

DELIVERED VIA EMAIL
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Ministry of the Environment, Conservation and Parks - Environmental Policy Branch
40 St Clair Avenue West, Floor 10
Toronto, ON
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Re: Ontario's Land Use Compatibility Guideline
ERO Posting 019-2785

Please accept this submission of the Canadian Environmental Law Association (“CELA”) in response to ERO Posting 019-2785¹.

A. About the Canadian Environmental Law Association

CELA is a non-profit, public interest law organization that works toward protecting public health and the environment by seeking justice for those harmed by pollution or poor decision-making and by advocating for improvements to laws and policies to prevent problems in the first place. Since 1970, CELA has used legal tools, conducted public legal education, undertaken ground-breaking research, and advocated for increased environmental protection and to safeguard communities. As a specialty clinic funded by Legal Aid Ontario, our primary focus is on assisting and empowering low-income, disproportionately impacted, and vulnerable communities to further access to environmental justice.

CELA has represented clients in the courts and before administrative tribunals in relation to various land use planning matters and has participated in various stakeholder consultations related to land use planning and environmental compliance. On the basis of our decades-long experience, CELA has carefully considered the proposal for a new land use compatibility guideline (the “Guideline”) provided by the Ministry of Environment, Conservation and Parks (“MECP”) from a public interest perspective. CELA’s response to the proposed Guideline is set out below.

B. Background: Ontario's Land Use Compatibility Guideline

On May 4, 2021, MECP issued a proposal on the Environmental Registry of Ontario (“ERO”) to strengthen Ontario’s approach to environmental compliance (Information Bulletin, ERO 019-3268). The overall proposal contains four separate initiatives:

1. Land use compatibility guideline (ERO 019-2785)
2. Odour guideline (ERO 019-2768)

¹ See: <https://ero.ontario.ca/notice/019-2785>

3. Compliance policy (ERO 019-2972)
4. Administrative monetary penalties

As part of this proposal, MECP is proposing a new land use compatibility guideline as an update to a number of existing D-series guidelines for municipalities to use when making land use planning decisions (ERO 019-2785). The Guideline would be applied to achieve and maintain land use compatibility between major facilities and sensitive land uses when a planning approval under the *Planning Act* is needed in the following circumstances:

- a new or expanding sensitive land use (e.g. a residential subdivision or condominium) is proposed near an existing or planned major facility; or
- a new or expanding major facility is proposed near an existing or planned sensitive land use.

According to the ERO posting, the Guideline would also be applied when municipalities are incorporating land use compatibility policies and principles into various land use planning tools under the *Planning Act* and other legislation.

C. CELA’s Response to the Land Use Compatibility Guideline

1. The Guideline Must Account for the Risk-Based Approach Taken to Compliance

As currently drafted, the Guideline does not account for inconsistencies between MECP’s approach to making land use compatibility decisions and its approach to compliance when concerns about adverse impacts arise as a result of incompatible land uses. While the Guideline prioritizes nuisance impacts—such as those from noise, dust and odour—in its recommended approach to assessing land use compatibility, MECP’s approach to compliance deems these types of impacts “low risk” and often leaves impacted individuals with nowhere to turn to address the effects of incompatible land uses.

For example, in the event that a sensitive land use, such as a residential use, is approved and developed in close proximity to a major facility, new residents may file complaints regarding noise or odour with MECP. The *Environmental Protection Act* (“EPA”) gives MECP the authority to respond to concerns about impacts from land use compatibility issues (i.e. potential adverse effects) as appropriate. However, the Guideline provides that a “risk-based approach” is used by MECP to address known and potential violations of the law and risks to the environment or human health. This approach prioritizes “high-risk” adverse human health and environmental impacts over “low-risk” nuisance impacts, meaning that individuals who complain about nuisance impacts from major facilities are often referred to another level of government or agency, such as their local municipality.

