



TURAN LAW OFFICE P.C.

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Honourable Minister Andrea Khanjin
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Re: ERO 019-7891- Proposal to Revoke the Municipal Class Environmental Assessments and the Private Sector Developers Regulation

Dear Honourable Minister Khanjin,

I am writing on behalf of my clients Williams Treaties First Nations in response to the proposal to revoke the Municipal Class Environmental Assessment process and Private Sector Developers Regulation and to enact a new regulation for what the Minister has determined “higher-risk” municipal infrastructure projects; and to subject only certain water, sewage, and shoreline infrastructure projects undertaken by municipalities to the *Environmental Assessment Act* (“EA Act”).

While Williams Treaties First Nations have identified several immediate concerns with the proposal explained in this letter, as indicated by my clients to the EA Modernization office previously the 30-day time frame provided makes it unfeasible for my clients to fully evaluate the implications of excluding 87 types of projects from the municipal environmental assessment process and also removing environmental assessment requirements for private sector developers. Infrastructure projects, whether they are carried out by municipalities or private entities, can have significant adverse impacts on Williams Treaties First Nations’ lands and resources, as well as cultural and archeological heritage, impacting their constitutionally protected Aboriginal and treaty rights. My clients require proper consultation and capacity funding to engage in this and any new proposed changes to the Municipal Class EA process. I understand that Mississaugas of Scugog Island First Nation has been granted an extension until May 17, 2024, to provide their comments on the proposal and that the EA Modernization team is considering their request for capacity funding. Please confirm that the same extension and capacity funding will be granted to all Williams Treaties First Nations. In the interim, this letter provides my clients’ preliminary comments on the proposal.

Before addressing the specifics of this proposal, Williams Treaties First Nations would like to comment on the overall “EA modernization” process the Ontario government has been undertaking since July 2020 and voice their objection to the revocation of the Municipal Class EA process and the Private Sector Developers Regulation (*O. Reg. 345/93*). Numerous amendments to the *EA Act* since Bill 197 could be more accurately described as an offensive on the EA process, rather than modernization. They have resulted in a decrease in environmental assessment, diminished public oversight, and have made it increasingly challenging, if not outright impossible, for all First Nations in Ontario to have the information necessary to assess the potential negative impacts of proposed projects on their Aboriginal and treaty rights through the EA process and to meaningfully participate in the consultation process. Williams Treaties First Nations are not only concerned for their ability to meaningfully exercise their constitutionally protected Aboriginal and treaty rights but those of all Indigenous peoples in Ontario.

Prior to the amendments to the *EA Act* made on July 21, 2020, through Bill 197, the *EA Act* requirements generally applied to most undertakings proposed by the public sector to ensure public scrutiny of potential impacts before projects could proceed. Bill 197 gave the government unfettered discretion to determine which projects would be subject to a comprehensive environmental assessment. A narrow Project List was proposed with projects that in the Ministry’s opinion had the potential for significant environmental impact. Chippewas of Georgina Island First Nation submitted at the time that this list was overly restrictive and that it was impossible for the Minister to assess the environmental impact of a specific project on a hypothetical basis and provided a list of projects that should be included in the Project List. To this date they have not received a response from the Ministry as to how their suggestions were taken into consideration by the Ministry.

With the ERO 019-7891 proposal, the Ontario government persists in its offensive against the environmental assessment regime in Ontario by proposing to further restrict the scope of environmental assessments despite Williams Treaties First Nations’, and other Indigenous communities’ feedback that environmental assessments are necessary for First Nations to have access to information to assess the impact of projects on their constitutional rights and engage in meaningful consultation to protect the exercise of those rights.

Environmental assessments often serve as the method through which the Crown’s constitutional duty to consult and accommodate First Nations is discharged. However, the proposed amendments will result in over 80 types of infrastructure projects being exempt from undergoing environmental assessment. The combination of excluding all road and bridge projects, water crossings, potentially impactful water and wastewater projects such as pumping stations, wells and storage facilities from undergoing environmental assessment, along with the proposed parameters of that process, is poised to have significant negative environmental and social consequences and will adversely impact Williams Treaties First Nations and their ability to exercise their constitutionally protected Aboriginal and treaty rights. My clients would like to know how does the Crown in right of Ontario, intend to discharge its constitutional duty to consult and accommodate in respect of projects that will be exempt from the *EA Act*, should these amendments be enacted?

