Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

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EA Modernization Project Team
Environmental Assessment Modernization Branch
Ministry of the Environment, Conservation & Parks
135 St Clair Ave West, 4th Floor
Toronto, ON M4V 1P5

RE: ERO 019-7891 – Proposed Revocation of Municipal Class EA and New Regulation for Streamlined EA for Municipal Infrastructure Projects

These are the comments of Canadian Environmental Law Association (CELA) in relation to the above-noted posting[1] on the Environmental Registry of Ontario (ERO).

In this posting, the Ministry of the Environment, Conservation, and Parks (MECP) is proposing the revocation and replacement of the Municipal Class EA (MCEA) with a new regulation that establishes a streamlined EA process for a small subset of municipal infrastructure projects.

For the reasons set out below, CELA concludes that this proposal is highly problematic, unsupported by persuasive evidence, devoid of implementation detail, and contrary to the public interest purpose of the *Environmental Assessment Act* (*EAA*), namely the betterment of Ontarians by providing for the protection, conservation, and wise management of the environment.

Accordingly, CELA recommends that this flawed proposal should be withdrawn and re-considered by the Ontario government.

1. CELA's Background and Experience in EA Matters

Our detailed comments on various aspects of the current ERO posting are set out below. These comments are based on CELA's decades-long experience under the *EAA*, including:

- representing clients in Individual EA processes for undertakings caught by Part II of the *EAA*
- representing clients in Class EA processes (e.g., the MCEA), including the filing of requests for Part II orders (also known as "elevation" or "bump-up" requests)
- representing clients in judicial review applications, statutory appeals, and administrative hearings in relation to the *EAA*

[1] See New regulation to focus municipal environmental assessment requirements | Environmental Registry of Ontario.

- filing numerous law reform submissions on the *EAA* and regulations, including new or proposed regulatory exemptions for specific sectors, undertakings, or proponents

- participating in provincial advisory committees considering matters under the *EAA*

- conducting public education/outreach, and providing summary advice, to countless individuals, non-governmental organizations, Indigenous communities, and other persons interested in matters arising under the *EAA*

Accordingly, CELA has carefully considered the proposal in the above-noted Registry posting from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

2. MECP's 2023 Consultation regarding the MCEA (ERO 019-6693)

Despite the decades-long existence of the MCEA, last year the MECP consulted on its proposal "to evaluate the requirements for municipal road, water and wastewater projects that are currently subject to the Municipal Class Environmental Assessment (Municipal Class EA) that may also include requirements under other legislation."[2] However, the notice was framed in ambiguous terms and simply set out broad options under consideration rather than precise measures that the provincial government was actually proposing to undertake in relation to the MCEA.

Among other things, the 2023 ERO notice advised that "Ontario is seeking feedback on changes that will improve timelines for completing low-risk infrastructure projects such as municipal roadways." However, no specific "improved" timelines were proposed within the notice, and there was no attempt to define "low-risk infrastructure projects" or provide a proposed list (or quantitative thresholds) of the kinds of infrastructure projects that fit within this so-called "low risk" category. The notice further stated that "similar projects in municipalities led by other [private sector] proponents would have no EA requirements; the related regulation[3] would be revoked."

In response to ERO 019-6693, CELA, other environmental organizations, and several Indigenous communities jointly filed a detailed letter that raised numerous concerns about the proposal regarding the MCEA.[4] While CELA and the letter signatories urged the Ontario government to withdraw and re-consider the proposal, it appears that this ill-advised initiative is still proceeding via ERO 019-7891, as described below.

3. Overview of the Current Proposal in ERO 019-7891

The ERO posting summarizes the current proposal as follows:

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[2] See Evaluating municipal class environmental assessment requirements for infrastructure projects | Environmental Registry of Ontario.
[3] See O. Reg. 345/93: DESIGNATION AND EXEMPTION - PRIVATE SECTOR DEVELOPERS (ontario.ca).
[4] See Submission on Environmental Assessment Changes Proposed by Ontario Government - Canadian Environmental Law Association (cela.ca).

