Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

May 30, 2019

Via email: comm-justicepolicy@ola.org

Jocelyn McCauley
Committee Clerk - Standing Committee on Justice Policy
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Ms. McCauley:

Re: Bill 108, *More Homes, More Choices Act, 2018*

On behalf of the Canadian Environmental Law Association (CELA), please find for the assistance of the Standing Committee the attached Presentation on Bill 108 (*More Homes, More Choices Act, 2019)*, specifically with respect to Schedules 2 (*Conservation Authorities Act*), 5 (*Endangered Species Act, 2007)*, 6 (*Environmental Assessment Act*), 9 (*Local Planning Appeal Tribunal Act, 2017*) and 12 (*Planning Act)*. The presentation is organized as follows:

I. Introduction

II. Summary Review of Selected Statutes under Bill 108

III. Conclusions

IV. Consolidated Recommendations

V. Consolidated Suggestions for Sections of Bill 108

VI. Attachments (consisting of more detailed reviews of the above statutes contained in four recent submissions provided to the provincial government on Bill 108)

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Jessica Karban, Counsel

Joseph Castrilli, Counsel

Presentation to the Ontario Standing Committee on Justice Policy on Bill 108, More Homes, More Choices Act, 2019

By Jessica Karban and Joseph F. Castrilli

Counsel

Canadian Environmental Law Association

May 31, 2019

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I. Introduction

The Canadian Environmental Law Association ("CELA") uses existing laws to protect the environment and, where necessary, advocates environmental law reforms.

This presentation is a summary of several recent briefs and submissions prepared by CELA alone, or with other organizations, regarding various schedules to Bill 108. The schedules addressed in this presentation contain proposed amendments to several environmental or land use planning statutes including the *Conservation Authorities Act*, *Endangered Species Act, 2007*, the *Environmental Assessment Act* ("*EAA*"), the *Planning Act*, and the *Local Planning Appeal Tribunal Act, 2017* ("*LPATA*"). The presentation consolidates our recommendations with respect to each statute from the briefs and submissions, which are themselves attached for the consideration of the Standing Committee.

It is CELA's overall submission that there are a number of amendments of a positive nature in the schedules reviewed (e.g. restoring of de novo hearings under *LPATA*, and of certain appeal grounds under the *Planning Act*, and granting of Ministerial authority to reconsider previously issued approvals under the *EAA*). However, the bulk of the amendments do not advance sound land use planning, environmental protection, or human health and safety. In fact, the cumulative negative impact of the amendments, may reduce the role of the public in land use planning decisions, facilitate increased environmental harm, cause further decline in endangered and threatened species, and hamstring flood protection measures in the province at a time when increasingly extreme weather events fueled by climate change are accelerating these problems.

II. Summary Review of Selected Statutes under Bill 108

A. Conservation Authorities Act (Schedule 2)

Proposed amendments to the *Conservation Authorities Act* (as well as a provincial Ministry of Natural Resources and Forestry notice proposal on conservation authority development permits) while ostensibly focused on improving "Ontario's resilience to climate change", in fact: (1) could constrain the ability of conservation authorities to engage in proper watershed management (e.g.

by limiting core programs and services related to conservation and management to lands owned by conservation authorities); and (2) are coupled with a 50 per cent cut to the natural hazards funding of conservation authorities by the provincial government. Furthermore, the proposed policy also calls for the exemption of "low risk" developments from obtaining a permit from a conservation authority. Such amendments will not make Ontario more resilient to climate change or less prone to flood hazards and risks.

B. Endangered Species Act (Schedule 5)

Proposed amendments to the *Endangered Species Act, 2007*, could: (1) allow threatened and endangered species to remain unprotected in Ontario if there are more robust populations outside of Ontario (based on consideration of their biologically relevant geographic range external to Ontario); (2) delay both the classification of species not currently listed on the Species At Risk in Ontario ("SARO") List (O Reg 230/08) and their automatic protection upon being listed; (3) establish a new form of agreement, known as a Landscape Agreement, which will permit otherwise prohibited activities to occur within a defined geographic area, thereby risking further loss of species in return for making a financial contribution to a "Conservation Fund"; and (4) allow the Minister to enter such an agreement without first seeking expert scientific advice. These measures are not consistent with a statute whose purpose is to protect endangered and threatened species.

C. Environmental Assessment Act (Schedule 6)

As noted above, there are certain proposed amendments to the *EAA* that CELA supports. These amendments are primarily in regard to expanding Ministerial authority to reconsider previous approvals issued under the Act. These amendments would: (1) empower the Minister to order a proponent to provide plans, specifications, technical reports or other information, and carry out and report on tests or experiments relating to the undertaking; (2) clarify that the approval being reconsidered by the Minister or the Environmental Review Tribunal may be amended or revoked; (3) specify that reconsideration decisions must be made in accordance with any rules and subject to any prescribed restrictions; and (4) ensure that the applicable section [s. 11.4] applies not only to approvals issued under the current Act, but also to approvals issued under the previous version of the *EAA*.

However, there are other proposed amendments to the *EAA* that CELA does not support that would: (1) exempt undertakings (or groups of undertakings such as public works, or provincial transportation facilities) from the statute's existing class environmental assessment ("EA") regime (which is already a system of streamlined assessment and public consultation of what are supposed to be environmentally routine and low risk projects); and (2) further constrain the public's ability to file requests for "bump-up" orders seeking a full environmental assessment of particular class EA projects. Regarding the first point, the class EA process has long been criticized by the office of the Environmental Commissioner of Ontario, the Auditor General of Ontario, and the 2005 Ontario Environmental Assessment Advisory Panel for being too lax and not subject to proper environment ministry oversight. Bill 108 will not improve this situation. Regarding the second point, between 2011 and 2016, the Auditor General found that only 1 of 177 bump-up requests

were granted by the province. In the circumstances, this regime should not be further restricted to just: (1) potential impacts to existing treaty and aboriginal rights under s. 35 of the Constitution; (2) a prescribed matter of "provincial importance"; or (3) a matter raised by a "qualified" person, as proposed by Bill 108.

D. Local Planning Appeal Tribunal Act, 2017 (Schedule 9)

As noted above, there are also certain proposed amendments to the *LPATA* that CELA supports, in particular the restoration of de novo appeals under the Act.

However, there are other proposed amendments to the *LPATA* that CELA does not support. These would: (1) limit the right of participants in LPAT hearings to written submissions only; and (2) repeal the authority of an LPAT panel to state a case to Divisional Court for an opinion. Limiting participants to written submissions deprives them of giving, and an LPAT panel of receiving, direct testimony during the course of a proceeding that may be of value to a tribunal in its consideration of, and deliberations on, matters before it. Repealing the authority of an LPAT panel to state a case deprives the immediate parties as well as parties in future cases of the value of judicial consideration of constitutional, legal, evidentiary, or other procedural advice that can facilitate the conduct of future proceedings.

E. Planning Act (Schedule 12)

Finally, as noted above, there are also amendments to the *Planning Act* that CELA supports that restore the basis for more fulsome grounds of appeal under the Act, such as non-comformity with provincial interests listed in s. 2 of the Act.

However, there are other proposed amendments to the *Planning Act* that CELA does not support. These amendments would: (1) restrict the ability of members of the public to appeal certain types of decisions, including (a) Minister-ordered development permits in connection with official plans, (b) non-decisions concerning an official plan, and (c) decisions on plans of subdivisions; and (2) shorten timelines for decisions by municipalities and planning boards, which will trigger more appeals to the LPAT by developers on the grounds that these governmental bodies failed to make a decision within the allotted time.

III. Conclusions

For the reasons set out more fully in our attachments, CELA concludes that Schedules 2, 5, and 6 regarding conservation authorities, endangered species, and environmental assessment, address some matters that do not require resolution, and fail to address problems that do require resolution. Accordingly, these schedules (with the exception of amendments to s. 11.4 of the *EAA*) should not be proceeded with at this time.

With respect to Schedules 9 and 12, CELA concludes that while there are some appropriate amendments in these schedules (e.g. restoring of de novo hearings, and more fulsome grounds of appeal), other proposed amendments restrict public participation in land use planning appeals and unduly shorten decision-making timelines, which are not warranted and that should not be enacted.

IV. Consolidated Recommendations from Briefs and Submissions

Conservation Authorities Act (Schedule 2)

RECOMMENDATION 1: Delay enacting Bill 108, Schedule 2 until fulsome and meaningful public consultations, aimed at ensuring that the proposed budgetary, legislative, and any future regulatory changes meet the desired vision of improving Ontario's resilience to climate change have been undertaken.

RECOMMENDATION 2: Ensure that legislative amendments to the *Conservation Authorities Act* do not hamper or limit the ability of conservation authorities to develop and deliver watershed-wide programs and services aimed at Ontario's climate resilience.

RECOMMENDATION 3: Provide additional details related to the timing of bringing various new provisions into force, as well as the content and development of future regulation(s).

RECOMMENDATION 4: Provide adequate resources for conservation authorities to achieve the goal of climate resilience across Ontario's watersheds.

RECOMMENDATION 5: Conservation authorities' five tests for development proposals must remain to include the consideration of wetlands and watercourses.

RECOMMENDATION 6: Conservation authorities' mandate must reflect their ability to implement effective integrated watershed management in a holistic way through their existing programs and services.

RECOMMENDATION 7: There should be no, so called "low-risk", developments exempted from development regulations and the permitting process.

RECOMMENDATION 8: Adopt a stable funding model to allow conservation authorities to fully exercise their development oversight function independently.

Endangered Species Act, 2007 (Schedule 5)

RECOMMENDATION 1: Maintain the cornerstones of the *ESA*: science-based listings, automatic protections, and mandatory timelines. This aligns with endangered species' protection best practices, which necessitates the identification of species at risk and their habitat, prohibitions on their killing and harming, and investment in their recovery.

RECOMMENDATION 2: Maintain the strict timelines set out in the *ESA*. Any changes to the *ESA* which lengthen the timeline for species assessment and listing are unwarranted for the express reason that it may cause further declines to their population and threaten their survival or recovery.

RECOMMENDATION 3: Retain the requirement for the government to consult with an expert prior to entering into agreements with a person or proponent to permit otherwise prohibited activities.

RECOMMENDATION 4: Apply binding standards and prohibitions against harming or killing at-risk species and their habitat broadly and consistently, instead of on a sector-by-sector or activity basis. Codes of practice, standards and guidelines regarding listed species should not be the primary means of protecting species and their habitat.

RECOMMENDATION 5: We do not support the Bill's proposal for landscape agreements. If the government chooses to go ahead with landscape agreements, and before any such agreement is approved, we request the government disclose upon what basis it will designate 'benefiting' and 'impacted' species, and develop clear and consistent policies outlining how a decision will be made respecting their jeopardy.

RECOMMENDATION 6: Ensure that authorizations remain the exception, not the norm. Authorizations which allow persons to engage in otherwise prohibited activities undermines the purposes of the *Act* and are contrary to endangered species protection best practices. Increasing the number of ways in which an authorization can be sought should not be permitted for the express reason that it is contrary to the *Act's* purposes of species recovery and protection.

RECOMMENDATION 7: Maintain mandatory conditions to be met, such as the 'overall benefit' requirements. Establishing a fund to protect species in lieu of conditions on permits, which is resourced by activities that directly harm species and their habitat, is contrary to the intent of the *ESA* and should not be advanced. Any action which provides a 'get out of jail free card' – in that proponents can pay a fee to act contrary to the *Act* – should not be permitted.

RECOMMENDATION 8: Set out the criteria upon which the Minister will base its decision to designate a species as a 'conversation fund species' and upon what basis their classification as such may change in the *Act.* The *Act* should not rely on non-binding guidelines to set out the activities and species eligible to receive funding.

RECOMMENDATION 9: Keep *ESA*-related notice postings on the *Environmental Bill of Rights* registry. The government should not substitute the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,*" with "a website maintained by the Government of Ontario." Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is an already well-established portal for achieving this purpose.

RECOMMENDATION 10: Require proponents engaging in harmful activities to publicly provide mitigation plans and monitoring reports, to enhance transparency, accountability, and the public's right to know.

Environmental Assessment Act (Schedule 6)

RECOMMENDATION 1: When developing reconsideration rules under subsection 11.4 of the *EAA*, the Minister should consult interested stakeholders to ensure that the rules entrench opportunities for meaningful public participation in the decision-making process.

RECOMMENDATION 2: The Ontario government should not proceed with Schedule 6's statutory amendments which require Class EAs to specify types of undertakings that will be exempt from the *EAA*.

RECOMMENDATION 3: The Ontario government should not proceed with Schedule 6's proposed revisions of section 16 of the *EAA* in relation to elevation (or "bump up") requests filed by members of the public pursuant to Class EAs.

RECOMMENDATION 4: The Ontario government should develop and consult upon appropriate amendments to section 16 of the *EAA* that reflect the reforms suggested by the EA Advisory Panel in relation to Class EAs and elevation (or "bump up") requests.

RECOMMENDATION 5: The Ontario government should develop and consult upon appropriate legislative and regulatory changes to the current EA program that are needed to achieve the public interest purpose of the *EAA*.

Local Planning Appeal Tribunal Act, 2017 (Schedule 9)

RECOMMENDATION 1: Bill 108 should restore the applicability of the *Statutory Powers and Procedures Act* to Local Planning Appeal Tribunal cases, including in cases of conflict between the *Statutory Powers Procedures Act* and the *Local Planning Appeal Tribunal Act, 2017.*

RECOMMENDATION 2: CELA recommends that the Ontario government provide funding assistance for lawyers, planners and other experts to eligible members of the public and community groups at the Local Planning Appeal Tribunal to improve access, fairness, and the quality of decisions.

RECOMMENDATION 3: Funding for the Local Planning Appeal Support Centre should be restored.

RECOMMENDATION 4: The proposed section 33.2 of the *LPAT Act* (section 5 of Schedule 9) should be removed to allow participants to participate in the Local Planning Appeal Tribunal process either in writing or by making an oral statement to the tribunal.

RECOMMENDATION 5: Section 6 of Schedule 9, which repeals section 36 of the *Local Planning Appeal Tribunal Act, 2017*, should be removed. The power of the LPAT or the parties to refer a stated case to the Divisional Court for opinion should be maintained.

Planning Act (Schedule 12)

RECOMMENDATION 6: Sections 3(2), 3(11), 14(3), 14(4), 14(6), 14(7) of Schedule 12, Bill 108 should be removed to maintain the public's ability to appeal development permit system provisions in Official Plans, non-decisions on an Official Plan, and plans of subdivision.

RECOMMENDATIO 7: Sections 3(11), 4(2), 6(1) and 14(2) of Schedule 12, Bill 108 should be removed to maintain the current timelines for decision in *Planning Act* matters.

RECOMMENDATION 8: Section 3(12) of Schedule 12, Bill 108 should be removed to maintain municipal discretion to extend the timeline for Official Plan decisions in appropriate circumstances. Municipalities or planning boards should also be granted similar discretion to extend any *Planning Act* decision timeline in appropriate circumstances.

RECOMMENDATION 9: CELA's supports Bill 108's restoration of more fulsome appeal grounds to the Local Planning Appeal Tribunal.

V. Consolidated Suggestions for Sections of Bill 108

Conservation Authorities Act (Schedule 2): **Delay** amendments to any sections of existing Act.

