Hal Leadlay
Coordinator
Ministry of Natural Resources and Forestry
Policy Division
Natural Resources Conservation Policy Branch
Resource Development Section
300 Water Street
Peterborough, Ontario
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Dear Mr. Leadlay,

EBR# 012-8443: Schedule 1 of Bill 39 - Aggregate Resources and Mining Modernization Act, 2016

On behalf of Ontario Nature, the Canadian Environmental Law Association and Environmental Defence, we would like to convey our frustration and disappointment with Schedule 1 of Bill 39, the *Aggregate Resources and Mining Modernization Act, 2016*. After over four years of public consultation it fails to deliver the changes needed to address the negative social and environmental impacts that arise from aggregate extraction in Ontario.

According to the posting on the Environmental Registry (EBR# 012-8443), the proposed amendments to the *Aggregate Resources Act* (ARA) through Bill 39 "would be the first step to modernizing and strengthening the way that aggregate resources are managed in Ontario by enabling stronger oversight, enhancing environmental accountability, improving information and participation and increasing fees and royalties." We fully support the objectives, as expressed. Yet, the proposed amendments would do little to accomplish these objectives. They fall far short of the expectations created when the Ministry of Natural Resources and Forestry (MNRF) released *A Blueprint for Change* in 2015. Key requirements regarding oversight, environmental accountability, public participation and fees and royalties are left to be developed in regulation and to the discretion of the Minister, with no conditions and none of the hoped-for clarity or commitment to improve environmental protection.

As noted on the EBR posting, should the Bill pass, there will be further consultation on regulations and policy. While opportunities for public consultation are always welcome, we must point out that in this particular situation, consultations on the ARA have been going on for over four years already. Such lengthy consultations - with such disappointing results - are

extremely onerous and discouraging. It is a struggle for individuals and non-government organizations such as ours, with very limited capacity, to adequately engage over such an extended time period. We question why the process has been dragged out for so many years. It suggests a lack of government resolve to deal with the issues directly and transparently and to make the decisions needed to address public concerns.

To be clear, our organizations are not seeking additional ministerial and Cabinet discretion, which is the focus of the proposed amendments that emphasize new regulations almost exclusively. Rather, we are looking for well-defined, enforceable provisions in the Act that address the environmental and social issues arising from aggregates extraction in Ontario. Regulations are intended for detailed implementation matters not for substantive requirements which should be spelled out in legislation.

Below is a list of some of the changes our groups had hoped to see in the amended ARA. None of these has been addressed, as far as we can ascertain:

1. A requirement for applicants for aggregate licences to demonstrate need for aggregate extraction in a particular area.
2. A requirement for MNRF to develop and maintain an up-to-date publicly available assessment of current aggregate demand and supply and provide projections of future needs, including analysis of opportunities for conservation, recycling and reduction of the demand for aggregates.
3. A requirement for MNRF to track and evaluate the amount of recycled aggregate resources used in Ontario, and make reports of the results available to the public.
4. Strict conditions in the legislation regarding self-filing to ensure the public interest is properly served.
5. A requirement to file site plans, rehabilitation plans and annual compliance reports online, to ensure public access and accountability.
6. A requirement to establish a schedule for rehabilitation of abandoned pits and quarries,
7. Detailed requirements regarding extraction of aggregates from beds of lakes or rivers.
8. A requirement for a full environmental assessment of potential impacts on the hydrological system for applications to extract aggregates below the water table.
9. A clear prohibition of extraction that necessitates pumping of water in perpetuity.
10. The establishment of maximum disturbed area at all new sites to encourage progressive rehabilitation.
11. A fixed term on licences (so that land use planning and rehabilitation can proceed in a timely fashion).
12. New rules and reporting requirements regarding the importation of fill for rehabilitation (to prevent contamination).
13. A clear requirement for applicants to prepare specific studies regarding: impacts on natural heritage; impacts on municipal water supplies; cumulative impacts on hydrology and hydrogeology (including water quality and quantity); and impacts on agricultural values.

14. Improved requirements regarding notification and consultation with Indigenous communities.
15. Expanded timelines for public consultation (up to 120 days).
16. Extension of the 120 metre area within which residents are notified of application.
17. A requirement to file a new application for an operation that is intended to change an above water table extraction to a below water table extraction. Significantly enhanced royalty fees earmarked for rehabilitation purposes payable by licensees with such fees going to the Trust to ensure rehabilitation occurs.