> We are proposing to revoke the Municipal Class EA (MCEA) and make a streamlined EA regulation for municipal infrastructure for higher-risk projects. The new regulation would help deliver critical public works to support housing infrastructure for Ontario's rapidly growing population…
>
> We are proposing a new environmental assessment regulation for municipal infrastructure that puts the focus on certain water, shoreline, and sewage system projects. This approach will help us eliminate unnecessary burden on lower-impact projects and reduce duplicative requirements to support Ontario's rapidly growing population.

The ERO notice goes on to describe the types of municipal infrastructure projects that will be subject to the forthcoming regulatory regime under Part II.4 of the *EAA*:

> Examples of these project types include:
>
> Drinking water facilities
>
> - constructing a new water system including a new well
> - establishing a new surface water source
> - constructing a new water treatment plant or expanding facility beyond existing rated capacity
>
> Sewage treatment facilities
>
> - constructing a new sewage treatment plant that processes over 50,000 litres of sewage per day
> - expanding an existing sewage treatment plant by 25% or more of existing rated capacity, establishing new lagoons, or expanding lagoons beyond existing rated capacity
>
> Stormwater management systems
>
> - constructing or modifying retention/detention facilities for stormwater control where active treatment (chemical/biological) is required
>
> Shoreline/In-water works
>
> - constructing a new dam in a watercourse
> - constructing new shoreline works such as offshore breakwaters, groynes (a shore protection structure) or seawalls

Alarmingly, the ERO posting also proposes that all other municipal projects currently caught by the MCEA will be excluded from the new regulation and will <u>not</u> be subject to any EA requirements under the *EAA*:

Other projects which are currently subject to the MCEA and not listed in the proposed regulation would no longer have *EA Act* requirements. This would include:

- all projects that are currently subject to Schedule B of the MCEA (2023), including constructing a new pumping station; a new, expansion or replacement of water intake pipe for a surface water source; or, expanding a sewage treatment plant, including relocation or replacement of outfall to receiving water body, up to existing rated capacity where new land acquisition is required;
- certain smaller sewage treatment plant expansions which are currently subject to Schedule C of the MCEA (e.g. expansions to existing facilities less than 25% of existing rated capacity and all new facilities under 50,000 litres per day);
- all municipal roads or new parking lots in any location, reconstruction of any bridges with or without cultural heritage value, all water crossings;
- all private sector infrastructure projects for residents of a municipality regardless of size, including a new sewage treatment plant of any size;
- the municipal projects that are currently exempt through the Class EA or by Section 15.3 (4) of the *EA Act* (Bill 108) and those proposed to be exempted under the Comprehensive Project List (CPL) regulation proposal, are not proposed to be made subject to the streamlined EA process under this proposed regulation;
- transit projects in the CPL regulation proposal (ERO posting 019-4219) would be subject to the process articulated in that proposal, rather than this proposal (emphasis added).

4. CELA's Comments on the Current Proposal in ERO 019-7891

(a) Paucity of Detail in the Proposal

While the posting states that the Ontario government is proposing to make a new regulation regarding EA requirements for certain municipal infrastructure projects, there is no draft regulation that accompanies the ERO notice. This omission makes it virtually impossible for CELA, stakeholders, and members of the public to review and comment on the regulatory requirements contemplated by the MECP at this time. This is particularly true since the above-noted list of projects to be included in the new regulation are merely offered by the MECP as illustrative "examples," rather than a full or exhaustive list of the project types that will be designated by regulation.

On this point, CELA notes that when the MECP consulted in 2022 on its proposed project list regulation for Comprehensive EAs, the ERO posting (019-4219) included the actual text of the draft regulation for public consultation purposes. Given this helpful precedent, CELA is unclear why ERO 019-7891 has not provided the draft regulation for municipal infrastructure projects. At the very least, the draft regulation (if and when available) must be posted on the ERO and public comment should be solicited by the MECP.

