



BRIEFING NOTE: DISCUSSION PAPER ON MODERNIZING ONTARIO'S ENVIRONMENTAL ASSESSMENT PROGRAM

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PART I - INTRODUCTION

The Ontario government has recently released a Discussion Paper¹ that solicits public comments on a number of potential changes to the province's environmental assessment (EA) program. However, the Discussion Paper fails to provide sufficient detail on precisely how these changes will be implemented by the province. Similarly, the Discussion Paper does not offer any persuasive evidence-based reasons in support of the changes and, in many instances, the Paper significantly misrepresents the current requirements of the EA program.

Moreover, the proposals appear to be inconsistent with the public interest purpose of the *Environmental Assessment Act (EAA)*, as described below. In addition, the Discussion Paper does not address the well-founded EA reforms that have been put forward in recent years by various stakeholders, advisory bodies, and independent officers of the Ontario Legislature.

Accordingly, CELA concludes that the Discussion Paper's vaguely defined changes should not be pursued as proposed. Instead, the Ontario government should develop and consult upon other long overdue reforms that are necessary to transform the province's EA program into a robust, credible and participatory regime.

PART II – OVERVIEW OF ONTARIO'S CURRENT EA PROGRAM

In general terms, EA is an information-gathering and decision-making process that systematically examines the environmental pros/cons of a proposed undertaking (and its alternatives) before it proceeds to the licencing and implementation stages. EA also includes opportunities for public and Indigenous engagement at key stages in the process.

All of these important elements are reflected in the *EAA*, which is aimed at anticipating and preventing environmental harm arising from undertakings that are subject to the Act. The *EAA* was first enacted in 1975, but it was substantially amended by controversial reforms implemented by the provincial government in 1996.²

¹ The Discussion Paper is available through the Environmental Registry: see <https://ero.ontario.ca/notice/013-5101>. The public comment period on the Discussion Paper ends on May 25, 2019. However, it appears that the Ontario government has already decided to proceed with its proposals regarding Class EAs and "bump up" requests: see Schedule 6 of Bill 108 that was introduced for First Reading on May 2, 2019 (<https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108>).

² See <http://www.cela.ca/publications/review-environmental-assessment-ontario> and <http://www.cela.ca/publications/environmental-assessment-ontario-rhetoric-vs-reality>.

The stated purpose of the *EAA* is "the betterment of the people of Ontario... by providing for the protection, conservation and wise management of the environment."³ Thus, the law is primarily intended to advance and protect the public interest of all Ontarians, not private corporate interests.

To help achieve this purpose, the term "environment" is defined broadly under the *EAA*. 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.

At present, the *EAA* establishes three different types of environmental review processes that are intended to be commensurate with the potential environmental risks of proposed projects:

- individual EAs for major undertakings (e.g. large landfills, incinerators, new provincial freeways, etc.);
- streamlined Class EA planning processes for small-scale projects that occur frequently and have impacts that are well-understood and mitigable (e.g. municipal roads, water/wastewater infrastructure, etc.); and
- simplified environmental screening processes for projects within certain sectors (e.g. electricity, transit, and waste management);

The general rule is that the *EAA* applies automatically to undertakings proposed by the public sector (e.g. provincial ministries or municipalities), unless they have been exempted by regulation or Ministerial order. To date, there have been numerous exemptions granted under the *EAA* in relation to public projects (e.g. Darlington nuclear power plant, conservation authorities' water quality and flood-proofing activities, municipal projects costing less than \$3.5 million, etc.).

Conversely, undertakings proposed by private sector proponents (e.g. industrial factories, mines, quarries, residential subdivisions, etc.) are generally not subject to the *EAA*, unless they have been specifically designated by Ministerial orders as undertakings to which the Act applies. To date, relatively few private undertakings have been designated under the *EAA*.⁴

PART III – PRELIMINARY ANALYSIS OF ONTARIO'S PROPOSED CHANGES

The Discussion Paper lacks many critical implementation details (e.g. what specific timelines or deadlines are being contemplated?), and fails to specify which mechanisms will be used by the government to operationalize the changes (e.g. legislative changes, regulatory revisions, policy development, or administrative improvements?). Instead, the Paper solicits public feedback on high-level questions and general EA issues. This is problematic since "the devil is in the details" when it comes to EA reform.

In addition, the Discussion Paper erroneously equates EA requirements with "red tape."⁵ This view reflects a profound misunderstanding of the societal importance of ensuring robust EA planning. As noted above, Ontario's

³ *EAA*, section 2.

⁴ Private proponents may voluntarily agree to have the *EAA* apply to their projects, but this occurs very infrequently.

⁵ Discussion Paper, page 1.

EA program should screen out and prevent harmful projects from proceeding (e.g. landfills at hydrogeologically unsuitable locations), while allowing necessary and environmentally sustainable projects to proceed, subject to effective and enforceable approval conditions that safeguard the public interest. Thus, by any objective standard, EA is not red tape, but an indispensable environmental planning tool.

