



24 May 2019

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Re: Discussion Paper on Modernizing Ontario's Environmental Assessment Program (ERO No. 013-5101, Proposed Changes to the Environmental Assessment Act (ERO No. 013-5102) and Schedule 6 of Bill 108

Dear Ms. Wyndham-Nguyen,

We are providing comments on the Ontario Ministry of Environment Conservation and Parks (MECP) proposals regarding Ontario's changes to the *Environmental Assessment Act* (EAA). It is irregular, at best, to be introducing amendments to the EAA through Schedule 6 of Bill 108, prior to the close of the comment period on the Discussion Paper and ERO 013-5102. However, we offer these remarks for the record on Schedule 6 of Bill 108, with reflections on the Discussion Paper.

We are submitting this feedback in our capacities as Wildlife Conservation Society (WCS) Canada scientists conducting research on species and ecosystems to inform conservation decisions. WCS Canada is a national non-government organization that has been engaged in Ontario since 2004, with research and conservation priorities in Ontario largely focused on the far north. We are some of the few scientists with continuous presence in the region. We lead ongoing field-based research programs that are currently focused on wolverine and freshwater fish; we support and collaborate with First Nations on community-based monitoring projects; and with academic and government researchers doing ecological studies in the region. WCS Canada has a long-term and consistent engagement around environmental assessment in the far north in Ontario.

Based on our experience, we make the following overarching recommendations:

Recommendation 1. In order to make the current EA program more robust, participatory, and transparent, Ontario should develop and consult on a wider suite of procedural and substantive reforms of the EAA including regional and strategic EA, cumulative effects, climate change, and ensuring meaningful public and Indigenous participation in EA. We do not support the current piecemeal approach or the “vision” laid out by the Discussion Paper.

Recommendation 2. To support harmonization (e.g., “one project, one assessment”) between federal and Ontario environmental assessment, Ontario must significantly improve and reform the EAA to better align with the federal environmental process (e.g. participant funding, cumulative effects, climate change considerations, Indigenous rights and interests, etc.).

Recommendation 3. Address the needs of Indigenous Peoples and the EA Program in a comprehensive manner to provide guidance to all parties and offer a formal clarification of relationships between the Crown and Indigenous Peoples with regard to involvement in Ontario’s EA process.

Further, we make the following specific recommendations based on both the Discussion Paper and Schedule 6:

Recommendation 4. Ontario should demonstrate why the EAA should be amended for “low risk projects” that are already exempt through various Class EA processes.

Recommendation 5. Ontario should follow recommendations by the Minister’s EA Advisory Panel to address known issues with Part II Order Requests and use the Environmental Review Tribunal (ERT) to seek rulings, direction, and adjudication in disputes.

Recommendation 6. Ontario should maintain the “all in unless excluded” approach for public sector projects under EAA. We do not support a “project list” as proposed in the Discussion Paper.

Recommendation 7. The Ontario government should demonstrate why the EAA should be amended because of purported “duplication” in the EA program and other provincial planning and approvals regimes.

Recommendation 8. Ontario should consider the value of regional and strategic EA for the purpose of reducing timelines on complex individual projects, particularly in the far north.

Recommendation 9. Ontario should develop procedural requirements or minimum standards for EA consultation programs for the public and Indigenous Peoples. While electronic submission processes and online registries may be useful, they should not be a substitute for comprehensive public and Indigenous consultation on EA, which is already very weak in the current EA program. In some cases, access to computers and broadband are limitations to enabling participation, particularly in the far north in Ontario.

Before providing support for our recommendations, we highlight three major issues around EA process in Ontario and the current proposals: inadequate public consultation on modernizing EAA; deliberate obfuscation of EA as “red tape”; and, the far north context which demands more appropriate EA processes.

Inadequate Public Consultation on Modernization of EAA

The overlap in multiple ERO postings on the EAA amendments is confusing and uncoordinated; the “proposals” provide selective and piecemeal changes to the EAA in the interests of “efficiency”. As such, they undermine public engagement and confidence in the MECP in considering amendments to this important legislation. WCS Canada has been supportive of modernization and reform of the EAA. However, the superficial Discussion Paper, lacks substantive information, critical implementation details (e.g. what specific timelines or deadlines are being contemplated?), and fails to specify what mechanisms will be used by the government to operationalize the changes (e.g. legislative changes, regulatory revisions, policy development, or administrative improvements?). Soliciting public feedback on certain high-level questions and general EA issues is woefully inadequate for a process touted as “modernization”.