My clients also state that the Ontario government’s claim of “duplication” between the *EA Act* and other planning, approvals, or asset management regimes is unfounded. The *EA Act* is distinct

in its requirements, as no other provincial law, including the *Planning Act*, requires proponents to identify need/purpose, consider alternatives, and systematically evaluate biophysical, ecological, or socio-economic impacts of proposed projects. Furthermore, while regulatory statutes like the *Environmental Protection Act* and the *Ontario Water Resources Act* focus on specific technical elements or isolated parts of projects, such as final design details, the *EA Act* stands alone in requiring a proactive and comprehensive assessment of a project's environmental consequences and alternatives. This comprehensive approach under the *EA Act* also addresses broader environmental planning issues that are often ignored or not addressed in other regulatory frameworks.

The current Municipal Class EA process, which has functioned well for almost five decades, takes a precautionary approach by including low, medium, and high-risk classes of projects in the attached schedules and establishing EA planning processes that are commensurate with the perceived risks. The current planning requirements in the Municipal Class EA are relatively streamlined and straightforward. Williams Treaties First Nations, therefore, do not agree with statements made by the Ontario government that it is too onerous or time-consuming for proponents to successfully get low risk infrastructure projects through the Municipal Class EA planning process.

The proposal to revoke the Private Sector Developers Regulation, which designates private sector projects that are for residents of a municipality and that are listed in Schedule C of the Municipal Class EA, without proposing to subject those projects to the *EA Act* or an alternative environmental assessment program is not only environmentally unsound but will also lead to delays for those projects and uncertainty for private sector developers. Williams Treaties First Nations, whose rights municipalities and/or the Minister will not have considered before providing any regulatory approvals for those projects are likely to seek judicial review of such decisions. Since no environmental assessment process will have been undertaken by the private sector developer, the assessment will have to be done by the affected First Nations during the judicial review process, which will certainly delay the project.

Further, the ERO proposal provides no rationale for why a project deemed to require environmental assessment if undertaken by a municipality could automatically be judged to have no impacts if undertaken by a private sector developer.

Creating a legislative regime to permit infrastructure projects to proceed without environmental assessment, where municipalities or ministries approve such projects without being informed of the adverse impacts of those projects on Aboriginal and treaty rights will undermine the duty to consult and accommodate and will undoubtedly lead to legal challenges that will cause further delays for proponents. As such, it is not clear to Williams Treaties First Nations why the Ontario government sees revoking the Municipal Class EA in its entirety and revoking the Private Sector Developers Regulation without proposing a framework for replacing it, will speed up development. Williams Treaties First Nations urge the Ontario government to leave the Municipal Class EA and the Private Sector Developers Regulation intact, monitor their implementation, and make amendments if necessary to address new or emerging issues.

Below, I summarize my clients' immediate concerns with the proposal. This list is not an exclusive list of their concerns. The Minister has an obligation to meaningfully consult Williams Treaties First Nations on these regulatory proposals.

1. Scope of Projects Requiring Assessments in the Proposed Project List is too Narrow

Williams Treaties First Nations are alarmed that the proposed project list that would be subject to the proposed Municipal Project Assessment Process (“MPAP”) significantly reduces the scope of projects requiring Municipal Class EAs from 87 different types of projects to merely 17 types of projects. Limiting the MPAP to an overly narrow list of projects could lead to significant cultural and environmental impacts from essential infrastructure projects such as new arterial roads, new bridges, replacement bridges, water wells, new water storage facilities or pumping stations, which will no longer be subject to the requirements of the *EA Act*.

Williams Treaties First Nations are especially concerned about the impact the revocation of the Municipal Class EA process will have on their Aboriginal rights to protect and preserve their archaeological, burial and sacred sites and ancestral remains. The current Municipal Class EA process integrates heritage concerns into land use and infrastructure planning by requiring consideration of both environmental and cultural heritage resources, including archaeological sites in any alteration or development of land. Archaeological assessments as part of a Municipal Class EA are a critical component of evaluating the potential impacts of municipal infrastructure projects on Williams Treaties First Nations’ rights to protect and preserve their archaeological, burial and sacred sites and ancestral remains.

Revoking the Municipal Class EA would leave archaeological sites, especially within municipalities without an archaeological management plan, vulnerable to disturbance and destruction. Even known archaeological sites would be at risk of impact. Municipalities generally do not have a full list of known archaeological sites at their disposal and are dependent on consultant archaeologists to compile and deliver a Stage 1 report on the archaeological potential of a given project area as part of an environmental assessment. By revoking the Municipal Class EA, the province would remove the current regulations that trigger archaeological assessment in advance of development projects. How does the Ontario government propose that the Minister and/or municipalities discharge the duty to consult and accommodate without undertaking the requisite archaeological assessments?

