May 25, 2019

Sharifa Wyndham-Nguyen

Client Services and Permissions Branch

Ministry of the Environment, Conservation and Parks

Government of Ontario

135 St. Clair Avenue West, 1st Floor

Toronto, ON M4V 1P5

*via e-mail: eamodernization.mecp@ontario.ca*

Dear Ms. Wyndham-Nguyen:

**Re: *Modernizing Ontario’s Environmental Assessment Program: Discussion Paper*, Environmental Registry no. 013-5101, and *Proposed Changes to the Environmental Assessment Act*, Environmental Registry no. 013-5102**

MiningWatch Canada is pleased that the Ontario government continues to acknowledge the need to reform the *Environmental Assessment Act,* as we have consistently advocated together with other public interest groups,[[1]](#footnote-1) and as recognised by the Auditor General of Ontario.[[2]](#footnote-2),[[3]](#footnote-3) However, the present proposals are rushed, incomplete, and poorly drafted. MiningWatch urges the Ontario government to ensure that the proposed changes are given a thorough public and multistakeholder review before anything is implemented. The amendments included in Schedule 6 of Bill 108 should also be suspended until they can undergo a thorough parliamentary review.

MiningWatch’s comments on these two proposals are prefaced by comments on the public consultation process itself.

# 1. Comments on public consultation process

* It is not clear why there are two duplicative and concurrent consultation processes, for what appear to be essentially different aspects of the same proposal: Environmental Registry no. 013-5101 on proposed amendments to the *Environmental Assessment Act* (*EAA*) and Environmental Registry no. 013-5102 on the Ontario government’s Discussion Paper “Modernizing Ontario’s Environmental Assessment Program.” Some of the *EAA* amendments presented in Registry posting no. 013-5101 are identical to those described in Registry posting no. 013-5102 (i.e. those on p. 13 of the Discussion Paper). We have chosen to address both of them together, but this arrangement makes it unnecessarily difficult to respond and comment.
* The 30-day comment period, the minimum required under the law, is inadequate for changes as far-reaching and potentially significant as those contemplated in these proposals. Webinars were provided to explain and help people familiarise themselves with the content of the proposed changes to the *Environmental Assessment Act*, which were useful as a preliminary public engagement but did not provide much context or rationale for the proposed changes. There was no follow up and the webinars were not able to reach many interested parties in the time available. We are not aware of any efforts at public outreach or engagement on the Discussion Paper. A longer (45 or 60-day) comment period with more public engagement effort would have been more appropriate.
* The public comment period has been at least partially overtaken and made irrelevant by the fact that the “early actions” suggested in the Discussion Paper are no longer proposals under consideration by the Ontario government, but are now statutory amendments, having been introduced in the Ontario Legislature in Schedule 6 of Bill 108 – on May 2, 2019, shortly after the Registry notices were posted and well before the May 25 deadline for comment – not to mention any reasonable interval of time for those comments to be considered. It is not possible that public comments on these “early actions” could have been considered by the Ontario government in deciding their implementation.

# 2. Comments on Modernizing Ontario’s Environmental Assessment Program: Discussion Paper, Environmental Registry no. 013-5101

The Discussion Paper provides anecdotes and generalisations in support of its proposals, but provides no concrete evidence to support its assertions of the problems the government is seeking to resolve, and no systematic analysis to support its recommendations.

We would further note that the Discussion Paper does not make mention of a number of critical problems with Ontario’s existing Environmental Assessment Program, such as the absence of participant or intervenor funding and the absence of a clear strategy for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In response to the proposals outlined in the Discussion Paper, MiningWatch makes the following specific observations:

## Ensure better alignment between the level of assessment and level of environmental risk associated with a project

Ontario’s *Environmental Assessment Act* applies to private projects like mines and smelters only if the proponent volunteers. As a result, many such projects either avoid environmental assessment altogether, or are subject only to a federal environmental assessment.[[4]](#footnote-4) The disadvantages of this situation are as grave as they are obvious: limited to non-existent opportunities

* for public participation in planning and decision-making;
* for Indigenous peoples to exercise their right to Free Prior Informed Consent (FPIC) in compliance with UNDRIP;
* for independent review of technical elements including public liabilities for long term management of millions of tonnes of toxic mine waste, among others; and
* for Ontario to ensure that such projects conform to planning frameworks within its jurisdiction (provincial, regional, and municipal).

The application of the *Environmental Assessment Act* to smaller and more routine projects by way of class assessment is entirely appropriate and a positive contribution to sustainability. It may require some adjustments to ensure that routine environmental safeguards and mitigation measures are properly considered and referenced to minimize unnecessary “regulatory burden”; at the same time, it is important to maintain the broad application of the *Act*, with the appropriate conditions and triggers, to ensure that it captures routine activities that deviate from routine conditions in a way that represents an environmental risk, for example where it could affect critical habitat for a species at risk.

Using a project list to identify high risk projects for assessment without complementary assessment tracks, as proposed in the Discussion Paper, has serious disadvantages, for example in the identification of cumulative effects, the capture of new or novel technologies or applications, and even in the simple tracking of project impacts in areas of provincial jurisdiction.