Importantly, the government released Schedule 6 in Bill 108¹ that presents “proposals” in the two public postings as already being implemented even though public consultation is in effect until May 25, 2019. With 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. In addition, it appears that a decision has already been made to proceed with proposals before public comments have been considered – or even received – by the MECP. This is unacceptable and undermines public trust in the government’s commitment to public consultation as part of MECP’s Statement of Environmental Values² under the *Environmental Bill of Rights* (EBR). To have legitimacy, the process and decisions around EAA modernization must be credible, transparent, and accountable.

Environmental Assessment is not “red tape”

There is a general tendency in the way MECP communicates to the public through these proposals, particularly the Discussion Paper, to equate the process of environmental assessment (EA) to “red tape.”³ This is wrong. Environmental assessment is one of the few legal processes to prevent environmental degradation over time. It does this by creating a process to identify and resolve potential environmental problems before actual damage occurs. One way in which it does so is by considering the need for the project, alternatives to both the project and its methods, and identifying ways to prevent or mitigate likely impacts. Determining whether the assessment is adequate and whether it should be approved, without compromising the integrity of the environmental assessment process, needs to be informed by experts’ and Indigenous Peoples, with adequate accommodation for engagement with the public and their perspectives. If unacceptable, the project should be abandoned or redesigned to eliminate or reduce the anticipated impacts.

In short, the EAA is not “red tape”, but rather an important environmental planning tool that requires reform and modernization to prevent environmentally harmful and socially unacceptable projects from proceeding while allowing projects that are in the public interest and subject to enforceable and

¹ 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>.

² <https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change>.

³ <https://ero.ontario.ca/notice/013-5101>, page 1.

effective approval conditions to proceed. Importantly, it is also an assessment process, not an approval process.

The Far North in Ontario Requires a World-Class EA Program

The vast 450,000 km² subarctic region, also known as the far north, is globally significant for its intact ecological condition, Indigenous population, and its natural resource potential. The region remains largely free of industrial development and is a stronghold for species at risk that have experienced declines elsewhere in Ontario and Canada (i.e., caribou, wolverine, and lake sturgeon). The region contains the largest wetland in North America and the second largest peatland complex in the world, with globally-significant carbon stores. It is the homeland for *Anishinaabe* and *Ininiwok* peoples with Aboriginal and treaty rights to the land who have been engaged with Ontario's various planning processes for decades, with mixed results.

In the far north, proposals for region-opening multi-metal mines, new transmission lines, all-weather roads, broadband cable lines, and rail access have been considered since at least 2007, often concurrently with other provincial planning processes⁴. The so-called "Ring of Fire" contains world-class deposits of chromite, nickel and copper⁵ and has been touted as the economic equivalent of an Alberta oil sands. Currently, there are mineral exploration projects underway in the Ring of Fire; and one active mining proposal under a joint provincial-federal impact assessment grandfathered under *CEAA 2012*⁶.

Getting minerals to market in this remote region will require access, by road or rail, to connect the Ring of Fire sites with provincial road networks and the power grid. Various governments have made commitments to doing so⁷ and currently two provincial EAs are under way. It is anticipated that after a transportation corridor is developed, mineral exploration and development costs will drop due to easier access, leading to more exploration, possible new discoveries of mineral, and increasing pressure to develop additional linear corridors.

Our experience with project-level EA in the far north has made it clear that Ontario's process is inadequate for addressing many of the ecological, social, and economic values in the region, particularly developments such as the Ring of Fire⁸. Consequently, we have actively promoted the need for regional and strategic environmental assessments in northern Ontario as a way to consider cumulative social and ecological effects, address regional-scale impacts on freshwater, caribou, and Aboriginal and Treaty rights as well as address climate change impacts on wildlife and First Nations communities.

⁴ including the Regional Framework Agreement with nine Matawa First Nations communities, community-based land-use planning and ecological and cultural commitments mandated in the *Far North Act, 2010*, and provincial commitments to addressing protection of species at risk under Ontario's *Endangered Species Act, 2007* among others.

⁵ <http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2014-17-e.htm>

⁶ <https://www.ontario.ca/page/noront-eagles-nest-multi-metal-mine>;
<http://www.ceaa.gc.ca/050/evaluations/proj/63925?>

⁷ <https://news.ontario.ca/mof/en/2014/04/ontario-investing-in-the-ring-of-fire.html>

⁸ https://canada.wcs.org/Portals/96/Documents/RSEA_Report_WCSCanada_Ecojustice_FINAL.pdf

Having said that, we make the following comments to support our 9 recommendations.