Similarly, ERO 019-7891 does not append or link to the draft Municipal Project Assessment Process (MPAP) that is mentioned in the posting. Again, CELA submits that the MECP's failure or refusal to provide the draft MPAP undermines meaningful public on the proposed process, and

the draft MPAP should be posted on the ERO for public review/comment, assuming that this initiative proceeds any further.

In making this submission, CELA is aware that the ERO posting states that the forthcoming MPAP will be "based" on the 2008 Transit Project Assessment Process under O.Reg.231/08. CELA also acknowledges that the Registry notice (including the accompanying "Summary of Requirements") attempts to describe some of the essential elements and main steps of the proposed MPAP. However, CELA submits that this description is only a high-level overview that lacks the specificity which is needed to facilitate informed public feedback on the proposed MPAP. This concern is compounded by the ERO notice's vague commitment that unspecified "guidance" will be provided in the future to proponents which will be subject to the MPAP.

CELA further submits that the MECP proposal is premised on the questionable assumption that "basing" the MPAP on the 16 year-old transit assessment process will result in an effective, enforceable, and equitable process for planning and consulting upon sewage, water, and wastewater projects. Presumably, there will be some similarities and key differences between the two assessment processes, but at this time it is exceedingly difficult to fully comment on the procedural and substantive adequacy of the proposed MPAP. Moreover, CELA[5] and the former Environmental Commissioner of Ontario[6] were highly critical of the transit assessment process when it was developed in 2008, which suggests that the MECP should reconsider its proposal to use the transit assessment process as the template for the proposed MPAP.

In addition, the ERO posting states that "transitional" provisions will be included in the new regulation, and that "complementary" changes will be made to regulations under other statutes. Again, there is an abject lack of detail in the posting about the content or timing of these other regulatory proposals. In our view, the lack of particulars in the Registry notice undermines the ability of the public to meaningfully comment on Ontario's proposal regarding the MCEA and the new regulations.

Finally, while the ERO notice asserts that the proposal will reduce "delay," CELA notes that the posting does not attach or link to any statistical information about how long it typically takes for municipal infrastructure projects to complete the prescribed steps of the current MCEA. The MECP's "delay" argument is especially unpersuasive at present since members of the public can no longer file "bump up" requests under the MCEA on environmental grounds.

(b) Lack of Risk Criteria or Analysis to Identify Appropriate Municipal Projects

The ERO notice proposes to restrict the application of the new regulatory process to only infrastructure projects that are deemed to be "complex" and "higher risk." According to the posting, all other municipal projects that are currently subject to the MCEA will no longer be subject to any *EAA* requirements, presumably because, in the MECP's view, they do not pose "high risks" and may be subject to other legislative approval processes (see below).

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[5] See, for example, Draft Regulations under the Environmental Assessment Act for Public Transit Projects and the Draft Transit Priority Statement - Canadian Environmental Law Association (cela.ca); Interim Guide: Ontario's Transit Project Assessment Process - Canadian Environmental Law Association (cela.ca).

[6] Environmental Commissioner of Ontario, *Annual Report 2008-09*, at pages 78-81.

However, CELA submits that the MECP has failed to provide objective, persuasive, or evidence-based analysis of the environmental or socio-economic risks posed by the municipal projects that will – or will not – be subject to the new regulatory regime. For example, the ERO notice does not contain or link to any documents that systematically identify, quantify, or analyze the relative risks posed by the projects that are to be included or excluded in the new regime. Similarly, the ERO notice provides no criteria, standards, or benchmarks used by the MECP to determine which projects are – or are not – sufficiently "high risk" to warrant inclusion in the new regulatory process.

In the result, CELA submits that the proposal to severely limit the application of the new regulatory regime appears to be highly subjective and arbitrary. Moreover, the MECP's decision-making on the municipal project list is not transparent, intelligible, or accountable. Accordingly, the MECP has not demonstrated any public interest justification for only applying the new process to certain types of sewage, water, or wastewater infrastructure projects, or for excluding all other environmentally significant or contentious projects (e.g., municipal roads) that currently trigger MCEA requirements.

