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Bill or item of business: **Bill 229, Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020**

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Bill 229 is hiding cuts to the environment. Remove schedual 6 from the bill. Protect our provincial watershead.

PRELIMINARY ANALYSIS OF SCHEDULE 6, BILL 229:
PROPOSED AMENDMENTS TO THE CONSERVATION AUTHORITIES ACT & OTHER
CONSEQUENTIAL CHANGES

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OVERVIEW

On November 5, 2020, the Ontario government tabled omnibus budget measures Bill 229 (the proposed Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020) for First Reading in the Ontario Legislature.¹ Schedule 6 of Bill 229 proposes fundamental changes to the *Conservation Authorities Act*² (CAAct) and to the conservation authorities' role in land use planning. An Environmental Registry of Ontario (ERO) bulletin titled Updating the Conservation Authorities Act³ (ERO # 019-2646) was also posted on November 5, 2020, stating that public consultation is not required under Ontario's *Environmental Bill of Rights, 1993*⁴ (EBR), because the proposed amendments form part of a budget. Bill 229 is the most recent, in a disturbing trend, starting with Bill 55, Strong Action for Ontario Act (Budget Measures), 2012⁵, of using omnibus budget measures bills to make substantive changes to environmental laws and thereby sidestepping the public's EBR rights.

Over the past five decades, the Canadian Environmental Law Association (CELA) has been involved in various law reform initiatives, court cases, public hearings and other administrative proceedings related to the importance of integrated watershed management and ensuring hydrological integrity in land use planning on behalf of low-income individuals and disadvantaged or vulnerable communities. In particular, CELA was counsel representing citizens of Walkerton at the associated drinking water inquiry and has been a persistent voice in seeking drinking water source protections for all residents of Ontario⁶. Further, Justice O'Connor endorsed watershed-based management of surface water and groundwater in his Part Two

¹ See <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-229>.

² See <https://www.ontario.ca/laws/statute/90c27>.

³ See <https://ero.ontario.ca/notice/019-2646>.

⁴ See <https://www.ontario.ca/laws/statute/93e28>. Section 33 of the EBR states:

33 (1) A minister need not give notice under section 15, 16 or 22 of a proposal that would, if implemented, form part of or give effect to a budget or economic statement presented to the Assembly.

(2) A minister need not give notice under section 15, 16 or 22 of a proposal that would, if implemented, change,
(a) a policy that forms part of a budget or economic statement presented to the Assembly; or
(b) a bill, Act, regulation or instrument that gives effect to a budget or economic statement presented to the Assembly.

⁵ See <https://www.ola.org/en/legislative-business/bills/parliament-40/session-1/bill-55>.

⁶ See <https://cela.ca/review-clean-water-act/>.

Report⁷. Conservation authorities have played a crucial role in the first phase of implementation⁸ of the *Clean Water Act, 2006*⁹. Having arms-length agencies, whose jurisdiction is on a watershed-basis, has been key to enabling drinking water source protections. On the basis of our extensive experience, CELA has carefully reviewed the proposed legislative amendments contained in Schedule 6 of Bill 229 from our public interest perspective.

CELA's overall conclusion is that while a small number of the proposed changes (including improved transparency through publicly available information) may be supportable in principle, the majority of the Schedule 6 amendments are regressive in nature and are completely contradictory to fulfilling both the purpose of the *Conservation Authorities Act* and the desire to set the course for more climate resilient communities in the future. Accordingly, CELA recommends that Schedule 6 not be enacted in its present form and instead be withdrawn in its entirety from Bill 229. Further, CELA recommends that the Ontario government ensure that the current mandate of the province's 36 conservation authorities is maintained and enhanced, in order to effectively protect, restore and manage the watersheds where 95 percent of the people of Ontario reside. Determining the most effective role for conservation authorities in ensuring a climate resilient Ontario would be better informed by meaningful consultations to complete watershed planning guidance¹⁰ and the province's on-going climate change impact assessment, the results of which are anticipated in 2022¹¹.