Nevertheless, the Discussion Paper proposes a number of sweeping changes to Ontario's EA program. The seven most significant changes are outlined below, and are accompanied by CELA's preliminary response to such proposals. These and other changes will be examined in more detail in CELA's forthcoming submissions to the Ontario government in relation to the Discussion Paper.

1. The Discussion Paper proposes to remove EA requirements from projects that are deemed by the Ontario government to pose no or low risks to the environment.

The Discussion Paper suggests that "low risk" projects, such as snow-plowing and de-icing operations, must always go through an EA in Ontario.⁶ This claim is untrue. Low risk projects have never triggered individual EA requirements under Part II of the *EAA*, which usually apply to the largest, costliest and most environmentally significant undertakings (unless exempted).

However, some small-scale activities may be subject to streamlined Class EA planning procedures, but Class EAs typically have schedules that wholly exempt projects that truly pose no or low risks. In such cases, these projects do not require detailed environmental planning or study reports before they may be undertaken.

For example, the Municipal Class EA contains Schedule A and Schedule A+ lists of normal operational or maintenance activities, and "plowing", "sanding", and "de-icing materials" are specifically listed under these Schedules. However, the Municipal Class EA is abundantly clear that these activities are pre-approved and can be immediately undertaken by municipalities without following Class EA planning procedures. Thus, the mere fact that these activities are mentioned in schedules to the Municipal Class EA does not mean that an EA is required.

Accordingly, the Discussion Paper's proposal to wholly exempt undefined "low risk" projects from EA obligations is redundant, and seems to be premised on an incorrect description of how the current EA program addresses routine or minor projects.

2. The Discussion Paper proposes to impose time limits and specify criteria for Ministerial decisions on public requests to elevate (or "bump up") projects from a Class EA planning process to an individual EA.

The Discussion Paper⁷ deals with the timeliness of Part II order decisions where members of the public have asked the Minister to elevate (or bump up) particularly significant or controversial projects from a Class EA to an individual EA under Part II of the *EAA*. The Paper correctly notes that these requests often take too long for the Minister to decide, and that most of the time, the public requests are refused. This has been a long-standing

⁶ Discussion Paper, page 10.

⁷ Discussion Paper, page 12.

problem under Class EAs in Ontario, but the Discussion Paper offers the wrong solutions (e.g. by imposing arbitrary time limits and suggesting that only "directly affected" persons should be able to file such requests).

From the public interest perspective, the fundamental concern is that the existing Part II order process has become non-credible and over-politicized, largely because the public requests are determined behind closed doors by the Minister, not an independent decision-maker. To remedy this situation, Ontario's EA Advisory Panel recommended years ago that Part II requests should be adjudicated in writing by the Environmental Review Tribunal, not the Minister.

However, this sound recommendation has never been adopted by the Ontario government to date. Accordingly, the current Part II process remains a contentious "black box" in which legitimate public requests are sent to the Minister, but they are almost always rejected, often for specious reasons. This unsatisfactory arrangement will not be fixed by the Discussion Paper's proposals to speed up Ministerial decision-making, restrict who may file Part II requests, and limit the grounds for such requests.

3. The Discussion Paper proposes to revise the current application of the *EAA* by creating a projects list that identifies which types of projects will trigger EA requirements.

The Discussion Paper's proposed move to a "projects list"⁸ under the *EAA* is particularly alarming, and represents a clear step backwards from the "all in unless excluded" approach that currently exists for public sector projects under the *EAA*.

The threshold question of which triggering mechanism should be used under the *EAA* was the subject of protracted public and political debate in the early 1970s when the Act was first being developed. However, when the *EAA* was passed in 1975, it did not entrench a projects list approach. Unfortunately, the Discussion Paper now proposes to re-open and re-argue this debate.

While some other Canadian jurisdictions have used project lists to trigger EA requirements, this approach has spawned intractable battles over which projects should be on the list, and which environmental criteria or thresholds should be used to make listing decisions. Invariably, environmentally significant activities or works have been left off project lists in other jurisdictions, often for political rather than ecological reasons. This acrimonious conflict over inadequate project listings is currently playing out under the federal EA regime, and it would be a mistake to replicate that conflict in Ontario, as suggested by the Discussion Paper.

4. The Discussion Paper proposes to eliminate alleged "duplication" between the *EAA* and other provincial or municipal planning and approvals processes.

The Discussion Paper contends that there is "duplication" between the *EAA* and other provincial planning and environmental approvals regimes.⁹ This assertion is incorrect since no other provincial statute requires proponents

⁸ Discussion Paper, page 15.

⁹ Discussion Paper, pages 17 and 19.

to demonstrate the need/purpose of the undertaking, consider “alternatives to” and “alternative methods”, and systematically evaluate and consult upon potential environmental, socio-economic or cultural impacts.