Endangered Species Act, 2007 (Schedule 5): **Delete** sections 5(4); 5(5); 6(1); 12.1; 12.2; 16.1; 20.1-20.18; 48.1; 56(1)(c)-(e).

Environmental Assessment Act (Schedule 6): **Delete** sections 4; 5; 6; 7; 8(5); 9.

Local Planning Appeal Tribunal Act, 2017 (Schedule 9): **Delete** sections 5; 6.

Planning Act (Schedule 12): **Delete** sections 3(2); 3(11)-(12); 4(2); 6(1); 14(2)-(4); 14(6)-(7).

VI. Attachments

The following briefs and submissions have been prepared by CELA alone, or with other organizations, on Bill 108 and are attached to this presentation:

1. Anastasia M. Lintner (CELA), Kelsey Scarfone (Environmental Defence Canada), Conservation Authorities Modernization (Operations and Permitting) ER) Numbers 013-5018 and 013-4992, Schedule 2, Bill 108 (May 21, 2019).

2. Anastasia M. Lintner (CELA), Sue Tan (Ecojustice), Kerrie Blaise (CELA), Submissions Regarding Legislative Amendments to the Endangered Species Act, Bill 108, Schedule 5, ERO 013-5033 (May 16, 2019).

3. Richard D. Lindgren (CELA), Proposed Changes to the Environmental Assessment Act, ERO 013-5102, Bill 108, Schedule 6 (May 16, 2019).

4. Jacqueline Wilson, (CELA), Submissions Regarding Legislative Amendments to the Local Planning Appeal Tribunal Act, 2017 and the Planning Act Bill 108, Schedules 9 and 12 (May 30, 2019).

May 21, 2019

BY EMAIL & REGULAR MAIL

Carolyn O'Neill
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Dear Ms O'Neill and Mr McLeod:

RE: Conservation Authorities Modernization (Operations and Permitting)
ERO Numbers: 013-5018 and 013-4992
Schedule 2, Bill 108

Attached please find our submission for Environmental Registry of Ontario postings #013-5018 (including Schedule 2, Bill 108) and #013-4992.

The Canadian Environmental Law Association and Environmental Defence Canada put forward the attached submission with the endorsement of the undersigned 11 individuals and 18 organizations.

We trust our recommendations will be duly considered and urge both the Ministry of the Environment, Conservation and Parks and the Ministry of Natural Resources and Forestry to consider the potential impacts of these proposed amendments to the health of Ontario's watersheds, our climate resilience, and to ecological wellbeing.

Sincerely,

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COUNTY SUSTAINABILITY GROUP
LOCAL ACTION ON GLOBAL ISSUES

Don Ross, Board Member, County Sustainability Group, Prince Edward County

Lisa Kohler, Executive Director, Halton Environmental Network

Jill Ryan, Executive Director, Freshwater Future Canada

Sandy Agnew, President, Simcoe County Greenbelt Coalition

Linda Heron, Chair, Ontario Rivers Alliance

Patrick Nadeau, Executive Director, Ottawa Riverkeeper

Mark Bartlett, President
Unifor Windsor Regional Environment Council

Attachment

SUBMISSION

Conservation Authorities Modernization (Operations and Permitting)
ERO Numbers: 013-5018 and 013-4992
Schedule 2, Bill 108

Authored by:

Anastasia M Lintner, Special Projects Counsel, Healthy Great Lakes
Canadian Environmental Law Association

Kelsey Scarfone, Program Manager, Water
Environmental Defence Canada

May 15, 2019

This submission represents our comments to date regarding two Environmental Registry of Ontario (ERO) proposals - "Modernising conservation authorities operations – Conservation Authorities Act" (ERO Number: 013-5018) and "Focusing conservation authority development permits on the protection of people and property" (ERO Number: 013-4992). It also contains our preliminary comments regarding Schedule 2, Bill 108, the proposed More Homes, More Choices Act, 2019. We reserved the right to provide further comment during the legislative process regarding Bill 108.

Overview

On April 5, 2019, two proposal notices regarding conservation authorities modernization (operations and permitting) were posted to the Environmental Registry of Ontario (ERO) for public comment. In a news release on the same day, it was stated, "These recommended changes are part of Ontario's commitment to support conservation and environmental planning and improve Ontario's resilience to climate change."

A week later, Conservation Ontario received the news that the province will cut the natural hazards funding in half (from $7.4million shared across Ontario's 36 conservation authorities) as a result of the 2019 budget entitled "Protecting What Matters Most".

On May 2, 2019, Bill 108, the proposed More Homes, More Choices Act, 2019 was introduced for first reading. Schedule 2 of Bill 108 proposes amendments to the *Conservation Authorities Act*. We are deeply disappointed that amendments to the *Conservation Authorities Act* were tabled in the Ontario Legislature, well before the close of the public consultation (ERO Number: 013-5018 comments are due May 20, 2019 and ERO Number: 013-4992 comments are due May 21, 2019). The *Environmental Bill of Rights, 1993* (EBR) requires that a Minister shall do

everything in his or her power to ensure that there will be at least 30 days of notice before a proposal is implemented[1] and that the Minister shall consider giving more than 30 days of notice for proposed legislative changes to permit "more informed public consultation"[2]. Further, the EBR requires that a Minister "shall take every reasonable step to ensure that all comments" received "are considered when decisions about the proposal are made in the ministry".[3] These statutory requirements are not being met in the Ministry of the Environment, Conservation and Parks proposals regarding changes to the *Conservation Authorities Act*.

Further, and contrary to the media statement on April 5, 2019, Bill 108 is not aimed at improving Ontario's resilience to climate change, rather (as the preamble states):

> The government's vision is that all people and their families find a home that meets their needs and budget. The best way to achieve this is to increase housing supply by: …
>
> Giving municipal government greater authority over conservation authorities to make them more accountable;

Debate on second reading of Bill 108 has emphasized the government's focus on "speed, cost, mix, rent and innovation."[4] Specifically, the government wishes to increase speed and reduce cost of development through so-called "red tape reduction":

> We need to turn things around. The proposed legislative amendments I will be speaking to today would, if passed, help bring more housing, more quickly, to our province. They include changes to the Planning Act and the Development Charges Act, along with an impressive suite of legislative policy and regulatory changes that will support our robust plan to address development challenges in Ontario.[5]
>
> We are taking a whole-of-government approach to this file. Legislation administered by several ministries across government impacts housing development. We can't just fix the problem by changing one act. We have to fix the system, and we have to reduce duplication and unnecessary delays so that it works more efficiently.[6]

We strongly encourage the Ministries to hold fulsome and meaningful public consultations, aimed at ensuring that the proposed budgetary, legislative, and any future regulatory changes meet the desired vision of improving Ontario's resilience to climate change. Until such time as a full assessment of the proposed changes is complete, we call on the government to delay enacting Bill 108, Schedule 2.

Recommendation 1: Delay enacting Bill 108, Schedule 2 until fulsome and meaningful public consultations, aimed at ensuring that the proposed budgetary, legislative, and any

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[1] *Environmental Bill of Rights, 1993*, SO 1993, c 28, s 15(1).
[2] *Ibid*., s17(1).
[3] *Ibid*., s35(1).
[4] Ontario, Legislative Assembly, Hansard, 42nd Parl, 1st Sess, No 103 (8 May 2019) at 4846 (Hon Steve Clark).
[5] *Ibid*. at 4845 (Hon Steve Clark).
[6] *Ibid*. at 4848 (Hon Steve Clark).

future regulatory changes meet the desired vision of improving Ontario's resilience to climate change have been undertaken.

Conservation Authority Operations

One proposal is from the Ministry of the Environment, Conservation and Parks (MECP), titled "Modernising conservation authorities operations – Conservation Authorities Act" (ERO Number: 013-5018). Comments are due May 21, 2019 and are be directed to Carolyn O'Neill in the Great Lakes Office (glo@ontario.ca).

The ERO notice indicates that amendments will be proposed to the *Conservation Authorities Act* that are aimed at:

- Clearly distinguishing between the conservation authority's core mandatory programs and services and non-mandatory programs and services, the latter to be transitioned to having agreements with relevant municipalities (eg, over 18 – 24 months).
- Creating more transparency in conservation authority levies, particularly providing for a regular review (eg, every 4 – 8 years) for non-mandatory programs and services.
- Providing for greater scrutiny (eg, give the Minister the ability to appoint an investigator) and accountability (eg, clarifying the duty of conservation authority boards to act in the best interests of the conservation authority, as is the case for non-profit organizations).

The "core mandatory programs and services" will be limited to natural hazards protection/management, conservation/management of conservation authority lands, drinking water source protection and Lake Simcoe watershed protection.

The notice suggests that various yet-to-be-proclaimed provisions from the 2017 amendments will be brought into force, including fees for programs and services, approval of projects with provincial grants, recovery of capital costs and operating expenses from municipalities, regulation related to conservation authorities jurisdiction, enforcement and offences, and additional regulations.

Analysis – Conservation Authority Operations

In describing the mandatory programs and services, the notice uses the term "as prescribed by" the legislation enabling drinking water source protection (*Clean Water Act, 2006*) and enabling Lake Simcoe watershed protection (*Lake Simcoe Protection Act, 2008*). Using this term in amendments to the *Conservation Authorities Act* may inadvertently limit the complementary programs and services that conservation authorities provide in aid of safeguarding drinking water and the Lake Simcoe watershed.

Further, with respect to the division of programs and services into mandatory versus non-mandatory, consideration must be given to all provincially mandated conservation authority responsibilities (conservation authorities are mentioned in numerous statutes). Specific mandatory programs and services will be set out in a future regulation, and will be limited to those that are within the identified categories: natural hazards protection/management, conservation/management of conservation authority lands, drinking water source protection and Lake Simcoe watershed protection (proposed s21.1(2), 21.1(3)). Similarly, programs and services will be mandated to be provided in accordance with standards and requirements set out in future

regulations (proposed s21.1(3)). Non-mandatory programs and services will be enabled through memorandums of understanding with municipalities (proposed s21.1.1) or, if the conservation authority determines a program or service is "advisable to further its objects" and funding from municipalities is required, through agreements with municipalities as set out in future regulations (proposed s21.1.2). The proposed amendments also contemplate a transition plan related to funding agreements with municipalities (proposed s21.1.3) and consultations regarding programs and services, the details of which will be set out in future regulations (proposed s21.1.4).

The notice also includes as mandatory the conservation and management of "conservation authority lands". This is a legally defined term: "conservation authority land means land owned by a conservation authority" (s1, *Conservation Land Act*). Limiting core programs and services related to conservation and management only to those lands owned by conservation authorities will be a lost opportunity for leading integrated watershed management and climate change resilience.

With the recent announcement of a dramatic reduction in the natural hazards transfer payment, there is concern about how the necessary funds will be raised to ensure that the core (and provincially mandated) programs and services will be provided adequately across all conservation authorities.

Transparency and accountability in conservation authorities operations is something that has been discussed over a number of years. We are supportive of moving forward on implementation. In particular, we are supportive of identifying the duty of conservation authority boards to act in the best interests of the conservation authority (proposed s14.1). The proposed amendments also contemplate the ability for the Minister to appoint an investigator or investigators to conduct an investigation of a conservation authority's operations and require that the conservation authority pay (all or part of) the cost (proposed s23.1(4)-23.1(8)). The as yet to be proclaimed provisions relating to recovery of capital costs and operating expenses will be amended to prohibit the apportionment of non-mandatory programs, except by agreement with municipalities, after a date to be set by regulation (proposed s25(1.1)-25(1.3) and s27(1.1)-27(1.3)). There will be new provisions related to determining amounts owed by municipalities to conservation authorities as a result of programs and services related to drinking water source protection and Lakes Simcoe protection (proposed s27.1). As we submitted in relation to proposed amendments to the *Conservation Authorities Act* in 2017:

> … we have serious concerns about the number of provisions that will not come into force until a date to be proclaimed by Cabinet, the extent to which the new amendments will require regulations before the intention of those provisions can be realized, and the lack of a clear commitment to increased resources to accompany the increased provincial oversight and enhanced CA responsibility.[7]

Although there are some additional details in this proposal, our concerns remain equally relevant now as they were in 2017.

Finally, we suggest that regular review of non-mandatory programs and services be done on a cycle that is sufficiently long to be able to assess progress and does not directly coincide with the

[7] Submission dated July 26, 2017 re Proposed amendments to the Conservation Authorities Act as part of Bill (139), the Building Better Communities and Conserving Watersheds Act, 2017; EBR Registry Number 013-0561.

municipal election cycle (eg, so that the review is not happening at the exact same time as new board members are being orientated to their conservation authority's programs and services).

Recommendation 2: Ensure that legislative amendments to the *Conservation Authorities Act* do not hamper or limit the ability of conservation authorities to develop and deliver watershed-wide programs and services aimed at Ontario's climate resilience.

Recommendation 3: Provide additional details related to the timing of bringing various new provisions into force, as well as the content and development of future regulation(s).

Recommendation 4: Provide adequate resources for conservation authorities to achieve the goal of climate resilience across Ontario's watersheds.

Conservation Authority Development Permits

A second proposal is from the Minister of Natural Resources and Forestry (MNRF), titled "Focusing conservation authority development permits on the protection of people and property" (ERO Number: 013-4992). Comments are due May 21, 2019 and are to be directed to Alex McLeod in the Natural Resources Conservation Policy Branch (alex.mcleod@ontario.ca).

Conservation authorities are the only agency in Ontario that hold deep expertise in watershed features and health. This expertise has been acquired through decades of extensive stewardship, monitoring, research, mapping and on-the-ground contact with the watershed resources and stakeholders in the regions in which they operate. There is no other agency, Ministry, or entity in Ontario with the same comprehensive understanding of integrated watershed management (IWM).

The proposed changes will severely limit conservation authorities' ability to achieve effective IWM in order to prevent hazards from flooding, and achieve sustainable outcomes for watershed health in the province. The consequences of these changes include severed watershed management, increased risk of flooding, loss of coordination among stakeholders and agencies, along with severe degradation of ecological health and water quality in our headwaters, lakes, rivers, and wetlands of the Great Lakes basin.

Integrated Watershed Management

IWM is based on the perception of water as an integral part of the ecosystem, a natural resource and social and economic good[8]. IWM provides direction to human activities in order to protect and rehabilitate water, the aquatic and terrestrial health and the social and economic resources and assets in the watershed. Through an IWM model, conservation authorities are able to achieve coordinated development and management of water and land resources that protects people and property, as well as the health of ecosystems upon which our societies and economies rely.

Conservation authorities provide services and deliver programs in their regions in order to achieve these goals of protecting people and property. Effective IWM includes not only flood

[8] https://conservationontario.ca/fileadmin/pdf/policy-priorities_section/IWM_OverviewIWM_PP.pdf

mapping, mitigation and hazard protection but must also include programs and services such as wetland protection, climate change mitigation, biodiversity health and land use planning.

Further, in his Part Two Report of the Walkerton Inquiry, the Honourable Dennis O'Connor stressed the need to have a comprehensive approach to watershed management:

> Because drinking water source protection is one aspect of the broader subject of watershed management, it makes the most sense in the context of an overall watershed management plan. In this report, I restrict my recommendations to those aspects of watershed management that I think are necessary to protect drinking water sources. However, **I want to emphasize that a comprehensive approach is needed and should be adopted by the Province. Source protection plans should be a subset of broader watershed management** (emphasis added).[9]

The Ministry's proposal to "further define" conservation authority jurisdiction, and amend or add definitions for "wetland", "watercourse", "pollution", "interference and conservation of land" will severely limit conservation authorities' ability to carry out their mandate in protecting people and property through IWM. The existing five tests of pollution and conservation under existing development regulation are necessary in order to holistically evaluate the risk a development poses to the watershed and to people and property. The proposed changes would severely limit or eliminate conservation authorities' role in environmental protection and IWM. By association, this will further limit their ability to focus on protected lands and natural hazards, as the framework for evaluation would be left severed and unclear.