SUMMARY OF PROPOSED CHANGES

Schedule 6, Bill 229, if passed will:

- Add a “non-derogation clause” to the CAAct, stating that “nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*.” (new CAAct provision 1.1)
- Mandate that the municipal councillors appointed by a particular municipality as members of a conservation authority be selected from that municipality's own councillors only (new CAAct provision 14(1.1))

⁷ The Honourable Dennis R. O'Connor, Part Two Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water (2002), Chapter 4, pp 103-107; report available for download online http://www.archives.gov.on.ca/en/e_records/walkerton/report2/index.html.

⁸ See <https://conservationontario.ca/conservation-authorities/source-water-protection>.

⁹ See <https://www.ontario.ca/laws/statute/06c22>.

¹⁰ See Draft Watershed Planning in Ontario Guidance for land-use planning authorities (February 2018) http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2018/013-1817_DraftGuidance.pdf.

¹¹ See News Release (Aug 14, 2020), “Ontario Launches First-Ever Climate Change Impact Assessment: Study will strengthen the province's resilience to the impacts of climate change”, <https://news.ontario.ca/en/release/57998/ontario-launches-first-ever-climate-change-impact-assessment>.

- Require that conservation authorities send the Minister¹² and make publicly available on the conservation authority's website an agreement with participating municipalities as to the total number of municipally appointment members and the total each municipality may appoint (new CAAct provision 14(2.2))
- Replace the current discretion to set other "such additional requirements regarding the composition of the authority and the qualification of members" in a regulation (CAAct, s14(4)) with the discretion of the Minister to appoint a member "as a representative of the agricultural sector" (new CAAct provision 14(4))
- Replace the currently unproclaimed duty of members to "act honestly and in good faith with a view to furthering the objects of the authority"¹³ (CAAct, s14.1) to require that members "act honestly and in good faith" and that, particularly, members of appointed by participating municipalities, "generally act on behalf of their respective municipalities" (new CAAct provision 14.1)
- Require that, subject to the *Municipal Freedom of Information and Protection of Privacy Act*, agendas and minutes of meetings of a conservation authority's members and executive committees be made publicly available on the conservation authority's website (new CAAct provisions 15(2.1), 15(2.2))
- Limit the term of a chair or vice-chair to one year and to no more than two consecutive terms (new CAAct provision 17(1.1))
- Narrow the objects of a conservation authority from providing "programs and services designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals" (CAAct, s20(1)) to only one of three categories: (i) mandatory programs and services, (ii) municipal programs and services, and (iii) other programs and services (new CAAct provision 20(1))
- Narrowing a conservation authority's powers to study and investigate the watershed from being directly focused on determining "programs and services whereby the natural resources of the watershed may be conserved, restored, developed and managed" (CAAct, s21(1)(a)) to research, study and investigate the watershed to "support" the development and implementation of programs and services (new CAAct provision 21(1)(a))

¹² Currently the Minister of Natural Resources, until the new definition in the CAAct is proclaimed to be the Minister of the Environment, Conservation and Parks (see *More Homes, More Choice Act, 2019*, SO 2019, c 9, Sched 2, s1, available online <https://www.ontario.ca/laws/statute/s19009>).

¹³ Amendment made per *More Homes, More Choice Act, 2019*, SO 2019, c 9, Sched 2, s3, available online <https://www.ontario.ca/laws/statute/s19009>).