1. Develop and consult on a wider suite of procedural and substantive reforms of the EAA.

In 2013, the Environmental Commissioner of Ontario (ECO) remarked that a comprehensive and public review of the EAA was long overdue.⁹ This was in response to recommendations made over the years by many experts and independent panels, including the Ontario Minister's EA Advisory Panel¹⁰, the Auditor General of Ontario¹¹, the Environmental Commissioner of Ontario¹², the Ontario Association for Impact Assessment (OAIA), WCS Canada¹³, and other civil society organizations¹⁴.

The provincial government first flagged its intention to "modernize" the EA process in the "made-in-Ontario" Environment Plan released in late 2018 for public consultation. Yet, none of the proposals nor Schedule 6 reflect recommendations made to the Government of Ontario on what is required to modernize and reform Ontario's EA program including:

- 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 and/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;

⁹ 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>.

¹⁰ 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>.

¹¹ <http://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html>.

¹² <http://docs.assets.eco.on.ca/reports/environmental-protection/2007-2008/2007-08-AR.pdf>

¹³ <https://www.wcscanada.org/Portals/96/Documents/EABriefing.pdf?ver=2016-12-01-124453-427>

¹⁴ MiningWatch Canada. (2014). *The Big Hole: Environmental Assessment and Mining in Ontario*. 29 pp. Available at: https://miningwatch.ca/sites/default/files/the_big_hole_report.pdf

- 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.

As such, we take exception to the “vision” identified in the Discussion Paper for a “modern” EA program. The narrow and piecemeal approach and focus on certain elements of the EA program highlighted in the current proposals and Schedule 6 fails to address the necessary reform required for Ontario’s EAA to be a relevant, modern, and valuable tool for the benefit and betterment of all Ontarians.

2. Upgrade EAA to support harmonization with federal EA.

While harmonization agreements exist between Ontario and the federal government on projects such as the Ring of Fire mining proposals, harmonization should be upward to the higher standard of process. This includes a consistent, minimum assessment standard, with harmonized assessments guided by key principles of understandable and accessible information, meaningful opportunities for public participation and precaution. Equivalency should remain an option where Indigenous jurisdiction is involved to demonstrate recognition of both the equal legitimacy of Indigenous laws and the historical context¹⁵.

3. Address the needs of Indigenous Peoples and the EA Program in a comprehensive manner and provide guidance and formal clarification of relationships between the Crown and Indigenous Peoples and the involvement of Indigenous Peoples in the EA process.

Indigenous peoples are founding nations of Canada. Their rights are closely related to nationhood. As such, the government’s commitment to nation-to-nation relationships is significant. One of the ways that relationship can be expressed is through EA. Constitutional rights also create real duties, such as the duty to consult and accommodate guided by the honour of the Crown. Yet, these duties are often passed onto proponents with mixed results. As such, EA can be a crucial nexus point for Indigenous Peoples and government relationships.

When the EAA was enacted and revised, it did not contemplate the specific needs of Indigenous Peoples. It did not consider the possibility of co-governance with Indigenous Nations on assessment and decision-making in EA. These considerations and obligations are described in more detail in recommendations in the Truth and Reconciliation Commission¹⁶, principles in the United Nations Declaration on the Rights of Indigenous Peoples¹⁷, particularly the principle of free, prior and informed consent.

¹⁵ https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf

¹⁶ <http://www.trc.ca/>

¹⁷ Canada endorsed UNDRIP in 2010. UNDRIP is available online at:

<http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

4. Ontario should demonstrate why the EAA needs to be amended to address “low risk projects”.

We were surprised to read in the Discussion Paper that “low risk” projects such as snow plowing and de-icing must always go through an EA in Ontario. We were unaware that these kinds of low risk projects would trigger Individual EA requirements under Part II of the EAA. Our experience has largely been with individual EA which are triggered for large, costly, and more risky projects in terms of ecological, social, and economic impacts.

Other projects are streamlined into Class EAs which, by definition, wholly exempt projects on the implicit premise that they pose no or low risks. These projects tend to occur on a frequent basis, are generally small in scale, and the impacts are generally predictable or well understood. It is understood that this enables a planning process that is appropriate for the project which can be completed in a timelier manner.

The Class EA are clear on what activities are “pre-approved” and can be undertaken without following Class EA procedures, including “plowing”, “sanding”, and “de-icing” under schedules in the Municipal Class EA and “routine maintenance activities”, “snow-plowing” and “salting” under schedules in the Class EA for Provincial Transportation Facilities. As such, it remains unclear why Ontario is seeking to amend the EAA to ensure these kinds of projects do not trigger individual or Class EA requirements.