Another immediate concern is exempting all projects currently under Schedule B of the MCEA from *EA Act* requirements, including constructing a new pumping station; a new or expansion or replacement of a water intake pipe for a surface water source; or, expanding a sewage treatment plant, including relocation or replacement of an outfall to a receiving water body, up to existing rated capacity where new land acquisition is required. The ERO notice does not provide any explanation as to why these types of projects would no longer require environmental assessment.

Relocating or replacing the outfall from a sewage treatment plant to a receiving water body could result in significant environmental repercussions, including the disruption of ecosystems, endangerment of aquatic life, and degradation of water quality. Moreover, acquiring new land for expanding sewage treatment facilities may necessitate clearing natural habitats like wetlands, riparian zones, or coastal areas, thereby disrupting ecosystem interconnectedness and affecting aquatic species’ movement and migration patterns. This habitat loss could also diminish available resources for breeding, foraging, and refuge. Construction activities associated with expanding sewage treatment plants and relocating outfalls could also disturb sediment stability, altering flow patterns, and damaging benthic communities. Modifications to outfall locations and the expansion of sewage treatment infrastructure can lead to changes in the hydrological regime,

including flow rates, water levels, and temperature regimes, impacting the distribution, behavior, and life cycles of aquatic species. Exempting such projects from municipal class environmental assessments will mean that these and many other adverse impacts to the environment will be overlooked.

Similarly, the ERO notice proposes to exempt certain smaller sewage treatment plant expansions which are currently subject to Schedule C of the MCEA (e.g. expansions to existing facilities less than 25% of existing rated capacity and all new facilities under 50,000 litres per day). As such, only new sewage systems with a rated capacity of greater than 50,000 litres per day and expansions of an existing sewage treatment plant by 25% or more of existing rated capacity, establishment of new lagoons, or expansion of lagoons beyond existing rated capacity undertaken by a municipality would be subject to the requirements of the *EA Act*. While 50,000 litres per day may cover most new sewage systems, the threshold of 25% expansion is arbitrary and is not reflective of actual environmental impact. This arbitrary threshold implies that a municipality could undertake a 24% capacity expansion in one year and, subsequently, another 24% expansion five years later, without being subject to an EA. However, even small expansions can contribute to pollution and ecosystem disruption, especially in sensitive or already stressed environments like Lake Simcoe. The cumulative impact of multiple small expansions over time can be considerable, leading to increased nutrient loading, including phosphorous and pharmaceutical and personal care products leading to habitat degradation, and compromised water quality and adversely impact aquatic life. Further, the use of a percentage (e.g. 25%) is unrealistic given that 25% of the capacity of a large existing facility could still be a large and potentially impactful project by itself with correspondingly high risks of negative impacts.

Williams Treaties First Nations object to the exemption of municipal roads or new parking lots in any location, reconstruction of any bridges with or without cultural heritage value and all water crossings. The scale and impact of environmental effects vary significantly depending on factors such as the specific site location, design, construction methods, and operational practices of a proposed road or bridge. For instance, extending or widening a municipal road in an urbanized area may present minimal risk under certain conditions. However, the same project in a rural or undeveloped area, such as constructing a new road through or near provincially significant wetlands, vital woodlands, or habitats for endangered species, could pose substantial risks that necessitate identification, avoidance, or mitigation through an appropriate EA. Until an individual project is proposed at an actual location and the requisite studies are conducted, it is impossible to know the significance of potential impacts solely on a hypothetical basis. How does the government intend to meet the constitutional obligation of the Crown to consult and accommodate First Nations, a responsibility that courts have also extended to municipalities, without first understanding the potential negative effects of constructing new or expanding roads or replacing bridges?

The ERO notice also proposes that all private sector infrastructure projects for residents of a municipality regardless of size, including a new sewage treatment plant of any size will be exempt from the *EA Act* requirements through the revocation of the Private Sector Developers Regulation. The ERO notice only states that “this regulation is proposed to be revoked, as the ministry is proposing to focus *EA Act* requirements only on infrastructure projects led by a municipality” and does not provide any justification for the revocation of the regulation and does not provide a new EA framework to assess the environmental impacts of a private sector project.

