gains and net contributions to sustainability, rather than just individually "acceptable" undertakings with mitigation of significant negative effects.[5]

Measured against these criteria, the Applicants submit that Ontario's current EA regime falls substantially short of the mark, and should therefore be reviewed and revised forthwith, as described below.

2.2 Continuing Inadequacy of the EA Act and EA-Related Regulations

Despite mounting criticisms of Ontario's EA program by CELA, the ECO and other stakeholders, and despite numerous recommendations from these parties to improve Ontario's EA program, it appears that little or no tangible progress has been made by the Ontario government to rectify the procedural flaws and substantive shortcomings that continue to exist within the current EA regime. In summary, there is considerable room for improvement in Ontario's EA program, which will require both legislative and regulatory reform in addition to policy development and administrative action.

(a) Evolution (and Devolution) of the EA Act

The Ontario Legislature enacted the EA Act in 1975, and proclaimed the EA Act in force in 1976 after considerable public and political debate over the appropriate nature, scope and content of the ground-breaking legislation.[6]

The newly enacted legislation was noteworthy for requiring proponents subject to the EA Act to: (a) consider a reasonable range of alternatives; (b) assess the environmental effects of such alternatives; and (c) demonstrate that their preferred alternative is environmentally superior and necessary.[7] Moreover, the EA Act required proponents to systematically address these matters with public input at key stages of the EA process, which was intended to be traceable, rational and iterative in nature.[8]

Since 1975, however, there have been periodic attempts by the Ontario government to review and revise the EA program in order to address stakeholders' concerns about cost,

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[5] Paul Muldoon et al., *supra*, at 133-34.
[6] Generally, see Alan Levy, "A Review of Environmental Assessment in Ontario" (2001), 11 J.E.L.P 173, at 194-207 ["Alan Levy"]; Rod Northey and John Swaigen, "Environmental Assessment", in Estrin & Swaigen, eds., *Environment on Trial (3rd edition)* (Toronto: Emond Montgomery Publications Limited, 1993), at 193-96.
[7] See, for example, *Re West Northumberland Landfill Site* (1996), 19 C.E.L.R. (N.S.) 181, at paras.86-94 (Ont. Joint Board).
[8] *Ibid.*, at paras.47-51.

timing, complexity, inconsistency, and uncertainty.[9] For example, major amendments to the EA Act were enacted in 1996, and various regulatory and administrative reforms have been implemented since 2006.

In his 2006-07 Annual Report to the provincial Legislature, the ECO was highly critical of recent EA reforms undertaken by the province:

> For years, the ECO has pointed out that an effective EA process – a process with both integrity and teeth – is essential to protect Ontario's environment. The EA Advisory Panel similarly recommended that the ministry develop guiding EA principles that embrace, among other things, the precautionary principle and the concept of "avoidance first". MOE's own language promises "a faster yes or a faster no for applicants while completely protecting the environment." The changes unveiled thus far seem weighted towards delivering the "faster yes". But the ability of the system to deliver a "faster no" – or indeed any "no" at all – remains unclear so far.
>
> Unfortunately, it does not appear that MOE's reform initiatives will address a number of the ongoing weaknesses described in recent ECO annual reports, including inadequate transparency and public consultation provided under the Class EA process, and the need for better enforcement of the EAA. [10]

Similarly, in his 2007-08 Annual Report, the ECO again criticized the current state of the EA program, despite recent changes implemented by the MOE. Among other things, the Environmental Commissioner concluded that "Ontario's EA process is broken" for a variety of reasons:

> [E]nvironmental assessment has a crucial role to play in our lives; it should be society's pre-eminent tool to carry out farsighted planning for public infrastructure in the name of the public good. Unfortunately, Ontario has been long burdened with an EA system where the hard questions are not being asked, and the most important decisions aren't being made – or at least not being made in a transparent, integrated way. The province has increasingly stepped away from some key EA decision-making responsibilities, and the Ministry of the Environment (MOE) is not adequately meeting its vital procedural oversight role. As a result, the EA process retains little credibility with those members of the public who have had to tangle with its complexities.[11]

Therefore, despite various EA changes in recent years, there remains well-founded public concern about whether – or to what extent – Ontario's EA program is actually achieving

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[9] Environment Minister's Environmental Assessment Advisory Panel – Executive Group, *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Volume I, at 25-26 ["EA Advisory Panel Report"]. For an overview of past EA reform efforts in Ontario, see also Alan Levy, *supra*, at 194-207; and ECO, *Annual Report 2007-08*, at 32-35.

[10] ECO, *Annual Report 2006-07*, at 94-95.

[11] ECO, *Annual Report 2007-08*, at 28.

its statutory purpose, *viz.*, "the betterment" of the people of Ontario by providing for the "protection, conservation and wise management" of the environment.[12]

The highly lamentable and wholly unacceptable state of Ontario's current EA program has been correctly characterized as follows:

> [T]he EA program in Ontario no longer appears to involve a full EA process, the examination of alternatives, participant or intervener funding, significant public accessibility and participation, resolution of public concerns, or public hearings...
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> The findings from this review of contemporary EA in Ontario reveal that much of the approach taken to reforming the program, which has been underway since 1995, is quite flawed. The principal reason for this may be that the package of reforms implemented by the Government was not designed with the goal of enhancing environmental protection, even though this is identified in EAA s.2 as the legislation's sole purpose. Rather, the evidence suggests that its purpose appears to have been perceived barriers to economic growth, financial prosperity and individual liberty or autonomy. Paradoxically, it is questionable whether these values have been advanced as a result.[13]

Despite these and other concerns, it seems that the only noteworthy (and rather ironic) amendment to the EA Act over the past decade was an exemption of "traffic calming measures" (speed bumps) from EA Act coverage.[14] Not even the three modest legislative amendments suggested by the EA Advisory Panel have been enacted to date.[15]

Instead, the Ontario government has attempted to implement piecemeal EA reforms in recent years through regulatory exemptions, guidance materials, and administrative changes. Measured against the public interest purpose of the EA Act, it can only be concluded that these non-statutory reforms have fallen considerably short of the mark, and have not resulted in a "revitalized, rebalanced, and refocused"[16] EA program in Ontario. Similarly, these recent changes have not resulted in "strategic" EA (or sustainability-based assessments) of major governmental policies, plans or programs which drive the individual undertakings or projects that are subject to the EA Act.[17]

Accordingly, Ontario needs to publicly develop and quickly implement an integrated EA reform package which must necessarily include statutory amendments. As noted by the former Environment Minister when Bill 76 was being debated:

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[12] EA Act, s.2.
[13] Alan Levy, *supra*, at 271, 280-81.
[14] EA Act, s.3.3.
[15] EA Advisory Panel Report, at 39 (policy guidelines), Recommendation 23 (fees), and Recommendation 27 (inspection/enforcement).
[16] EA Advisory Panel Report, at 16.
[17] Paul Muldoon et al., *supra*, at 136-38.

> The problem with administrative change, though, is that it can only go so far… To modernize the process, you need to get inside the process.[18]

(b) Overview of EA Reform Initiatives

From 1975 to the mid-1990s, the EA Act remained virtually unchanged, and only one general regulation (Regulation 334) was promulgated under the Act. During this timeframe, however, there was periodic interest by the Ontario government (and key stakeholders) in improving the EA process, and various provincial initiatives were undertaken to develop and consult upon legislative, regulatory and administrative reforms.

