Canadian Environmental Law Association
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Ministry of Environment, Conservation and Parks
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via email Cindy.Batista@ontario.ca Tim.Marchand@ontario.ca

August 22, 2020

Re: Proposed exemption to the Environmental Assessment Act and a new policy under the Provincial Parks and Conservation Reserves Act for projects in provincial parks and conservation reserves (ERO No. 019-1804)

I. INTRODUCTION

Please accept this submission of the Canadian Environmental Law Association (CELA) in response to the Ministry of Environment, Conservation and Parks (MECP) proposals to exempt all projects in provincial parks and conservation reserves from the *Environmental Assessment Act* (EAA) and to introduce a new environmental assessment (EA) policy under the *Provincial Parks and Conservation Reserves Act* (PPCRA) for projects carried out in provincial parks or conservation reserves.[1]

As set out in Environmental Registry Notice 019-1804, the Ontario government is proposing to exempt all projects in provincial parks and conservation reserves carried out by or on the behalf of the MECP from the *EAA*. Additionally, a new policy would replace the environmental evaluation and consultation requirements currently required by the Class EA for Provincial Parks and Conservation Reserves. These changes are to bring Ontario's EA law "into the "21st century" and build on the province's commitment to make a more "modern and efficient" EA program.[2] Unfortunately, Ontario has not chosen to meaningful reform the Act, which is one of Ontario's oldest and most important environmental statutes, but rather exempt projects altogether from its scope.

As we first communicated following the release of the province's 2019 discussion paper entitled *Modernizing Ontario's Environmental Assessment Program*,[3] over the past 20 years, many commentators, stakeholders and independent officers of the Ontario Legislature have identified the structural improvements that are needed in the EA program in order to face the environmental issues and opportunities of the 21st century. Unfortunately, the suite of reforms for EA law undertaken by the province to date

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1 Online: https://ero.ontario.ca/notice/019-1804
2 *Ibid*
3 See online: https://cela.ca/wp-content/uploads/2019/07/1268-CELASubmissionsOnEADiscussionPaper.pdf

neglect to discuss or even mention these key reforms, and instead focus on quick-fixes that make Ontario's EA regime *less* robust, *less* participatory and *less* accountable to the people of Ontario.

In our view, the proposals now provided by the MECP furthers the suite of regressive changes to date and shows the government's continued lack of understanding for the importance of rigorous EA planning. Accordingly, we make the following recommendations and request the province reject MECP's proposal to exempt parks and protected areas from the *EAA*:

RECOMMENDATION NO. 1: To fulfill the spirit and intent of section 35 of the *Environmental Bill of Rights,* any change to the *EAA* should require a comprehensive approach to public comment, rather than a time-limited opportunity to respond to a proposal.

RECOMMENDATION NO. 2: Provincial parks and conservation reserves should not be exempt from the *EAA* as there will be:

- ***No*** legal requirement to consider the potential environmental effects (and any necessary preventative or mitigation measures) of the undertaking, alternative methods of carrying out the undertaking, and alternatives to the undertaking
- ***No*** legal requirement to consider alternative methods of carrying out the undertaking, and alternatives to the undertaking;
- ***No*** decision-making mechanism which considers the environmental advantages/disadvantages of the undertaking, alternative methods of carrying out the undertaking and alternatives to the undertaking

RECOMMENDATION NO. 3: The unsatisfactory public participation rights currently accorded under the *EAA* will not be remedied by further exempting projects from the Act and the public's purview. Instead, the province should:

- Support meaningful opportunities for public participation in individual EAs and Class EAs;
- Enhance 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

RECOMMENDATION NO. 4: Ontario must advance the principles and best practices of environmental assessment law for the 21st century and not remove the ability of government to consider environment, economic and social changes which are inherent to development.

RECOMMENDATION NO. 5: The proposed Environmental Impact Assessment Policy is not a sufficient nor equal stand in for the *EAA.* Considerations of environmental impact assessment and commitments to public input and consultation with Indigenous communities should be set out in a legally enforceable regulation and not "guidance" set out in an environmental impact policy statement.

RECOMMENDATION NO. 6: The substitution of the *EAA* with a non-binding policy document is neither a sufficient stand-in nor replacement for statutory requirements obligating consideration of a

project's social, economic and environmental effects.