In her 2016 Annual Report, the provincial Auditor General dispelled the myth that other regulatory requirements are duplicative of EA requirements. She wrote:

“4.1.3 Other Regulatory Processes No Substitute for Environmental Assessment

Private-sector projects may require other types of municipal, provincial, or federal approvals and permits to begin operations. However, even though many of these are also meant to protect the environment, we noted that, even collectively, they do not result in the same level of comprehensive evaluation as an environmental assessment... While many other regulatory approvals for private-sector projects—such as mines, quarries, manufacturing plants and refineries—consider the natural environment, they do not include all key elements of an environmental assessment. For example, while operators of chemical manufacturing plants must obtain an environmental approval from the Ministry to emit contaminants into the land, air and water, the approvals do not consider the social, cultural, and economic impacts of the emissions.”

It is extremely concerning to Williams Treaties First Nations that all private sector infrastructure projects for residents of a municipality regardless of size including a new sewage treatment plant of any size would not be subject to the *EA Act*. Accordingly, a municipal project like the Upper York Sewage Solutions, with its capacity of 40 Mega Litres Per Day — which is 800 times greater than the 50,000 litres per day threshold — would necessitate an environmental assessment if undertaken by York Region. However, if a private sector developer were to undertake the same project, it would not be subject to the same environmental assessment criteria. This is environmentally unsound, unreasonable and unacceptable.

Chippewas of Georgina Island First Nation’s experience with the Upper York Sewage Solutions Project has demonstrated the indispensability of a Comprehensive EA to assess the impacts of a new municipal sewage treatment plant on their Aboriginal and treaty rights and the importance of examining alternatives. Elimination of environmental assessments for municipal wastewater would be inconsistent with the requirements in the designated policies of the Lake Simcoe Protection Plan including Policy 4.1-DP.

The process followed to identify wastewater servicing options and potential impacts needs to be transparent, follow accountable rules and be predictable for First Nations and the public, with clear and accessible participatory rights, objectives and appropriate studies of the impacts on watersheds and Aboriginal and treaty rights.

2. The Timeline to Complete the EPR and Consultation is Unreasonable

For the projects that will be required to go through the MPAP, the timeline from the Notice of Commencement to the publishing of a Notice of Completion is a maximum of 150 days. The 150-day timeline to conduct studies, including archeology and environmental investigations, is very short and will not provide adequate time for thorough environmental impact assessments, consultations, and community feedback for complex projects. Environmental assessments are inherently detailed and require a comprehensive understanding of the potential impacts. A rushed process is poised to result in inadequate assessments and the overlooking of environmental impacts.

By default, the examination of alternatives and most site-specific impact assessments, like archeological assessments and environmental impact studies will have to take place prior to the Notice of Commencement. This compressed timeframe means that proponents will likely arrive at the EA process with a preferred solution already in place, without thorough, or perhaps any, investigation of alternatives, making the MPAP essentially an exercise in communication. It will be very challenging to effectively object to the preferred alternatives since the Environmental Project Report, as discussed below, will not require documenting description of any other design methods.

3. The Requirements for the Environmental Project Report are Inadequate to meet DTCA

One of the requirements under the proposed MPAP is for proponents to prepare an Environmental Project Report (“EPR”). The EPR is to include an assessment and evaluation of the impacts of the municipal infrastructure project and other methods considered once the project commenced the MPAP. First, the MPAP does not seem to require consideration of alternative methods. The MPAP should require consideration of alternatives. Second, the proposal states that proponents are not required to provide a description of any other design methods that were considered prior to the initiation of the MPAP process.¹ Proponents will also not be required to include assessments, evaluation and criteria for any impacts of any other design method that was considered prior to notification. Given that proponents are only provided 120 days to both prepare the EPR and consult with Indigenous communities, it is conceivable that they would not consider alternatives, if any, given that the requirement to consider alternatives in the Municipal Class EA process is not brought into the MPAP process. It is conceivable that a method that was less intrusive to Aboriginal and treaty rights would be eliminated or never considered, and a preferred design method which will have more intrusive adverse impacts on Aboriginal and treaty rights selected prior the commencement of the MPAP. This process will make it possible for proponents to bury that information and make it impossible for First Nations to know the assessments, evaluation and criteria for impacts. In effect, under this proposal there will be no public examination of alternatives and consultation with Indigenous communities on alternatives to the project. The MPAP should require the inclusion of any alternatives and related impact investigations considered in the EPR, whether they were considered prior to or after the commencement of the MPAP.