In 1988, for example, the province established the Environmental Assessment Program Improvement Project, which subsequently led to the formation of an EA Task Force in 1989. In 1990, the Task Force released a discussion paper on EA reform,[19] and public consultation on the Task Force's proposals was carried out by the Environmental Assessment Advisory Committee ("EAAC"), which had been established by Ontario's Environment Minister to provide advice on key EA and planning matters. In 1991 and 1992, the EAAC issued reports which called for various changes to Ontario's EA program.[20]

In response to these reform proposals, the Ontario government released a report in 1993 that endorsed several of the EAAC's suggested administrative changes, but generally deferred further consideration of the EAAC's recommendations for amendments to the EA Act itself.[21] In the same timeframe, the quasi-judicial EA Board [now the Environmental Review Tribunal] consulted upon and implemented a number of changes to clarify and expedite its pre-hearing and hearing procedures under the EA Act.[22]

Despite these incremental improvements, the Ontario government decided in 1996 to overhaul the EA Act itself, and significant amendments to the Act were enacted to establish new procedural and substantive requirements.[23] The specific EA-related regulations which form the subject-matter of this EBR Application for Review were made in the controversial aftermath of these statutory amendments.

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[18] Proceedings of the Standing Committee on Social Development (August 7, 1996) (Presentation by the Hon. Brenda Elliot).

[19] EA Task Force, *Toward Improving the Environmental Assessment Program in Ontario* (Toronto: Queen's Printer for Ontario, 1990).

[20] EAAC, *Report No.47: Reforms to the Environmental Assessment Program* (Part 1: October 31, 1991; and Part 2: January 27, 1992).

[21] Ministry of the Environment, *Environmental Assessment Reform: A Report on Improvements in Program Administration* (Toronto: Queen's Printer for Ontario, 1993).

[22] See, for example, EA Board, *The Hearing Process: Discussion Papers on Procedural and Legislative Change* (1990).

[23] These amendments are often referred to as the "Bill 76" changes. See the *Environmental Assessment and Consultation Improvement Act*, S.O. 1996, c.27. See also Marcia Valiante, "Evaluating Ontario's Environmental Assessment Reforms" (1999), 8 J.E.L.P. 215.

Among other things, the 1996 amendments to the EA Act created new steps in the individual EA process (i.e., Terms of Reference), and provided a firmer legislative basis for the large number of Class EAs which had come into existence by that time. In addition, the statutory amendments created "scoped" or streamlined EA procedures which dispensed with the long-standing requirement upon proponents to fully consider "need" and alternatives under the EA Act. The 1996 amendments also imposed a mandatory duty upon proponents to undertake public consultation within EA processes, although consultation had already been widely regarded as an essential component of proper EA planning in Ontario. Other significant EA-related changes (i.e., abolition of the EAAC and lapsing of the *Intervenor Funding Project Act*) were also undertaken by the Ontario government at this time. These extensive changes were pursued by the Ontario government despite objections from environmental groups.[24]

In the years following these sweeping amendments, various proponents, elected officials, and the public at large continued to express dissatisfaction with various aspects of Ontario's revised EA program. In 2004, this ongoing criticism prompted Ontario's Environment Minister to establish a multi-stakeholder EA Advisory Panel (of which CELA was a member) to develop recommendations to improve the EA program, particularly in relation to the energy, waste and transportation sectors.[25]

The EA Advisory Panel's two-volume report was released in 2005, and concluded that while Ontario's EA Act "is fundamentally sound", there are "significant policy gaps, procedural inconsistencies, and administrative reforms that are necessary to ensure that the EA program remains viable and relevant as Ontarians face the challenges and opportunities of the 21st century."[26] Accordingly, the EA Advisory Panel made 41 specific recommendations for legislative, regulatory, policy and administrative changes which were aimed at establishing an efficient and robust EA program based upon clear, consistent and transparent rules.[27]

After the release of the EA Advisory Panel report, the Environment Minister proposed certain EA "improvements" in 2006 to ensure "a faster 'yes' or a faster 'no' for applicants while completely protecting the environment."[28] In particular, the Minister committed to the following changes:

- streamlining the approvals process for transit projects;

- developing a new regulation to establish a new process for waste projects;

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[24] See, for example, R. Lindgren, *Submissions of CELA to the Standing Committee on Social Development Regarding Bill 76* (July 1996). During the Standing Committee hearings on Bill 76 in August 1996, numerous concerns about the proposed statutory reforms were expressed by various municipal, industrial and environmental organizations.
[25] ECO, *Annual Report 2007-08* at 34.
[26] EA Advisory Panel Report at 3.
[27] *Ibid.,* at 7-14.
[28] Ministry of the Environment, *News Release: Environmental Assessment Improvements will Protect the Environment; Save Time and Money* (June 6, 2006).

- integrating the EA process with planning processes under other provincial laws;

- ensuring projects receive a level of review appropriate to their environmental impact; and

- improving education and guidance to eliminate "confusion and false starts."[29]

Subsequent to these announcements, certain "Codes of Practice" were promulgated by the Ministry of the Environment to provide direction on key components of the EA program (e.g. terms of reference, consultation, mediation, and Class EAs).[30] As anticipated, new regulations were also passed under the EA Act which streamlined certain waste[31] and transit[32] planning procedures. However, the Ministerial promise of better integration of the EA program with other provincial planning regimes remains unfulfilled at the present time. Similarly, most of the EA Advisory Panel's wide-ranging recommendations have not been implemented (or have only been partially implemented) to date, and the Ontario government has not formally declared its response to each of these recommendations.

In any event, the first few years of experience under the revamped EA regime in Ontario revealed that many lingering problems were either unresolved or compounded by the 1996 reforms. In 2001, for example, one commentator concluded that Ontario's EA program had taken a major step backwards:

> What emerges from this review is the perception that apart from the Class EA System (a complex area which requires far more study and independent evaluation), the Ontario government has retained an environmental assessment program in name only. It appears that EA in this province has, after years of development and evolution, reverted from a progressive, open and environmentally enlightened planning and decision-making process to a narrow approach, one that focuses solely on identifying and mitigating the adverse biophysical effects of individual projects…
>
> The result is little more than a project approval regime involving an overabundance of direct political intervention in both process and outcomes. Most key aspects of the EA program have been gutted, especially those components designed to promote transparency and accountability to the public (emphasis added).[33]

Similarly, the ECO correctly observed in 2008 that "we have lost the old vision for EA; a new vision is urgently needed."[34]

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[29] *Ibid.*
[30] These and other EA guidance documents are available at the Ministry of the Environment's website: www.ene.gov.on.ca.
[31] See O.Reg.101/07 (Waste Management Projects).
[32] See O.Reg 231/08 (Transit Projects and Greater Toronto Transportation Authority Undertakings).
[33] Alan Levy, *supra*, at 181-82.
[34] ECO, *Annual Report 2007-08*, at 28.

2.3 Overdue EA Reform: The Top 12 Issues

While numerous problems plague Ontario's current EA program, the Applicants submit that the following twelve issues should be regarded as high-priority candidates for reform if the MOE undertakes the requested review of the EA Act and EA-related regulations.

