BY EMAIL TO: **EAmodernization.mecp@ontario.ca**

January 25, 2022

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

RE: DRAFT PROJECT LIST REGULATION UNDER THE *ENVIRONMENTAL ASSESSMENT ACT* (ERO 019-4219)

These are the comments of the undersigned organizations[1] in relation to the draft project list regulation under the amended *Environmental Assessment Act* (*EAA*). For the reasons outlined below, we conclude that this regulatory proposal is inadequate, incomplete, and unacceptable.

Accordingly, we request that the Ministry revise and re-post the draft regulation for further public review/comment to ensure that it fully implements the stated purpose of the *EAA*, namely, the betterment of the people of Ontario by providing for the protection, conservation, and wise management of the environment.

Our main concerns about the draft regulation may be summarized as follows:

1. The draft regulation inappropriately restricts the application of Part II.3 of the *EAA* (Comprehensive EAs) to a relatively small number of major projects, most of which are currently subject to EA requirements under Part II of the *EAA*. In our view, maintaining the status quo under the *EAA* does not constitute "modernization" of Ontario's EA program.

2. The Ministry has failed to provide objective, persuasive, or evidence-based justification for the project thresholds that have been proposed in the draft project list regulation. For the most part, the pre-existing thresholds under the *EAA* (which were set by regulations well over a decade ago) have been carried forward into the draft regulation with no analysis of whether they should be updated.

3. The proposed list of designated projects in the draft regulation is not credible or comprehensive because it inexplicably omits too many environmentally significant projects (e.g., mines, mills,

[1] Canadian Environmental Law Association; Northwatch; Friends of the Attawapiskat River; Earthroots; Ontario Nature; Wildlands League; Ontario Rivers Alliance; Clean North; Toronto Environmental Alliance; David Suzuki Foundation.

smelters, and other private sector projects) that trigger EA requirements in other jurisdictions and should be subject to Part II.3 under the *EAA*.

4. The draft regulation fails to establish a clear process that enables Ontarians to request designation of non-listed projects which warrant a Comprehensive EA.

Each of these concerns is addressed in more detail below.

1. Unduly Restricting the Draft Regulation to Large-Scale Projects

The Registry notice for this regulatory proposal indicates that "most project types that currently require a comprehensive EA will continue to need one."[2] As a practical matter, this means that the draft regulation only designates a relatively small handful of major projects that currently trigger an individual EA under the Act.

We further note that for the most part, the draft regulation simply replicates the same short list of project types that had been proposed in the Ministry's previous discussion materials in 2020.[3] In particular, the draft regulation proposes to designate certain projects in various categories, including:

- Transmission lines
- Transformer stations
- Hydroelectric facilities
- Electricity generating facility that uses oil as fuel
- Project Changes - Significant modifications to electricity projects
- Landfill
- Waste Disposal Site – Hazardous or Liquid Industrial Waste
- Thermal treatment site
- Waste disposal site (Changes to sites described above)
- Transit or other transportation projects
- Provincial highway
- Municipal highway
- Major waterfront project involving shoreline alteration and lake filling
- Intra-provincial railway line

For most of these project categories, the draft regulation proposes certain thresholds (e.g., production capacity, linear length, etc.) and other qualifiers which have the effect of excluding projects within the category if they fall below the prescribed threshold or do not meet other prescribed criteria.

[2] See Moving to a project list approach under the Environmental Assessment Act | Environmental Registry of Ontario.

[3] For a detailed analysis of the shortcomings of the proposed project list and the Ministry's previous consultation materials, see CELA-Legal-Analysis-of-EAA-project-list-November-10-2020_with_appendix-1.pdf.

Given the designation proposals in the draft regulation, it is readily apparent that the draft regulation has not dramatically expanded the types of projects that have been traditionally subject to EA requirements in Ontario. The draft list also pales in comparison to the federal project list (SOR/2019-285) under the *Impact Assessment Act*, which designates 61 different categories of projects that trigger assessment obligations under the Act.

We therefore view Ontario's draft regulation as a missed opportunity for facilitating the long overdue extension of *EAA* coverage to other projects or activities that may cause significant biophysical or socio-economic impacts.

Moreover, for certain project types, the draft regulation varies or alters existing EA requirements (i.e., allowing certain proponents to follow a "streamlined" processes instead of conducting a Comprehensive EA).

For example, the draft regulation proposes a new change that would enable landfill proponents to follow a "streamlined" process for large site expansions. Similarly, the draft regulation carries forward but adjusts the EA requirements that are currently applicable to transit and other transportation projects. By any objective standard, these proposals represent regrettable rollbacks of current EA requirements and have not been adequately justified by the Ministry.

2. No Evidence-Based Justification for Project Thresholds

We are also concerned about the arbitrary – and stale-dated – thresholds used to delineate the size, scale, or capacity of the project types that the draft regulation proposes to designate under Part II.3 of the *EAA*.