- Limit a conservation authority's power to "enter into and upon land" for surveying toward "any purpose necessary to any project under consideration or undertaken" (CAAct, s21(1)(b)) to requiring the "consent of the occupant or owner" (new wording to be added to CAAct provision s21(1)(b))
- Removing a conservation authority's power to expropriate "any land that it may require" (to be eliminated from CAAct, s21(1)(c) and the repeal of CAAct, s31); power to "acquire by purchase, lease or otherwise" remains
- Eliminate a conservation authority's power to "cause research to be done" (repealing CAAct, s21(1)(p)); "research" will instead be included along with a conservation authority's study and investigate (as described in earlier bullet regarding entering into and upon land)
- Clarify mandatory programs and services of conservation authorities¹⁴:
 - will include the following, only if set out in a future regulation and related to -- (i) "the risk of natural hazards", (ii) "the conservation and management of lands owned or controlled by" the conservation authority, (iii) "duties, functions and responsibilities as a source protection authority", or (iv) other "duties, functions and responsibilities" under other legislation (new CAAct provision 21.1(1)1)
 - can only include any programs and services, if not part of the four mentioned above, that are set out in a future regulation within one year of a yet to be determined date (new CAAct provision 21.1(1)2)
 - for the Lake Simcoe Region Conservation Authority specifically, its mandatory programs and services will also include those set out in a future regulation and related to "duties, functions and responsibilities under the *Lakes Simcoe Protection Act* (new CAAct provision 21.1(1)(2))
 - require all programs and services to be provided in accordance with "standards and requirements" that may be set out in future regulations (new CAAct provision 21.1(1)(3))
- Clarify municipal programs and services of conservation authorities¹⁵:
 - will include those which are subject to any future regulations that may be made and an authority agrees to provide on behalf of a municipality and under an agreement with a municipality (new CAAct provision 21.1.1(1))

¹⁴ All of these provisions related to mandatory programs and services were previously included in the unproclaimed amendments made in 2019.

¹⁵ Much of these provisions related to municipal programs and services were previously included in the unproclaimed amendments made in 2019.

- will be publicly known, as agreements between conservation authorities and municipalities must be publicly available (new CAACT provision 21.1.1(2)) and subject to regular review (new CAACT provision 21.1.1(3))
- will be provided in accordance with terms and conditions set out in an agreement and any standards and requirements that may be set out in future regulations (new CAACT provision 21.1.1(4)); should there be a conflict between terms and conditions in an agreement and the standards and requirement of a regulation, the latter prevails (new CAACT provision 21.1.1(5))
- Clarify other programs and services of conservation authorities¹⁶:
 - will include those which are subject to any future regulations that may be made and which a conservation authority “determines are advisable to further the purposes of the Act” (new CAACT provision 21.1.2(1))
 - will be provided in accordance any standards and requirements that may be set out in future regulations (new CAACT provision 21.1.2(2))
- Require that a conservation authority conduct consultations regarding all three types of the programs and services it provides, in accordance with any future regulations (new CAACT provision 21.1.3¹⁷)
- Require, at a future date to be set out in regulations, other programs and services that need the financing of a participating municipality will be subject to securing an agreement regarding apportionment and other factors, some of which may be set out in future regulations, otherwise the conservation authority will not be able to provide such programs and services (per s9(2), Schedule 6, Bill 229)
- Require every conservation authority to develop and implement a transition plan to ensure it will be in compliance with any regulations regarding securing municipal financing, by a date to be set out in a future regulation (new CAACT provision 21.1.4(1)), and the transition plan will be address both matters set out -- including an inventory, consultation with municipalities, and plans for seeking financing -- and any other matters set out in a future regulation (new CAACT provision 21.1.4(2))
- Set a limit (30 days) on the amount of time that a conservation authority has to make a decision on a request for reconsideration a fee charged for a permit application (new CAACT provision 21.2(13)), allow the requester to directly appeal the amount of the fee to the Local Planning Appeal Tribunal (LPAT) if a conservation authority fails to do so

¹⁶ These provisions are less detailed than those previously included in unproclaimed amendments made in 2019; the financing requirements in unproclaimed s21.1.2(2) and related transition requirements of unproclaimed s21.1.3 will be part of a future transition to be prescribed.

¹⁷ Identical to unproclaimed section 21.1.4, per amendments made in 2019.