1. General Regulatory Exemptions

For many years, Regulation 334 under the EA Act has exempted a wide variety of proponents and undertakings from being subject to EA requirements.[35] Among other things, this regulation exempts a dozen provincial ministries, municipal undertakings costing less than $3.5 million, drainage works, certain waste disposal sites (including pilot projects and mobile PCB destruction facilities), subdivision agreements, various undertakings by conservation authorities, financial assistance programs, and "research undertakings."[36] In addition, there is a lengthy list of project-specific regulations which exempt numerous other municipal and provincial undertakings from EA Act coverage,[37] including a controversial regulation which exempts Ontario's proposed long-term electricity supply plan (the Integrated Power System Plan) from the EA Act.[38]

In light of continuing public concern over such exemptions, the Environment Minister's EA Advisory Panel recommended in 2005 that these general regulatory exemptions be revisited in order to enhance clarity and ensure overall consistency within Ontario's EA program.[39] However, this recommendation has not been acted upon by the Ontario government, and there remains well-founded concern that the pervasive list of exemptions undermines the public interest purpose of the EA Act.

2. Sectoral Regulatory Exemptions

In recent years, the Ontario government has demonstrated considerable interest in passing sectoral regulations which conditionally exempt broad classes of environmentally significant undertakings from individual EA requirements.

The precedent for this approach is the Electricity Projects Regulation[40] under the EA Act, which sets out different levels of assessment for certain public and private electricity projects in Ontario. Depending on fuel type, capacity and potential for significant

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[35] R.R.O. 1990, Regulation 334, as amended.
[36] *Ibid.*, ss.5, 6, 8, 9, 11, 11.1, 12, 14, and 15.
[37] The current list of exempting regulations under the EA Act is available at: www.e-laws.gov.on.ca.
[38] O.Reg.276/06. The passage of this exempting regulation was strongly criticized by Ontario's Environmental Commissioner: see ECO, *Annual Report 2007-08*, at 38. See also ECO, *News Release: Third Decision on Government's Electricity Plan Evades Environmental Bill of Rights, says Environmental Commissioner* (June 19, 2006); and ECO, *Annual Report 2006-07*, at 84-86.
[39] EA Advisory Panel Report, Recommendations 38 and 39. See also the EA Advisory Panel's Volume II Report, at 24-30.
[40] O.Reg.116/01. See also the MOE's *Guide to Environmental Assessment Requirements for Electricity Projects* (2001).

environmental effects, this regulation specifies which projects are wholly exempted from the EAA, subject to a streamlined Environmental Screening Process ("ESP"), or remain subject to the individual EA requirements under Part II of the EA Act. Proponents which are obliged to follow the ESP must consult with interested persons and prepare a Screening Report (or, in some instances, a more extensive Environmental Review Report) to address environmental impacts and mitigation measures. As in the Class EA model, it is possible under the ESP for members of the public to request that a particular project be "elevated" (or "bumped up") to the more rigorous review of an individual EA. To date, however, it appears that few, if any, elevation requests have been granted under the regulation since it was passed in 2001.

Despite concerns about the Electricity Projects Regulation expressed by the EA Advisory Panel[41] and the ECO,[42] it appears that this regulation served as the template for two other sectoral exempting regulations. In 2007, for example, the Ontario government passed the Waste Management Projects Regulation[43] under the EA Act, which designates and exempts public and private sector waste management projects from individual EA requirements. For certain projects, this exemption is conditional upon the proponent's completion of the streamlined ESP (which is substantially similar to the ESP established under the Electricity Projects Regulation), and includes a procedure for making elevation requests.

When the Waste Management Projects Regulation was first proposed, environmental groups raised a number of objections, particularly in relation to the province's proposal that certain landfills and energy-from-waste projects should be subject only to the ESP rather than individual EA requirements.[44] Nevertheless, the regulation was passed with conditional exemptions for these and other environmentally significant facilities.

In his review of the Waste Management Project Regulation, the ECO identified a number of serious deficiencies:

> Without such a [waste] policy framework developed in consultation with the public, the ECO believes it was premature for the government to develop a new Screening Process that promotes certain types of waste facilitates, and eliminates the requirement to assess "need" and "alternatives."
>
> The waste sector Screening Process retains only a few vestiges of the spirit and intent of the EAA, even though it is being used as a proxy for the full EA process. There is no requirement to consider "need" or "alternatives"; there is no requirement for formal approval; and a recommendation in the guide directs proponents to seek other project approvals while conducting the Screening

[41] EA Advisory Panel Report, Recommendations 18, 19 and 36.
[42] ECO, *Annual Report 2009-10*, at 151-52.
[43] O.Reg.101/07. See also the MOE's *Guide to Environmental Assessment Requirements for Waste Management Projects* (2007).
[44] See, for example, A. Lintner, R. Lindgren, B. Lloyd, and J. Jackson, *Response of Sierra Legal, CELA, Northwatch and Great Lakes United to Proposed EA Changes for Ontario's Waste Sector* (March 2007).

> Process. Based on these shortcomings, the Screening Process appears to be just another means of planning out the details of the proposed project, rather than a comprehensive assessment of *if* (and how) a project should proceed – as intended by the EAA.[45]

In 2008, the Ontario government passed the Transit Projects and Greater Toronto Transportation Authority Undertakings Regulation[46] under the EA Act, which exempts certain public transit projects from the EA Act, and subjects other transit projects to a streamlined planning process that is analogous to the above-noted ESPs. Under this new process, transit proponents are required to undertake public consultation, evaluate and mitigate environmental impacts, and prepare an Environmental Project Report ("EPR"). Upon completion of the EPR, members of the public may file an "objection" on limited grounds (eg. adverse effects upon aboriginal rights or matters of provincial interest), and the Minister is empowered to require further study, allow the project to proceed, or require the preparation of an individual EA.

When the transit regulation was first proposed, environmental groups generally supported the principle of facilitating properly located and well-designed public transit projects, but raised numerous concerns about the procedural and substantive aspects of the transit planning process.[47] However, the regulation is now in force, and in October 2009 the Environment Minister conditionally approved a controversial diesel train project that is intended to link downtown Toronto to the Pearson international airport.[48]

In his 2008-09 Annual Report, the Environmental Commissioner scrutinized the new transit regulation under the EA Act, and questioned whether the "faster" process is necessarily a "better" process:

> The ECO views increased public transit as a highly desirable goal. There are, however, two concerns that the ECO has with O. Reg. 231/08. One is that various components of traditional environmental assessments are removed by O. Reg. 231/08…O. Reg. 231/08 explicitly limits the grounds upon which public concerns will trigger government intervention. This is of significant concern to the ECO, as social and economic considerations are often key issues that local citizens raise in opposition to proposed transit projects...
>
> The second concern is that O. Reg. 231/08 adopts a "one size fits all" approach. Accordingly, large projects such as the Georgetown South Expansion and Union-Pearson Rail Link are subject to the same assessment process as much smaller projects with fewer potential impacts. Unlike the streamlined environmental

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[45] ECO, *Annual Report 2007-08*, at 40-41.

[46] O.Reg.231/08. See also Ontario's *Transit Project Assessment Guide* (2009) and *Transit Priority Statement* (2008).