CELA is strongly of the view that a risk-based approach to responding to concerns about land use compatibility issues fails to address the living reality of many Ontarians. Nuisance impacts, such as those related to dust, noise and odour, are a major concern for individuals living in low-income, disadvantaged and vulnerable communities. CELA regularly receives inquiries from the public related to noise pollution from major facilities or agricultural equipment (i.e. bird bangers) located

near their homes, dust from neighbouring pits and quarries, and odours from nearby slaughterhouses or factories. For these individuals, MECP’s current approach to compliance means that they are often referred out to their local municipalities, which do not have the bylaws in place to properly address their concerns.

Ongoing use of a risk-based approach to compliance will mean that the public has to turn to courts and tribunals, such as the Small Claims Court and the Normal Farm Practices Protection Board, to deal with nuisance impacts that are properly within the jurisdiction of MECP and could be avoided with a more robust land use compatibility assessment.

CELA urges MECP to account for this discrepancy when determining Areas of Influence (“AOIs”) and Minimum Separation Distances (“MSDs”) to ensure that Ontarians are not subject to nuisance impacts for which there is no accessible avenue of redress. CELA further recommends that MECP re-evaluate its risk-based approach to compliance and include “low-risk” impacts among the types of incidents it will respond to, as these fall within its jurisdiction under the EPA.

Recommendation #1: CELA recommends that AOIs and MSDs are increased for Class 1 and Class 2 major facilities which are described as having “smaller” or “moderate” adverse effects to address the inequities created by MECP risk-based approach to compliance when complaints involve “low-risk” impacts.

Recommendation #2: CELA recommends that MECP re-evaluate its risk-based approach to compliance and include “low-risk” impacts among the types of incidents it will respond to.

2. The Assessment of Land Use Compatibility Should Include a Cumulative Effects Assessment

MECP’s Statement of Environmental Values requires the Ministry to consider “the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society” when it is drafting new policies.² Despite this, there is no requirement in the Guideline for land use planning authorities or other relevant agencies to incorporate a cumulative effects assessment (“CEA”) when assessing land use compatibility.

In its discussion of compatibility studies, the draft Guideline simply states that, “the planning authority can also, at their discretion, undertake or require broader studies outside of a site-specific study, such as regional or cumulative impact modeling. This could be appropriate if there are multiple existing major facilities or multiple proposals for potentially incompatible development in a regional area, and the planning authority may want to assess impacts on an area-wide scale.”³ This leaves the decision about whether or not to conduct a CEA when assessing land use compatibility at the sole discretion of the planning authority.

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

³ Ontario Ministry of Environment, Conservation and Parks, “DRAFT Land Use Compatibility Guideline” (March 2021) at 31.

CELA submits that leaving the requirements for this much-needed scientific assessment at the discretion of planning authorities, local municipalities and other relevant agencies is not only inappropriate but extremely careless.

CELA further submits that Ontario’s failure to incorporate a CEA in its land use compatibility guidelines has had, and will continue to have, serious implications for environmental protection and human health in Ontario.

In Sarnia, for example, the lack of a CEA process in land use planning has allowed significantly high levels of toxic pollution to be emitted into the local airshed. A report by Ecojustice which examined the cumulative air pollution emissions in Sarnia, found that in 2005, the facilities which were subject to the National Pollutant Release Inventory (“NPRI”) had “released 5.7 million kilograms of Toxic Air Pollutants including numerous chemicals associated with reproductive and development disorders and cancer among humans.”⁴ These toxic air emissions were found to be more than the NPRI releases of Manitoba, New Brunswick or Saskatchewan and more than that of any other Ontario community.⁵ Exposure to air pollution has resulted in serious health impacts to local residents, in particular to the members of the Aamjiwnaang First Nations, who live in close proximity to industrial facilities which are causing the air pollution. The residents of Aamjiwnaang have reported disproportionately higher levels of asthma, respiratory problems, miscarriages, learning disabilities, cancer and skewed birth ratios in some years.⁶ Hospital admission rates are also higher in Sarnia for respiratory illness in comparison to Windsor and Ontario.⁷

The need for a robust CEA mechanism cannot be understated—it is an essential component of an effective land use compatibility framework.⁸ CELA urges MECP to incorporate a mandatory cumulative effects assessment as part of the land compatibility assessment process set out in the Guideline. Ontario needs to catch up with not only the world⁹ but also various other provinces from Canada, who have already taken this step.