(new CAACT provision 21.2(14)), and provide the LPAT with powers associated with such an appeal (new CAACT provision 21.2(19))

- Add immunity for investigators for “any act done in good faith in the performance or intended performance of their duties” or “any alleged neglect or default in the performance in good faith of their duties” (new CAACT provision 23.1(9)¹⁸)
- Set out powers and duties on the Minister upon the receipt of an investigator’s report, including making an order requiring a conservation authority to comply or recommending to the Lieutenant Governor in Council that an administrator be appointed to take over a conservation authority’s operations (new CAACT provision 23.2)
- Enable the ability for: (i) the Lieutenant Governor in Council, on a recommendation from the Minister, to appoint an administrator, (ii) set out in the appointment, or in terms and conditions set by the Minister, an administrator’s powers and duties, and (iii) provide immunity to an administrator for “any act done in good faith in the performance or intended performance of their duties” or “any alleged neglect or default in the performance in good faith of their duties” (new CAACT provision 23.3)
- Add procedural rights for an applicant seeking a permit¹⁹ from a conservation authority to engage in an activity that would otherwise be prohibited²⁰, including
 - submitting a request for Minister’s review of a conservation authority’s refusal of a permit or any conditions on a permit to which the applicant objects within 15 days of a decision (new CAACT provision 28.1(8))
 - setting out the time limit for the Minister’s review decision (30 days) and deeming that no reply within the time limit is “an indication that the Minister does not intend to review” the conservation authority’s decision (new CAACT provision 28.1(9))
 - setting out the details for conducting a Minister’s review (new CAACT provisions 28.1(10)-28.1(14)) and the Minister’s subsequent decision, including that the Minister’s decision is final (new CAACT provisions 28.1(15)-28.1(19))
 - setting out the applicant’s rights to appeal to the LPAT regarding a conservation authority’s permit decision (new CAACT provisions 28.1(21)-28.1(23)), including the ability to appeal prior to a decision being made when a conservation authority “fails to give the applicant notice of a decision” within 120 days of when the application was made (new CAACT provision 28.1(22))

¹⁸ Adding to the unproclaimed section 23.1 (amendments made in 2019), which enables the “investigation of an authority’s operations, including the programs and services it provides” (CAACT, s23.1(1)) and various powers and duties on appointed investigators.

¹⁹ Permitting regime is enabled in an unproclaimed section 28.1 (amendments made in 2017).

²⁰ Prohibitions are stated in an unproclaimed section 28 (amendments made in 2017).

- setting out the notice, hearing, and powers associated with permit appeals to the LPAT (new CAACT provisions 28.1(24)-28.1(26))
- Add new procedures for a Minister to
 - order a conservation authority to not issue a permit or class of permits (new CAACT provision 28.1.1(1)), including before an application has been submitted to the conservation authority (new CAACT provision 28.1.1(3)) or before a conservation authority has made a decision about a permit application (new CAACT provision 28.1.1(4))
 - issue a permit for an otherwise prohibited activity, by replacing the conservation authority's opinion with the Minister's (new CAACT provision 28.1.1(2))
 - cancel a permit issued by the Minister (amendment to unproclaimed CAACT provision 28.3)
- Add new procedural rights for an applicant to appeal a Minister's decisions regarding a permit (new CAACT provisions 28.1.1(13)-28.1.1(14)), including the ability to appeal prior to a decision being made when the Minister "fails to give notice of a decision" with 90 days (new CAACT provision 28.1.1(13))
- Add new procedural rights for an applicant to appeal a conservation authority's or a Minister's decision to cancel a permit (new CAACT provisions 28.3(6)-28.3(9))
- Clarify conditions for officers appointed by conservation authorities to enter lands without a warrant for the purposes of
 - determining whether to issue a permit (amendment to unproclaimed CAACT provision 30.2(1))
 - ensuring compliance with the prohibitions, regulations, or permit conditions, only when the officer has "reasonable grounds to believe that a contravention" (new CAACT provision 30.2(1.1))
 - "is causing or likely to have a significant effect on the control of flooding, erosion, dynamic beaches or the pollution or conservation of land" (new CAACT provision 30.2(1.1)(b)(i)) or
 - "is likely to create conditions or circumstances in the event of a natural hazard that might jeopardize the health and safety of persons or result in significant damage or destruction of property" (new CAACT provision 30.2(1.1)(b)(ii))
 - and when the officer has "reasonable grounds to believe that the entry is required to prevent or reduce the effects" of the above noted risks (new CAACT provision 30.2(1.1)(c))