Instead, Bill 39 introduces a suite of enabling amendments that risk undermining oversight, environmental protection and public participation. These include proposals to:

1. Remove the requirement for annual compliance reports (allowing them to be required more or less frequently, as prescribed in regulation).
2. Replace licence application procedures and requirements (ARA, sec. 8 – 11) with procedures and requirements in regulation.
3. Create new exemptions to sections 7 and 34 allowing a person to operate a pit or quarry without an aggregate licence or an aggregate permit (qualifications and conditions to be prescribed in regulation).
4. Allow licensees and permittees to make minor amendments to site plans without the Minister's approval (details to be prescribed in regulation).
5. Prohibit the Minister from having regard to a history of non-compliance if the applicant remedied non-compliance within 90 days of getting caught.
6. Add new exemptions from the prescribed notification and consultation procedures that normally pertain to a person applying for an aggregate licence or permit.
7. Allow licence or permit holders to apply to amend a site plan without public notification requirements.
8. Allow the Minister to waive application fees for licences and permits and other licence and permit fees.
9. Provide that licensees and permittees are protected from prosecution on self-reported violations if they are reported before they are discovered by an Inspector;[1]

Even where proposed amendments are intended to enhance environmental protection, the lack of clear requirements or conditions makes the outcome highly uncertain and vulnerable to future changes in minister or government. For example:

[1] The Supreme Court of Canada held in R v Fitzpatrick that statutory self reporting requirement does not infringe rights against self incrimination under s. 7 of the Charter in context of a regulatory scheme. http://www.hrcr.org/safrica/arrested_rights/fitzpatrick.html. There are strong policy reasons why this should not be allowed. Otherwise, licensees who contravene the ARA can avoid prosecution simply by notifying the Ministry. This does not ensure specific or general deterrence from committing the offence in the first place.

1. While the Minister must "have regard to" impacts on municipal drinking water when granting licence or permit, there is no requirement to refuse a licence or permit application that conflicts with source water protections.
2. Rehabilitation reports are mandatory, but critical requirements about frequency of submission and critical elements to be included are left to regulation.
3. Impact studies "may" be required in regulations.
4. The Minister "may" require additional studies, tests, inventories etc..
5. Regulations "may" provide for a person with prescribed qualifications to review technical or specialized studies or reports that a licensee or permittee is required to prepare and to submit a report to the Minister.
6. Flexibility with respect to the collection and distribution of fees and royalties will be increased. While the government has expressed its intent to increase fees and royalties at this time, there are no conditions attached to the approach to determining the fees, or what costs they must cover.
7. While the Minister will be able to set aside Crown land where no aggregate permit will be issued, no conditions are attached to constrain or direct this power.
8. The new sections 37 and 37.1 which provide authority of the Minister to attach any conditions, or to vary conditions at any time, are ambiguous in that this power may be used so as to better environmental protection; but may also be used so as to decrease environmental protection including provisions that citizens groups have advocated for. The instrument classification regulation under the *Environmental Bill of Rights* captures aggregate permits and site plans, allowing for public comment, but the EBR coverage is subject to certain qualifiers and exceptions.

In the suite of proposed amendments there are some which provide the clarity and certainty needed:

1. The requirement that the Minister must determine whether adequate consultation with Indigenous communities has taken place before issuing a license or permit.
2. Higher maximum fines for non-compliance
3. Allowing the Minister to add conditions to existing sites, without tribunal hearings, to implement a source protection plan under the Clean Water Act;[2]

We support these three amendments. Given the Ministry's poor record to date in terms of enforcement, however, the second amendment listed will be of no benefit unless the Ministry invests in staff to monitor and enforce compliance.

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[2] Approved source protection plans take priority under the conflict provisions of the *Clean Water Act*. O.Reg. 287/07 under the CWA lists s.37 ARA permits as prescribed instruments. Subsection 38(7) of the CWA requires prescribed instruments to conform to significant threat policies and Great Lakes policies in approved plans. Similarly, s.43 of the CWA requires existing instruments to be amended to conform with such policies. Accordingly, where they are applicable, there should be no impediment to the Ministerial power to impose conditions that implement the Source Protection Plan.

In closing, we thank you for the opportunity to comment on the proposed changes, but regret that we are not able to support the Bill as proposed.

Yours truly,

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