Significant reforms to the *Environmental Assessment Act* reshape environmental review in Ontario

Environmental Alert

17 AUG 2020
By: Lana Finney | Ryan McNamara

Since November 2018, the Government of Ontario has repeatedly signalled its intention to "modernize" the *Ontario Environmental Assessment Act* ("EAA") to better align the level of review with the degree of potential environmental risk associated with a project and streamline review processes for low risk projects. With the substantial amendments to the EAA recently enacted by the Legislative Assembly of Ontario on July 21, 2020, the government has taken a significant step towards reforming how projects are assessed in Ontario. Nevertheless, whether the government has delivered on its promises and truly "modernized" the EAA remains an open question, both because it has yet to publish key regulations elaborating on the new assessment framework and because the amended *Act*, in its current state, arguably does not address all of the objectives the government set for itself. Regardless of whether the EAA amendments meaningfully realize every one of the government's self-proclaimed goals, they represent a significant shift in project assessment in Ontario and should be closely examined by project proponents.

Overview of environmental assessment in Ontario

Environmental assessment ("EA") in Ontario dates back to 1975 when the EAA was first enacted. The EAA as it existed from 1975 until July 21, 2020 established an assessment framework that only applied to "undertakings", as defined in the EAA. These "undertakings" included all public sector projects carried out by provincial and municipal bodies, as well as a small number of private sector undertakings deemed to carry a higher likelihood of adverse environmental effects, such as certain waste management, electricity, and transit projects. Prior to the most recent amendment, the EAA applied to all "undertakings" in the province, with specific regulations or ministry-approved documents reducing the procedural requirements for certain classes of projects or, in some cases, entirely eliminating the requirement for assessment. Streamlining environmental assessment through the modification of the default EA process to expedite lower risk projects was achieved by two means: "Class" EA documents and regulations.

Following the passage of significant amendments to the EAA in 1996, a "Class" EA document could be approved by the Minister of the Environment, Conservation and Parks (the "Minister") for certain classes of undertakings – such as municipal infrastructure work, provincial highway repairs, and electricity transmission facility upgrades – expected to have relatively minor and better understood environmental impacts. A minister-approved Class EA document authorized proponents of projects described in the document to carry out their projects following a streamlined "self-assessment" process. Class EA documents generally divided the class of undertakings subject to the document into sub-categories, setting different requirements for project planning, documentation, and public consultation based on project categorization. These categories were devised based on the nature of the project activities and the potential for environmental impacts to be caused by those activities, with more onerous requirements being imposed on undertakings associated with more significant potential impacts. Regulations were also used by the government to exempt certain activities that would have otherwise been required to undergo an individual EA from some or all of the requirements of the EAA.

Development of the "modern" EA framework

In November 2018, the Ministry of the Environment, Conservation and Parks (the "MECP") released the Made-in-Ontario Environment Plan, which signalled the intention of the then newly elected Progressive Conservative government to reform a variety of environmental statutes with the self-described aim of reconciling the need for a healthy environment with the promotion of a robust provincial economy. This plan briefly mentioned the objective of "modernizing" Ontario's environmental assessment process to "address duplication, streamline processes, improve service standards to reduce delays, and better recognize other planning processes". The details of how Ontario's EA regime would be changed to achieve this objective were, however, absent from the plan. Further information about the government's reform agenda were supplied by a discussion paper, Modernizing Ontario's *Environmental Assessment Program*, which was published by the MECP in April 2019. This discussion paper set out several "initial actions" to create a "modern framework" for environmental assessment. In the MECP's own words, this framework:

- ensures better alignment between the level of assessment and level of environmental risk associated with a project;
- eliminates duplication between environmental assessment and other planning and approvals processes;
- finds efficiencies in the environmental assessment process and related planning and approvals processes to shorten the timelines from start to finish; and
- goes digital by permitting online submissions to permit interested persons to access information about environmental assessment.

Following public consultation and legislative drafting, the Government of Ontario proposed amendments to the EAA via Bill 197, the *COVID-19 Economic Recovery Act, 2020*, which was introduced on July 8, 2020. Bill 197 contained amendments to twenty different pieces of legislation, many of them planned by the government prior to the pandemic. The bill was fast-tracked through legislative process and was enacted on July 21, 2020.

Changes to the EA process

The key amendments to the EAA that were passed in Bill 197 include:

- *Tying environmental assessment to inclusion in a project list* – Unlike the existing framework for EA, the

amendments passed on July 21 make the requirement to undertake an environmental assessment contingent on whether or not a given project involves activities matching one of the project descriptions contained in a project list, which is to be set out in a forthcoming regulation. This new approach to identifying which projects require environmental assessment aligns the EAA more closely with its federal counterpart, the *Impact Assessment Act*, which likewise ties impact assessment to whether a project is "designated". By removing the requirement for all "undertakings" proceeding through the EA process, the amendments ostensibly further the government's objective of allocating resources to the assessment of major projects with the potential to cause significant environmental effects rather than requiring all public sector projects, regardless of the level of associated risk, to undergo environmental assessment.