Further to this, we also note that the Ministry's proposal to "better align" the definitions of wetlands, watercourses and pollution "with other provincial policy" is extremely problematic. It is impossible to derive definitions or standards that align with provincial policy, because Ontario currently lacks any coherent watershed management, flood protection, pollution or environmental management regulation for wetlands and watercourses outside of those in the *Conservation Authorities Act*. The most recent Ontario strategy on wetlands published in 2017 is the only other provincial proposal on wetland management, and it states quite clearly that a landscape-based, ecosystem management and IWM approach must be included in any regulatory regime that is to be effective[10].

Limiting the scope of conservation authorities in Ontario, as proposed by this notice and in Bill 108, Schedule 2 is counterproductive to the goal of protecting people and property from flood hazard and mitigation. Holistic and well implemented IWM requires a multi-disciplinary approach that includes in depth on-the-ground knowledge of watershed features including wetlands and ecosystem services. The only agencies with this knowledge in Ontario are conservation authorities. Therefore, in order to achieve the best outcomes for watershed health and for the protection of people and property, the full mandate of conservation authorities to implement IWM must be respected.

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[9] The Honourable Dennis R. O'Connor, Part Two Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water (2002) at pp 89-90.
[10] Ministry of Natural Resources and Forestry, A Wetland Conservation Strategy for Ontario 2017–2030 (2017).

Recommendation 5: Conservation authorities' five tests for development proposals must remain to include the consideration of wetlands and watercourses.

Recommendation 6: Conservation authorities' mandate must reflect their ability to implement effective integrated watershed management in a holistic way through their existing programs and services.

Exemption of low-risk developments

The proposal to exempt "low-risk" developments from requiring a permit subject to the *Drainage Act* and *Conservation Authorities Act* is highly concerning. The three proposed changes to allow these exemptions will result in increased risk to the watershed to flooding hazards and other impacts. The entire purpose of the permitting process is to evaluate the level of risk and determine if the criteria for "low-risk" have been met. Without the permitting process, there is no way to determine with certainty if a proposed development is truly low-risk to the watershed and therefore to people and property.

Risks posed by a development are unique and site-specific; therefore the proper permitting evaluations must be conducted in order to know if the activity poses a risk in that specific circumstance and location. When an activity is found to have no negative impacts, it will be eligible for the permit. Therefore, there is no need for an exemption as the process already allows for a low-risk development to proceed when and only when it is proven not to have negative impacts.

By allowing exemptions without an evaluation of risk, there would be a severe reduction of oversight and allow blanket authorizations to activities that could have unknown risks to environment and to people and property. Using approximations are impossible to justify with scientific evidence when a development is not properly assessed and reviewed. In fact, these proposed changes run contrary to the government's own goals of focusing on the protection of people and property. Without a permitting process, a seemingly low-risk development could proceed and contribute to the exact flooding hazards that the Conservation Authorities are tasked to prevent. These changes will also render permitting more ambiguous, less certain and unclear to the public. This also runs contrary to the government's proposed goal to make development approvals more accessible by the public.

Recommendation 7: There should be no, so called "low-risk", developments exempted from development regulations and the permitting process.

Respecting Conservation Authorities

This spring, we experienced flooding that impacted thousands of Ontarians, forcing them out of their homes and onto the streets with their neighbours sandbagging desperately to protect themselves and their homes. The proposal to limit conservation authorities' ability to deliver their programs and services is reprehensible. We know that in the coming years, floods will become

more frequent and more severe, costing our province billions and risking human life[11]. The above changes are a step in the wrong direction. If the province is serious about protecting people and property from the hazards of flooding, they will respect conservation authorities in their delivery of programs and services in an IWM approach.

Conservation authorities are the only agencies in Ontario that can protect us from the severe impacts of flooding and advance watershed health to the benefit of our society, economy and environment. For this reason, the recent announcement to cut provincial transfer payments for flood hazard mitigation to conservation authorities is alarming. Conservation authorities need stable and adequate funding to deliver on their mandate regardless of the changes proposed in this registry notice or in Bill 108, Schedule 2. The reduction in Ontario's transfer payments to conservation authorities for flood mitigation is wholly inconsistent with the proposed changes, or their claims to want to prioritize the protection of people and property.

Recommendation 8: Adopt a stable funding model to allow conservation authorities to fully exercise their development oversight function independently.

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[11] Insurance Bureau of Canada, et al., Combatting Canada's Rising Flood Costs: Natural infrastructure is an underutilized option (2018).

SUBMISSION REGARDING
LEGISLATIVE AMENDMENTS TO THE *ENDANGERED SPECIES ACT*
BILL 108, SCHEDULE 5

ENVIRONMENTAL REGISTRY NO. 013-5033

May 16, 2019

I. INTRODUCTION

(a) Proposed amendments to the ESA

This is the submission of Ecojustice, the Canadian Environmental Law Association ("CELA") and Lintner Law in relation to the Ministry of the Environment, Conservation and Parks ("MECP") proposed changes to the *Endangered Species Act ("ESA")*.[1]

On May 2, 2019, the Ontario government introduced Bill 108 (the proposed *More Homes, More Choice Act, 2019*) for First Reading.[2] Schedule 5 of Ontario's Bill 108 proposes to amend the *Endangered Species Act, 2007* ("Schedule 5").

In our view, the changes to the *ESA* proposed in Schedule 5 downgrades the core purposes and values of the *ESA*, which was intended to prioritize the protection and recovery of at-risk species. The proposed amendments set out in Schedule 5 will delay the classification of species not currently listed on the Species At Risk in Ontario ("SARO") List (O Reg 230/08) and their automatic protection upon being listed; broaden Ministerial decision-making powers absent a requirement to seek expert advice; and, continue to limit the public accessibility and transparency of agreements made under the *Act*.[3]

Schedule 5 also proposes to establish a new Agency to oversee a Conservation Fund and introduce a new form of agreement, known as a Landscape Agreement, which will allow otherwise prohibited activities to occur within a defined geographic area.

[1] Environmental Registry of Ontario, "10th Year Review of Ontario's Endangered Species Act: Proposed Changes," online: https://ero.ontario.ca/notice/013-5033 **[Notice]**
[2] Bill 108, *An Act to amend various statutes with respect to housing, other development and various other matters*, 1st Sess, 42nd Parl, Ontario, 2019, Schedule 5, online: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108 **[Schedule 5]**
[3] *See* Notice, *supra*, note 1

This submission examines the adverse legal consequences of Schedule 5 and its implications for at-risk species in Ontario. We conclude that the changes proposed are inconsistent with the principles of strong species-at-risk legislation.

Accordingly, we make the following recommendations and submit that **Schedule 5 should be immediately abandoned or withdrawn by the Ontario government, in order to safeguard species at risk**:

> **RECOMMENDATION NO. 1:** Maintain the cornerstones of the *ESA*: science-based listings, automatic protections, and mandatory timelines. This aligns with endangered species' protection best practices, which necessitates the identification of species at risk and their habitat, prohibitions on their killing and harming, and investment in their recovery.
>
> **RECOMMENDATION NO. 2:** Maintain the strict timelines set out in the *ESA.* Any changes to the *ESA* which lengthen the timeline for species assessment and listing are unwarranted for the express reason that it may cause further declines to their population and threaten their survival or recovery.
>
> **RECOMMENDATION NO. 3:** Retain the requirement for the government to consult with an expert prior to entering into agreements with a person or proponent to permit otherwise prohibited activities.
>
> **RECOMMENDATION NO. 4:** Apply binding standards and prohibitions against harming or killing at-risk species and their habitat broadly and consistently, instead of on a sector-by-sector or activity basis. Codes of practice, standards and guidelines regarding listed species should not be the primary means of protecting species and their habitat.
>
> **RECOMMENDATION NO. 5:** We do not support the Bill's proposal for landscape agreements. If the government chooses to go ahead with landscape agreements, and before any such agreement is approved, we request the government disclose upon what basis it will designate 'benefiting' and 'impacted' species, and develop clear and consistent policies outlining how a decision will be made respecting their jeopardy.
>
> **RECOMMENDATION NO. 6:** Ensure that authorizations remain the exception, not the norm. Authorizations which allow persons to engage in otherwise prohibited activities undermines the purposes of the *Act* and are contrary to endangered species protection best practices. Increasing the number of ways in which an authorization can be sought should not be permitted for the express reason that it is contrary to the *Act's* purposes of species recovery and protection.
>
> **RECOMMENDATION NO. 7:** Maintain mandatory conditions to be met, such as the 'overall benefit' requirements. Establishing a fund to protect species in lieu of conditions on permits, which is resourced by activities that directly harm species and their habitat, is contrary to the intent of the *ESA* and should not be advanced. Any action which provides a 'get out of jail free card' – in that proponents can pay a fee to act contrary to the *Act* – should not be permitted.

RECOMMENDATION NO. 8: Set out the criteria upon which the Minister will base its decision to designate a species as a 'conversation fund species' and upon what basis their classification as such may change in the *Act*. The *Act* should not rely on non-binding guidelines to set out the activities and species eligible to receive funding.

RECOMMENDATION NO. 9: Keep *ESA*-related notice postings on the *Environmental Bill of Rights* registry. The government should not substitute the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,"* with "a website maintained by the Government of Ontario." Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is an already well-established portal for achieving this purpose.

RECOMMENDATION NO. 10: Require proponents engaging in harmful activities to publicly provide mitigation plans and monitoring reports, to enhance transparency, accountability, and the public's right to know.

(b) Consultation and the Environmental Bill of Rights

Ecojustice, Lintner Law and CELA are also gravely concerned about the government's approach to conducting consultations under the *Environmental Bill of Rights* ("EBR"). Ontario has developed a practice of introducing bills in the assembly prior to completing required *EBR* consultations. We call on Ontario to discontinue this practice and allow time for members of the public to submit comments on a proposed bill before it is tabled.

In this case, Schedule 5 was introduced prior to conclusion of the deadline for posting comments on EBR Notice: 013-5033. This is inconsistent with the spirit and purpose of public consultation under the *EBR* and has rendered the consultation process demonstrably hollow. The Minister has a duty under section 35 of the *EBR* to take every reasonable step to ensure that all comments received in relation to a proposal are considered when decisions about a proposal are made. In our opinion, this burden has not been satisfactorily discharged in this case and any change to the *ESA* should require a comprehensive approach to public comment, rather than a time-limited opportunity to respond within an existing proposal.

II. ABOUT ECOJUSTICE, CELA & LINTNER LAW

Ecojustice is a national charitable environmental law organization[4] with an extensive history of involvement in the protection of Ontario's species at risk under the *ESA*. Ecojustice (then called Sierra Legal Defence Fund) was one of the lead organizations that advocated for the enactment of Ontario's *ESA* in 2007 due to deficiencies in the previous statute. Ecojustice has been actively monitoring the implementation of the Act and commenting on its strengths and weaknesses since it was enacted.

[4] Online: www.ecojustice.ca

CELA is a non-profit, public interest organization established in 1970 for the purpose of using and improving existing laws to protect public health and the environment.[5] For nearly 50 years, CELA has used legal tools, undertaken ground-breaking research and conducted public interest advocacy to increase environmental protection and the safeguarding of communities. CELA works towards protecting human health and the environment by actively engaging in policy planning and seeking justice for those harmed by pollution or poor environmental decision-making.

Lintner Law is a private practice focused on environmental law and policy. Prior to establishing Lintner Law, Anastasia Lintner was a staff lawyer and economist with Ecojustice for more than a decade. Dr. Lintner has been involved in the species at risk file since consultations commenced on A Review of Species at Risk Legislation in 2006.

III. THE HISTORY OF ONTARIO'S *ESA* – PURPOSES AND BEST PRACTICES

In order to understand the nature, scope and significance of the amendments proposed in Schedule 5, it is instructive to first review the historical and legislative context of the *ESA,* and the 'best-in-class' principles which guided its enactment.

The coming into force of Ontario's current *ESA* law represented a significant improvement over the Province's original *Endangered Species Act*, enacted in 1971. The new *ESA* mandated a science-based approach to listing species protected under the law, required timely preparation of recovery strategies, and automatically protected the habitat of endangered and threatened species. It also offered flexibility to landowners and development proponents by allowing them to apply for permits for activities that might harm an at-risk species or its habitat under certain conditions, while raising the standard of protection from simply doing less harm to actually benefiting species.

Recognizing that Ontario's *ESA* and associated programs had not accomplished the goals of recovering extirpated, endangered, threatened and species of special concern, Ontario sought to put in place a new law which was reflective of 'best practices' and enabled on-the-ground-effectiveness. As part of this commitment, Ontario's Minister of Natural Resources established the Endangered Species Act Review Advisory Panel in April 2006.

In 2006, the Advisory Panel released their report, making a number of recommendations aimed at ESA 'best practices' including:[6]

- Ensuring the expert and independent status of Committee on the Status of Species at Risk in Ontario (COSSARO) and its members

- Prohibiting killing, harassing, capturing, taking, possessing, collecting, buying, selling, trading a listed endangered, threatened or extirpated species, or attempts to do so

[5] Online: www.cela.ca
[6] Endangered Species Act Review Advisory Panel, "Report of the Endangered Species Act Review Advisory Panel: Recommendations for Ontario's New Endangered Species Act" (2006) **[Advisory Panel Report]**

- Prohibiting damage, destruction, interference with the habitat of such species, or attempts to do so

- Streamlining provisions for Ministry-issued agreements and instruments for activities whose purpose was to assist species

- Clear constraints on the use of agreements and instruments, such that they could only be used when there was an overall benefit to the species

- Prescribed timelines to ensure the timely preparation and implementation of recovery action plans and their currency

Despite the intent to create a best-in-class *ESA*, since coming into force in 2008, various exemptions through regulation were granted removing numerous species- and sector-specific activities from its scope.[7] This includes:

- Hunting and trapping of the Algonquin wolf

- Hunting of the Northern bobwhite

- Killing or harming the eastern meadowlark or bobolink caused by farming

- Forestry operations on Crown land

- Early exploration mining activities

- Aggregate operations, pits and quarries

- Work undertaken to meet safety standards (i.e. brushing of transmission line corridors)

As reported by the Environment Commission of Ontario in a special report to the Legislative Assembly, the result of exempting major activities known to negatively impact species at risk and their habitat removed the *Act's* "key safeguards" that formed the "backbone of the *ESA*".[8]

IV. COMMENTS ON SCHEDULE 5 AND LEGISLATIVE CHANGES TO THE *ESA*

(a) "Best-in-Class" Species at Risk Protection

In January 2019, the government announced pending reforms to the *ESA* to ensure "best-in-class endangered and threatened species protections."[9] Unfortunately, neither the ERO Notice nor Schedule 5

[7] O Reg 242/08: General under *Endangered Species Act, 2007,* SO 2007 c 6
[8] Environmental Commissioner of Ontario, "Laying Siege to the Last Line of Defence: A Review of Ontario's Weakened Protections for Species at Risk," (2013), online: http://docs.assets.eco.on.ca/reports/special-reports/2013/2013-Laying-Siege-to-ESA.pdf, 6
[9] Notice, *supra*, note 1

provide any well-defined explanation allowing the public to gauge upon what basis the province seeks to measure success for species protection and recovery.