## Eliminate duplication between environmental assessment and other planning and approvals processes

Unnecessary duplication should be minimized, for example between federal and provincial environmental assessment processes. Specific efforts need to be made to coordinate and harmonise administrative requirements – such as filing and information requirements and timelines – while preserving the appropriate jurisdiction and decision-making authority, both in the legal and policy framework (modifications in legislation or policy, harmonization agreements, etc.) and for individual project (or indeed regional) assessments.

Two principles need to be clearly recognized here: first, environmental assessment is a planning tool, not a regulatory process. Regulatory regimes are not meant to analyse development scenarios and impacts. The provincial Auditor-General has also made this observation.[[5]](#footnote-5) Second, not all duplication is bad; in fact, in areas of high sensitivity or high importance, having more than one set of eyes on an issue may be very important, while avoiding and minimising administrative duplication and inconsistency.

## Find efficiencies in the environmental assessment process and related planning and approvals processes to shorten the timelines from start to finish

The Discussion Paper make a general assertion about delays, confusion and uncertain timelines but shows no effort to document and analyse them so as to be able to formulate an appropriate policy response. Instead it proposes allowing applicants to get permits for activities that have not yet been assessed, much less approved – almost certainly paving the way for future legal action by disappointed investors who will claim that the permits gave them a legitimate expectation that their projects would be approved as submitted. An in-depth analysis – or indeed, any analysis at all – is required in order to determine where and to what extent this problem actually exists and how it can and should be addressed.

## Go digital by permitting online submissions

MiningWatch supports “going digital” as an important advance. However, care must be taken to ensure cross-platform availability of complete and comprehensive information. A registry should be accompanied by comprehensive project files, including data from the applicant, intervenors, and government regulatory and expert agencies, in commonly-accessible and searchable formats. It should also link to all relevant regulatory and monitoring data for the life of the project and as long as such information is being gathered.

At the same time, electronic information is not universally accessible, especially in rural, remote, and underprivileged urban communities. Documentation has to still be available and accessible in other formats or via other mechanisms. Likewise, online access is a complement, not a substitute, for other forms of public engagement and access for Indigenous peoples. Meaningful public participation, not to mention meeting FPIC requirements for Indigenous peoples, will continue to require a wide range of methods, in person, on paper, and online.

# 3. Comments on Proposed Changes to the *Environmental Assessment Act*, Environmental Registry no. 013-5102

In response to the proposed amendments to the *Environmental Assessment Act,* MiningWatch makes the following specific observations:

## Modernize the environmental assessment program to focus on higher-risk projects

Please see comments on this issue above. The proposed measures are unjustified and problematic and should not be pursued.

## Focus the environmental assessment program on higher-risk projects

Please see comments on this issue above. The proposed measures are unjustified and problematic and should not be pursued.

## Ensure timeliness and certainty for the review of requests to the Minister asking for a higher level of assessment on a project (i.e. “bump-up”)

As noted with respect to the Discussion Paper, the proposal provides no background information or analysis to support its assertion that there is a problem with elevation requests (bump-ups), much less that the proposed measures are likely to resolve that problem without – or instead of – creating serious problems in terms of administrative fairness and access to justice by unfairly restricting the ability and opportunity for the public and/or Indigenous peoples to make an elevation request. The proposed measures are unjustified and problematic and should not be pursued.

## Clarify the Minister’s authority to reconsider an approval of a project and ask for additional information on an individual environmental assessment

Section 11.4 of the *EAA* enables the Environment Minister to reconsider approval of a project or ask for additional information where there is “a change in circumstances” or “new information” regarding the approved application. It is an important safeguard mechanism. Any modification should not restrict the minister’s ability to act, but rather provide broad opportunities and specific mechanisms for Indigenous peoples, members of the public, and public interest groups to identify where reconsideration may be necessary and request the minister to do so, where the minister is required to respond within a specified time period.

# 4. Conclusion

We trust these observations and recommendations will be taken into consideration, and we look forward to continued engagement in this important discussion.

Sincerely,

Jamie Kneen,

Communications and Outreach Coordinator

1. Canadian Environmental Law Association (CELA), CPAWS Wildlands League, MiningWatch Canada and Wildlife Conservation Society (WCS) Canada. *Briefing Note: Need for Environmental Assessment Reform for Ontario*. June 2016. <https://www.cela.ca/sites/cela.ca/files/EABriefing.pdf> [↑](#footnote-ref-1)
2. Auditor General of Ontario. *2016 Annual Report of the Office of the Auditor General of Ontario*, Chapter 3 • Value for Money (VFM) Section 3.06 <http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf> [↑](#footnote-ref-2)
3. Canadian Environmental Law Association (CELA), CPAWS Wildlands League, MiningWatch Canada and Wildlife Conservation Society (WCS) Canada. *Auditor General Slams Ontario’s Outdated Environmental Assessment Act – Groups Urge Government to Act*. 1 December 2016. <https://miningwatch.ca/news/2016/12/1/auditor-general-slams-ontario-s-outdated-environmental-assessment-act-groups-urge> [↑](#footnote-ref-3)
4. The Canary Institute/MiningWatch Canada. *The Big Hole: Environmental Assessment and Mining in Ontario*. December 2014. <https://miningwatch.ca/sites/default/files/the_big_hole_report.pdf> [↑](#footnote-ref-4)
5. Auditor General of Ontario, *op. cit*.at 4.1.3, p. 351 [↑](#footnote-ref-5)