CELA further recommends that MECP provide detailed guidance on how cumulative effects assessments are to be integrated within the broader planning regime.

Recommendation #3: CELA recommends that the Guideline require a cumulative effects assessment for all existing facilities as well as new and expanding facilities.

Recommendation #4: CELA recommends that the Guideline provide detailed guidance on how cumulative effects assessments are to be integrated within the broader planning regime.

⁴ Ecojustice, “Exposing Canada’s Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area” (Toronto: Ecojustice, October 2007) at 5.

⁵ *Ibid.*

⁶ *Ibid* at 9-10.

⁷ *Ibid* at 9.

⁸ Alberta, for example, has developed and implemented a cumulative effects management system as an integral part of their land use planning framework. See: <https://www.alberta.ca/land-resource-planning-overview.aspx>; <https://landuse.alberta.ca/CumulativeEffects/CumulativeEffectsManagement/Pages/default.aspx>; <https://landuse.alberta.ca/PlanforAlberta/LanduseFramework/Pages/default.aspx>

⁹ At an international level, many countries have incorporated cumulative effects assessment as a part of the land use planning process, including in the EU, the UK, India, New Zealand, etc.

3. MECP Must Apply an Equity Lens in Crafting the Guideline

Land use compatibility decisions have and continue to play a role in creating and perpetuating discriminatory practices against low-income, vulnerable and disadvantaged communities. As noted above, these communities are often disproportionately exposed to and affected by environmental contaminants, such as air pollution and industrial emissions, as a result of incompatible land uses.¹⁰

For example, findings from the 2010 “Code Red” Series in the Hamilton Spectator¹¹ show clear correlations between income and proximity of major facilities. Perhaps most disturbingly, the Series found that there exists a 21-year difference in life expectancy between one of Hamilton’s richest neighborhoods and one of its poorest. Much of this difference can be attributed to disproportionate exposure of low-income communities to environmental contaminants from major facilities.¹²

Research has similarly established that areas of the province that have higher air pollution also tend to have higher poverty rates, raising serious environmental equity concerns regarding the siting and operation of industrial facilities in Ontario.¹³

There are countless examples in Canadian literature that shed light on how Indigenous and other racialized communities are exposed to greater health risks because they are more likely to be spatially clustered around waste disposal sites and other environmental hazards.¹⁴ Living near environmentally hazardous industries does not only put these communities at greater risk of life threatening and life altering diseases, but affects future generations as well. In its report on environmental racism in Canada, the Canadian Commission for UNESCO noted that women living close to industrial sites are at increased risk of giving birth to children with overall congenital malformations and specific congenital malformations, including neural tube defects and congenital heart defects.¹⁵

The Canadian Commission for UNESCO’s report also highlights that the failure of provinces to look at land use compatibility decisions through an equity lens helps to perpetuate inequity by lowering property values and forcing low-income, vulnerable and disadvantaged communities to remain in or move into highly polluted areas. The report states that “populations with higher socioeconomic status that are near polluting industries tend to move out, while lower-income populations remain.”¹⁶ In other words, “it is more expensive to buy homes outside environmentally hazardous neighbourhoods.”¹⁷

¹⁰ Pollution Watch, “An Examination of Pollution and Poverty in the Great Lakes Basin” (2008) online: https://cela.ca/wp-content/uploads/2019/07/633_PW_SE_Study.pdf

¹¹ <https://codered.thespec.io/>

¹² See: <https://codered.thespec.io/>; See also *supra* note 10.

¹³ *Supra* note 10 at 2-4.

¹⁴ See for example: Cryderman et al, “An Ecological and Human Biomonitoring Investigation of Mercury Contamination at the Aamjiwnaang First Nation” (2016) 13:4 *EcoHealth* 784; See also Canadian Commission for UNESCO, “Environmental Racism in Canada” (2020) at 2.