Furthermore, when Bill 108 was first introduced, the Ontario government repeated its desire for a plan that will "reduce red tape."[10] This framing was also evidenced in the language used in the province's 10th Year Review of Ontario's Endangered Species Act: Discussion Paper (herein, "Discussion Paper") and the Environmental Registry Notice (dated April 18, 2019) proposing legislative changes to the *Act*.[11]

Upon reading the text of Schedule 5, it is our belief that the government has not prioritized the *ESA's* purposes of protecting and enabling the recovery of species at risk in Ontario. We reiterate that the cornerstones of the *Act* must be maintained: without science-based listings, automatic protections and mandatory timelines, species at risk will not stand a chance of recovery.[12]

As the government has not undertaken an expert review, like that of the Advisory Panel, nor sought to expand upon its pronouncement of best-in-class protection, we propose the following principles be used as a benchmark, against which MECP's goals and legislative amendments can be measured.[13] In instances where the following principles are not met, we submit the proposed legislative should not be advanced.

1. **Identify species and their habitat**
   Incomplete or out of date data impedes species recovery and the protection of their habitat. Data must be science-based and include Traditional Ecological Knowledge.

2. **Prohibit harm to at-risk species and their habitat**
   Prohibitions on the killing, harming and harassing is a necessary perquisite to species recovery.

3. **Invest in recovery**
   Private landowners, extractive and natural resource industries must be proactively engaged to ensure the effective protection and recovery of species at risk and their habitat. Time-limited actions based on science and inclusive of Traditional Ecological Knowledge must guide at-risk species recovery.

RECOMMENDATION NO. 1: Maintain the cornerstones of the *ESA*: science-based listings, automatic protections, and mandatory timelines. This aligns with endangered species' protection best practices, which necessitates the identification of species at risk and their habitat, prohibitions on their killing and harming, and investment in their recovery.

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[10] *See* https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2019-05-02/hansard#para1032

[11] Notice, *supra*, note 1**;** Ministry of Environment, Conservation and Parks, 10th Year Review of Ontario's Endangered Species Act: Discussion Paper (2019), online: https://prod-environmental-registry.s3.amazonaws.com/2019-01/ESA-10thYrReviewDiscussionPaper.pdf **[Discussion Paper]**

[12] *See* online: https://www.cela.ca/publications/10th-year-review-ontarios-endangered-species-act

[13] *See* for instance, Ecojustice (2012), "Failure to Protect: Grading Canada's Species at Risk Laws" at p 5; A Review of Ontario's Species at Risk Legislation, EBR Registry Number: AB06E6001.

(b) Classification of Species at Risk

The Committee on the Status of Species at Risk in Ontario (COSSARO) oversees the classification of species at risk in Ontario. Currently, the Act requires COSSARO's listing of species be based on the "best available scientific information."[14] However, Schedule 5 broadens the criteria informing the designation of at-risk species, now requiring COSSARO's review to include the species' status across its "biologically relevant geographic range" - which may be within or external to Ontario.[15]

Permitting COSSARO assessments to be based not on the status of a species in Ontario, but instead on its status across its "biologically relevant geographic range"[16] could leave species at risk without protection in Ontario. As many of Ontario's listed species are more stable in the United States, the result of this amendment could trigger their delisting. The species that could be most affected are 'edge of range' species, whose Northern limit is in Canada. These species are critical to conservation efforts, particularly in light of climate change, as they may be better adapted to extreme climates than core populations. They may also have other characteristics that will facilitate adaptation. Excluding them from protection could result in a significant loss of genetic diversity and reduce the ability of species to persist, for example, through geographic range shifts.

Regarding species at risk recovery, the *ESA* currently requires that within 9 months of a recovery strategy being prepared, the Minister must publish a statement of actions it intends to take in response.[17] Schedule 5 introduces an exemption to this requirement. As proposed, Schedule 5's section 12.1 allows the Minister to exceed the 9 months should they state (1) that they need additional time and (2) provide an estimated completion date.[18] In our view, this amendment should not be supported because it creates a loophole to the *Act's* mandatory purpose of advancing species protection and fails to prescribe time limits.

Also, while the *ESA* currently specifies that within 5 years of government's response to a recovery strategy, it must review the progress towards the protection and recovery of the species,[19] Schedule 5 adds a workaround to the 5 year rule, providing an alternative timeframe of a "time specified in the government response statement."[20] As drafted, Schedule 5 does not clearly indicate to what extent this timeframe may exceed the default 5 year review period.

We do not support extending the timeframe for the production of or response to recovery strategies. The five-year reporting on progress is reasonable and ensures transparency and accountability, and provides an impetus for action. If there is no progress to report at the appointed time, then Ontario needs to clearly indicate the state of affairs and why.

In our view, when read together, these amendments will prevent or significantly delay the addition of new species to the SARO List. Because of the numerous ways in which the Minister can pause automatic

[14] *ESA*, s 5(3)
[15] Schedule 5, proposed subsection 5(4) and (5)
[16] *Ibid*
[17] *ESA*, s 11(8), 12(5)
[18] Schedule 5, proposed subsection 12.1(4)
[19] *ESA*, s 11(11)
[20] Schedule 5, proposed subsection 12.2(2)(a)

protections or send back a species' classification to COSSARO for review (without a deadline for its reconsideration), the proposed amendments will effectively bar new species from being added to the SARO List.

Any changes to the *ESA* which lengthen the timeline for species assessment and listing should not be permitted for the express reason that it may cause further declines to their population and threaten their survival or recovery. Furthermore, without set timelines (i.e. within three months or one year), Schedule 5 legalizes delay and allows varying standards to be adopted, on a decision-making basis that is not transparent.

When the *ESA* was passed in 2007, there were 182 species on SARO List - six of which were already extinct.[21] The list has since grown to encompass nearly 250 extirpated, endangered, threatened and special concern species. Therefore, a Bill which introduces provisions which effectively bars new species being added to the SARO List is incongruous with the reality that an increasing number of species face threats to their survival and require the protections provided by the *ESA.*

RECOMMENDATION NO. 2: Maintain the strict timelines set out in the *ESA.* Any changes to the *ESA* which lengthen the timeline for species assessment and listing are unwarranted for the express reason that it may cause further declines to their population and threaten their survival or recovery.

(c) Government Decisions and Expertise

In numerous instances, Schedule 5 increases the potential for Ministerial discretion when classifying species. For instance, formerly the Minister could require the reconsideration of a species listed as at-risk should there be credible scientific evidence that the classification "is not appropriate."[22] Now, the Minister may trigger the reconsideration of a listed species in instances where the classification "may not be appropriate."[23] The Minister is also able to enter into agreements with persons, to allow for otherwise prohibited activities, so long as the survival or recovery of a threatened or endangered species is not jeopardized.[24] In both instances, there is no accompanying requirement that the Minister consult with an expert. For this reason, we oppose the proposed amendments.

Similarly, Schedule 5 proposes to amend the *Act* requiring the Minister to consider whether a proposed regulation is likely to jeopardize the survival of a listed species. Currently, the *ESA* requires the Minister to seek "consultation with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation."[25] Removing the requirement for the Minister to consult with an expert in the field undermines the credibility and rigour of their decision. Schedule 5's reliance on the standard that an activity 'not jeopardize the survival or recovery of species at risk' is also a lower standard than ensuring the activity has an 'overall benefit' to species at risk.

[21] Advisory Panel Report, *supra* note 6, 1
[22] *ESA*, s 8(2)
[23] Schedule 5, proposed subsection 6(1)
[24] *Ibid*, proposed subsection 16.1(3)(i)
[25] *ESA*, s 57(1)

A new provision in Schedule 5 also allows the Minister to establish codes of practice, standards or guidelines regarding any listed species.[26] Schedule 5 permits the Minister or Cabinet to incorporate by reference any of these documents into regulation.[27] While this would trigger the enforcement mechanisms of the *Act*, whereby "any provision of the regulations" falls within its scope, it is not clear to what extent otherwise unenforceable guidance documents will be incorporated by reference into the *Act*.

In our view, these proposed amendments will increase the discretionary decision-making power of the Minister absent a prerequisite of seeking expert advice. Read together, these provisions increase the ambiguity of the Schedule 5's terms. While Schedule 5 envisions incorporating guidance documents by reference into the regulations, the extent to which this will occur is unknown, thereby limiting their enforceability.

RECOMMENDATION NO. 3: Retain the requirement for the government to consult with an expert prior to entering into agreements with a person or proponent to permit otherwise prohibited activities.

RECOMMENDATION NO. 4: Apply binding standards and prohibitions against harming or killing at-risk species and their habitat broadly and consistently, instead of on a sector-by-sector or activity basis. Codes of practice, standards and guidelines regarding listed species should not be the primary means of protecting species and their habitat.

(d) New to the ESA: Landscape Agreements

As was first posed in the *ESA*'s 10th year review Discussion Paper, the province has sought to advance a landscape approach rather than a species-specific approach to improving outcomes for species at risk. In this regard, Schedule 5 introduces a new form of authorization, termed "landscape agreements", thereby exempting activities which would otherwise be prohibited under the *Act*. We reiterate that we do not support this broad, landscape-level approach which permits harmful activities and fails to consider species-specific and site-specific concerns.

As detailed in the proposed section 16.1 of Schedule 5, a landscape agreement may be entered in to, to permit otherwise prohibited activities within a certain geographic area. The agreement requires that actions be included in its terms which will assist in the protection of 'one or more' listed species within the landscape's defined range.

This new form of exemption to the *Act's* prohibitions also introduces two new definitions, [28] as follows:

> "benefiting species" means species that are listed on the Species at Risk in Ontario List as endangered, threatened or special concern species and that are specified in a landscape agreement as species in respect of which beneficial actions will be executed to assist in their protection or recovery

[26] Schedule 5, proposed section 48.1
[27] *Ibid*, proposed section 58
[28] *Ibid*, proposed subsection 16(10)

> "impacted species" means species that are listed on the Species at Risk in Ontario List as endangered or threatened species and that are specified in a landscape agreement as species in respect of which authorized activities may be carried out despite being otherwise prohibited in respect of the species under section 9 or 10.

Accordingly, the Minister may only enter into a landscape agreement should it be of benefit to one or more impacted species. The test the Minister must meet in deciding whether or not to enter into a landscape agreement is whether the survival or recovery of an impacted species under the agreement is jeopardized. The provision is silent as to whether all impacted species within the geographic scope of the agreement will be considered. Schedule 5 contemplates this will be set out in regulation.[29] Further, not all impacted species will necessarily be the subject of beneficial actions to assist species recovery. According to the proposed subsections 16.1(2) and (3), there is no requirement for the benefiting species under a landscape agreement to be an impacted species as long as there is at least one impacted species that is a benefiting species. The provision is also silent on the basis upon which the Minister will gauge the "jeopardy" of the species.

RECOMMENDATION NO. 5: We do not support the Bill's proposal for landscape agreements. If the government chooses to go ahead with landscape agreements, and before any such agreement is approved, we request the government disclose upon what basis it will designate 'benefiting' and 'impacted' species, and develop clear and consistent policies outlining how a decision will be made respecting their jeopardy.

(e) Authorizations Permitting Prohibited Activities

The authorizations enabled in sections 17 and 18 of the *ESA* which allow the Minister to issue to a permit or instrument to a person, allowing them to engage in otherwise prohibited activities, remains in the text of Schedule 5.

Section 17 of the *ESA* has been amended to include the proviso that a person in receipt of an authorization may be required to pay a conservation change to the Conservation Fund (as discussed in more detail below), as a condition of a permit and in lieu of fulfilling on-the-ground activities to benefit species.[30] Section 17(2)(c) in its current form recognizes that there are circumstances in which a permit may not be issued if an overall benefit to species cannot be achieved. The proposed amendment to section 17(2)(c) effectively increases the number of authorizations that could be issued as proponents who may have not been able to obtain permits under 17(2)(c) can now do so by paying into the Conservation Fund.[31] It has also been amended such that proponents seeking permits under section 17(2)(c) and (d) need only take steps to minimize adverse effects on the affected species in general. Proponents are no longer required to take steps to minimize adverse effects on *individual* members of species.

In our view, these provisions further add to the ways in which the guiding principles and core protections in the *Act* can be undermined. The overall benefit requirement found in section 18 has also been removed in the proposed amendments set out in Schedule 5 in favour of the Conservation Fund.

[29] *Ibid*, proposed subsection 56(1)(c)(iii)
[30] *Ibid*, proposed subsections 17(5)(d.1); 18(2)(d)
[31] *Ibid*, proposed subsection 17(2)(c)(i)

RECOMMENDATION NO. 6: Ensure that authorizations remain the exception, not the norm. Authorizations which allow persons to engage in otherwise prohibited activities undermines the purposes of the *Act* and are contrary to endangered species protection best practices. Increasing the number of ways in which an authorization can be sought should not be permitted for the express reason that it is contrary to the *Act's* purposes of species recovery and protection.

(f) New to the Act: The Conservation Fund

The Notice proposes creating a Crown agency, to be called the Species at Risk Conservation Trust, to provide municipalities and infrastructure developers the option of paying a charge in lieu of meeting species-based conditions of a permit.

Schedule 5 proposes to establish the Species at Risk Conservation Fund (the "Conservation Fund"), with the purpose of providing funding for activities that are reasonably likely to protect or advance species recovery. The Conservation Fund does not apply to all listed species, rather only those the Minister designates by regulation as "conservation fund species."[32] The text is otherwise silent on the criteria the Minister will apply in designating species as conversation fund species and upon what basis their classification as such may change. The Minister may also establish guidelines that set out eligible activities and species to receive funding.[33]

Monies into the fund will primarily arise as a result of:

- Landscape agreements
- Permits authorizing acts otherwise contrary to the prohibitions of the *Act*
- Agreements with Aboriginal persons

The Conservation Fund is to be used to abate or reverse population declines; increase the viability or resilience of a species; increase a species' distribution within their range; or, increase of reproductively-capable individuals.[34] However, as 'conservation fund species' are not yet listed (and instead, to be set out in regulation), it is presently unknown to what extent the Fund will assist in alleviating threats to species and their recovery.

Schedule 5 also seeks to make the Agency overseeing the fund immune from liability noting "no proceeding shall be commenced against the Crown in respect of any act or omission of the Agency."[35]

We strongly oppose the proposal that proponents engaging in activities which harm threatened or endangered species and their habitat should be allowed to simply pay into a conservation fund. This approach reduces accountability and facilitates harm to species at risk and their habitats, with no guarantee that tangible benefits to species at risk will occur. Establishing a fund to protect species in lieu of conditions on permits, which is resourced by activities that directly harm species and their habitat, is contrary to the

[32] *Ibid,* proposed subsection 20.1(2)
[33] *Ibid,* proposed subsection 20.8(2)
[34] *Ibid,* proposed section 20.7
[35] *Ibid,* proposed subsection 20.18(1)

intent of the *ESA* and should not be advanced. Any action which provides a 'get out of jail free card' – in that proponents can pay a fee to act contrary to the *Act* – should not be permitted.