Lastly, in making these recommendations, we refer the Ministry to our detailed comments previously provided on the topic of environmental assessment law modernization, including:

- "Exemption of forestry from the *Environmental Assessment Act* sets a bad precedent," online: https://cela.ca/exemption-of-forestry-from-the-environmental-assessment-act-sets-a-bad-precedent/

- Submission on Modernizing Ontario's Environmental Assessment Program: Discussion Paper Environmental Registry No. 013-5101, online: https://cela.ca/modernizing-ontarios-environmental-assessment-program-discussion-paper-environmental-registry-no-013-5101/

- Briefing Note: Discussion Paper – Modernizing Ontario's Environmental Assessment Program, online: https://cela.ca/modernizing-ontarios-environmental-assessment-program/

- Submission on Made-In-Ontario Environment Plan, Environmental Registry No. 013-4208, online: https://cela.ca/wp-content/uploads/2019/07/1238-CELA-Response-Ontario-Environmental-Plan.pdf

(b) About the Canadian Environmental Law Association

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.[4] 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.

(c) Preliminary Remarks Regarding Consultation and the Environmental Bill of Rights

CELA is 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. This is true of Bill 197, which has substantially reformed Ontario's EA law without due public participation. We again 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.

Further, 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. However, this right is jeopardized by the government's approach to EA reform which has been fast paced and sweeping in scope. As a result, the spirit and intent of the *EBR* cannot be met when there is inadequate time to review, understand and comment upon reforms. In our opinion, the duty under section 35 of the

[4] Canadian Environmental Law Association, online: www.cela.ca

EBR has not been satisfactorily discharged in this case. Accordingly:

RECOMMENDATION NO. 1: To fulfill the spirit and intent of section 35 of the *EBR*, any change to the *EAA* should require a comprehensive approach to public comment, rather than a time-limited opportunity to respond to a proposal.

II. COMMENTS ON PROPOSED EXEMPTION UNDER THE *EAA*

(a) Exemption of protected areas from environmental assessment erodes protection of biodiversity and ecological integrity

Ontario boasts an exceptional range of biodiversity, with the peatlands of the James Bay Lowlands providing habitat to the threatened boreal caribou, the boreal forests in the North sequestering vast amounts of the globe's carbon emissions and the more temperate Carolinian zone in the South supporting one-third of all at-risk species in Canada. By extension, protected areas offer a refuge for these species and their critical habitats, protected from industrial activity and developments which may harm their survival or longevity as a species.

Parks and protected areas are also highly valued spaces, where thousands of Ontarians visit with family and friends to camp, paddle and enjoy wild spaces. CELA is therefore alarmed by the province's proposal to remove parks and protected areas from the *EAA* which undercuts our best available mechanism for ensuring a project's impact is considered *prior* to development. The removal of any mechanism which lessens the protections afforded to our parks threatens the resiliency of these spaces, their species and habitat to new and mounting threats, like climate change and habitat loss.

Notably, the stated purpose of the *EAA*, which is "the betterment of the people of Ontario... by providing for the protection, conservation and wise management of the environment"[5] supports the statutory purpose of the *PPCRA* which is to "permanently protect a system of provincial parks and conservation reserves that includes ecosystems that are representative of all of Ontario's natural regions, protects provincially significant elements of Ontario's natural and cultural heritage, maintains biodiversity and provides opportunities for compatible, ecologically sustainable recreation."[6]

These Acts are not duplicative, but rather distinct - with the *EAA* providing a means to achieving the purposes set out in the *PPCRA.* For instance, under the *EAA*, the term "environment" is defined broadly. In effect, this means that if an EA is required for a particular undertaking, then the proponent's EA documentation must identify and evaluate not only ecological effects, but also potential impacts on the social, economic, cultural and built environments. Thus, the *EAA* has a broader scope than other regulatory or land use planning laws in Ontario.

In essence, Ontario's EA law is a 'look before you leap' statute, as it requires the pros/cons of the proposal (and alternatives to the undertaking) to be considered in order to prevent environmental harms. It also provides the public with the right to know and comment on projects which may directly impact their

[5] *Environmental Assessment Act*, RSO 1990, c E 18, s 2 [**EAA**]
[6] *Provincial Parks and Conservation Reserves Act, 2006,* SO 2006, c 12, s 1 [**PPCRA**]

community's health and environment. In short, the *EAA* is intended to anticipate and prevent ecological harm through an informed decision-making process, whereby terms and conditions may be necessary to protect human health or the environment.