More fundamentally, by purporting to focus on so-called "high risk" projects, the MECP is overlooking the public interest need for smaller or less complex projects to undergo appropriate EA planning requirements, even if they may pose moderate (or unknown) risks. This is why the MCEA has traditionally created different types of assessment requirements that are tailored to the nature, extent, frequency, and significance of a municipal project's potential impacts to the environment. In CELA's view, the potentially variable range of environmental impacts posed by municipal projects is precisely why the MCEA properly takes a precautionary approach by including low, medium, and high-risk classes of projects in the attached schedules and establishing EA planning processes that are commensurate with the perceived risks.

CELA further submits that this important flexibility under the MCEA will be lost if only a relatively small handful of infrastructure projects will be subject to the "one size fits all" approach under the proposed MPAP. After all, EA requirements are not "red tape" and are instead predictive, anticipatory, and preventative so that informed decisions can be made on whether environmentally significant projects should be permitted to proceed. In our view, the wide-ranging exclusion of numerous types of municipal projects from the scope of the new regulation without an adequate explanation or any evidence-based reasons is inconsistent with this overarching public interest purpose.

(c) The Objectionable Exclusion of Municipal Road Projects

CELA strongly objects to the unjustifiable exclusion of municipal road projects from the new regulation and the proposed MPAP. In our experience, municipal roads are, in fact, infrastructure projects that can be environmentally significant and highly contentious, depending on the site-specific location, design, construction, and operation of the proposed roadway. In short, municipal road projects can cause or contribute to serious environmental harm, which, for example, served as the MECP's basis for granting a "bump up" request under the MCEA in relation to the controversial Parkway project in Peterborough.

CELA acknowledges that a proposal to extend or widen a municipal road in an urbanized area may be "low risk" under certain circumstances. However, the same proposal in a rural or greenfield setting (e.g., a new road through or adjacent to provincially significant wetlands, important woodlands, or habitat for species at risk) clearly has considerable potential to cause serious or irreversible impacts which should be identified, avoided, or mitigated in an appropriate EA process.

(d) The Unfounded "Duplication" Argument by MECP

The Registry notice implies that the existence of other legislative or planning requirements for certain municipal projects negates the need to include such projects in the new regulatory regime:

> Depending on the project and location, there may be other legislative, regulatory and/or municipal requirements outside of the *EA Act*. Any applicable permit or approval would still be required. Municipalities will continue to consult on official plans. Municipalities may continue to carry out master servicing planning under their own processes to assess planned municipal infrastructure.

In response, CELA notes that the infrastructure "examples" listed in the posting often require licences, permits, or approvals under other provincial statutes (e.g., *Ontario Water Resources Act*, *Safe Drinking Water Act*, *Conservation Authorities Act*, *Lakes and Rivers Improvement Act*, etc.). Accordingly, the presence or absence of other applicable approval requirements does not appear to have played a major role in the MECP's determination of which municipal projects should – or should not – be subject to the new regulatory process.

More importantly, CELA submits that the posting is incorrect in suggesting that there is "duplication" between the EA program and other planning, approvals, or asset management regimes. For example, no other provincial statute (including the *Planning Act*) requires proponents to identify need/purpose, consider alternatives, and systematically evaluate biophysical, ecological, or socio-economic impacts of proposed projects. In our view, this is precisely why EA requirements are not "duplicative" and do not constitute "unnecessary burden," as indicated in the Registry notice.

In addition, regulatory statutes (e.g., *Environmental Protection Act*, *Ontario Water Resources Act*, etc.) tend to deal with technical details or discrete aspects of proposed projects (e.g., final design specifications). In contrast, only the *EAA* requires an upfront and comprehensive assessment of the environmental effects of an undertaking and its alternatives. Similarly, only the *EAA* addresses the "big picture" environmental planning questions that typically do not get asked or answered under regulatory statutes. In her 2016 Annual Report, the provincial Auditor General also dispelled the myth that other regulatory requirements are duplicative of EA requirements.[7]

[7] See 3.06 Environmental Assessments (auditor.on.ca).