[47] See, for example, R. Lindgren and K. Mitchell, *Response by CELA to Draft Regulations under the EAA for Public Transit Projects and the Draft Transit Priority Statement* (May 2008); and R. Lindgren, *Response by CELA on the Interim Guide: Ontario's Transit Project Assessment Process* (August 2008).

[48] See *Minister's Notice to Proceed with Transit Project Subject to Conditions: Metrolinx* (October 5, 2009).

> assessment processes that MOE introduced for electricity in 2001 and waste projects in 2007, no "classification" or categorization scheme is included within O. Reg. 231/08 based on the type or size of the project or the scale of potential environmental impacts.
>
> Accordingly, while O. Reg. 231/08 has removed some key requirements of the EA process, such as the requirement to consider both the "need" for and the potential "alternatives" to a particular project, the ECO hopes that the planning processes used by all proponents will still include these considerations.[49]

In light of the foregoing concerns, the Applicants submit that it is incumbent upon the MOE to review and revise the existing sectoral exempting regulations under the EA Act.

3. Inadequate Monitoring and Enforcement under the EA Act

The Applicants' above-noted concerns about regulatory exemptions are accompanied by long-standing unease about the institutional capacity of the Ministry of the Environment to effectively monitor proponents' compliance with procedural or substantive requirements imposed by exemptions, Class EAs or individual EA approvals. In 2004, for example, the ECO reported to the Legislature that:

> The ECO's 2001-02 annual report raised a number of concerns about MOE's ability as regulator to oversee compliance trends in the various Class EAs. MOE promised a number of improvements to compliance and monitoring of Class EAs, including a requirement that annual reports eventually be prepared by all proponent agencies. But MOE conducted only cursory reviews of annual reports submitted for 2002 and carried out little followup…
>
> Overall, this application [individual EA for Highway 69 expansion] illustrates a number of systemic weaknesses in the EA process: that MOE does not have the resources to properly monitor the large number of approvals it issues under the EAA; that MOE continues to rely on a complaints-based compliance model; and that MOE is practically unable to prosecute proponents for failure to comply with the EAA.[50]

Similarly, in 2005 the EA Advisory Panel made the following findings:

> [T]he mere existence of terms and conditions will not necessarily protect the environment or safeguard the public interest unless there are adequate mechanisms to ensure proponent compliance.
>
> Traditionally, Ontario's EA program has been characterized by an *ad hoc* approach to monitoring, inspection and enforcement activities. For example, where a proponent had made certain commitments during the EA process, or

[49] ECO, *Annual Report 2008-09*, at 80-81.
[50] ECO, *Annual Report 2003-04*, at 57, 150.

> where certain conditions had been imposed by an order or approval under the EA Act, the MOE did not systematically follow up to verify whether such commitments or conditions were being complied with by the proponent, or to assess whether the commitments or conditions were actually effective in addressing biophysical or socio-economic impacts associated with the undertaking. Where MOE followup did occur, it was likely to be complaints-driven rather than an integral part of annual work plan inspections by MOE staff.[51]

Accordingly, the EA Advisory Panel made several recommendations aimed at strengthening compliance monitoring and enforcement activities under the EA Act.[52] For example, the EA Advisory was critical of the outdated offence provision of the EA Act (section 38), which establishes minimal fines for contraventions of the Act, regulations, or terms/conditions of orders or approvals. Since section 38 prescribes penalties far below those found in other provincial environmental laws, the EA Advisory Panel recommended that the EA Act should be substantially amended to bring the inspection and enforcement provisions into line with the *Environmental Protection Act* and *Ontario Water Resources Act*.[53] However, the Ontario government has not acted upon or responded to this important recommendation, and section 38 of the EA Act remains unchanged and wholly inadequate at the present time.

On the matter of EA monitoring and compliance, the ECO concluded that:

> For local citizens, these conditions are often the only tangible evidence of the "betterment" alluded to in the purpose of the EAA. Despite this, MOE has traditionally done little or no monitoring to check if these conditions are being adhered to and, instead, has relied on complaints from vigilant observers. MOE has now committed to supporting a single compliance officer, based in the EA Branch, to audit selected individual EA projects for compliance with approval conditions. Whether this nod towards compliance will be adequate to deal with the large number of approved individual EAs is open to question. It will certainly not address the need for monitoring of thousands of projects proceeding province-wide through various Class EA procedures.[54]

Accordingly, the ECO has called upon the MOE to become "an effective regulator, with compliance and enforcement capacity, to protect the quality and integrity of EA processes."[55] Similar recommendations were repeated in the ECO's 2008-09 Annual Report:

> These observations suggest that MOE does not have sufficient resources to properly monitor the large number of Class EA approvals being issued under the

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[51] EA Advisory Panel Report, at 109-10.
[52] *Ibid.,* Recommendations 26-31.
[53] *Ibid.,* Recommendation 27, and at 109-114.
[54] ECO, *Annual Report 2007-08,* at 46.
[55] *Ibid.,* at 47.

> *EAA*, and that MOE staff need better training and information about the nuances of the MCEA and other Class EAs. This review also demonstrates that MOE continues to rely on a complaint-based compliance model, and the ministry is reluctant to prosecute proponents for failures to comply with the terms of approvals under Class EAs and the *EAA*. The ECO urges MOE to develop an enforcement policy that applies to alleged contraventions of the *EAA*.[56]

To the Applicants' knowledge, no legislative or regulatory steps have been taken to date to address these widespread concerns about inadequate monitoring and enforcement under the EA Act.

4. No Public Hearings under the EA Act

Ontario's EA Act has long provided for public hearings before an independent, quasi-judicial body (i.e., the ERT) to assess the adequacy of EA documentation or the acceptability of a particular undertaking. As noted by the EA Advisory Panel, "public hearings under the EA Act are important mechanisms for gathering information, testing evidence, weighing competing interests, and making informed decisions about particularly significant or controversial undertakings."[57]

In the past, public hearings have been held under the EA Act in relation to high-profile undertakings such as landfills, incinerators, highways, transmission lines, hazardous waste facilities, timber management on Crown lands, and a provincial energy demand-supply plan. In some hearings, the EA applications were rejected or withdrawn, but in most cases the proposed undertakings were conditionally approved after due consideration of the evidence and submissions adduced by the hearing parties.

At the present time, the EA Act empowers the Environment Minister to refer an application (eg. individual EA or Class EA), in whole or in part, to the ERT for a public hearing and decision.[58] For example, where a member of the public requests referral to the ERT, the Minister "shall" make the referral, unless the Minister opines that: (i) the hearing request is frivolous or vexatious; (ii) a hearing is unnecessary; or (iii) a hearing may cause "undue delay."[59]

Despite such provisions, it appears that since 1996, only two matters (both landfill proposals) have been referred to the ERT for public hearings, and all other hearing requests have been refused by the Minister under the EA Act. Thus, at the present time, virtually all EA applications are being decided (and typically approved) by the Minister without any hearings whatsoever. When analyzing this "no hearing" trend, the EA Advisory Panel found that "the ongoing absence of hearings under the EA Act is both ironic and perplexing,"[60] particularly since the Bill 76 amendments specifically gave the

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[56] ECO, *Annual Report 2008-09*, at 36-37.
[57] EA Advisory Panel Report, at 81.
[58] EA Act, subs.9.1 and 9.2.
[59] EA Act, subs.9.3.
[60] EA Advisory Panel Report, at 82.

