

CELA's preliminary analysis of the proposed amendments in Schedule 2 of Bill 23,
as reflected in ERO Number 019-6141¹

By CELA Counsel,
Joseph Castrilli

November 4, 2022, Updated November 11, 2022

I. Selected Provisions of Concern Under Bill 23, Schedule 2

Conservation authorities (“CAs”) provide at least three critical roles that are threatened by Bill 23: (1) under the *Conservation Authorities Act* (“CAA”) they: (i) make regulations restricting or regulating the use of wetlands, including prohibiting, regulating, or requiring the permission of the authority for development if the control of flooding, pollution, or the conservation of land may be affected by development; as well as (ii) play a critical role in the municipal planning process that can provide important non-point source water pollution controls with respect to development in urban, suburban, and rural development; and (2) under the *Clean Water Act* (“CWA”) they act as source protection authorities for the purpose of protecting drinking water sources from contamination.²

The following covers a selected number of concerns with the Bill 23 amendments to the CAA that may undermine the above CA powers.

A. Restrictions on Entering into Agreements with Municipalities to Review Planning Applications on Behalf of Municipalities

- Bill 23 would amend sections 21.1.1 and 21.1.2 of the CAA to provide that conservation authorities (“CAs”) may not provide a program or service related to reviewing and commenting on certain matters under prescribed Acts:

21.1.1 (1.1) An authority shall not provide under subsection (1), within its area of jurisdiction, a municipal program or service related to reviewing and commenting on a proposal, application or other matter made under a prescribed Act.

21.1.2 (1.1) An authority shall not provide under subsection (1), within its area of jurisdiction, a program or service related to reviewing and commenting on a proposal, application or other matter made under a prescribed Act.

¹ See: <https://ero.ontario.ca/notice/019-6141>

² While no specific amendments to CA powers under the CWA are proposed by Bill 23, the changes to CA powers authority under the CAA could create conflict situations for CAs where CA powers to protect source water under the CWA run afoul of Bill 23 changes to the CAA designed to accommodate development, such as through potential disposition of CA lands.

Comment: These amendments will have a deleterious effect on the ability of CAs to assist municipalities during the municipal planning process to control non-point source water pollution (e.g., erosion and sedimentation from construction site runoff including the release of contaminated sedimentary materials into water bodies) from urban, suburban, and rural development. This could occur if the *Planning Act* is listed as a prescribed Act under section 21 as anticipated. The result may well be that non-point source water pollution from urbanization will increase in rivers, streams, and lakes throughout the Ontario portion of the Great Lakes Basin.³ Historically, CA involvement in the municipal planning process, though not acknowledged in the *Planning Act*, has included reviewing official plan, zoning, subdivision applications, and related matters. The role is both advisory and regulatory (through CAs ability to enter into agreements with municipalities to act as a reviewing body and through their authority to regulate development in certain hazard or sensitive areas under the *CAA*).⁴ Conservation Ontario itself has recently commented as follows on the proposed Bill 23 changes in this regard:

“The plan review process by [CAs] ensures the protection of the watershed-based approach and enables the connections to be made between flood control, wetlands, and other green infrastructure or natural cover, thus ensuring safe development”.⁵

Thus, the proposed amendments will have the potential to undermine both non-point source water pollution control and public safety.

B. Exemption from CA Natural Hazard Permits for Select Municipalities Where Planning Act Approvals Are in Place

- Bill 23 would amend section 28 of the *CAA* to provide that certain prohibitions on activities in the area of jurisdiction of a CA (e.g., development in areas that are hazard lands or wetlands) do not apply if the activities are part of development authorized under the *Planning Act* and if other specified conditions are satisfied:

28 (4.1) Subject to subsection (4.2), the prohibitions in subsection (1) do not apply to an activity within a municipality prescribed by the regulations if,

- (a) the activity is part of development authorized under the *Planning Act*; and
- (b) such conditions and restrictions as may be prescribed for obtaining the exception and on carrying out the activity are satisfied.

³ Great Lakes Water Quality Board, Report to the International Joint Commission, *1980 Report on Great Lakes Water Quality* (November 1980) at 47 (noting that the 1978 GLWQA required Canada and the United States to develop and implement measures for the abatement and control of water pollution from a variety of land use activities, such as urbanization). It was expected that these measures would be undertaken at the sub-national (i.e., provincial and state) levels. See J.F. Castrilli and A.J. Dines, *Control of Water Pollution from Land Use Activities in the Great Lakes Basin: An Evaluation of Legislative and Administrative Programs in Canada and the United States*, Prepared for the International Joint Commission Reference Group on Great Lakes Pollution from Land Use Activities (March 1978) at 7-8.