From our perspective, there are more important concerns about the Class EA process under which approximately 90% of Ontario’s projects are processed (ECO 2008, Lindgren & Dunn 2010). These include:

- Allowing large and environmentally significant projects to “slip into” the Class EA track.
- Many small projects over time and space (e.g., cumulative effects) can pose greater risks.
- Certain projects that are low risk in one context, may be high risk in an other (see below on far north).
- A “no” decision is not a possible outcome.
- Inadequate transparency and lack of expert review.
- Limited or no public consultation provided.

We suspect that these are the main reasons, Ontarians submit numerous requests for Part II Orders under Class EA processes. However, for these reasons, we do not think Class EA processes are appropriate in the far north, given the biophysical and socio-cultural environment. This is highly relevant when considering roads beyond First Nations reservations where roads can be region-opening or lead to “contagious” development. The burden of proof must be on development interests, including where the government is the proponent, to demonstrate that their activities are ecologically and socially sustainable (Far North Science Advisory Panel 2010: 79).

5. Ontario should follow recommendations by the Minister’s EA Advisory Panel to address issues around timeliness and decision-making related to Part II Order Requests.

The Discussion Paper notes that decisions on Part II Order Requests to the Minister to elevate (or bump up) projects from a Class EA to an individual EA under Part II of the EAA take too long and are typically rejected. (ECO 2007:42, Lindgren & Dunn 2010). We agree, but do not support the proposed suggestions. Restricting who may file Part II Order Requests, imposing timelines, and limiting the grounds for such requests, as outlined in the Discussion Paper are the wrong solutions to addressing the

issues with Part II Order Requests under EAA. Instead, we recommend that Part II Order Requests be adjudicated, in writing, by an independent Environmental Review Tribunal rather than the Minister. This recommendation was made previously by the EA Advisory Panel¹⁸.

Part II Order Requests are invoked because of known limitations in Ontario's Class EA program. For example, the ECO (2008) noted that under the Class EA process, a "no" decision is not a possible outcome. The only approach available to address public concerns about a project in a Class EA process is to have the ministry elevate the status of the project to an Individual EA or impose conditions. The formal requests to "bump up" the Class EA to an Individual EA is rarely granted.

For example, in the far north, Victor Diamond Mine underwent a Comprehensive Study EA that was approved in August 2005. Ontario's EAA does not apply to private companies unless designated by regulation or the company volunteers to be subject to the requirements of the EAA. The initial proposal for power generation (i.e., diesel barges for fuel) for Victor required an Individual EA due to the scope of potential impacts and concerns raised by communities about contamination among others. When this proposal was withdrawn, it was replaced with a Class EA for a transmission line as an alternative power supply. However, under EAA, Class EA assumes that environmental effects of the new transmission line are "predictable and readily manageable" – this seems unlikely given it is a new linear feature in one of the world's largest wetlands and in the absence of any formal land use planning process. As such, neither the full scope of the mine's potential impacts nor the Indigenous and public interest were considered under Ontario's EAA. Two requests for a bump up of the transmission line to an Individual EA were denied (McEachren et al. 2011).

6. Ontario should maintain the "all in unless excluded" approach for public sector projects under EAA.

Presently, Ontario's Class EA already contain a well-defined set of project listings. However, we do not support a "project list" for Individual or merged Class EAs. Triggering mechanisms under the EAA was the subject of protracted public and political debate in the early 1970s when the Act was first being developed. When the EAA was passed in 1975, it did not entrench a projects list approach with an "all in unless excluded" approach. The Discussion Paper states that by adopting a listing approach, EA processes will be "focused" on "major projects". Yet, a proposed move to a "projects list" is a major concern, and represents a step backwards.

Project lists for triggering EA requirements have created intractable battles over which projects should be on the list. Some of these include:

- The use of arbitrary thresholds based on production levels rather than ecological and social thresholds that are highly dependent on context.
- There is a well-documented tendency for developers to staying just below the threshold for production within project types to avoid assessment, including purposefully designing the development so that it comes online in increments (e.g., Holmes River hydro project, BC), phases (e.g., Wataynikeneyap Power, ON), or extensions (Tango Extension at Victor Diamond Mine, ON).

¹⁸ EA Advisory Panel Report, *Environmental Assessment in Ontario: A Framework for Reform* (Vol. I, March 2005). Available at: <https://www.cela.ca/sites/cela.ca/files/EA-Panel-Report-VolOne.pdf>

- Many smaller project that do not meet size or production thresholds are not assessed yet it is well known that the smaller projects (or multiple small undertakings) can contribute importantly to adverse and significant cumulative effects. Since Ontario's EAA has no formal and legislated mechanism for addressing cumulative effects, this would be a major concern. Since Class EAs presume no impact, cumulative effects are ignored.