Minister more control over the nature, scope and timing of ERT hearings held under the EA Act.[61]

The ECO has also correctly noted that under the current EA program, "'no' is rarely an option" and "the EA process seems to lead inexorably towards the approval of projects" due to "several entrenched barriers", including: piecemealing of projects; allowing key decisions to precede the EA process; and scoping EA terms of reference to exclude key considerations such as "need".[62] The Environmental Commissioner also lamented the loss of public hearings under the EA Act:

> With the virtual elimination of hearings since 1996, the important role of reviewing the sufficiency of EA studies by the Board [now ERT] was lost. The responsibility for quality control for EA studies has come to rest overwhelmingly with MOE, but MOE's reviews of EA studies submitted by proponents often seem to rely on a checklist approach, with little guidance or critical oversight. As a result, EA studies remain prone to weak methodology, and are a source of frustration to stakeholders.[63]

For the foregoing reasons, the Applicants submit that the public hearing provisions of the EA Act must be reviewed and revised forthwith in order to ensure that there actually are public hearings under the Act.

5. Scoped Individual EAs

When the Bill 76 amendments to the EA Act were introduced, the Environment Minister repeatedly assured Ontarians that comprehensive EAs (with an emphasis on alternatives analysis) would still be required under the legislation:

> A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, [and] the role of the Environmental Assessment Board as an independent decision-maker.[64]

Accordingly, the Bill 76 amendments left intact the individual EA content requirements that have been in place since the EA Act was enacted. In particular, section 6.1(2) of the EA Act provides, among other things, that individual EAs must:

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[61] For example, the Minister may prescribe hearing deadlines and limit which issues are to be considered by the ERT: see EAA, subs.9.1(5) and 9.2(6). These new Ministerial powers have been criticized as unnecessary constraints which undermine the independence and utility of ERT hearings: see Alan Levy, *supra*, at 259-61. See also Alan Levy, "Scoping Issues and Imposing Time Limits by Ontario's Environment Minister at Environmental Assessment Hearings – A History and Case Study" (2000), 10 J.E.L.P. 147.

[62] ECO, *Annual Report 2007-08*, at 41.

[63] *Ibid.*, at 44-45.

[64] *Hansard* (June 13, 1996): Minister's Statement on Environmental Assessment (Bill 76).

- describe and state the rationale for the undertaking, alternatives to the undertaking, and alternative methods of carrying out the undertaking;

- describe the expected environmental impacts from (and necessary mitigation measures for) the undertaking, alternatives to the undertaking, and alternative methods of carrying out the undertaking; and

- evaluate the environmental advantages and disadvantages of the undertaking, alternatives to the undertaking, and alternate methods of carrying out the undertaking.

Despite these assurances, it now appears that the Minister enjoys – and has frequently exercised – considerable discretion under the Bill 76 reforms to approve "scoped" Terms of Reference which exclude consideration of key EA planning matters, such as the rationale (or "need") and "alternatives to."[65] If such matters are scoped out of the EA process, then "the proponent need not consider them and they are not open to debate or challenge if the project were to go to a hearing."[66] The legality of the Minister's authority to approve scoped Terms of Reference has been confirmed by the Ontario Court of Appeal,[67] but it remains unclear whether (or to what extent) the Minister will decide to include – or exclude – "need" or "alternatives" on a case-by-case basis.

For example, it has been readily apparent that the Minister has been willing to approve scoped Terms of Reference in the context of waste disposal activities. In 2005, the EA Advisory Panel found that "some landfills are subject to full EAs while others are subject to scoped EAs,"[68] but the overwhelming trend was Ministerial approval of scoped Terms of Reference in respect of waste-related undertakings.[69] Even after passage of the Waste Management Projects Regulation, it is reasonable to anticipate that this scoping trend will continue in relation to large landfill undertakings which may still require an individual EA.

In 2007, the Ministry of the Environment finalized a "Code of Practice" for preparing and reviewing Terms of Reference. In essence, however, this Code contains only general and unenforceable direction on Terms of Reference content and process, and it does not adequately address the EA Advisory Panel's concerns about inconsistency and uncertainty regarding scoping.

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[65] EA Act, subs.6(1)(c) and 6.1(3). See also Alan Levy, *supra*, at 224-26. When the Bill 76 reforms were enacted in 1996, the Minister was prohibited from delegating the statutory power to approve Terms of Reference. A further amendment to the EAA in 2001 removed this prohibition, and now this approval power can be delegated to designated Ministry staff: see EA Act, subs.31(3).

[66] ECO, *Annual Report 2007-08*, at 43.

[67] *Sutcliffe v. Minister of the Environment* (2004), 7 C.E.L.R. (3d) 184.

[68] EA Advisory Panel Report, at 41.

[69] *Ibid.*, at 52. The EA Advisory Panel found that of the 23 Terms of Reference for waste EAs approved since 1997, 19 were "scoped" and only 4 were not.

In his review of this Code of Practice, the ECO concluded that "the new guidance on scoping remains ambiguous," and that the "scoping provision is used fairly often."[70] Accordingly, the Environmental Commissioner recommended that during the next round of EA reform, the MOE should "give renewed weight to upfront questions of 'need' and 'alternatives' for projects."[71] In the Applicants' view, the time for the next round of EA reform is now here.

6. Extensive Use of Class EAs

Although public and political attention is often focused upon individual EAs, the practical reality is that most undertakings under the EA Act are processed under the numerous approved Class EAs now in force in Ontario. In fact, by the early 1990s, "90% of the undertakings subject to the EAA had obtained streamlined approvals through the Class EA process,"[72] although the legal basis for Class EAs was not fully entrenched into the EA Act until the Bill 76 changes in 1996.

Given the proliferation of approved Class EAs in Ontario, commentators have raised various concerns about public participation, piecemeal planning, and cumulative effects.[73] It appears, however, that courts are reluctant to judicially review Ministry refusals to "bump up" projects to individual EA,[74] or proponents' decisions as to which Class EA category or schedule is applicable to their projects.[75]

Similarly, the EA Advisory Panel concluded that there were no meaningful mechanisms under the existing Class EAs for effectively resolving "differences of opinion between the proponent and others as to the proper project schedule, the appropriate level of public consultation, or adequacy of studies required to comply with the parent Class EA."[76] In such circumstances, the only remedy available to concerned stakeholders is to file "bump up" requests upon completion of the project planning process. However, virtually no "bump up" requests have been granted in recent years, and there have been vigorous complaints by proponents and stakeholders about the time-consuming and non-transparent manner in which "bump up" requests are decided by the MOE.[77]

To address these issues, the EA Advisory Panel recommended the creation of new procedures which would enable an independent adjudicator (the ERT) to provide interim directions or summary rulings on Class EA planning disputes, and to expeditiously

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[70] ECO, *Annual Report 2007-08*, at 43.
[71] *Ibid.*, Recommendation 1.
[72] *Ibid.*, at 30.
[73] See, for example, the authorities cited in Alan Levy, *supra*, at 228. One commentator has correctly characterized Ontario's Class EA regime as an "EA-lite approach": see Conor Mihel, "Why We Can't Save this Forest", *ON Nature* (Autumn 2009) at 19.
[74] *Hollinger Farms No.1 Inc. v. Ontario* (2007), 229 O.A.C. 303 (Ont. Div.Ct.).
[75] *Ibid.* See also *William Ashley China Ltd. v. Toronto* (2008), 39 C.E.L.R. (3d) 306 (Ont.Div.Ct.) and *South Etobicoke Residents and Ratepayers Assoc. v. Ontario Realty Corp.* (2004), 181 O.A.C. 303 (Ont.Div.Ct); affd. (2005), 75 O.R. (3d) 641 (Ont. C.A.).
[76] EA Advisory Panel Report, at 91.
[77] *Ibid.*

decide "bump up" requests filed at the end of Class EA planning processes.[78] To date, however, the MOE has not amended the current Class EAs to give effect to these recommendations.