5. Conclusion and CELA's Recommendations

In conclusion, it is unclear to CELA why it is now suddenly necessary, at least according to the Ontario government, to revoke the MCEA in its entirety. This proposal is particularly puzzling since the MECP recently spent considerable time in reviewing and approving amendments to the MCEA.[8] Accordingly, CELA recommends that instead of revocation, the newly amended MCEA should be left intact, monitored during implementation, and subject to further amendments to address new or emerging issues.

For the foregoing reasons, CELA calls upon the provincial government to withdraw and re-consider the fundamentally flawed proposal outlined in ERO 019-7891. In our view, if Ontario is serious about implementing credible, robust, efficient, evidence-based, and participatory EA processes in relation to municipal projects, then this new proposal cannot proceed in its current form.

More generally, CELA recommends that the Ontario government should re-focus its *EAA* modernization program away from attempting to make Comprehensive EA and Streamlined EA processes faster, easier, less robust, or applicable to far fewer projects. Instead, the province must develop, with meaningful public and Indigenous consultation, the necessary EA reforms that have been advocated over the years by civil society, the Auditor General of Ontario, the former Environmental Commissioner of Ontario, and various stakeholders, academics, and practitioners. These long overdue reforms include:

- updating and improving the purposes and principles of the *EAA* to reflect a sustainability focus
- ensuring meaningful opportunities for public participation in Individual EAs/Comprehensive EA and Class EAs/Streamlined EAs
- establishing an accessible, comprehensive, and user-friendly online registry to contain all notices, records, information, decisions, and other documentation arising from Individual EAs/Comprehensive EAs and Class EAs/Streamlined EAs
- enhancing consultation requirements for engaging Indigenous communities in a manner that aligns with the United Nations Declaration on the Rights of Indigenous Peoples, including the right to free, prior and informed consent
- reinstating "proponent pays" intervenor funding legislation to facilitate public participation and Indigenous engagement
- restoring the public's ability to request "bump-ups" on environmental grounds

[8] See Notice of amendment: Municipal Class Environmental Assessment | Environmental Registry of Ontario. See also Cover amended 2007 FINAL.cdr (prod-environmental-registry.s3.amazonaws.com).

- entrenching a statutory climate change test to help *EAA* decision-makers to determine whether a project should be approved or rejected due to its greenhouse gas emissions, carbon storage implications, and other climate change considerations (e.g., increased wildfires, floods, extreme weather, urban heat islands, etc.)

- curtailing the ability of the Minister to approve Terms of Reference that narrow or exclude the consideration of a project's purpose, need, alternatives or other key factors in Individual EAs/Comprehensive EAs

- extending the application of the *EAA* to environmentally significant projects within the private sector (e.g., mines)

- requiring mandatory and robust assessment of cumulative effects under the *EAA*

- facilitating regional assessments under the *EAA* for sensitive, significant, or largely undeveloped geographic areas in the province

- ensuring strategic assessments of governmental plans, policies, and programs under the *EAA*

- referring Individual EA/Comprehensive EA applications to the Ontario Land Tribunal for a hearing and decision upon request from members of the public or Indigenous communities

- reducing the lengthy list of environmentally significant undertakings that have been exempted from the *EAA* by regulation, declaration orders, or legislative means

- removing section 32 of the *Environmental Bill of Rights* (*EBR*), which currently exempts from the *EBR*'s public participation regime any licenses, permits or approvals that implement undertakings that have been approved or exempted under the *EAA*.

We trust that CELA's comments and recommendations will be duly considered as the Ontario government contemplates its next steps in implementing EA modernization and revising EA requirements for municipal projects.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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