Ultimately, neither the government's promises of environmental protection nor the purposes of the *PPCRA* to protect and maintain ecological integrity can be upheld should parks be removed from the scope of the *EAA.*

RECOMMENDATION NO. 2: Provincial parks and conservation reserve should not be exempt from the *EAA* as there will be:

- ***No*** legal requirement to consider the potential environmental effects (and any necessary preventative or mitigation measures) of the undertaking, alternative methods of carrying out the undertaking, and alternatives to the undertaking
- ***No*** legal requirement to consider alternative methods of carrying out the undertaking, and alternatives to the undertaking;
- ***No*** decision-making mechanism which considers the environmental advantages/disadvantages of the undertaking, alternative methods of carrying out the undertaking and alternatives to the undertaking

(b) Exempting projects from environmental assessment removes the public's right to know and participate

The proposal to remove parks and conservation reserves from the *EAA* not only remove's the public's opportunity to weigh-in on the need for the project, its purpose and potential alternatives, but excludes their input in government decision-making. Public participation is not only a basic principle of EA law, but a prerequisite to sound and credible environmental-decision making by the Ontario government.

As CELA has previously provided, there should be greater clarity within the *EAA* regarding how the government will achieve "meaningful" public and Indigenous participation. There have been countless complaints over the years about the lack of adequate consultation in individual EAs and Class EA processes (e.g. inadequate or jargon-laden notices, unduly short comment periods, difficulty in obtaining timely access to all relevant documents, etc.) and these outstanding issues remain unaddressed.

Unfortunately, instead of remedying issues of inadequate public participation within Ontario's EA process, the MECP is now proposing to remove the means which provided public participation rights.

RECOMMENDATION NO. 3: The unsatisfactory public participation rights currently accorded under the *EAA* will not be remedied by further exempting projects from the Act and the public's purview. Instead, the province should:

- Support meaningful opportunities for public participation in individual EAs and Class Eas;
- Enhance 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

(c) Ontario should support the principles and best practices of EA law

The proposal sets out on the Environmental Registry demonstrate a fundamental lack of appreciation for the separate and extremely important role that environmental assessment plays in decision-making. By systematically removing projects from the scope of the *EAA*, Ontario is disabling the statute which allows us to determine whether projects and undertakings will (or will not) pose threats to environment *prior* to development. The precautionary approach of EA law also provides the government the opportunity to impose conditions - such as mitigation strategies or environmental monitoring - on projects in order to safeguard the environment in the public's interest. There is no other process besides environmental assessment which provides for these safeguards.

For these reasons, CELA submits Ontario must *advance* the 21st century principles and best practices of environmental assessment law. Environmental assessment plays an important role in delivering the evidence necessary to support critical issues of climate change mitigation, promoting environmental justice and sustainability.[7] Instead, Ontario – by way of these proposals – is removing the ability of government to consider environment, economic and social changes which are inherent to development. As set out in Figure 1 below, absent the *EAA's* application to provincial parks and conservation reserves, the following will not be applicable:

Figure 1. Generic Environmental Impact Assessment Process[8]

Project description	Description of the proposed action, including its alternatives, and details sufficient for an assessment.
Screening	Determination of whether the action is subject to an EIA under the regulations or guidelines present, and if so what type or level of assessment is required.
Scoping	Delineation of the key issues and the boundaries to be considered in the assessment, including the baseline conditions and scoping of alternatives.
Impact prediction and evaluation	Prediction of environmental impacts and determination of impact significance.
Impact management	Identification of impact management and mitigation strategies and development of environmental management or protection plans.
Review and decision	Technical and public review of EIS and related documents and subsequent recommendation as to whether the proposed action should proceed and under what conditions.
Implementation and follow-up	Implementation of project and associated management measures; continuous data collection to monitor compliance with conditions and regulations; monitoring the effectiveness of impact management measures and the accuracy of impact predictions.

[7] Sara Bice & Thomas B Fischer (2020) Impact assessment for the 21st century – what future?, Impact Assessment and Project Appraisal, 38:2, 89-93, DOI: 10.1080/14615517.2020.1731202

[8] B. Noble (2010) "Introduction to Environmental Impact Assessment – A Guide to Principles and Practice," Don Mills: Oxford University Press, p. 16 **[EIA Principles and Practice]** 6

Further, there are a number of key principles which apply within EA decision-making which are critical to maintaining the transparency, traceability and accountability of Ontario's environmental decision-making. As detailed below, these include considerations of cumulative effects, alternatives to the project, appropriate monitoring, and opportunities for public participation.

First, EAs provide an assessment of cumulative effects. This generally entails assessing changes to the environment, caused by actions in combination with other past, present or future actions. Accordingly, these actions may be linear, amplifying or exponential in effect.[9] By assessing a project's cumulative effects, the synergistic effects of the project can be reviewed.[10]

Second, EA enables a comparison of reasonable alternatives to a project, which typically refers to the different ways of carrying out the proposed project, for instance alternative locations, timing of activities, and designs.[11] Many environmental impacts can be prevented before project decisions are made and thus the scoping of alternatives, which occurs early in the EA decision making process, allows other options or different courses of action (which still accomplish a defined end) to be considered.[12]

Third, EA processes provide the means to decide upon monitoring programs. Monitoring is a systematic method of collecting data and observations to track and evaluate changes across a range of considerations, including environment, economic, and social variables and are usually associated with projects where there is uncertainty in the effects or the potential for significant adverse outcomes.[13] This allows the cause and nature of environmental change from a project to be identified.