In 2008, the ECO summarized public concerns about Class EAs as follows:

> Class EA approaches were intended for projects that occur frequently, with generally predictable ranges of effects and relatively minor environmental impacts. But critics have long argued that too many large and environmentally significant projects have been inappropriately slipped into the Class EA fast track…
>
> Under the Class EA process, public concerns abound. A "no" decision is not a possible outcome. The ministry can only elevate the status of the project to an individual EA or impose conditions. Frustrated members of the public invoke the available appeal mechanism (a request for a "bump up" to an individual EA, also known as a "Part II order") about 60 to 70 times in a typical year, but to the ECO's knowledge, the ministry has not granted one such request. The minister does, in some cases, respond to bump-up requests by imposing conditions on proponents. But the conditions are often soft measures, such as additional consultation through liaison committees, rather than what is most sorely needed: stronger mitigation measures.[79]

Similar comments were made by the ECO in the 2009-10 Annual Report:

> The ECO has expressed concern in the past with MOE's approach to bump-up requests under the EAA. While the ministry apparently receives approximately 60 to 70 such requests a year, the ECO is unaware of any bump-up requests that have been granted. The ECO, therefore, questions MOE's assertion that the opportunity exists for members of the public to request a bump-up through the ESP process. A request that is never granted rings as a hollow promise.[80]

The topic of Class EAs was revisited by the ECO in the 2012-13 Annual Report:

> In recent years the ECO has become increasingly troubled by the repeated failure of prescribed ministries to adequately consult the public on the development of, or revisions to, Class EAs. Prescribed ministries are failing to post policy proposal notices on the Environmental Registry for new Class EAs or amendments to existing Class EAs, which undermines the intent of the EBR and the public's ability to fully participate in these environmentally significant decisions.[81]

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[78] *Ibid.*, Recommendations 18-19.
[79] ECO, *Annual Report 2007-08,* at 30, 42.
[80] ECO, *Annual Report 2009-10,* at 151.
[81] ECO, *Annual Report 2012-13,* at 23.

The Applicants submit that the above-noted concern about public access to Class EA decision-making is particularly acute in the context of the approved Municipal Class EA that applies to various types of municipal projects (eg. road extensions or widening). Since the approved Municipal Class EA (or "parent" Class EA) is not available on the MOE website, members of the public have reported difficulty accessing complete (and free) copies of this Class EA, especially when time-limited opportunities for making bump-up requests are underway. Therefore, as part of the requested review of Ontario's EA regime, the MOE should consider web-posting copies of all approved Class EA documents on the EA section of the MOE website.

7. Inadequate Consideration of Cumulative Effects

The MOE's current *Statement of Environmental Values* ("SEV") under the EBR commits the Ministry to a number of important principles, including the ecosystem approach and consideration of cumulative environmental effects.[82] The MOE SEV further provides that these principles will be reflected in the Ministry's decisions respecting laws, regulations and policies.[83] To date, however, there is little evidence demonstrating that cumulative effects are being adequately addressed in Ontario's EA program.

For example, the vast majority of undertakings subject to the EA Act are now being processed through approved Class EAs rather individual EAs, as noted above. However, the EA Advisory Panel questioned whether the cumulative effects of these thousands of projects are being properly monitored by proponents or the MOE:

> Concerns have also been expressed about monitoring and reporting in the Class EA context, particularly since some Class EAs do not yet require the collection and reporting of data regarding the number and type of projects being carried out. Even for Class EAs that now require data reporting, it is unclear how such reports can be used to assess the cumulative impact of countless "Schedule A" projects undertaken under Class EAs (i.e., projects that trigger no EA or documentary requirements).[84]

It would appear that such concerns are also applicable to the numerous projects which are subject to the streamlined procedures under the sectoral regulatory exemptions described above.

The MOE also appears to have jurisdictional doubts whether cumulative effects analysis can even be required under the EA Act, presumably because this specific phrase does not expressly appear within the legislation.[85] For example, in rejecting public requests under

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[82] MOE SEV (October 2008), Section 3.

[83] *Ibid*. However, the ERT and the Ontario Divisional Court have held that SEV principles should also be considered when the Ministry is making decisions as to whether to issue environmentally significant approvals: see *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281(ERT); affd. (2008), 36 C.E.L.R. (3d) 191 (Ont.Div.Ct.); leave to appeal refused (Ont. C.A File No. M36552, November 26, 2008).

[84] EA Advisory Panel Report, at 109.

[85] In contrast, consideration of "cumulative environmental effects" is expressly required in federal EAs: see *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"), S.C. 2012, c.19, subs.19(1)(a). However,

the Electricity Projects Regulation for elevation of a proposed wind farm to individual EA, the Acting Director of the Ministry's EA and Approvals Branch opined as follows:

> As Ontario's EAA does not require consideration of cumulative effects through either the ESP or an individual EA, the ministry will not be requiring CREC [the proponent] to further address cumulative effects. Federal EA legislation, however, does require consideration of cumulative effects and therefore, I will defer any decision making about the quality of the cumulative effects assessment in the ERR to federal colleagues at Natural Resources Canada, as the lead responsible authority for federal processes.[86]

Given the broad definition of "environment" under the EA Act, and given proponents' general duty under the Act to identify and evaluate baseline conditions as well as the "direct and indirect" impacts of the undertaking (and alternatives) upon the environment, there can be little doubt that cumulative effects can and should be considered in Ontario's EA program. However, the Director's above-noted comments suggest that if this matter is legally unclear to the MOE, then it is imperative to amend the EA Act in order to ensure that cumulative effects are duly considered by proponents and EA decision-makers.

This point was reiterated by the ECO in his most recent Annual Report in the context of potential Ring of Fire developments:

> The ECO believes that MOE should have taken this opportunity to explore the methods available to examine cumulative effects across the region. Since recent changes to the federal CEAA will mean that fewer projects will undergo federal environmental assessments, MOE can no longer rely on that process to consider cumulative effects. MOE must develop its own framework to assess cumulative impacts in environmental assessment processes (emphasis added).[87]

8. Barriers to Meaningful Public Participation

One of the few positive Bill 76 changes to the EA Act was the creation of a new mandatory duty upon proponents to consult "interested persons" when preparing Terms of Reference or EA documentation.[88] However, the EA Act fails to define or provide specific direction on what constitutes meaningful consultation, or on which persons are sufficiently "interested" to be consulted. Although the MOE has developed a non-binding Code of Practice regarding consultation, serious concerns remain about the adequacy of public participation opportunities under the EA Act.