For example, the draft regulation essentially carries forward the existing thresholds for certain electricity projects. However, the Ministry's consultation materials do not include any empirical evidence that justifies these thresholds or explains how these were derived. We further note that these thresholds were first established over 20 years ago when the Electricity Projects Regulation (O.Reg.116/01) was first made under the *EAA*. However, the Ministry has provided no information or analysis indicating that these thresholds are still valid and should be left intact.

In relation to waste management projects, the draft regulation generally proposes to use the same capacity-based thresholds that were developed about 15 years ago when the Waste Management Projects Regulation (O.Reg.101/07) was made under the *EAA*. In our view, these volumetric criteria have little or no bearing on a waste facility's potential to create adverse biophysical or socio-economic effects, which typically depend more on the proposed location, design, and operation of the facility.

With respect to transportation projects, the draft regulation proposes to only apply Part II.3 of the *EAA* to intra-provincial railways greater than 50 km, and to certain provincial or municipal highways greater than 75 km. No environmental rationale or evidence has been offered to justify either of these linear thresholds. However, the Ministry's consultation materials state that both the 50 and 75 km distances are intended to "align" the *EAA* with the federal *Impact Assessment Act*.

In short, the Ministry has not provided any cogent evidence demonstrating that only 75+ km roadways and 50+ km railways have the potential to produce significant adverse environmental effects in Ontario.

Despite the Ministry's professed interest in aligning the *EAA* with the *Impact Assessment Act*, the draft regulation does not propose to designate any mining projects. In contrast, the federal project list (SOR/2019-285) includes various types of mines (e.g., coal, metal, diamond, uranium, rare earth, oil sands, etc.). Our further comments about the draft regulation's failure to designate mines are outlined below.

3. Significant Omissions from the Designated Project List

The content of the draft regulation is critically important because proponents of any projects left off the regulatory list will not be legally required to prepare a Comprehensive EA, undertake public consultation, or seek approval under Part II.3 of the Act.

For non-listed projects, we acknowledge that statutory approvals may still be required under other environmental or planning laws. We further note that it remains theoretically possible for a proponent to voluntarily agree to conduct an EA if it elects to do so. However, in our experience, this is a relatively rare occurrence under the *EAA*.

Similarly, we understand that it is open to the provincial Cabinet, on a case-by-case basis, to utilize its discretionary authority to designate a non-listed project as being subject to the *EAA*. However, the Act contains no express criteria to identify when a non-listed project should be made subject to Comprehensive EA requirements.

Nevertheless, the Ministry is promoting the draft regulation on the basis that it provides greater clarity and transparency for proponents, stakeholders, governmental officials, and members of the public regarding the types of projects that will – or will not – require a Comprehensive EA.

Given this overall objective, it is important to ensure that the regulatory list is sufficiently inclusive of public and private undertakings that may cause significant adverse environmental or socio-economic impacts. From a public interest perspective, it is necessary and appropriate to subject these kinds of projects to the detailed information-gathering, consultation, and decision-making provisions in Part II.3 of the Act.

On this point, we note that the amended *EAA* now includes a new definition of "project":

> "project" means one or more enterprises or activities or a proposal, plan, or program in respect of an enterprise or activity (emphasis added).

However, no "proposals, plans, or programs" have been designated or included in the draft regulation. For example, the draft regulation does not designate other environmentally significant public undertakings, such as governmental plans and programs (e.g., long-term energy plans, climate change plans, transportation plans, provincial land use plans, etc.).

This is an alarming omission because, as noted by the Auditor General in her 2016 report[4] on EA, "the impact of government plans and programs can have a broader and longer-term impact compared to individual projects, and therefore warrant a thorough assessment beyond that which is possible for individual projects."

Moreover, the draft regulation inexplicably omits numerous types of private sector projects, activities, or facilities that may pose serious risks to the environment or human health and safety.

For example, although the Ministry's 2020 discussion paper raised the possibility of designating mines under the Act, the draft regulation does not include any mining projects. As observed by the Auditor General's 2015 report,[5] this continuing omission leaves Ontario "as the only province in Canada that does not require a provincial environmental assessment to be performed for mining projects."

Because the provincial government wholly removed logging on Crown lands from *EAA* coverage last year, and because the draft regulation omits mining projects, resource development is now largely exempt from Ontario's EA requirements. In our view, this makes Ontario's EA regime an outlier compared to other provincial EA laws across the country (and at the federal level) since renewable and non-renewable resource extraction and processing activities are a prime focus of EA legislation in these other jurisdictions.