Fourth, a fundamental principle of EA law is to facilitate public participate in EA decision making.[14] To facilitate meaningful engagement, the process should be:

- Informative and proactive so that communities with an interest in the project or those who may be affected can engage at the earliest of review stages;
- Equitable to ensure that all represented and unrepresented interests are included in participation; and
- Context-oriented and adapted to the local, social, or political climate relevant at the time of review.

RECOMMENDATION NO. 4: Ontario must *advance* the principles and best practices of environmental assessment law for the 21st century and not remove the ability of government to consider environment, economic and social changes which are inherent to development.

[9] EIA Principles and Practice, p 261
[10] *Ibid,* p 199
[11] *Ibid,* p 260
[12] *Ibid,* p 85
[13] *Ibid,* p, 263
[14] *Ibid,* p 190

III. COMMENTS ON PROPOSED NEW POLICY

(a) A non-binding guidance document is not a replacement for obligations set out in environmental assessment law

In lieu of the *EAA* applying to projects within provincial parks and conservation reserves, MECP is proposing an Environmental Impact Assessment Policy under the *PPCRA.* The new policy would inform decision-making on projects in parks by assessing potential environmental effects, proposing appropriate mitigation methods of negative effects on natural, social, and economic considerations and consider the purposes of the *PPCRA* and its aims of maintaining ecological integrity and protecting natural and cultural heritage. While the policy emulates many of the purposes which are core consideration in EA law, it cannot remedy the shortcomings listed above, as it is a non-binding, guidance document.

Leaving aside the substantive shortcomings of the proposal noted above, CELA submits that relegating legally enforceable EA considerations to a non-binding and unenforceable policy leave it open to project proponents to disregard the guidance set out by the province. If the Ontario government and MECP truly wanted to commit to the protection of our parks and conservation reserves, their ecological systems and biodiversity, they would do so through a robust, traceable and accountable EA process.

RECOMMENDATION NO. 5: Considerations of environmental impact assessment and commitments to public input and consultation with Indigenous communities should be set out in a legally enforceable regulation and not "guidance" set out in an environmental impact policy statement.

(b) Exemption of provincial parks from EA law could open up new development opportunities in protected areas

The MECP's proposed exemption of provincial parks and conservation reserves from the *EAA* would include, but may not be limited to, all of the following undertakings:

- managing existing parks or conservation reserves
- fish and wildlife management
- land management
- building or structures including infrastructure
- campgrounds and day use facilities
- water and shoreline works

Currently, the MECP's description of projects which may be exempt is too vague and incomplete to determine the entirety of ecological impacts resulting from the *EAA* exemption. We are also troubled by the statement in the notice that the policy will 'focus on projects with higher potential for harm to the environment' which indicates there may be projects, currently prohibited from parks or subject to the *EAA* which, which will only be reviewed by the proposed policy. In this respect, we note that CELA reserves the right to file further and more detailed submissions on these proposals, in the event Ontario proceeds with these proposed changes.

RECOMMENDATION NO. 6: The substitution of the *EAA* with a non-binding policy document is neither a sufficient stand-in nor replacement for statutory requirements obligating consideration of a project's social, economic and environmental effects.

IV. CONCLUSION

Based on our legal analysis, the proposed exemption of parks and conservation reserves from the *EAA* threatens the protection of Ontario's ecological integrity and biodiversity, which are core purposes of the *PPCRA*. Opting for a policy to oversee projects - whose scale, scope and nature has not been disclosed - in place of the *EAA* should be immediately abandoned by the Ontario government and MECP.

We recommend that the government immediately halt these reforms, and in their place commence a robust, meaningful, transparent, and accountable public consultation process aimed at what we all want – a rigorous, efficient and effective environmental assessment program for Ontario, based on 21st century principles and best practices.

We trust that CELA's comments on these proposals will be considered and acted upon as the Ontario government determines its next steps in relation to the EA program. If requested, CELA would be pleased to meet with provincial staff to further elaborate upon this - and other proposed amendments - to Ontario's EA law.

Thank you for your consideration of our submission.

Regards,

Kerrie Blaise
Northern Services Counsel, CELA

cc: Jerry DeMarco, Commissioner of Environment