RECOMMENDATION NO. 7: Maintain mandatory conditions to be met, such as the 'overall benefit' requirements. Establishing a fund to protect species in lieu of conditions on permits, which is resourced by activities that directly harm species and their habitat, is contrary to the intent of the *ESA* and should not be advanced. Any action which provides a 'get out of jail free card' – in that proponents can pay a fee to act contrary to the *Act* – should not be permitted.

RECOMMENDATION NO. 8: Set out the criteria upon which the Minister will base its decision to designate a species as a 'conversation fund species' and upon what basis their classification as such may change in the *Act*. The *Act* should not rely on non-binding guidelines to set out the activities and species eligible to receive funding.

(g) Planning, Reporting and Public Transparency

Schedule 5 introduces new regulation making powers pertaining to the submission of documents from proponents seeking authorizations,[36] landscape agreements[37] and the Conservation Fund.[38] As previously indicated, much of the detail pertaining to these new provisions will be set out in regulation. Therefore, the legal effect of the *Act's* new provisions depends almost entirely on future regulations.

Currently under the *ESA*, proponents are not required to submit their mitigation plans. Schedule 5 amends this process allowing that regulations to be made requiring proponents to submit any documents, data, reports by electronic means to the Minister.[39] However, there is no accompanying provision requiring that these mitigation plans and data be made publicly available.

In our view, proponents should be required to automatically submit mitigation plans so that they are publicly available in order to further the public's right to know and facilitate the public's oversight of proponent activities.

Schedule 5 also proposes new regulation making powers for the "criteria for entering into a landscape agreement," the designation of "conservation fund species," and the manner in which the amount of "species conservation charges" and the timing for such payments will be made.[40] Without seeing the text of the proposed regulations, the sufficiency of this new power within the *Act* for species protection is unknown. Ontario must ensure it seeks to protect and enable the recovery of all species on the SARO List. Any reduction to this list – as contemplated by the selection of 'conservation fund species' - would limit the efficacy of Ontario's *ESA.*

[36] *Ibid,* proposed subsection 55(1)(g)
[37] *Ibid,* proposed subsection 56(1)(c)
[38] *Ibid,* proposed sections 20.1 – 20.18
[39] *Ibid,* proposed subsection 55(1)(g)
[40] *Ibid,* proposed subsection 56(1)

In a number of instances, Schedule 5 substitutes the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,"* with "a website maintained by the Government of Ontario".[41]

In our view, this diminishes the public's right to know. Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is a well-established portal for achieving this purpose. Creating a patchwork of websites where notices and information may be posted in related to at-risk species does not increase their public accessibility. In fact, this contributes little (if any) to the reduction of red-tape or cost-efficiencies.

The principles of natural justice require that every person have adequate notice before a decision is made which may negatively affect them. This requires good faith efforts by the government to make the notice accessible. The *Environmental Bill of Rights, 1993* already provides this framework and absent any rationale as to why it has failed in this regard, substitutes to the Environmental Registry should not be permitted.

RECOMMENDATION NO. 9: Keep *ESA*-related notice postings on the *Environmental Bill of Rights* registry. The government should not substitute the requirement that publications be posted on the "environmental registry established under the *Environmental Bill of Rights, 1993,"* with "a website maintained by the Government of Ontario." Ensuring the public's right to know increases the transparency and accountability of decision-makers and, by requiring the disclosure of information, increases its accessibility. The Environmental Registry is an already well-established portal for achieving this purpose.

RECOMMENDATION NO. 10: Require proponents engaging in harmful activities to publicly provide mitigation plans and monitoring reports, to enhance transparency, accountability, and the public's right to know.

(h) Enforcement Powers

Schedule 5 amends the enforcement officers under the *Act*, removing conservation officers and park wardens and only listing any persons or classes of persons as enforcement officers for the purposes of the *Act*.[42] The Bill expands the scope of enforcement to include "any provision of the regulations" as an offence under the *Act*.[43]

Again, due to the sweeping exemptions permitted by the *Act*, and activities which are yet to seek exemptions through Schedule 5's various authorization processes, enforcement will be of extremely limited value to protecting species at risk and their habitat from harm.

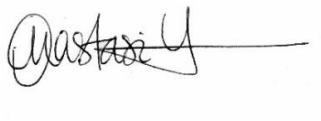
[41] *Ibid*, proposed subsections 12(4), 12.1(2)
[42] *Ibid*, proposed section 21
[43] *Ibid*, proposed subsection 36(1)5

PART V – CONCLUSIONS

Based on our legal analysis, Schedule 5 of Bill 108 represents an unjustified rollback of species protection and recovery actions and should be immediately abandoned or withdrawn by the Ontario government.

In our view, these proposed amendments will result in the status quo of habitat loss and degradation being upheld. Protecting the environment and Ontario's biodiversity requires directing and encouraging economic growth towards less damaging practices. Without timely and meaningful protection and restoration actions through provincial endangered species law, these species will be lost.

Sincerely,



Anastasia M Lintner	Sue Tan	Kerrie Blaise
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Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

May 16, 2019 **BY EMAIL**

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

Dear Ms. Wyndham-Nguyen:

RE: PROPOSED CHANGES TO THE *ENVIRONMENTAL ASSESSMENT ACT*
ENVIRONMENTAL REGISTRY NO. 013-5102

These are the comments of the Canadian Environmental Law Association (CELA) on the Ontario government's proposed amendments to the *Environmental Assessment Act* (*EAA*) in relation to the following matters:

- Ministerial decisions to reconsider previously issued approvals under the *EAA*;
- amendments to Class Environmental Assessments (EAs) to exempt certain undertakings; and
- Ministerial decision-making on public requests for Part II orders under the *EAA*.

These comments are being forwarded to you in accordance with the above-noted Registry notice.

Part I of this submission provides CELA's general views on the questionable manner in which the proposed *EAA* amendments have been presented to the public for review and comment. Part II of this submission outlines CELA's specific comments and recommendations in relation to the *EAA* proposals, while Part III sets out CELA's overall conclusions about next steps.

PART I – CELA'S GENERAL COMMENTS ON THE REGISTRY POSTING

(a) Uncoordinated Consultation

At the outset, CELA notes that there is considerable overlap between the *EAA* amendments outlined in this Registry posting and some identical amendments described in a separate Registry posting for Ontario's recent Discussion Paper[1] on "modernizing" the *EAA*.

[1] The Discussion Paper is available through the Environmental Registry: see https://ero.ontario.ca/notice/013-5101.

CELA is unclear why the Ministry of the Environment, Conservation and Parks (MECP) has decided to post two different Registry notices with respect to the same set of *EAA* proposals.[2] In our view, these duplicative postings may create unnecessary confusion among stakeholders and members of the general public, and may unduly impair public input during the perfunctory 30 day comment period.[3] In any event, this brief sets out CELA's submissions on the above-noted *EAA* changes, and our submissions on the Discussion Paper will be provided to the MECP under separate cover.

More alarmingly, even though the Discussion Paper and Registry Notice 013-5102 describe the MECP's suggested *EAA* changes as "proposals," it appears that these suggestions have now moved well beyond the proposal stage and are already being implemented by the provincial government.

In particular, the generalized proposals outlined in the Registry posting are now set out in legislative form in Schedule 6 of Bill 108.[4] This statute was introduced in the Ontario Legislature earlier this month, despite the fact that the public comment period under the Registry notice is still running until May 25, 2019. Moreover, after the introduction of Bill 108, the Registry notice has not been updated or re-posted to let Ontarians know that the actual text for these proposed *EAA* amendments is now available for scrutiny.

In CELA's view, this chronology of uncoordinated consultation by the MECP is unacceptable, and it substantially undermines public participation rights under Part II of the *EBR*. By any objective standard, amending the *EAA* (which is Ontario's oldest and arguably most important environmental planning law) is an environmentally significant matter of profound public importance. Therefore, any governmental proposal to change the *EAA* requires an integrated and comprehensive approach to public notice/comment, rather than fragmented, time-limited chances to respond to separate online postings.

(b) EBR Non-Compliance

Section 35 of the *EBR* legally obliges the Environment Minister to "take every reasonable step to ensure that all comments" received from the public "are considered when decisions about the proposal are made by the ministry." In our opinion, this burden has not been satisfactorily discharged in this case since it appears that a decision has already been made to proceed with this proposal long before public comments have been considered – or even received – by the MECP.

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[2] For example, the Discussion Paper (Registry Notice 013-5101) discusses exemptions of low-risk projects from Class EAs (page 10), reforms to the decision-making process for Part II order requests (pages 12-13), and changes to the Minister's power to reconsider EA approvals (page 13). These same reforms are also proposed in Registry Notice 013-5102.

[3] In addition, CELA notes that there has been a third separate Registry posting in relation to the Ontario government's recent proposal to exempt certain dispositions of provincially owned property from *EAA* coverage: see https://ero.ontario.ca/notice/013-4845. This proposal triggered a 45 day comment period, and CELA's response to this posting is available at: https://www.cela.ca/publications/EA-exemptions-public-lands.

[4] Bill 108 (*More Homes, More Choice Act, 2019*) was introduced for First Reading on May 2, 2019: see https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108. To date, Second Reading debate on Bill 108 occurred on May 8, 9, 13 and 14, 2019 with no discussion by government representatives about the rationale for, or content of, the *EAA* changes in Schedule 6.

Similarly, CELA submits that the current "consultation" is inconsistent with the commitment to public participation in the MECP's Statement of Environmental Values (SEV) under the *EBR*:

> The Ministry… believes that public consultation is vital to sound environmental decision-making. The Ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.[5]

In light of the MECP's apparent failure to comply with the *EBR* and its own SEV, CELA draws no comfort from the Registry notice's assurance that the MECP will be consulting "at a later date" on regulations that "result" from the statutory changes, or that the MECP is "planning" to host webinars for "indigenous communities and organizations, as well as stakeholder groups."

In our view, this type of engagement is being scheduled far too late in the decision-making process regarding the proposed *EAA* changes, which have already been introduced in Bill 108. Rather than undertake belated consultation on implementation details, it would have been far more preferable for the MECP to meaningfully pre-consult with stakeholders, Indigenous communities and members of the public well before Schedule 6 of Bill 108 was drafted and tabled in the Ontario Legislature. It strikes CELA as highly ironic that the MECP's objectionable consultation in this case has occurred in the context of an EA statute that is intended to establish an open, accessible and participatory process.

In any event, given the unfortunate confluence of Registry Notice 013-5102, the EA Discussion Paper, and Schedule 6 of Bill 108, the following submissions by CELA will, of necessity, discuss all three documents.

(c) CELA's Background and Experience in EA Matters

CELA's comments on the most significant *EAA* amendments outlined in the Registry notice and proposed in Schedule 6 of Bill 108 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, including making 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*;
- filing 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*; and

[5] See https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change.

- 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 proposed *EAA* changes from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

PART II – CELA COMMENTS ON SCHEDULE 6 OF BILL 108

(a) Overview of Proposed EAA Changes

If enacted, Schedule 6 of Bill 108 proposes to:

- clarify the scope of the Minister's existing power under subsection 11.4 to reconsider approvals that have been previously issued under the current *EAA* and its predecessor;

- add new provisions regarding the approval and amendment of Class EAs in order to exempt certain undertakings (or groups of undertakings) from Class EA requirements; and

- establish new constraints on the public's ability to request the Environment Minister to elevate (or "bump up") specific undertakings from a Class EA planning process to an individual EA under Part II of the *EAA*.

As explained below, CELA generally supports the suggested changes to subsection 11.4 of the *EAA*. However, CELA concludes that Schedule 6's proposed amendments in relation to Class EAs and Part II order requests are problematic for various reasons, and they should therefore not be enacted by the Ontario Legislature.

In addition, CELA submits that rather than pursuing these piecemeal amendments to the *EAA*, the provincial government should be developing and consulting on the wider suite of procedural and substantive reforms that are long overdue in Ontario in order to make the current EA program more robust, participatory, transparent and accountable.

Unfortunately, none of these broader EA reforms are addressed in Schedule 6 of Bill 108, nor have they been discussed (or even mentioned) in the Registry notice or the Discussion Paper.

(b) Reconsideration of Previous EA Approvals

Section 11.4 of the *EAA* currently enables the Environment Minister to reconsider approvals issued under the Act to grant permission to proponents to proceed with their undertakings. This reconsideration power may be exercised where there is "a change in circumstances" or "new information" regarding the approved EA application.

This reconsideration provision applies to EA approvals previously issued by either the Minister or the Environmental Review Tribunal (ERT) when an EA application has been referred by the Minister to the ERT for a public hearing and decision. The reconsideration of the EA approval may be carried out by the Minister, who is also empowered to request the ERT to determine whether it is appropriate to reconsider the approval, or to actually carry out the reconsideration of a previous approval.

Subsection 11.4 was added to the *EAA* in 1996. However, to CELA's knowledge, the Ministerial reconsideration power has rarely (if ever) been exercised to formally re-examine previous EA approvals, or to amend or revoke such approvals. Nevertheless, CELA supports the continuation of subsection 11.4 since it serves as an important safeguard in cases where it may become necessary to review older approvals, or to adjust the terms and conditions attached to such approvals, in accordance with the public interest purpose of the *EAA*.[6]

Schedule 6 of Bill 108 leaves the existing provisions of subsection 11.4 largely intact, but proposes to add new provisions that:

- empower the Minister or the ERT to order the proponent to "provide plans, specifications, technical reports or other information, and to carry out and report on tests or experiments relating to the undertaking";[7]

- clarify that the approval being reconsidered by the Minister or the ERT may be amended or revoked;[8]

- specify that reconsideration decisions "shall be made in accordance with any rules and subject to any restrictions as may be prescribed";[9] and

- ensure that subsection 11.4 applies not only to EA approvals issued under the current Act, but also to EA approvals issued under the previous version of the *EAA*.[10]

CELA generally supports these proposed amendments since they add important clarity on how the reconsideration power shall be exercised by the Minister and by the ERT. At the same time, CELA recommends that the forthcoming rules under subsection 11.4 should be developed with public input, and should entrench opportunities for meaningful public participation in the decision-making process used by the Minister and by the ERT.

RECOMMENDATION 1: When developing reconsideration rules under subsection 11.4 of the *EAA*, the Minister should consult interested stakeholders to ensure that the rules entrench opportunities for meaningful public participation in the decision-making process.

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[6] The purpose of the *EAA* is "the betterment" of the people of Ontario "by providing for the protection, conservation and wise management" of the environment: *EAA*, section 2.
[7] Proposed subsection 11.4(3.1).
[8] Proposed subsection 11.4(4).
[9] Proposed subsection 11.4(4.1).
[10] Proposed subsection 12.4(4).

(c) Class EA Exemptions

Under Part II.1 of the *EAA*, there are a number of "parent" Class EAs that establish common planning processes for certain classes of small-scale projects that occur frequently and have environmental impacts that are well-understood and are amenable to known mitigation measures.

At present, Class EAs in Ontario cover various public and private activities, including: municipal projects; GO Transit facilities; provincial highways; provincial parks and conservation reserves, MNRF resource stewardship and facility development projects; remedial flood and erosion control projects; minor electricity transmission facilities; certain mining-related matters; and waterpower projects.[11] Accordingly, the vast majority of undertakings considered under the *EAA* are processed under Class EAs, and relatively few projects undergo an individual EA.