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the ECO has correctly pointed out that recent changes in the federal EA program means that CEAA 2012 will apply far less frequently to projects in Ontario: see ECO, *Annual Report 2012-13*, at 75. In the Applicants' view, these federal rollbacks make it even more important and timely to improve Ontario's EA law.

[86] Letter dated March 28, 2008 to Lake Ontario Waterkeeper from Agatha Garcia-Wright, Acting Director of the MOE's EA and Approvals Branch.

[87] ECO, *Annual Report 2012-13*, at 75.

[88] EA Act, s.5.1.

For example, the EA Advisory Panel reviewed the rationale for, and benefits of, ensuring effective public consultation, but found that several daunting problems were often encountered by persons attempting to participate in EA processes in Ontario:

> However, serious concerns have been repeatedly expressed by First Nations, aboriginal communities and various stakeholders (referred to collectively as participants) that they cannot participate in the planning, approval and monitoring of undertakings subject to the EA Act. They claim that the comment periods are too short, relevant documents are too inaccessible, and consultation efforts are too superficial and with no real purpose other than to enable a proponent to report to the EAAB that it has fulfilled its statutory obligation to consult. In addition, concern has been raised that public consultation rights are illusory at best if participants lack sufficient resources to retain the technical, scientific or legal assistance necessary to meaningfully participate in the EA process.[89]

Accordingly, the EA Advisory Panel made several recommendations aimed at improving public participation in Ontario's EA program,[90] but these recommendations have not been implemented adequately or at all to date. For example, the Panel highlighted the value and importance of establishing a new participant/intervenor funding regime to fill the void left by the Ontario's government's 1996 decision to allow the *Intervenor Funding Project Act* to expire without passing replacement legislation.[91] However, no steps have been taken by the Ontario government to enact a new statute that ensures eligible public interest participants receive financial assistance from proponents in order to meaningfully participate in EA processes.

In 2008, the ECO also reported that:

> The ECO regularly hears from members of the public who find EA consultation processes unduly complex and opaque. They find the system weighted in favour of proponents, and are frustrated by MOE's evident inability or unwillingness to insist on fairness in consultation and in process. A frequent concern is the public's inability to access key documents and technical studies in a timely manner… Public unhappiness with weak consultation is often exacerbated by related failings, such as flawed EA studies, and blocked public input on front-end questions such as need or back-end technical details in permits and approvals.[92]

Accordingly, the Environmental Commissioner has called for renewed "emphasis on transparency and credibility in public consultation," and he specifically recommended that Ontario's EA program be reformed in order to ensure "an effective engagement of the broader public in all aspects, but including big and medium picture planning, as well

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[89] EA Advisory Panel Report, at 71. See also Alan Levy, *supra*, at 239-43.
[90] *Ibid.*, Recommendations 8-11.
[91] *Ibid.*, at 74-77.
[92] ECO, *Annual Report 2007-08*, at 46.

as post-approval technical issues."[93] To date, such recommendations have not been addressed by the Ontario government adequately or at all.

9. EA Exception under the EBR

As noted above, virtually all individual EA applications under the EA Act are currently being decided (and usually approved) by the Environment Minister without EA hearings. In addition, it should be noted that the Ontario government has passed regulations to preclude ERT hearings under other environmental statutes for certain undertakings which are subject to the EA Act.[94] While the EA Advisory Panel recommended certain revisions of these regulations,[95] they remain intact at the present time (see below). The net result is that under the EA Act, interested persons are usually invited by proponents to comment upon the conceptual or general design of these undertakings, but the critically important technical or operational details are being shielded from scrutiny in public hearings before an independent tribunal established for that very purpose.

This systemic problem has been compounded by the Ontario government's increasingly frequent reliance upon the "EA exception" in section 32 of the EBR. In essence, this section provides that the mandatory public participation rights found in Part II of the EBR (i.e., notice, comment, and third-party appeal) do not apply to statutory permits or approvals which implement undertakings that have been approved (or exempted) under the EA Act. From the public interest perspective, the main concern is that the section 32 "EA exception" has been used to prevent meaningful public notice, comment or appeal of technical instruments issued (without hearings) in relation to EA-approved (or exempted) undertakings.

In 2005, the EA Advisory Panel recommended that section 32 should be revised to ensure that public notice is provided on the EBR Registry in relation to such instruments, and to enable residents to utilize the third-party appeal mechanism under the EBR in situations where the undertaking has been approved under the EA Act without a public hearing.[96]

The ECO has also been sharply critical of the section 32 "EA exception" to public participation:

> Though often a source of intense public interest and concern, many technical decisions… tend to be pushed beyond the back-end of the EA process, to be covered by permits and approvals under a variety of other legislation. And perversely, an exemption under the EBR allows proponents to obtain all permits and approvals arising from EA processes without being subject to public comment or appeal rights. Both the ECO and the EA Advisory Panel have

[93] *Ibid.,* at 47.
[94] See, for example, O.Reg.206/97(no hearings under the *Environmental Protection Act* in relation to waste disposal sites or waste management systems subject to the EA Act); and O.Reg.207/97 (no hearings under the *Ontario Water Resources Act* for sewage works subject to the EA Act).
[95] EA Advisory Panel Report, Recommendation 35.
[96] *Ibid.,* at 89-90 and Recommendation 17.

> recommended that this notorious "section 32" exemption needs amendment because it inappropriately shrouds environmentally significant decisions from public scrutiny.[97]

Despite widespread public concerns about section 32 of the EBR, the Ontario Legislature has not acted upon such recommendations to date.

As noted in the ECO's most recent Annual Report,[98] section 32 of the EBR was targeted in the Application for Review of the EBR filed by CELA lawyers in 2010 and granted by the MOE in 2011. However, the MOE's EBR review appears to have been stalled since that time, and no tangible progress has been made in relation to section 32 of the EBR. Accordingly, the Applicants submit that section 32 of the EBR should be reconsidered as part of the requested review of Ontario's overall EA regime, and further submit that the necessary statutory changes to address the problems caused by the current "EA exception" could be made in the EA Act, the EBR, or both statutes.

10. Lack of Integration between EA and Land Use Planning

Many undertakings subject to the EA Act may require rezoning or official plan amendments under the *Planning Act,*[99] or may require approvals under other provincial statutes which govern land uses or activities upon private and public lands across Ontario. The need to more effectively integrate Ontario's EA program with municipal and provincial land use planning regimes has been recognized and supported by many observers and stakeholders since the late 1980s.[100] While there has been occasional government interest in "greening" the province's land use planning regime,[101] little tangible progress has been achieved under the EA Act in addressing this long overdue need for integration.