⁴ J.F. Castrilli, *Control of Water Pollution from Land Use Activities in the Canadian Great Lakes Basin: An Evaluation of Legislative, Regulatory and Administrative Programs*, Prepared for the International Joint Commission Reference Group on Great Lakes Pollution from Land Use Activities (1977) at 50-52;

⁵ Conservation Ontario, Media Release, “Province Continues to Change Roles and Responsibilities of Conservation Authorities” (October 27, 2022) at 1 (quote from Angela Coleman, General Manager, Conservation Ontario).

(4.2) If a regulation prescribes activities, areas of municipalities or types of authorizations under the *Planning Act* for the purposes of this subsection, or prescribes any other conditions or restrictions relating to an exception under subsection (4.1), the exception applies only in respect of such activities, areas and authorizations and subject to such conditions and restrictions.

Comment: Our comments above are also applicable with respect to the section 28 amendments. These amendments, in conjunction with other proposed changes to the Ontario Wetlands Evaluation System being undertaken by the provincial government at the same time as Bill 23 that could see many wetlands re-defined to downgrade their significance on the basis of local municipal decision-makers,⁶ will produce or contribute to many of the water pollution and hazard conditions the historical statutory mandate of CAs was designed to avoid.

C. Removal of Conservation of Lands and Pollution as Considerations in CA Permit Decisions

- Currently, several factors must be considered when making decisions relating to a permission to carry out a development project or a permit to engage in otherwise prohibited activities. The factors include the possible effects on the control of pollution and the conservation of land. Bill 23 would amend section 28.0.1(17) of the CAA to instead require consideration of the effects on the control of unstable soil or bedrock:

28.0.1(17) (a) effects the development project is likely to have on the control of flooding, erosion, dynamic beaches or unstable soil or bedrock;

Comment: This amendment again undermines the historic role of CAs with respect to pollution and conservation of land by narrowing it unnecessarily as per the above comments.

D. Converting to Housing Purposes CA Lands Meant for Environmental and Natural Hazard Protection

- Detailed amendments to section 21 under Bill 23 set out the circumstances surrounding potential sale of CA lands to support housing development.

Comment: The amendments to section 21 contemplate the potential disposition of CA lands that have the following characteristics: (1) areas of natural and scientific interest (“ANSIs”); (2) habitat of threatened or endangered species; (3) forest lands; and (4) natural hazard lands (e.g., dynamic beach hazard, erosion hazard, flooding hazard, hazardous lands or sites, low water or drought conditions, as set out in section 1(1) of O. Reg. 686/21 of the CAA). Conservation Ontario has identified the following potential problems with the disposition of such lands for private development:

⁶ Ministry of Natural Resources and Forestry, *Proposed Updates to the Ontario Wetlands Evaluation System*, EBR Registry 019-6160 (October 25, 2022).

“[CAs] own approximately 147,000 hectares of land which are made up of important natural systems and biodiversity such as wetlands, forests, moraines, and ecologically sensitive lands. These lands typically have clear functions and purposes.

[CA] lands are often located in floodplains and help to protect against flooding and erosion. They offer trails and other outdoor amenities that contribute to public well-being and they protect important sources of drinking water and biodiversity. They also contribute to climate change adaptation measures by capturing emissions, cooling temperatures, and protecting water quality.”⁷

E. Freezing Fees Conservation Authorities May Charge on Development

- Bill 23 adds a new section 21.3 to the CAA authorizing the Minister to direct an authority not to change the fees it charges for a specified period of time:

Minister’s direction re fee changes

21.3 (1) The Minister may give a written direction to an authority directing it not to change the amount of any fee it charges under subsection 21.2 (10) in respect of a program or service set out in the list referred to in subsection 21.2 (2), for the period specified in the direction.

Compliance

(2) An authority that receives a direction under subsection (1) shall comply with the direction within the time specified in the direction.

Comment: CAs expect that by freezing CA cost recovery fees respecting development this will produce “a backlog of costs that will eventually need to be addressed”. They ask the question: “Who will pay for the eventual shortfall?”⁸ It is not inconceivable to imagine that the shortfall will result in increased pressure on CAs to begin to divest their lands. For the reasons discussed under Part D, above, given the purposes and functions of CA lands, divestiture could produce the very environmental and public safety problems the original acquisition of the lands was meant to avoid.

⁷ Conservation Ontario, Media Release, “Province Continues to Change Roles and Responsibilities of Conservation Authorities” (October 27, 2022) at 2.

⁸ *Ibid.*