In general terms, projects planned under Class EAs are essentially "pre-approved" and can be undertaken by proponents (without project-specific Ministerial approval) once they have satisfactorily completed the notification, assessment and documentation requirements prescribed by the Class EA. However, for particularly significant or controversial projects, members of the public may file written requests to ask the Minister to elevate (or "bump up") projects from the streamlined provisions of the Class EA to an individual EA under Part II of the *EAA*, as discussed below.

In addition, for the purposes of greater certainty, current Class EAs typically have schedules or project categories that list and wholly exempt projects that truly pose no or low risks. In such cases, these projects do not require detailed environmental planning or project-specific reports before they may be undertaken.

For example, the Municipal Class EA contains Schedule A and Schedule A+ lists of normal operational or maintenance activities carried out by municipalities (including the "snow plowing" and "de-icing operations" mentioned in Registry Notice 013-5102). The Municipal Class EA is abundantly clear that these activities are pre-approved and can be immediately undertaken by municipalities without following Class EA planning procedures. Thus, the mere fact that these minor activities are mentioned in schedules to the Municipal Class EA does not mean that an EA is required.

Similarly, the Class EA for Provincial Transportation Facilities contains a Group D list of routine maintenance activities carried out by the Ministry of Transportation of Ontario (MTO). Again, however, there is no requirement for MTO to conduct an individual EA, and there is no requirement under the Class EA for a project-specific study, report or consultation, before these maintenance activities may be undertaken.

Although these schedules and categories already effectively exempt low risk projects from Class EA planning requirements, Schedule 6 of Bill 108 proposes *EAA* amendments that will require Class EAs to identify the types of undertakings within the defined class that will be exempt from the *EAA*.[12] Similarly, Schedule 6 mentions four specific Class EAs for provincial undertakings that are in effect at the present time, and provides that proponents do not need to conduct further

[11] See https://www.ontario.ca/page/class-environmental-assessments-approved-class-ea-information.
[12] Proposed subsections 14(2)(1.1) and 15.3.

assessment or public consultation in relation to undertakings that are exempted under these Class EAs.[13] It is unclear to CELA why this subset of current Class EAs has been singled out for preferential treatment under Schedule 6, or why a different list of Class EAs is described in Registry Notice 013-5102, which states that "the projects within the [following] categories/groups/schedules are proposed to be exempted":

- Schedules A and A + of the Municipal Class Environmental Assessment;
- Category A of the Class Environmental Assessment for Public Works;
- Category A of the Class Environmental Assessment for Provincial Parks and Conservation Reserves;
- Category A of the Class Environmental Assessment for Resource Stewardship and Facility Development Projects;
- Category A of the Class Environmental Assessment for Activities of the Ministry of Northern Development and Mines under the *Mining Act*;
- Group A of the GO Transit Class Environmental Assessment; and
- Group D of the Class Environmental Assessment for Provincial Transportation Facilities.

Given that these Class EAs already exempt routine or low risk undertakings from Class EA requirements, CELA submits that the Ontario government has failed to demonstrate why it is now necessary to amend the *EAA* itself in order to ensure that exemptions are addressed in Class EAs when they are being approved or amended by the Minister. This has been standard practice for decades, and CELA sees no compelling legal or jurisdictional reason to codify this practice in the *EAA* at this time.

In addition, CELA is concerned that these statutory amendments are intended to set the stage for a rapid expansion of the types of undertakings that will be exempted from *EAA* coverage. In our view, the low level of public trust in the Class EA regime will be further eroded if even more projects are exempted from Class EA planning requirements, which, by their very nature, are more streamlined (and less onerous) that those established for individual EAs.

RECOMMENDATION 2: The Ontario government should not proceed with Schedule 6's statutory amendments which require Class EAs to specify types of undertakings that will be exempt from the *EAA*.

(d) Filing and Deciding Part II Order Requests

As noted above, parent Class EAs typically contain provisions which enable members of the public to file elevation (or "bump up") requests with the Minister. In essence, these requests ask the Minister to elevate contentious projects from a streamlined Class EA process to an individual EA

[13] Proposed subsection 15.3(3).

process in order to address unresolved concerns about potential environmental impacts (or alternatives) that were not examined adequately (or at all) in the Class EA planning process.

Thus, the public's ability to file requests for Part II orders by the Minister represents an important safety valve for situations when Class EA procedures are not being adequately followed, or where environmentally significant projects are being inappropriately rammed through a Class EA process despite public objections.

In CELA's experience, there have been long-standing concerns about the overall Class EA regime, but particular criticism has been properly aimed at the process for deciding requests for Part II orders. For example, the Environmental Commissioner of Ontario made the following findings in his 2003-04 annual report to the Ontario Legislature:

> MOE staff have observed that some proponents under the Municipal Class EA submit inadequate environmental studies, and have incomplete or missing project files at key review stages of projects. For example, information on water quality, water quantity, contingency plans and baseline data has been lacking. Tight timelines prohibiting proper technical reviews are also cited as concerns.
>
> In some cases, EA processes governing provincial highway projects fail to achieve the intended levels of environmental protection… MNR staff have similarly raised concerns that the MTO Class EA for highway construction has been unable to achieve environmental protection in instances involving provincially significant wetlands and threatened species habitat. There is also no requirement to prevent a continual net loss of natural heritage features.
>
> Under Class EAs, the public does have certain time-limited opportunities to request more detailed environmental studies (termed "Part II Orders" or, previously, "bump-up requests"). But in practice, there is a very low likelihood that such requests will be granted by MOE. For example, MOE reviewed 11 such requests under the Municipal Class EA in 2002, and all were denied. Similarly, MOE reviewed six such requests under MTO's Class EA in 2001/2002, and all were denied. Under MNR's Class EA for Timber Management, over 80 bump-up requests were made from 1994 to 2001, and all were denied.
>
> In some cases, members of the public are frustrated when proponents operating under Class EAs change their projects in a significant way after most of the public consultation opportunities are over. The ECO has observed that concerned residents have very few options of redress in such situations.
>
> Under Class EAs, public comments and concerns are submitted to the proponent, rather than to an independent arbiter. The proponent can decide how (or whether) to respond to the concerns. MOE also tends to bounce commenters' procedural concerns about a project back to the proponent.[14]

[14] ECO 2003-04 Annual Report, pages 56-57: see http://docs.assets.eco.on.ca/reports/environmental-protection/2003-2004/2003-04-AR.pdf.

Similar observations were made by the Auditor General of Ontario in her 2016 report to the Ontario Legislature:

> The majority of projects that are subject to an environmental assessment in Ontario are assessed under a streamlined process. The Ministry has limited involvement in these assessments. While the Ministry is responsible for administering the *Environmental Assessment Act*, it does not know how many streamlined assessments are completed annually, nor does it have assurance that these assessments are being done properly…
>
> Ministry staff also informed us that in some instances the Ministry became aware of a Class EA project only through bump-up requests from the public. Staff at the Ministry's regional offices had no previous information on approximately one-quarter of the 177 Class EA projects for which the Ministry had received bump-up requests in the last five-and-a-half years. In these cases, the project owner had already conducted public consultation and prepared the assessment report before the Ministry became aware of the project. As a result, the Ministry missed opportunities to contact project owners in the early stages of the assessment to ensure that all the risks are identified and addressed…
>
> Ministry regional office staff reviews of streamlined assessments often identified deficiencies in the environmental assessment done by project owners. Such deficiencies confirm the need for the Ministry to provide feedback on streamlined assessments.
>
> In our review of a sample of streamlined assessments, we found that the Ministry identified deficiencies in about three-quarters of the assessments it reviewed. Such deficiencies include insufficient public and Indigenous consultation, lack of details to support the project owner's assessment of environmental impact, and additional measures needed to mitigate impact on the environment. Many of these deficiencies would otherwise not have been detected and corrected, since the only other means of identifying these would have been through a public request for a bump-up to a comprehensive assessment—which occurs with less than 10% of projects.[15]

In CELA's view, the above-noted findings and concerns expressed by the Environmental Commissioner and the Auditor General remain equally valid in 2019. However, Schedule 6 of Bill 108 does not adequately rectify these systemic problems within Ontario's Class EA regime.

Instead, the MECP's Discussion Paper[16] and Schedule 6 of Bill 108 largely focus on the timeliness of Part II order decisions. CELA agrees that elevation requests often take too long for the Minister to decide, and we note that most of the time, the public requests are refused. On this latter point, the Discussion Paper states that out of the 172 elevation requests received by the Minister from 2012 to 2017, only one request was granted.[17] In CELA's experience, this excessively high refusal

[15] Auditor General of Ontario, 2016 Annual Report, Chapter 3.06: Environmental Assessment, pages 356-57, 359: see http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf.
[16] Discussion Paper, page 12.
[17] *Ibid*. The 2016 Annual Report of the provincial Auditor General similarly found that only one of 177 elevation requests was granted by the Environment Minister in the previous 5.5 year period: see http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf.

rate has been a long-standing problem under Class EAs in Ontario, but the Discussion Paper and Schedule 6 of Bill 108 offer the wrong solution.

From our public interest perspective, CELA's fundamental concern is that the existing Part II order process has become non-credible and over-politicized, largely because elevation requests are determined behind closed doors by the Minister, not an independent decision-maker. We are also concerned by claims that the dismal track record of unsuccessful elevation requests demonstrates that these requests do not have merit. This line of argument was expressly rejected years ago by Environment Minister's EA Advisory Panel in no uncertain terms:

> Some proponents whose projects are covered by Class EAs claim that the absence of successful bump-up requests demonstrates that such requests are unmeritorious, and proves that Class EA planning procedures are working well. The Executive Group respectfully disagrees with this claim, especially given the inherently political nature of the current bump-up decision-making process. In our view, the fact that bump-up requests continue to be filed by Ontarians (despite the strong likelihood of rejection) suggests that there is significant and ongoing public dissatisfaction with Class EA implementation (i.e. insufficient or untimely public notices, inadequate documentation prepared by proponents, unacceptable environmental impacts or tradeoffs, inappropriateness of Class EA procedures for particularly significant projects or sensitive sites, etc.).[18]

To remedy this situation, the EA Advisory Panel made two key recommendations for quickly resolving project-specific disputes that may arise during the Class EA planning process, and for adjudicating Part II order requests that may get filed to address outstanding issues at the end of the Class EA planning process.

The first reform recommended by the Panel was that disagreements which arise between the proponent and members of the public during the Class EA process should be resolved in an expedited process administered by the ERT. This reform was explained by the Panel as follows:

> During the time that a parent Class EA is being applied to a project and an Environmental Study Report (ESR) is being prepared, where there are 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, there is no meaningful procedure or mechanism for resolving such issues. Failing agreement between the proponents and EA participants, the only remedy is for those concerned to await the completion of the project-specific Class EA and resulting ESR, and then request a bump-up/Part II order. The same issue exists in relation to projects subject to environmental screening under the Electricity Projects Regulation. The lack of a mechanism for resolving issues prior to completion of the project-specific Class EA is problematic both for proponents and others. Both sectors would benefit by having timely procedures which can resolve disputes during, and not at the end of, the preparation of the ESR, with the objective of avoiding or limiting subsequent bump-up requests…

[18] EA Advisory Panel Report, *Environmental Assessment in Ontario: A Framework for Reform* (Vol. I, March 2005), page 93: see https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1.

> In light of the foregoing observations, the Executive Group concludes that there should be processes and means for dealing with obvious problems in the preparation of a project-specific Class EA/ESR while it is ongoing, instead of waiting until the end for a "bump-up" request. For example, those persons who are concerned about the process might identify a problem with the "need" discussion, or allege there are deficiencies in the scope of alternatives being considered, or the screening criteria being used. If the proponent and stakeholders cannot resolve these themselves, provision should be made for seeking directions from the ERT which could include ERT mediation, or rulings from the ERT during a "time out". We observe that if these procedures are established, the mere fact they exist will likely cause proponents to more carefully consider and use more genuine effort to resolve community concerns during the preparation of an ESR, and not allow these to fester until the end of the process.

The second reform recommended by the Panel was that Part II requests should be adjudicated in writing by the ERT, not the Minister:

> In addition to the foregoing procedures that may be triggered during Class EA planning exercises, the Executive Group is also recommending the creation of a formal adjudicative process, administered by the ERT, to expeditiously hear and determine requests for bump-ups/Part II Orders/elevation requests after the completion of an ESR/screening report. For the reasons outlined above, the Executive Group considers that the ERT is best positioned to serve as the adjudicative body to hear and determine bump up or elevation requests that arrive at the end of planning procedures.

The EA Advisory Panel's suggested framework for implementing these reforms is set out below in Schedule 1 of these submissions. However, the Panel's sound recommendations have not been adopted by the Ontario government to date.

To the contrary, Schedule 6 of Bill 108 now proposes *EAA* amendments that:

- prohibit the Minister from issuing a Part II order unless the Minister opines that the order will "prevent, mitigate or remedy adverse effects" upon:

  > (i) existing treaty and aboriginal rights affirmed by section 35 of the *Constitution Act, 1982*; or
  >
  > (ii) a prescribed matter "of provincial importance";[19]

- require an MECP Director to review the Part II request to ensure that it raised an issue related to the above-noted grounds, and it was made by a person "qualified" to make the request;[20]

[19] Proposed subsection 16(4.1). To date, no information has been provided by the Ontario government to describe what constitutes a prescribed matter of public importance for the purposes of this new subsection. Moreover, there is no mandatory duty on the Cabinet to pass a regulation prescribing matters since section 39 of the *EAA* is permissive in nature. Thus, it is unknown when – or if – any matters will be prescribed in relation to Part II order requests.
[20] Proposed subsection 16(7.2).

- empower the Director to refuse the Part II order request, in whole or in part, if these conditions precedent are not satisfied,[21] and to notify the requester, with reasons, if the request is summarily refused;[22]

- impose a new Ontario residency restriction for individuals or groups that file requests for Part II orders;[23]

- indicate that the Minister shall make his/her decision on the requested Part II order before the prescribed deadline, but if the deadline is missed, the Minister must provide reasons to the proponent and requestor to explain why a decision could not be made by the deadline, and to indicate the timeline in which the decision is expected to be made.[24]

In CELA's view, these proposals are unacceptable because they will not fix the fundamental structural problems that undermine the credibility of the Part II order process. CELA is particularly concerned about the unwarranted proposal to restrict the grounds for elevation requests to treaty/aboriginal rights and to unspecified matters of undefined "provincial significance."

To our knowledge, the Ontario government has presented no empirical evidence or statistical analysis indicating how often treaty/aboriginal rights have served as the basis for Part II order requests. However, even if such requests only constitute a small percentage of elevation requests over the years, CELA agrees that Indigenous communities should continue to be empowered to file elevation requests on the basis of potential impacts on treaty/aboriginal rights.

At the same time, based on our *EAA* experience in recent decades, it is CELA's understanding that Part II order requests have been much more frequently filed by non-Indigenous individuals, groups and communities on grounds other than treaty/aboriginal rights.

However, if future Part II orders are only available for treaty/aboriginal rights, and given that no provincially significant matters have been prescribed or even identified by the Ontario government, then Schedule 6 will inappropriately reduce the number of requests to a relatively small handful each year. In CELA's view, arbitrarily restricting Part II requests to a single ground (or two) will diminish the efficacy of this important safety valve, and will undermine accountability and transparency under Class EAs.

CELA is aware that Part II order requests often raise public concerns about potential effects upon provincially significant natural heritage (e.g. species at risk or their habitat). However, a number of elevation requests address impacts to natural heritage that may not be provincially significant, but may be highly valuable and ecologically important at the local or regional level.