- Eliminate the (not yet proclaimed) powers for officers appointed by conservation authorities to issue stop orders (CAAct provision 30.4 will be repealed upon Royal Assent of Bill 229, per Schedule 6, s20 and s29(2))
- Enable the Minister to delegate any powers to an employee of the Ministry in writing (new CAAct provision 36.1)
- Add a requirement that conservation authorities ensure annual audits are conducted “in accordance with generally accepted accounting principles” (amendment to CAAct, s38(1)) and that conservation authorities make the auditor’s reports publicly available by publishing on the conservation authority’s website (new CAAct provision 38(4))
- Delegate authority to make regulations “governing programs and services” (among other things) to the Lieutenant Governor in Council (new CAAct provision 40(1)(b)) and indicate that any “standards and requirements” that may be established in such future regulations might include those which “mitigate the impacts of climate change and provide for the adaptation of climate change, including through increasing resiliency” (new CAAct provision 40(2))
- Through “consequential amendments”, exclude conservation authorities from the definition of a public body as relates to being able to seek to appeal certain land use planning decisions to the LPAT or being able to be added as a party to an appeal before the LPAT; only the Ministry of Municipal Affairs and Housing is authorized to represent provincial interests associated with watersheds in land use planning appeals (amendment to *Planning Act*, s1(2))

IMPLICATIONS OF THE PROPOSED CHANGES

Ontario’s Special Advisor on Flooding Doug McNeil noted:

Ontario has a long history of taking actions to keep people and property safe from the impacts of flooding through land use planning policies and mitigative activities. The development of the modern floodplain policy in Ontario, the watershed approach, the conservation authority model, and the flood standards have been extremely effective at reducing flood risks, especially in new greenfield development areas.²¹

While the purpose of the CAAct is to “provide for the organization and delivery of programs and services that further the conservation, restoration, development and management of natural

²¹ See Executive Summary, Ontario’s Special Advisor on Flooding Report to Government, An Independent Review of the 2019 Flood Events in Ontario, A Report to the Hon. John Yakabuski, Minister of Natural Resources and Forestry (October 2019), <https://www.ontario.ca/document/independent-review-2019-flood-events-ontario>.

resources in watersheds in Ontario”²², the scope and powers of conservation authorities will be limited to the point that no meaningful integrated watershed management will be possible. The “watershed approach” and the “conservation authority model” that the Special Advisor on Flooding lauded will be stripped down and made unrecognizable. Building climate resilient communities for the future will be impeded, if not impossible. Outlined below is a non-exhaustive list of concerns.

1. Indigenous rights are not anticipated to be represented in membership of conservation authorities

Although it is proposed that a non-derogation clause will be added to the CAAct, such a confirmation of the constitutional protections afforded to existing aboriginal and treaty rights in and of itself will not be sufficient to bring Indigenous rights into consideration by conservation authorities. For example, the membership of conservation authorities is not expanded to include the ability to appoint Indigenous representation. The governance model for conservation authorities does not appear to have been adjusted at all to incorporate Indigenous ways of knowing.

2. Narrowing of duties of conservation authorities’ members is counter to the watershed approach needed to build climate resilient communities for the future

The duty of members will not include acting to “further the objects” of a conservation authority and the duty of members who are municipal councillors will be to act on behalf of their respective municipality. Conservation authorities were established to have a watershed-based approach and oversight precisely because municipal boundaries and interests do not align completely with such ecologically relevant (e.g. watershed) boundaries.