Similarly, the draft regulation also omits several dozen project types that are otherwise on project lists in one or more other jurisdictions across Canada, such as:

- Industrial/commercial facilities or waste management projects in parks or protected areas
- Dams, dykes, reservoirs, water diversion, land drainage and irrigation projects
- Pulp and paper mills, saw mills or wood/plywood manufacturing
- Chemical, cement, lime, brick, fertilizer, pesticide, explosives, paint, vehicle, tire, battery, textile, or pharmaceutical manufacturing
- Nuclear facilities,[6] including power generation stations and nuclear waste storage or disposal sites
- Oil refineries, petroleum storage facilities, and liquefied natural gas facilities
- Pipelines
- Pits and quarries

[4] See 3.06 Environmental Assessments (auditor.on.ca).
[5] See 3.11: Mines and Minerals Program (auditor.on.ca).
[6] While the Ontario government has argued that it has no constitutional jurisdiction to apply provincial EA requirements to nuclear power plants, Quebec's project list specifically includes such plants and Saskatchewan applies its EA process to nuclear facilities (mines) despite the existence of federal licencing requirements under the *Nuclear Safety and Control Act*. In addition, Ontario issues provincial approvals for air or water discharges from nuclear power plants located in the province.

- Iron, steel, aluminum and other metal mills or production facilities
- Municipal wastewater facilities
- Ferry terminals, ports, or harbours
- Tourist destination resort projects, including marinas, ski resorts, or other accommodation services
- Intensive livestock operations and agricultural facilities such as feed mills and grain elevators
- Fish hatcheries and aquaculture facilities
- Asphalt plants
- Scrap processing and auto wrecking yards
- Timber cutting, forestry activities, and aerial application of pesticides on a forested area
- Introduction of non-native plant or animal species
- Major residential developments
- Activities or projects affecting wetlands or rare or endangered environmental features
- Construction of industrial plants that emit large amounts of greenhouse gases.

We acknowledge that many of the above-noted project types designated in other jurisdictions are subject to quantitative thresholds, location-based criteria, or certain exceptions. However, it is noteworthy that these project types are wholly absent from Ontario's draft regulation. In addition, there is nothing in Ontario's consultation materials or the Registry notice that indicates these project types were duly evaluated or screened by the Ministry for potential inclusion in the draft regulation.

Accordingly, we submit that the Ministry should go back to the drawing board and consider the foregoing projects as potential candidates for designation in the draft regulation, with or without appropriate thresholds or criteria.

4. <u>Need for a Public Process to Request Designation of Non-Listed Projects</u>

Over the decades, many Ontarians have found it necessary to file letters which request the Minister to designate high-profile or contentious projects which were not automatically caught by Part II of the *EAA*. Typically, these requests involved private sector undertakings that were otherwise not subject to the Act (e.g., proposed subdivisions, industrial manufacturing facilities, alternative fuel projects, etc.). However, to our knowledge, most of these requests were refused by the Minister, and only rarely did environmentally significant private projects (e.g., the Highland Quarry) get designated by regulation under the *EAA*.

Given the above-noted track record, we draw little comfort from the Ministry's suggestion that non-listed projects can still be made subject to Part II.3 of the *EAA* via a project-specific regulation. Moreover, given the relatively short project list now under consideration by the Ministry, it is inevitable that some significant projects will be left off the regulatory list.

We are also concerned that some controversial undertakings may be framed by the proponent in a "project-splitting" manner to ensure that the proposal falls just below the prescribed thresholds in the regulatory list and therefore does not trigger a Comprehensive EA. In addition, it has been our observation that regulatory project lists often remain unchanged for prolonged periods of time, which means that new or emerging technologies or activities may remain non-listed despite their environmental significance.

In our view, enabling Ontarians to request designation of non-listed projects offers an important "safety valve" that helps fulfill the public interest purpose of the *EAA* (i.e., the betterment of Ontarians by providing for the protection, conservation, and wise management of the environment).

Accordingly, we submit that the draft regulation should be amended to establish a clear, transparent, and expedited process that allows individuals, groups, municipalities, or First Nation communities to request the Minister to designate non-listed projects under the *EAA*. In our view, this process should include express criteria, time limits, and a mandatory duty upon the Minister to grant the requested order except in specified or limited circumstances.

***

For the foregoing reasons, we conclude that the draft regulation has been crafted in an excessively narrow manner. For the most part, the draft regulation simply adopts the abbreviated list of project types (and thresholds) that had been previously proposed in the Ministry's 2020 discussion paper.

Accordingly, we recommend that the Ministry should substantially revise the draft regulation to not only include a broader range of project types under Part II.3 of the *EAA*, but also to ensure that environmentally significant governmental "proposals, plans, and programs" are also designated in the regulation. We further recommend that the Ministry's re-drafting of the project list regulation should involve meaningful public participation (not just another one-hour webinar or superficial discussion paper).

We trust that these comments will be considered and acted upon by the Ministry as it determines its next steps regarding the draft project list regulation under the *EAA*.

Richard D. Lindgren
Counsel
Canadian Environmental Law Association

Brennain Lloyd
Project Coordinator
Northwatch

Michel Koostachin
Founder
Friends of the Attawapiskat River

Franz Hartman
Executive Director
Earthroots

Dr. Anne Bell
Director of Conservation & Education
Ontario Nature

Anna Baggio
Conservation Director
Wildlands League

Linda Heron
Chair
Ontario Rivers Alliance

Bill Cole
Chair
Clean North

Jay Ritchlin
Director-General
Western Canada
David Suzuki Foundation

Emmay Mah
Executive Director
Toronto Environmental Alliance