

April 27, 2022

BY EMAIL

Tyler Schulz
Commissioner of the Environment / Assistant Auditor General
Office of the Auditor General of Ontario
20 Dundas St. West, Suite 1530
Toronto ON M5G 2C2

Dear Commissioner Schulz:

RE: ERO 019-5284: BILL 109 -- PROPOSED AMENDMENTS TO THE *PLANNING ACT*

On behalf of the Canadian Environmental Law Association (CELA), we are writing to express our strong objections to another improper refusal by the Ministry of Municipal Affairs and Housing (MMAH) to fully comply with its public consultation duties under Part II of the *Environmental Bill of Rights (EBR)*.

On March 30, 2022, the Minister introduced Bill 109 (*More Homes for Everyone Act, 2022*) for First Reading in the Ontario Legislature. Among other things, Schedule 5 of this Bill proposed to amend the *Planning Act* to substantially revise Ontario's land use planning and appeals process, and create a new Ministerial zoning power under section 34.1 of the Act that is not subject to the Provincial Policy Statement, provincial plans, or official plans.

Given the potential environmental significance of these changes, the MMAH apparently concluded that a public comment opportunity was warranted pursuant to section 14 of the *EBR*. Accordingly, notice of this legislative proposal was duly posted on the Registry¹ on March 30, 2022, which triggered a minimum 30-day comment period that was scheduled to end on April 29, 2022.

In our view, this initial posting was consistent with the provisions of section 15(1) of the *EBR*, which imposes a mandatory duty on the Minister to “do everything in his power to give notice to the public at least thirty days before the proposal is implemented (emphasis added).”

However, Bill 109 was implemented long before the 30-day comment period ended. On this point, section 1(6)(b) of the *EBR* provides that “a proposal for an Act is implemented when the bill that would implement the proposal receives third reading in the Legislative Assembly.” Nevertheless, about halfway through the ongoing comment period for the proposed *Planning Act* amendments, Bill 109 was given Third Reading and obtained Royal Assent on April 14, 2022.

¹ See [Proposed Planning Act Changes \(the proposed More Homes for Everyone Act, 2022\) | Environmental Registry of Ontario](#).

Alarming, the MMAH then amended the Registry notice to purportedly declare that the *EBR* comment period is “closed” due to the mid-April enactment of Bill 109.

In our view, the MMAH’s conduct in relation to Bill 109 makes a mockery of the important public participation rights that have been entrenched in the *EBR* for over 25 years.

First, section 35 of the *EBR* expressly states that a minister who gives notice of a proposal under section 15 “shall take every reasonable step to ensure that all comments that are received as part of the public participation process described in the notice of the proposal are considered when decisions about the proposal are made in the ministry.” It goes without saying that the MMAH fundamentally failed to satisfy this obligation in relation to Bill 109, particularly since the public participation process was abruptly terminated before the 30 days had elapsed. Similarly, the amended Registry notice does not describe how – or whether – any public comments received prior to the termination were considered by the MMAH.

Second, it is our opinion that there is no statutory authority in the *EBR* that empowers the Minister to unilaterally stop the running of a public comment period that has been lawfully commenced under section 15(1). Moreover, CELA notes that the amended Registry notice does not invoke or rely upon any of the limited statutory exceptions to public participation that are recognized under the *EBR*.

Third, the MMAH’s own Statement of Environmental Values (SEV) issued under the *EBR* professes commitment to public consultation and compliance with *EBR* requirements:

The Ministry of Municipal Affairs and Housing believes that public consultation is vital to sound decision-making. The ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment...

The ministry remains committed to the *EBR* and the ministry's statutory obligations contained therein. The ministry recognizes the *EBR*'s value in improving public engagement and government performance on environmental stewardship. The ministry will ensure its responsibilities under the *EBR* are implemented and will strive to ensure that its use of the Environmental Registry of Ontario continues to allow the public to participate and be informed. The ministry will:

- Continue to place great importance on the proper use of the Environmental Registry of Ontario and continue consulting with the public for input on proposals which may have potential impacts on the environment;
- Recognize the importance of communicating significant decisions with the public through the Environmental Registry of Ontario and will continue to use the Environmental Registry of Ontario as one of its primary public consultation tools (emphasis added).

Section 11 of the *EBR* specifically compels the MMAH to “take every reasonable step” to ensure that its SEV commitments are considered whenever environmentally significant decisions are being made within the ministry. However, it appears that the above-noted SEV consultation principles were not considered or applied when Bill 109 was rammed through the Legislature in approximately two weeks, and without the MMAH’s provision of the full 30-day comment period required under the *EBR*.

For the foregoing reasons, CELA submits that public participation rights under Part II of the *EBR* should not be contravened, sidestepped, or undermined in this manner by the MMAH or other prescribed ministries.

We hasten to add that this is not the first time that the MMAH has failed to comply with its consultation duties under the *EBR*. Last year, for example, the MMAH proposed amendments in Bill 197 that would enhance the use of Minister Zoning Orders (MZO) under the *Planning Act*. However, the MMAH did not post a Registry notice about this proposal until after the amendments were already enacted by the Legislature.

The MMAH’s ill-advised circumvention of the *EBR* prompted well-founded criticism from your office in the 2021 annual report² to the Ontario Legislature regarding the *EBR*. The MMAH’s *EBR* non-compliance also resulted in litigation brought by CELA and other parties, and the Divisional Court unequivocally declared that the MMAH acted “unreasonably and unlawfully”³ in failing to post the MZO proposal in accordance with section 15.

In these circumstances, CELA respectfully requests that your office take all necessary steps to immediately investigate and publicly report upon the MMAH’s non-compliance with the *EBR* in relation to the passage of Bill 109. We further request that your office correspond with the Minister forthwith to advise that the passage of Bill 109 was not *EBR*-compliant, and to remind the MMAH of the public interest value (and legally binding nature) of consultation requirements under the *EBR*.

We look forward to your response to this time-sensitive request, and please contact the undersigned if you have any questions or comments about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Theresa A. McClenaghan
Executive Director



Richard D. Lindgren
Counsel

² See [Operation of the Environmental Bill of Rights, 1993 \(auditor.on.ca\)](https://www.auditor.on.ca).

³ See [2021 ONSC 4521 \(CanLII\) | Greenpeace Canada \(2471256 Canada Inc.\) v. Ontario \(Minister of the Environment, Conservation and Parks\) | CanLII](#).