In 2005, the EA Advisory Panel reviewed the "disconnect" between the EA program and land use planning, and made several recommendations intended to better integrate the EAA and the *Planning Act*.[102] For example, the Panel recommended that the current Provincial Policy Statement under the *Planning Act* should be adopted and applied under the EA Act, and that appropriate means should be developed to coordinate municipal master plans (eg. infrastructure) with the EA program.[103]

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[97] ECO, *Annual Report 2007-08*, at 44. See also ECO, *Annual Report 2003-04*, at 53-57; and ECO, *Annual Report 2012-13*, at 21-22.
[98] ECO, *Annual Report 2012-13*, at 23.
[99] R.S.O. 1990, c.P.13.
[100] See, for example, EAAC, *Report No.38: The Adequacy of the Existing Environmental Planning and Approvals Process at the Ganaraska Watershed* (1989); EAAC, *Report No.41 (Part 2): Environmental Planning and Approvals in Grey County* (1990); Stephen Garrod et al., "Land-Use Planning", in Swaigen & Estrin, eds., *Environment on Trial (3rd ed.)* (Toronto: Emond Montgomery Publications Ltd., 1993).
[101] See, for example, Commission on Planning and Development Reform in Ontario, *New Planning for Ontario* (1993).
[102] EA Advisory Panel Report, at 84-88.
[103] *Ibid.*, Recommendations 15 and 41.

In 2008, the ECO similarly observed that there is "poor integration between EA and the land use planning process,"[104] and further commented on the problematic relationship between the EA program and municipal master plans:

> Municipalities are expected to consult with the public on Master Plans, but Master Plans do not require approval under the EAA – only specific projects within a Master Plan are subject to EA. Thus, in spite of the warning against piecemealing and the encouragement to think long-range, the approach tends to lead to fragmented decision-making. For example, the York Durham Sewer System was assessed as 14 different Class EA projects, despite broad regional implications; the construction phase alone has required a massive dewatering effort, removing vast amounts of water from aquifers in York Region.[105]

Notwithstanding these concerns, there remains poor (or virtually non-existent) integration between the EA Act and other land use planning regimes at the present time in Ontario.

11. Need for Improved EA Purposes and Policies

The briefly stated "betterment" and "protection" purposes of the EA Act represent an important affirmation of the public interest objective of Ontario's EA program, but these stated purposes have remained essentially unchanged since 1975. In the intervening decades, a number of key environmental principles have emerged – such as ecosystem approach, precautionary principle, polluter pays, intragenerational equity, etc. – but these have not been incorporated into the EA Act to clarify and strengthen the Act's purposes. Accordingly, the EA Advisory Panel recommended that the EA Act should be updated to include these fundamental principles to help direct EA decision-making in the province.[106] However, these recommendations have not been acted upon by the Ontario Legislature to date.

Similarly, the EA Advisory Panel noted the existence of section 27.1 of the EA Act, which empowers the Minister to promulgate "policy guidelines" that should be taken into account by proponents and decision-makers under the EA Act. However, it appears that this power has not been used to date by the Minister since it was added to the EA Act in 1996. Accordingly, the EA Advisory Panel recommended that this existing statutory authority should be used to establish sector-specific policies, which were to be developed in an open and consultative manner.[107]

To kick-start such discussions, the EA Advisory Panel produced a number of draft policies to articulate EA principles and priorities within the waste, energy and transportation sectors.[108] However, the Ontario government has failed to either develop these sectoral policies or establish a multi-stakeholder process for doing so. In addition,

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[104] ECO, *Annual Report 2007-08*, at 38.
[105] *Ibid.*, at 42.
[106] EA Advisory Panel Report, at 28-37.
[107] EA Advisory Panel Report, at 37-40.
[108] EA Advisory Panel Report, Volume II, at 18-23

the Ontario government has not acted upon (or even responded to) the EA Advisory Panel's recommendation that section 27.1 itself should be amended to better facilitate EA policy development and to ensure that EA decisions are consistent with provincial EA policy.[109]

12. Need for Consolidated Hearings

The 1981 enactment of Ontario's *Consolidated Hearings Act* ("CHA") was an important step towards ensuring consistency and efficiency where large-scale undertakings triggered more than one public hearing under Ontario's environmental and planning statutes. In such circumstances, this Act avoids a multiplicity of hearings by facilitating the creation of a single Joint Board to fulfill hearing requirements under various Ontario laws.

In the EA context, however, the efficacy of this consolidated approach has disappeared in recent years because no public hearings have been held under the EA Act and, more alarmingly, because two regulations (i.e. O.Reg.206/97 and O.Reg.207/97) were passed to dispense with public hearing requirements for certain undertakings (i.e. waste disposal sites and sewage works) subject to the EA Act. Accordingly, the EA Advisory Panel recommended that the CHA should be reviewed and updated, and that the two regulations should be substantially re-written.[110] However, these recommendations have not been acted upon or responded to by the Ontario government, which has simply decided to merge the two above-noted regulatory exemptions into O.Reg.206/97, but otherwise has not reversed the "no hearings" trend under the EA Act, as discussed above. The CHA itself has not been amended since 2009.

3. MOE Statement of Environmental Values

In determining whether the public interest warrants the requested review, subsection 67(2)(a) of the EBR directs the Minister to consider the relevant SEV.

In this case, the MOE's SEV indicates that the Ministry's "vision" is "clean and safe air, land and water" in order to ensure healthy communities, ecological protection and environmentally sustainable development for present and future generations. To achieve this vision, the SEV commits the MOE to a number of important principles, such as:

- adopting an "ecosystem approach" to environmental protection and resource management;

- using a "precautionary, science-based approach" in MOE decision-making in order to protect human health and the environment;

- developing legislation, regulations, standards and policies to protect the environment and human health;

[109] EA Advisory Panel Report, at 39-40.
[110] EA Advisory Panel Report, Recommendations 34 and 35, and at 118-121.

These and other SEV commitments represent a provincial promise to Ontarians that the MOE will take all necessary steps to safeguard the environment and public health and safety. In the Applicants' view, the requested review of the EA Act and EA-related regulations is consistent with – if not mandated by – the principles and provisions of the MOE's SEV.

4. Absence of Periodic Review

In determining whether the public interest warrants the requested review, subsection 67(2)(c) of the EBR directs the Minister to consider whether "the matters sought to be reviewed are otherwise subject to periodic review".

At the present time, aside from using Part IV of the EBR, there is no statutory mechanism for the formal public review of the EA Act or EA-related regulations.

5. Inapplicability of the Presumption against Reviewing Recent Decisions

Subsection 68(1) of the EBR provides a general (and rebuttable) presumption against reviewing governmental decisions made within the past five years. However, the Applicants submit that this presumption is not applicable in this case, primarily because the 1996 amendments to the EA Act (and the bulk of the EA-related regulations) pre-date this Application for Review by more than five years.

6. Resources Required for the Requested Review

Subsection 67(2)(f) of the EBR lists "resources required to conduct the review" as another factor to be considered by the Minister when determining if the public interest warrants a review.

To the Applicants' knowledge, the requested review of the EA Act and EA-related regulations can be carried out by relevant MOE personnel without the allocation of any new resources or staff.

EVIDENCE SUPPORTING THE REQUESTED REVIEW

The documentary evidence supporting the requested review is attached hereto as follows:

1. The EA Act;

2. EA-related regulations;

3. MOE's SEV;

4. Excerpts from ECO Annual Reports re EA;

5. Executive Summary, Recommendations and excerpts from the 2005 Report of the Minister's EA Advisory Panel (Volume I);

6. Alan Levy, "A Review of Environmental Assessment in Ontario" (2001), 11 J.E.L.P 173 (excerpts)

7. Paul Muldoon et al., *Environmental Law and Policy in Canada* (Toronto: Emond Montgomery Publications, 2009), Chapter 10 (excerpts)