One of the requirements of the MPAP process is to discuss potential negative impacts of the municipal infrastructure project on any constitutionally protected Aboriginal or treaty right that may be identified and the measures to mitigate these negative impacts. It will be impossible for First Nations to identify mitigation measures, which could be choosing another alternative method to address the municipal infrastructure problem, without knowing how, or if, those alternatives were evaluated prior to the selection of the preferred alternative.

¹ Environmental Assessment Modernization, Summary of Proposed Requirements Proposed Municipal Project Assessment Process, Regulation, p.10, bullet point 3 “A description of any other design methods that were considered once the project commenced the MPAP. (Note: This does not include any alternatives considered prior to initiating the MPAP process).”

4. 30-day timeline to review the EPR is unreasonable

Under the MPAP proposal, Indigenous communities are to have 30 days to review the EPR. This period is extremely short and unreasonable. If an impacted First Nation wanted to undertake a peer-review of the EPR and then discuss the results of that peer-review with their consultants and leadership, it would be impossible to do so within 30-days.

5. Projects should not be allowed to proceed without a decision from the Minister under s.17(31)(7)

While there is an ability to request a Minister's Order under section 17.31 (7) to request a comprehensive assessment or the imposition of specific conditions on the project's approval, the ERO notice proposes to include a provision that provides 35 days for the Minister to give notice that the project can proceed, can proceed with conditions, or to make an order/give a notice subjecting the project to comprehensive EA requirements.

If the Minister does not give notice in 35 days, the project may proceed in complete disregard for the First Nations' who have identified potential adverse impacts on a constitutionally protected Aboriginal or treaty rights. Such a scenario would fundamentally undermine the intent of section 17.31(7) of the *EA Act*, rendering it ineffective. If this proposal goes ahead despite Williams Treaties First Nations' objections to it, the regulation must provide that the Minister shall make a decision within the 35-day period.

6. Addendum Process will Create Inconsistencies in Treatment of Environmental Impacts Across the Province

The proposal will also allow municipalities to determine the significance of changes to their projects. The lack of provincial standards will inevitably lead to inconsistencies in how different municipalities assess similar changes. The absence of a clear, standardized definition of what constitutes a "significant" change could also lead to underreporting or misclassification of impactful modifications.

The exemption from public notice requirements for changes deemed non-significant by a proponent will result in lack of transparency and public engagement. Consequently, if a municipality decides that the proposed change is not significant and does not evaluate the new proposal for potential adverse impacts, Indigenous communities will not become aware of important changes to a project. A change in location that might be deemed insignificant by the proponent may be significant for an Indigenous community. The lack of public notice for these so-called non-significant changes will deny Indigenous communities, as well as the general public, the opportunity to voice their concerns and suggest alternatives that could mitigate the potential negative impacts.

Moreover, if multiple "non-significant" changes are not reported and evaluated for their environmental impacts, the cumulative effects of several "non-significant" changes deemed by municipalities could lead to substantial environmental degradation and adverse impacts on Aboriginal and treaty rights.

While the proposal requires feedback from Indigenous communities on significant changes to be documented, there is no requirement to inform Indigenous communities of changes, and no requirement to allow their meaningful participation in decision-making.

Additionally, the requirement for municipalities to simply keep a record of the addendum to the EPR, instead of actively reporting or publicizing it, will result in important information being inaccessible to Indigenous communities.

If the government were to go ahead with the proposal, despite Williams Treaties First Nations' objection to it, it needs to be revised to include a standardized assessment criterion of significant changes, requirements to notify and consult with Indigenous communities of any changes that may have an adverse impact on their Aboriginal and treaty rights that is to be determined by the Indigenous communities.

In these submissions, I have provided a summary of Williams Treaties First Nations' immediate concerns regarding the proposal. As previously communicated to the Ministry, the limited time frame provided makes it impractical for my clients to thoroughly assess the implications of exempting over 80 projects from the municipal assessment process and eliminating environmental assessment requirements for private sector developers. Infrastructure projects, whether initiated by municipalities or private entities, can significantly impact First Nations' lands, resources, cultural heritage, and constitutionally protected Aboriginal and treaty rights. My clients insist on proper consultation and adequate funding to engage in this and any proposed changes to the Municipal Class EA process.

Kind regards,



Ceyda Turan

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cc. Karry Sandy, Senior Negotiator, Williams Treaties First Nations