This issue is not limited to Ontario EA process and we note the conflict over inadequate project listings is currently playing out under the federal EA regime.

7. The Ontario government should demonstrate why the EAA should be amended because of alleged “duplication” between the EAA and other provincial or municipal planning and approvals processes.

It is unclear to us where duplication may exist between the EAA and other provincial planning and environmental approvals regimes. In the far north of Ontario, for example, the *Far North Act, 2010*, was explicitly exempt from the EAA and could not consider development in the same way that the EAA does (e.g., alternatives, ecological and social impacts). In southern Ontario, only the EAA requires an upfront and comprehensive evaluation of the broad environmental effects of the undertaking (and the alternatives), and individual EAs often address big-picture policy questions that do not get examined under regulatory statutes or the *Planning Act*. Finally, the Auditor General in her 2016¹⁹ report noted that collectively many of the current municipal, provincial, or federal approvals and permits do not result in the same level of comprehensive evaluation at environmental assessment.

That said, we encourage MECP to identify and integrate existing Ontario programs with the EA Program (e.g., Provincial Growth Plan and Municipal Class EA studies for infrastructure) and consider opportunities to initiate intra-governmental regulatory strategies, which could identify and work to minimize duplication between approval regimes. This could be achieved by MECP through education, coordination of activities, multi-agency meetings and job-sharing.

8. Ontario should consider the value of regional and strategic EA for the purpose of reducing timelines on complex individual projects, particularly in the far north.

Timelines for reviewing individual EAs and making decisions under the Deadlines Regulation (Ontario Regulation 616/98) and timelines for dealing with objections under Class EAs and other streamlined EA processes are rarely met. However, faster decisions are not necessarily better decisions and consultations, particularly for large and complex new projects, will take time. For example, in the far north where ecological systems are largely intact with globally significant ecosystems and species-at-risk, Noront Resources Eagle's Nest multi-metal mine's Terms of Reference for its EA took over two years to approve with significant amendments. We suggest Ontario should better understand the value of regional and strategic assessments as one way to lead to shorter project-level EA timelines as well as lessening the burden of cumulative effects assessments at the project level. This is highly relevant in the Ring of Fire, where mining and infrastructure proposals will have regional-scale impacts and affect multiple First Nations communities.

In general, shorter fixed deadlines for EAA decisions are inconsistent with the practical reality of EA practice and consultation, particularly in regions like the far north, where the main concerns are cumulative effects, First Nations values and rights, globally significant carbon resources, and threatened species at risk. However, the Discussion Paper does not actually specify what the new timelines will be,

¹⁹ See http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf.

or which statutory approvals will be "streamlined." As such, we do not support shorter deadlines and streamlined permitting for complex projects typical of the far north.

We also recommend MECP build its accountability as the regulator. In our experience, the lack of transparency and use of experts, the lack of seasoned, experienced, senior EA practitioners in the Environmental Approvals Branch has been a significant issue. Improvements to the hiring of experienced, knowledgeable MECP staff and their ability and willingness to provide strategic EA guidance to proponents, respond to complex issues, address consultation concerns, deal with Part II Order Requests, respond to questions about level of detail required in EA studies, scoping, etc. is also suggested.

9. Electronic submission processes are not a substitute for meaningful public and Indigenous participation in EA.

Online registries may be more efficient and, in principle, this would be a helpful reform that partially addresses the significant gaps in the Ministry's current EA website. But online registries should not be a substitute for comprehensive public and Indigenous consultation on EA, which is already very weak in the current EA program under EAA. If the government wants to improve the EA process, it should not assume that interested people have access to computers and should consider language barriers and limited access to broadband systems, particularly for First Nations communities.

Conclusion:

Ontario's environmental assessment program needs updating in order to meet the public's and First Nations and Métis communities' interests on "betterment". Ontario's EAA needs to be modernized to ensure protection, conservation, and wise use of the environment through environmental planning and decision-making based on sound science and Indigenous Knowledge. The needed reforms include cumulative effects assessment, sustainability assessment, as well as regional and strategic environmental assessment, addressing climate change, and meaningful and transparent engagement with the public and Indigenous Peoples.

Now is the time to bring Ontario's Environmental Assessment Act into the 21st Century and restore the public's faith in Ontario's EA program and processes. We would be pleased to engage in any discussions regarding our recommendations.

Sincerely,



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