For example, given the extensive loss of wetlands across southern Ontario, it is important to protect and conserve the remaining wetlands even if they do not qualify as provincially significant under Ontario's wetlands evaluation system. Accordingly, CELA submits that Part II order requests

[21] Proposed subsection 16(7.3)
[22] Proposed subsection 16(7.4).
[23] Proposed subsection 16(5).
[24] Proposed subsection 16(7.1).

should not be limited to only those matters that are deemed by Ontario government to be worthy enough at the provincial scale to warrant the application of the elevation request process.

In addition, while Schedule 6 of Bill 108 proposes to prohibit persons from filing elevation requests unless they are "resident in Ontario," there is no actual definition of this key term in Schedule 6. Instead, Schedule 6 merely enables the Cabinet to pass a regulation to define or clarify this critically important phrase, but there is no mandatory duty to so under the *EAA*. It therefore remains unclear under Schedule 6 whether elevation requests can be filed by federal ministries or agencies, non-Ontario corporations that carry on business in the province, persons from other provinces or states who own Ontario properties (e.g. homes, cottages, etc.), unincorporated associations based in Ontario, or officials from neighbouring jurisdictions that may be concerned about potential transboundary impacts.

At the same time, Schedule 6 also proposes that the Cabinet may make regulations that permit non-Ontarians to file Part II order requests.[25] If the Cabinet intends to exercise this regulation-making authority, then there appears to be no compelling need to change the status quo by initially restricting Part II order requests to Ontario residents. In CELA's view, requests for Part II orders should be available to any person (resident or otherwise) who is interested in, or potentially affected by, projects that are being planned under Class EAs.

More fundamentally, CELA observes that the Ontario government has offered no evidence-based justification for fundamentally altering who can – or cannot – file Part II order requests under the *EAA*. For example, the Government of Ontario has not demonstrated that the elevation request process needs to be constrained by residency requirements because the process has been "hi-jacked" or subverted by a proliferation of requests filed by non-Ontario organizations, persons or entities.

Similarly, the Schedule 6 proposal to prescribe a deadline for the Minister's decision-making is misplaced and ambiguous. For example, CELA notes that Schedule 6 and the Discussion Paper do not specify an actual timeframe for the Minister's decision. Instead, Schedule 6 merely enables the Cabinet to pass a regulation that sets a deadline, but there is no legal obligation upon the Cabinet to do so. Therefore, despite Schedule 6's provisions, proponents, stakeholders and members of the public have no indication how long (or how short) the decision-making timeline may be in relation to elevation requests.

More generally, CELA understands the political attractiveness of setting deadlines in order to be seen as providing more certainty and predictability to parties involved in disputes over elevation requests. However, Schedule 6 itself undermines this timeliness objective by specifying, in effect, that the Minister's failure to make a decision by the prescribed deadline is neither fatal to, nor determinative of, his/her decision on the merits of the request.

Instead, the Minister is simply required to provide an explanation as to why more time may be required to decide the elevation request. By giving the Minister an open-ended discretion to decide elevation requests well after the prescribed deadline, CELA submits that, as a matter of law, Schedule 6 does not establish any binding or enforceable timelines at all.

[25] Proposed subsection 39(g.2).

In summary, CELA concludes that even if the Schedule 6 amendments are enacted, the decision-making process will remain intact as an indiscernible "black box" in which elevation requests are sent by the public to the Minister but are almost always rejected, often for specious reasons. This unsatisfactory arrangement will not be fixed by *EAA* changes that are intended to simply speed up Ministerial decision-making, restrict who may file Part II requests, limit the grounds for such requests, and empower the Director to screen out requests on a preliminary basis. In fact, given that virtually all Part II order requests are rejected by the Minister in any event, we see no persuasive reason for any of these new Schedule 6 changes to the decision-making process.

Accordingly, CELA recommends that Schedule 6's proposed amendments regarding Part II order requests should not be enacted under Bill 108. Instead, the EA Advisory Panel's above-noted recommendations should be developed and implemented forthwith by the Ontario government. As noted above, the fact that numerous elevation requests are filed every year by concerned citizens suggests that there is a high level of public dissatisfaction with the current state of Class EA planning processes.

Thus, CELA submits that it would make more sense for the Ontario government to systematically review and address the root causes of elevation requests, rather than try to expedite or constrain the Ministerial decision-making process in the manner set out in Schedule 6 of Bill 108.

RECOMMENDATION 3: The Ontario government should not proceed with Schedule 6's proposed revisions of section 16 of the *EAA* in relation to elevation (or "bump up") requests filed by members of the public pursuant to Class EAs.

RECOMMENDATION 4: The Ontario government should develop and consult upon appropriate amendments to section 16 of the *EAA* that reflect the reforms suggested by the EA Advisory Panel in relation to Class EAs and elevation (or "bump up") requests.

(e) Essential EA Reforms Missing From Schedule 6 of Bill 108

In the wake of the 1996 amendments to the *EAA*, there has been a widespread consensus that Ontario's EA program needs to be renewed, revised and revitalized. Thus, important recommendations for critically needed EA reforms have been offered over the years by CELA,[26] other environmental groups,[27] the Environment Minister's EA Advisory Panel,[28] the Auditor General of Ontario,[29] and the Environmental Commissioner of Ontario.[30]

It is beyond the scope of these submissions on the Registry posting and Schedule 6 of Bill 108 to describe in detail the various EA reforms that are overdue in Ontario, such as:

[26] See http://www.cela.ca/publications/application-review-environmental-assessment-act-and-six-associated-regulations.
[27] See http://www.cela.ca/publications/briefing-note-need-environmental-assessment-ontario.
[28] *Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Recommendations 1-41: see https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1.
[29] See http://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html.
[30] See http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf and http://docs.assets.eco.on.ca/reports/environmental-protection/2007-2008/2007-08-AR.pdf.

- updating and improving the purposes and principles of the *EAA* to reflect a sustainability focus;
- ensuring meaningful opportunities for public participation in individual EAs and Class 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;
- entrenching a statutory climate change test to help *EAA* decision-makers to determine whether particular undertakings should be approved or rejected in light of their greenhouse gas emissions or carbon storage implications;
- curtailing the ability of the Minister to approve Terms of Reference that narrow or exclude the consideration of an undertaking's purpose, need, alternatives or other key factors in individual 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;
- facilitating regional assessments for sensitive or vulnerable geographic areas;
- ensuring strategic assessments of governmental plans, policies and programs;
- referring individual EA applications to the ERT for a hearing and decision upon request from members of the public;
- reviewing and reducing the lengthy list of environmentally significant undertakings that have been exempted from the *EAA* by regulation, declaration orders, or legislative means; and
- removing or revising section 32 of the *EBR*, which currently exempts from the *EBR*'s public participation regime any licences, permits or approvals that implement undertakings that have been approved or exempted under the *EAA*.

Until these and other key reforms are implemented, CELA fully agrees with the 2014 commentary by the Environmental Commissioner of Ontario that the province's current EA program is a "vision lost":

> Given the unaddressed concerns and unfulfilled recommendations of the EA Advisory Panel, the ECO and many observers and stakeholders, the ECO believes a comprehensive and public review of the EAA is long overdue. The ECO also believes that MOE should

> conduct such a review with an open mind, listening to concerns from all sectors and utilizing the consultative power afforded by the Environmental Registry.[31]

Unfortunately, the above-noted reforms are not addressed by Schedule 6 of Bill 108, nor are they mentioned in the Registry posting or the Discussion Paper. Rather than tackling the serious systemic problems in Ontario's EA program, Schedule 6 proposes piecemeal "efficiency" measures (e.g. exemptions, deadlines, etc.). In CELA's view, this narrow approach falls considerably short of the mark if the Ontario government is interested in pursuing appropriate *EAA* reforms that benefit all Ontarians, not just proponents or their shareholders.

RECOMMENDATION 5: The Ontario government should develop and consult upon appropriate legislative and regulatory changes to the current EA program that are needed to achieve the public interest purpose of the *EAA*.

PART III – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA supports Schedule 6's proposed additions to subsection 11.4 of the *EAA*. However, CELA objects to Schedule 6's unwarranted and unacceptable proposals to amend the existing Class EA regime to exempt certain undertakings, and to unduly constrain the process for filing and deciding Part II order requests.

In addition, CELA concludes that Schedule 6 of Bill 108 does not contain the types of broad *EAA* reforms that are needed to safeguard the public interest in Ontario in an effective, enforceable and equitable manner.

Accordingly, CELA makes the following recommendations in relation to the Registry posting and Schedule 6 of Bill 108:

RECOMMENDATION 1: When developing reconsideration rules under subsection 11.4 of the *EAA*, the Minister should consult interested stakeholders to ensure that the rules entrench opportunities for meaningful public participation in the decision-making process.

RECOMMENDATION 2: The Ontario government should not proceed with Schedule 6's statutory amendments which require Class EAs to specify types of undertakings that will be exempt from the *EAA*.

RECOMMENDATION 3: The Ontario government should not proceed with Schedule 6's proposed revisions of section 16 of the *EAA* in relation to elevation (or "bump up") requests filed by members of the public pursuant to Class EAs.

RECOMMENDATION 4: The Ontario government should develop and consult upon appropriate amendments to section 16 of the *EAA* that reflect the reforms suggested by the EA Advisory Panel in relation to Class EAs and elevation (or "bump up") requests.

[31] ECO Annual Report 2013-14, at pages 132-39: see http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf.

RECOMMENDATION 5: The Ontario government should develop and consult upon appropriate legislative and regulatory changes to the current EA program that are needed to achieve the public interest purpose of the *EAA*.

We trust that these recommendations will be considered and acted upon as the MECP determines its next steps in this matter. If requested, CELA would be pleased to meet with MECP staff to further elaborate upon the above-noted recommendations.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

SCHEDULE 1:
EXCERPTS FROM THE REPORT OF THE ENVIRONMENT MINISTER'S ENVIRONMENTAL ASSESSMENT ADVISORY PANEL (2005)

This Schedule contains verbatim excerpts from the EA Advisory Panel's proposals to improve and strengthen the process for addressing disputes that arise during and after Class EA planning procedures.

The full text of the Panel's report is available at: https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1

1. *EAA* Reforms to Obtain ERT Directions on Issues Arising during Class EA Planning

(a) The ERT should be enabled to provide guidance on the need for the proponent to take further steps to comply with the parent Class EA (e.g., consider further alternatives, gather more or further analyze data, undertake further consultation), and generally advise on or direct the resolution of differences between the proponent and the public. The jurisdiction of the ERT to provide such rulings should, if necessary, be clarified under the EA Act for these purposes.

(b) The ERT should have the authority to determine that the parent Class EA schedule/category being used by the Proponent should be changed to a more rigorous one, require the proponent to carry out supplementary studies and consultation prior to completing the ESR, as well as direct that the Class EA process be terminated and an individual EA be undertaken, with Terms of Reference to be approved by the ERT.

(c) The ERT should have the authority to impose a "time out" on the proponent proceeding further with or completing the ESR process, where the ERT is of the opinion such time out is appropriate.

(d) Applications to the ERT should be dealt with in an expedited way, and any hearing for these purposes should be limited to one day or less, unless the ERT is persuaded otherwise. Subject to any rules made by the ERT, the hearing should occur within 10 business days of the applicant's materials being filed with the ERT and any usual notice provisions should be modified so as not to delay the hearing of the application. The ERT should be encouraged to provide its direction as soon as possible, and in any event within one week of hearing the application.

(e) MOE staff should be encouraged to provide the Ministry's views on the matter to the parties, and make a written submission to the ERT with the objective of attempting to provide a resolution of the issues, without prejudice to any decision by the ERT.

(f) Where the ERT deems it appropriate, the proponent may be required to provide funding to the community for their engagement of independent expertise and obtaining expert information, and for participation in mediation, with the objective of resolving differences and avoiding bump-up requests at the end of the process.

(g) The ERT should clearly have the authority to engage in mediation as well as rule on applications.

(h) Where the ERT directs that an individual EA with appropriate Terms of Reference be undertaken in substitution for the Class EA process, this ruling becomes final and binding unless within 30 days the Minister rejects or modifies the direction.

(i) Factors to be considered by the ERT in considering whether an undertaking should be required to be processed under a more rigorous category or pursuant to an individual EA should include:

- the intended timing of and any substantive urgency related to the proponent's undertaking;
- likely environmental impacts of the project and their significance;
- extent and nature of public concerns;
- the adequacy of the proponent's planning process;
- the availability of other alternatives to the project;
- the adequacy of the public consultation program and the opportunities for public participation;
- the involvement of the community or complaining party in the planning of the project; - the nature of the specific concerns which remain unresolved;
- details of any discussions held between the community or person and the proponent;
- benefits of requiring the proponent to undertake further studies and/or an individual EA;
- degree to which public consultation and dispute resolution have occurred;
- how the proposed undertaking differs from other undertakings in the class and the significance of those factors; and
- any other important matters considered relevant.

2. *EAA* Reforms to Enable the ERT to Adjudicate Part II Order Requests

(a) Where a request is made for a Part II order, bump-up or elevation ("a request") unless the Minister decides the request within 30 days, or within the 30 day period the Minister stipulates a decision will be made within a further 30 day period and makes a decision within a total of 60 days, the proponent or requestor who has substantively participated throughout the project-specific Class EA process, may require the project-specific Class EA to be referred to the ERT for its consideration and decision;

(b) The Minister shall provide reasons for any decision made regarding such requests;

(c) The ERT shall not consider a request for an individual EA where, prior to completion of the ESR, the ERT had determined no individual EA was warranted for the specific project in issue;

(d) Where the ERT holds a hearing in respect of the ESR, the ERT shall have the power to:

- approve the undertaking with or without conditions;
- require an individual EA, including approval of the Terms of Reference, and the completion of the EA within specified time limits;
- require further studies and consultation within specified time limits and adjourn the hearing pending completion of such requirements, following which it shall determine whether or

not to approve the ESR/undertaking, unless in the interim the bump-up requests have been withdrawn, whereupon it shall be deemed approved;

(e) A hearing before the ERT may be in writing only or an oral hearing. Any hearing before the ERT shall be commenced within 30 days of a hearing request, the hearing limited to 1 day, and a decision rendered within 45 days of the hearing request, unless the ERT otherwise orders;

(f) No request shall be granted by the ERT where:

- There is an objective and apparent basis to conclude that the proponent's project-specific Class EA process conformed to all substantive and procedural requirements of the applicable parent Class EA for the undertaking and the commitments, if any, made by the proponent during the preparation of its ESR or which may have been ordered during that period by the ERT; and,
- The decision by the proponent as to the schedule in the parent Class EA used for its project was not patently unreasonable.

(g) Factors to be considered by the ERT in making its decisions should include:

- the intended timing of and any substantive urgency related to the proponent's undertaking;
- likely environmental impacts of the project and their significance;
- the extent and nature of public concerns;
- the adequacy of the proponent's planning process;
- the availability of other alternatives to the project;
- the adequacy of the public consultation program and the opportunities for public participation;
- the involvement of the community or requesting person in the planning of the project;
- the nature of the specific concerns which remain unresolved;
- details of any discussions held between the community or requesting person and the proponent;
- benefits of requiring the proponent to undertake further studies and/or an individual EA;
- degree to which public consultation and dispute resolution have occurred;
- how the proposed undertaking differs from other undertakings in the class and the significance of those factors; and
- any other important matters considered relevant.

Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

SUBMISSIONS REGARDING LEGISLATIVE AMENDMENTS TO THE *LOCAL PLANNING APPEAL TRIBUNAL ACT, 2017* AND THE *PLANNING ACT* BILL 108, SCHEDULES 9 AND 12

May 29, 2019

Prepared by
Jacqueline Wilson, Legal Counsel

A. Introduction

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide submissions in relation to Bill 108, Schedule 9 (*Local Planning Appeal Tribunal Act, 2017*) and Schedule 12 (*Planning Act*).

In CELA's view, any analysis of the land use planning system should be viewed through the lens of ensuring access to justice for members of the public. Any Ontarian interested in, or affected by, land use planning decisions should have a meaningful opportunity to participate in the decision-making process. Bill 108's reforms to the *Planning Act* and *Local Planning Appeal Tribunal Act ("LPAT Act")* do not address this critical issue.

CELA supports the return to *de novo* hearings at the Local Planning Appeal Tribunal ("LPAT") to restore procedural rights and ensure that evidence on serious environmental issues is tested. However, we recommend that amendments which restrict public participation in appeals in the planning system, including short timelines for decisions and limits on the types of appeals to LPAT, be removed.

B. Background on Canadian Environmental Law Association

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues. Since our inception, CELA's casework, law reform and public outreach activities have increasingly focused on land use planning matters at the provincial, regional and local levels in Ontario. For example, CELA lawyers represent clients involved in appeals under the *Planning Act* in relation to official plans, zoning by-laws, subdivision plans and other planning instruments. In some cases, CELA clients are the appellants, while in other cases, CELA clients are added by the LPAT as parties or participants in response to appeals brought by other persons or corporations.

CELA's planning cases tend to occur outside of the Greater Toronto Area. The overall objective of CELA's clients in these hearings include to conserve water resources; protect ecosystem functions; preserve prime agricultural lands; safeguard public health and safety; and otherwise ensure good land use planning across Ontario.

C. Analysis

(1) Schedule 9 – *Local Planning Appeal Tribunal Act, 2017*

i. Restore paramountcy of Statutory Powers Procedure Act

The *Statutory Powers Procedures Act* ("*SPPA*") applies generally to Ontario tribunals and applied to the Ontario Municipal Board. It provides important procedural protections, for instance a parties' right to notice[1], the right to attend or access hearings[2], the right to examine and cross-examine witnesses[3], and the right to reasons for decision[4]. The *LPAT Act* established that the *SPPA* would not prevail if there was a conflict between it and the *SPPA*.[5] In CELA's view, the paramountcy of the *SPPA* and its procedural safeguards should be restored.

Recommendation 1: Bill 108 should restore the applicability of the *Statutory Powers and Procedures Act* to Local Planning Appeal Tribunal cases, including in cases of conflict between the *Statutory Powers Procedures Act* and the *Local Planning Appeal Tribunal Act, 2017.*

ii. Repeal of restricted Local Planning Appeal Tribunal Hearing Rules in Schedules 9 and 12

CELA opposed Bill 139's amendments to the Ontario Municipal Board regime because it eliminated important procedural and substantive rights for the public and community groups within the land use planning appeal framework. It has been our experience representing community groups in the current LPAT regime that the following issues arise:

- The current system requires parties to submit their evidence, including expert reports, to the local municipality or planning board making the initial planning decision. It is difficult for community groups to incur significant expenses at this earlier stage of the proceeding.

- At the municipal or planning board level, there is no opportunity to cross-examine experts or ensure that the authors of expert reports are duly qualified to offer expert evidence. Smaller or rural municipalities often do not possess in-house capacity to critically assess planning applications and the supporting technical documentation. The restrictions on parties controlling what evidence to call and the cross-examination of witnesses at LPAT is problematic because expert evidence may never be tested adequately.

- The requirement to create a written record which includes all affidavits and legal argument within 20 days of receipt of the Notice of Validity is time consuming and resource-intensive.

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[1] *Statutory Powers Procedure Act*, RSO 1990, c S22 ("S*PPA*"), s. 6
[2] *SPPA*, s. 9
[3] *SPPA*, s. 10.1
[4] *SPPA*, s. 17
[5] *Local Planning Appeal Tribunal Act, 2017*, SO 2017, c 23, Sched 1, ("*LPAT* Act"), s 31(1)(b), (3)

- In our view, it is not efficient to have a two-stage appeal process whereby the LPAT is restricted in its potential remedy on a first appeal to returning the matter to the municipal decision-maker, but allowing a full *de novo* hearing on a second appeal.

However, CELA does not recommend restoring the pre-Bill 139 status quo without further reform. There is a pressing need to strengthen and improve Ontario's existing land use planning system, particularly in terms of protecting provincial interests, enabling local decision-making, ensuring meaningful public participation, and providing effective appellate oversight by a specialized administrative body.

In particular, Bill 108 does not address the fundamental access to justice issue in our land use planning system, namely, the financial barriers facing residents and non-governmental organizations who seek to participate in decision-making. The current land use planning system is difficult to access and relies heavily on expensive experts. It is incumbent on the Ontario government to address the fiscal imbalance in parties' resources to ensure that the public can participate and contribute to the development of their communities in a fair manner.

We also note that the Ontario government's decision to discontinue funding for the Local Planning Appeal Support Centre ("LPASC"), which provided legal and planning support to the public, exacerbates this access to justice issue. We recommend that funding for the LPASC be restored.

Recommendation 2: CELA recommends that the Ontario government provide funding assistance for lawyers, planners and other experts to eligible members of the public and community groups at the Local Planning Appeal Tribunal to improve access, fairness, and the quality of decisions.

Recommendation 3: Funding for the Local Planning Appeal Support Centre should be restored.

iii. Participants should be able to make an oral statement to the LPAT

Section 5 of Schedule 9 proposes to add section 33.2 to the *LPAT Act*, which would restrict the participation rights of participants to written submissions only.[6] CELA's clients often wish to participate at LPAT by making a presentation to the tribunal, but do not have the resources to assume the role and responsibilities of a full party. It is very useful for the tribunal to receive presentations directly from the public, who are typically unrepresented residents with considerable local knowledge and valuable perspectives on the issues in dispute.

Recommendation 4: The proposed section 33.2 of the *LPAT Act* (section 5 of Schedule 9) should be deleted to allow participants to participate in the Local Planning Appeal Tribunal process either in writing or by making an oral statement to the tribunal.

[6] Bill 108, *More Homes, More Choice Act, 2019*, Schedule 9, Local Planning Appeal Tribunal Act, 2017, section 5 [amending section 33.2 of the *LPAT Act*]

iv. Repeal of Power for Tribunal to state case for opinion of Divisional Court

CELA disagrees with section 6 of Schedule 9, which repeals section 36 of the *LPAT Act* (previously subsection 94(1) of the *Ontario Municipal Board Act*). Section 36 allows for the parties to a tribunal hearing or the tribunal to refer a stated case to the Divisional Court for opinion. This power is not used frequently, but it is useful to efficiently and fairly resolve issues that could affect a multiplicity of cases, for instance on the constitutional authority of the LPAT or procedural issues.

For example, the most recent use of this power was in *Craft et al v. City of Toronto et al*, 2019 ONSC 1151, which clarified the ability of parties to cross-examine witnesses called by the LPAT. This use of the stated case power was useful and efficient because it provided guidance on a procedural issue common to all LPAT appeals.

Administrative law principles generally prohibit parties to an administrative tribunal hearing from judicially reviewing interlocutory decisions, such that a recurring procedural concern may not be quickly resolved by the Divisional Court.

Recommendation 5: Section 6 of Schedule 9, which repeals section 36 of the *Local Planning Appeal Tribunal Act, 2017,* should be removed. The power of the LPAT or the parties to refer a stated case to the Divisional Court for opinion should be maintained.

(2) <u>Schedule 12 - Planning Act</u>

i. Restricted appeal rights for the public

CELA opposes Bill 108's proposal to remove the public's ability to appeal several *Planning Act* decisions. The following proposed amendments should be removed:

- Under the proposal, there is no appeal of Minister-ordered development permit system provisions in Official Plans, unless the Minister himself appeals.[7]

- The ability for a member of the public to appeal a non-decision on an Official Plan has also been removed. Now, it is only a municipality, the Minister, or the proponent of an amendment who can appeal.[8]

- The public's ability to appeal decisions on plans of subdivision has been removed. In the current system a person who made oral or written submissions to the municipality or planning board could appeal. The term "person" has been removed from subsections 51(39) and 51(48) of the *Planning Act*. Instead, the list of the persons who can appeal is now found in subsection 51(48.3) and only

[7] Bill 108, Schedule 12, Section 3(2) [amending sections 17(24.1.4), 17(24.1.5), 17(24.1.6) of the *Planning Act*], Section 3(8) [amending section 17(36.1.8), 17(36.1.9), 17(36.1.10) of the *Planning Act*], and section 19 [amending section 70.2.2(1) of the *Planning Act*]
[8] Bill 108, Schedule 12, Section 3(11) [amending s. 17(40) of the *Planning Act*]

includes corporate entities, such as a corporations operating an electric utility, Ontario Power Generation Inc., and a corporation operating telecommunication infrastructure.[9]

We also note that the ability of the public to appeal official plans and official plan updates has not been restored.

Restricting access to the LPAT is contrary to sound, participatory decision-making and will likely result in more issues being litigated in the court system, which is more costly and lacks the planning expertise of the LPAT. It is advisable to ensure that the LPAT has a robust appeal authority and the public is not excluded from appealing to LPAT on important land use planning matters.

Recommendation 6: Sections 3(2), 3(11), 14(3), 14(4), 14(6), 14(7) of Schedule 12, Bill 108 should be amended to maintain the public's ability to appeal development permit system provisions in Official Plans, non-decisions on an Official Plan, and plans of subdivision.

ii. Shorter timelines for decision by municipalities and planning boards

The proposed amendments to the *Planning Act* significant shorten the timelines for decision by municipalities and planning boards. CELA opposes those amendments because the timelines are set arbitrarily with no reference to the significance or complexity of any particular decision. Short timelines will also decrease efficiency in the overall planning approval process by resulting in more developer appeals to the LPAT for non-decisions, which will start the costly appeal process. Providing municipalities and planning authorities with a reasonable amount of time to make a decision would lower costs and conflict.

We also note that the proposed timelines are shorter than the timelines for decision under the *Planning Act* before the amendments to the planning system by Bill 139.

Examples of the shortened timelines for decision include:

- Subsection 17(40) relates to decisions in respect of all or part of an Official Plan. The timeline for decision has been shortened from 210 days to 120 days. Prior to the amendments to the *Planning Act* in Bill 139, the timeline for decision was 180 days.[10] The discretion to lengthen the timeline in appropriate circumstances, which existed in the pre-Bill 139 system and the current system, has also been repealed.[11]

- Subsection 22(7.0.2) shortens the timeline for decision on amendments to Official Plans to 120 days from 210 days. The previous standard prior to the Bill 139 amendments was 180 days.[12]

- Subsection 34(11) shortens the timeline for decision on zoning by-law amendments to 90 days from 150 days. The previous standard prior to the Bill 139 amendments was 120 days.[13]

[9] Bill 108, Schedule 12, Section 14(3), (4), (6), (7) [amending sections 51(39), (48) and (48.3) of the *Planning Act*]
[10] Bill 108, Schedule 12, Section 3(11) [amending section 17(40) of the *Planning Act*]
[11] Bill 108, Schedule 12, Section 3(12) [amending section 17(40.1) of the *Planning Act*]
[12] Bill 108, Schedule 12, Section 4(2) [amending section 22(7.0.2) of the *Planning Act*]
[13] Bill 108, Schedule 12, Section 6(1) [amending section 34(11) of the *Planning Act*]

- Subsection 51(34) shortens the timeline for decision on plans of subdivision to 120 days from 180 days. The previous standard prior to the Bill 139 amendments was 180 days.[14]

Recommendation 7: Sections 3(11), 4(2), 6(1) and 14(2) of Schedule 12, Bill 108 should be amended to maintain the current timelines for decision in *Planning Act* matters.

Recommendation 8: Section 3(12) of Schedule 12, Bill 108 should be removed to maintain municipal discretion to extend the timeline for Official Plan decisions in appropriate circumstances. Municipalities or planning boards should also be granted similar discretion to extend any *Planning Act* decision timeline in appropriate circumstances.

iii. Repeal of restricted appeal grounds

The proposed repeal of sections 17(24.0.1), 17(25), 17(36.0.1), 17(37), 22(7.0.0.1), 22(8) and 34(19.0.1) restores more fulsome appeal grounds in appeals to the LPAT. The current system restricts appeals by only considering whether a decision on Official Plans or zoning by-law amendments are inconsistent with a policy statement, fail to conform with or conflict with a provincial plan, or fail to conform with an applicable official plan. We welcome the ability to raise other appropriate planning grounds on appeal, for instance prematurity, land use incompatibility, non-conformity with provincial interests listed in section 2 of the *Planning Act*, non-compliance with statutory prerequisites, or conflict with other provincial legislation.

Recommendation 9: CELA's supports Bill 108's restoration of more fulsome appeal grounds to the Local Planning Appeal Tribunal.

D. Summary of Recommendations

In summary, CELA makes the following recommendations in relation to Schedule 9 and 12 of Bill 108:

Recommendation 1: Bill 108 should restore the applicability of the *Statutory Powers and Procedures Act* to Local Planning Appeal Tribunal cases, including in cases of conflict between the *Statutory Powers Procedures Act* and the *Local Planning Appeal Tribunal Act, 2017.*

Recommendation 2: CELA recommends that the Ontario government provide funding assistance for lawyers, planners and other experts to eligible members of the public and community groups at the Local Planning Appeal Tribunal to improve access, fairness, and the quality of decisions.

[14] Bill 108, Schedule 12, Section 14(2) [amending section 51(34) of the *Planning Act*]

Recommendation 3: Funding for the Local Planning Appeal Support Centre should be restored.

Recommendation 4: The proposed section 33.2 of the *LPAT Act* (section 5 of Schedule 9) should be deleted to allow participants to participate in the Local Planning Appeal Tribunal process either in writing or by making an oral statement to the tribunal.

Recommendation 5: Section 6 of Schedule 9, which repeals section 36 of the *Local Planning Appeal Tribunal Act, 2017,* should be removed. The power of the LPAT or the parties to refer a stated case to the Divisional Court for opinion should be maintained.

Recommendation 6: Sections 3(2), 3(11), 14(3), 14(4), 14(6), 14(7) of Schedule 12, Bill 108 should be amended to maintain the public's ability to appeal development permit system provisions in Official Plans, non-decisions on an Official Plan, and plans of subdivision.

Recommendation 7: Sections 3(11), 4(2), 6(1) and 14(2) of Schedule 12, Bill 108 should be amended to maintain the current timelines for decision in *Planning Act* matters.

Recommendation 8: Section 3(12) of Schedule 12, Bill 108 should be removed to maintain municipal discretion to extend the timeline for Official Plan decisions in appropriate circumstances. Municipalities or planning boards should also be granted similar discretion to extend any *Planning Act* decision timeline in appropriate circumstances.

Recommendation 9: CELA's supports Bill 108's restoration of more fulsome appeal grounds to the Local Planning Appeal Tribunal.