3. Narrowing the objects and powers of conservation authorities is counter to the watershed approach needed to build climate resilient communities for the future

The current Provincial Policy Statement (PPS) contains policies aimed at protecting, improving and restoring water quality and quantity, including emphasizing “using the watershed as the ecologically meaningful scale for integrated and long-term planning, which can be a foundation for considering cumulative impacts of development”²³ and aimed at ensuring “the diversity and connectivity of natural features in an area, and the long-term ecological function and biodiversity of natural heritage systems” as important recognition of the “linkages between and among natural heritage features and areas, surface water features and ground water features.”²⁴ The proposed amendments will narrow the objects of conservation authorities such that ensuring land use planning decisions are consistent with the PPS and achieving the overall purpose of the CAAct will be significantly impeded.

²² CAAct, section 0.1.

²³ Provincial Policy Statement (2020), policy 2.2.1(a). See <https://www.ontario.ca/page/provincial-policy-statement-2020>.

²⁴ PPS (2020), policy 2.1.2.

Further, conservation authorities powers to study & investigate, enter land throughout the watershed, cause research to be done, and expropriate will be narrowed or removed, making the ability to use a watershed approach next to impossible.

4. Removing conservation authorities status as independent public bodies in land use planning will set integrated watershed management back decades

Bringing conservation authorities under the “one window” approach to municipal land use planning will likely limit the ability to ensure meaningful integrated watershed management. Under the *Planning Act*, all provincial interests are expressed and defended only through the Ministry of Municipal Affairs and Housing (MMAH). As there is no express mechanism to ensure the interests of other ministry’s mandates, including (as proposed) the watershed approach of conservation authorities, are reflected in MMAH’s implementation of the *Planning Act*, the desire to build climate resilient communities for the future is unlikely to be fully realized.

5. New procedures are being introduced, without indication of whether matching third party rights of appeal in the public interest will be provided

New procedural rights for requestors (for fee reconsideration) and applicants (for the yet to be proclaimed permits), including new rights to appeal to the LPAT, are proposed. Further, new processes for the Minister to review, as well as appoint investigators and recommend the appointment of administrators, are also proposed. These amendments do not indicate, one way or another, whether third party, public interest based, appeal rights (as exist under the EBR for certain "instruments") will be made available.

6. Confusion about the roles of the Ministry of the Environment, Conservation and Parks and the Ministry of Natural Resources and Forestry is not resolved

Although it is proposed that the Minister, as defined in the CAAAct, will be the Minister of the Environment, Conservation and Parks, it is anticipated that there will continue to be confusion about roles and responsibilities as the Minister of Natural Resources and Forestry (MNRF) appears to maintain authority related to natural hazards. For example, MNRF conducted public consultations on a regulation “focusing conservation authority development permits on the protection of people and property” (ERO # 013-4992)²⁵. It is unclear how such a regulation relates to the proposed amendments now before the Ontario Legislature.

7. Much of the detail, particularly in relation to setting out the scope of programs and services, any standards and requirements, and other important matters, continue to be left to the development of future regulations

²⁵ See <https://ero.ontario.ca/notice/013-4992>, a proposal posted April 5, 2019 for 46 days and for which, as of writing, no decision has been issued.;

It is impossible to fully analyze the impact of the proposed changes to conservation authorities' roles and responsibilities, as so many details are left to the discretion of the Lieutenant Governor in Council and/or the Minister to make future regulations.

CONCLUSION

Building climate resilience is crucially important for Ontario. For all of the reasons discussed above, CELA believes that the proposed changes to conservation authorities will not achieve this important task. To the contrary, the package of amendments as proposed are likely to set back watershed planning and implementation of an ecosystem-based approach by decades. As such, CELA recommends that Schedule 6 not be enacted in its present form and instead be withdrawn in its entirety from Bill 229. Further, CELA recommends that the Ontario government immediately seek to ensure that the current mandate of the province's 36 conservation authorities is maintained and enhanced, in order to effectively protect, restore and manage the watersheds where 95 percent of the people of Ontario reside.

November 10, 2020