- *Eliminating Class EAs in favour of streamlined EAs* – The newly enacted amendments set in motion a process to replace Class EA documents with a single streamlined EA process, which will be specified by regulations applying to certain classes of designated projects. As of July 21, 2020 no more Class EA documents will be approved; nevertheless, proponents will continue to be allowed to comply with the EAA by following the assessment processes described in one of the 10 existing Class EA documents. This option to follow a Class EA process will only be eliminated once each of the 10 Class EA documents are revoked and replaced, where appropriate, with new regulations.

  A new part of the EAA, Part II.3, will now govern the review of "individual" EAs, which will now be referred to as "comprehensive" EAs. Part II.3 will largely replicate the requirements and EA processes that applied to projects previously subject to "individual" EA.

- *Limitations of "bump-up" or elevation requests* – Prior to amendment, the EAA permitted "any person" resident in Ontario to request that the Minister issue an order elevating a project that would otherwise follow the streamlined Class EA process to an "individual" EA. These "bump-up" orders may still be requested or issued by the Minister at his or her own initiative; however, section 16.1 of the amended EAA now restricts the timeframe in which the Minister can make such an order. Even more significantly, the amended Act limits the grounds on which a person may seek a "bump-up" order to where a project will have an adverse impact on existing aboriginal and treaty rights of the aboriginal peoples of Canada.
- *Expiry dates for approvals* – Approval of a project by the Minister or the Environmental Review Tribunal following a comprehensive EA will now expire after 10 years, where the Minister or ERT has not otherwise specified an expiry date for the approval.
- *Municipal approval required for new landfills* – A proponent which proposes to "establish" a landfill must obtain the approval of the municipality in which the landfill is located. In addition, the approval of other municipalities may be required. If a proposed landfill is within 3.5 km of the boundaries of a municipality in which a parcel of land is (a) zoned for residential uses and (b) located within an "area of settlement", the proponent of that landfill will need to obtain the approval of that municipality as well.

Concerns raised about the new amendments

Concerns have been raised by members of affected industries and environmental groups about certain elements of the amended EAA. Legal practitioners and participants in the waste management industry have expressed disquiet about the requirement that landfill proponents secure the approval of local municipal councils before proceeding with construction. The Ontario Waste Management Association ("OWMA"), for example, has suggested that this "municipal veto" will put the economy and environment in jeopardy by "making it virtually impossible to build new landfills in Ontario." This is a significant concern given that in its 2018 report the OWMA estimated that population growth would result in the depletion of landfill capacity by 2032 if no new landfill waste disposal facilities were approved and the rate of waste exports remained at 2018 levels.

Environmental groups, meanwhile, have expressed numerous objections to the recent EAA amendments. For example, the Canadian Environmental Law Association ("CELA") in its analysis highlights the permissive nature of the new provision in the EAA that empowers the government to introduce Project List regulations, objecting to the government's decision not to set a deadline for the publication of regulations, communicate criteria that will be used to designate projects for assessment, or provide a draft list of designated projects. The CELA is of the view that the broad discretion given to the provincial cabinet by the amended EAA to prescribe projects for which an environmental assessment is required creates the risk that the government will designate only those projects that "have the most potential to impact the environment", thereby exempting medium to smaller-scale projects that may

still carry environmental risks.

A second major concern about the government's amendments to the EAA mentioned by several environmental groups is that the limitation of requests to elevate a streamlined EA project to a "comprehensive" EA to circumstances where such an order will prevent, mitigate, or remedy harm to a recognized Aboriginal right or treaty right is far too restrictive and prevents members of the public from raising concerns about environmental or other non-Indigenous impacts that may nevertheless be relevant to the level of scrutiny that should be applied to a project.

It remains possible that some of these criticisms will be addressed through forthcoming regulations. Because of the dependence of the new EAA framework on regulations establishing a Project List and determining which classes of projects may proceed via a streamlined EA process, the extent to which overhaul of the EAA will impact project proponents and achieve the government's stated objectives remains to be determined.

Consequently, proponents will want to follow the regulation development process closely to ascertain whether their proposed projects will fall within one of the activity descriptions contained in the forthcoming draft Project List regulations and, if so, whether they will be able to rely on a streamlined assessment process. It may be the case that the Project List regulations will include project types that were not included in the definition of an "undertaking" under the EAA and, thus, not previously subject to the EAA.

AUTHORS

Lana Finney
Partner
Toronto | T: +1 416 365 3500
lana.finney@dlapiper.com

Ryan McNamara
Associate
Toronto | T: +1 416 365 3500
ryan.mcnamara@dlapiper.com