¹⁵ Canadian Commission for UNESCO, “Environmental Racism in Canada” (2020) at 3

¹⁶ *Ibid* at 2-3.

¹⁷ *Ibid* at 3.

A recent report published by the City of Edmonton similarly concludes that various planning policies and, in particular, zoning bylaws have been or can be discriminatory, as they produce deeply inequitable outcomes for different population groups, such as low-income communities.¹⁸ The report confirms that “establishing and propagating equity, and making cities inclusive, are fundamental tasks in planning.”¹⁹

Unfortunately, despite the need for planning policies that explicitly aim to ameliorate these inequities, the Guideline fails to look at land use compatibility through an equity lens. Without any strict guidance for planning authorities, the location of pollution emitting industries (like pulp and paper mills, incinerators, waste disposal sites, etc.) will continue to have disproportionate effects on low-income, vulnerable and disadvantaged communities.²⁰

The Guideline provides that proponents, planning authorities and other relevant agencies should consider “existing” land uses when making decisions about land use compatibility for new proposed major facilities. CELA urges MECP to consider how consideration of “existing uses”, absent an overarching equity lens, perpetuates existing inequality and is likely to subject already vulnerable communities to further adverse effects.

In its guidance related to infill and intensification scenarios, the Guideline does recommend that “the cumulative effects of development are considered” because the potential implications of approving an additional industrial use near existing sensitive land uses may have a cumulative impact on the existing sensitive land uses. However, no specific guidance is provided for how to assess whether existing land uses are already incompatible with the surrounding sensitive land uses or how to shift industrial intensification away from communities that are already experiencing disproportionate adverse effects.

CELA recommends that an equity lens be applied when MECP is reviewing all existing policies and crafting new ones. While there is no one clear definition of equity, “many scholars agree that equity stands for the justice and fair treatment of individuals in society regardless of their social, economic, and political placements in the community.”²¹ This means that the Guideline, and all other MECP policies, must be crafted in such a way that it does not lead to differential treatment, hardship, or disadvantage to some populations.

In a land use compatibility context, this could refer to a decision-making framework that prioritizes the “social function” of the lands and buildings, such as the surrounding communities’ historical relationship with their lands, as opposed to the properties’ commercial value.²² Jurisdictions like Brazil, the United Kingdom, Mexico City, and Montreal²³, provide useful examples of how an equity lens can be applied in land use planning legislation, policies and regulations.

¹⁸ City of Edmonton, “Edmonton’s Zoning ByLaw Under the Lens of Equity” (2021) online: https://www.edmonton.ca/sites/default/files/public-files/assets/PDF/ZoningBylaw_ThroughLensofEquity_Report.pdf at 18.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid* at 14.

²² *Ibid*; See for example the description of Brazil’s *City Statute* of 2001 at 22.

²³ *Ibid* at 22-26.

Recommendation #5: CELA recommends that MECP apply an equity lens in crafting the Guideline.

D. Summary of Recommendations

In summary:

Recommendation #1: CELA recommends that AOIs and MSDs are increased for Class 1 and Class 2 major facilities which are described as having “smaller” or “moderate” adverse effects to address the inequities created by MECP risk-based approach to compliance when complaints involve “low-risk” impacts.

Recommendation #2: CELA recommends that MECP re-evaluate its risk-based approach to compliance and include “low-risk” impacts among the types of incidents it will respond to.

Recommendation #3: CELA recommends that the Guideline require a cumulative effects assessment for all existing facilities as well as new and expanding facilities.

Recommendation #4: CELA recommends that the Guideline provide detailed guidance on how cumulative effects assessments are to be integrated within the broader planning regime.

Recommendation #5: CELA recommends that MECP apply an equity lens in crafting the Guideline.

The above recommendations will help ensure that the communities who tend to disproportionately bear the impacts of incompatible land use decisions and contamination from industrial facilities are protected.

CELA would be happy to meet to discuss any of our comments or recommendations.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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