To the contrary, environmental regulatory statutes (e.g. *Environmental Protection Act*, *Ontario Water Resources Act*, etc.) tend to deal with technical details or final design specifications of proposed facilities, structures or equipment. In contrast, 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*.

Similarly, most commentators and EA participants do not object in principle to the "one project, one assessment" approach suggested by the Discussion Paper.¹⁰ In fact, there are number of past examples where joint federal/provincial EA processes have worked reasonably well in evaluating major projects that are subject to both regimes. However, for harmonized EAs to work properly and efficiently at the present time, Ontario will have to significantly upgrade and improve the *EAA* so that it better dovetails with the federal EA process (e.g. participant funding, cumulative effects, climate change considerations, Indigenous rights and interests, etc.).

5. The Discussion Paper proposes to reduce timelines for government agencies’ review of EA documentation submitted by proponents.

The Discussion Paper notes that in some cases, the individual EA process can become slow and complex.¹¹ However, faster decisions are not necessarily better decisions, and the Discussion Paper's vague musings about a "one window" approach seem to rely heavily upon shorter deadlines and streamlined permitting requirements. Significantly, the Discussion Paper does not actually specify what the new timelines will be, or which statutory approvals will be "streamlined."

In addition, since EA processes are intended to be iterative and participatory in nature, it is not uncommon for EA participants to bring forward new information or concerns that may require more field work and analysis. Therefore, extra time may be needed for the proponent to properly complete the EA process, for government and public reviewers to evaluate the EA documentation, and for decision-makers to reach credible, evidence-based decisions. Accordingly, shorter fixed deadlines for *EAA* decisions are inconsistent with this practical reality.

6. The Discussion Paper proposes to create “sectoral” terms of reference for individual EAs.

Under the *EAA*, Minister-approved terms of reference are the legal roadmap for the conduct and content of individual EAs, and must be complied with by proponents. Rather than tailoring case-specific terms of reference, the Discussion Paper suggests that "sectoral" (or generic) terms of reference could be developed to prescribe the issues to be addressed in individual EA processes. However, the Paper fails to identify which sectors would be candidates for this unprecedented approach, or which environmental issues would (or would not) have to be addressed in such sectors.¹²

¹⁰ Discussion Paper, page 17.

¹¹ Discussion Paper, pages 22 and 27.

¹² Discussion Paper, page 24.

Given that the *EAA* already allows the Minister to approve terms of reference that "focus" (or scope) EA content requirements, and given that this scoping power has been extensively used by the Minister since the 1996 amendments, there appears to be no demonstrable need for "sectoral" (or one-size-fits-all) terms of reference for major undertakings that are significant enough to warrant individual EAs.

7. The Discussion Paper proposes to enable the electronic submission of EA documentation.

The Discussion Paper proposes the creation of an electronic registry that allows the uploading and retention of digital copies of EA documentation submitted by proponents.¹³ In principle, this would be a helpful reform that partially addresses the significant gaps in the Ministry's current EA website. However, it goes without saying that not everyone interested in, or potentially affected by, proposed undertakings has access to a computer or broadband service (especially in rural or remote communities), and not everyone speaks English as a first language.

Therefore, the creation of an electronic registry is not a substitute for other traditional forms of consultation in the area of the proposed undertaking, and in appropriate languages and formats. In short, meaningful public and Indigenous participation in Ontario's EA program requires more than simply having a time-limited opportunity to skim voluminous online documents and to email comments to the proponent or governmental reviewers.

PART IV - CONCLUSIONS

In the wake of the 1996 amendments to the *EAA*, there has been widespread consensus that Ontario's EA program needs to be renewed, revised and revitalized. Thus, important recommendations for critically needed EA reforms have been offered over the years by CELA,¹⁴ other environmental groups,¹⁵ the Environment Minister's EA Advisory Panel,¹⁶ the Auditor General of Ontario,¹⁷ and the Environmental Commissioner of Ontario.¹⁸

Unfortunately, the need for such reforms is not addressed or even mentioned in the Discussion Paper. Rather than tackling the serious systemic problems in Ontario's EA program (e.g. lack of a climate change test, inadequate treatment of cumulative effects, insufficient public participation requirements, etc.), the Discussion Paper selectively proposes some piecemeal changes (e.g. exemptions, time limits, streamlining devices, and other so-called "efficiency" measures). CELA concludes that these questionable proposals will not result in an effective, enforceable and equitable EA program that safeguards the public interest in Ontario.

May 6, 2019

¹³ Discussion Paper, page 28.

¹⁴ See <http://www.cela.ca/publications/application-review-environmental-assessment-act-and-six-associated-regulations>.

¹⁵ See <http://www.cela.ca/publications/briefing-note-need-environmental-assessment-ontario>.

¹⁶ *Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Recommendations 1-41: see <https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1>.

¹⁷ See <http://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html>.

¹⁸ See <http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf> and <http://docs.assets.eco.on.ca/reports/environmental-protection/2007-2008/2007-08-AR.pdf>.