



environmental
defence

December 2, 2020

Julia Douglas, Clerk
Standing Committee on Finance and Economic Affairs
Room 1405, Whitney Block,
99 Wellesley Street West
Toronto ON M7A 1A2

RE: Submission to the Standing Committee on Finance and Economic Affairs Regarding *Bill 229: An Act to implement Budget measures and to enact, amend and repeal various statutes.*

Dear Julia Douglas,

Environmental Defence requests the removal of Schedule 6 and Schedule 8 of Bill 229. With regards to Schedule 8, Environmental Defence adopts and endorses the submissions of the Canadian Environmental Law Association, the Wildlands League and Ontario Nature.

Environmental Defence is also gravely concerned about the content of Schedule 6 of Bill 229: *An Act to implement Budget measures and to enact, amend and repeal various statutes* ("Schedule 6"), and that Schedule is the focus of this written submission.

It is clear from our review of **Schedule 6** that it will diminish the scope, powers, and non-political nature of **conservation authorities** and the *Conservation Authorities Act* system to such a degree that they will become incapable of protecting Ontarians as they were designed to do.

Schedule 6 would undermine the conservation authority system in two broad ways:

1. It would transform fact-based, arms-length decisions about what is necessary to prevent flooding, landslides or otherwise protect natural resources in watersheds as a whole, into polarizing battles between political partisans, or between municipalities with conflicting short-term interests
2. Second, Schedule 6 would cause conservation authorities to be stymied by the fragmented ownership, jurisdiction and technical discipline (e.g., "geoengineering" vs. "invasive species ecology" vs. "hydrology") that they were designed to overcome.



In our submission, the predominant thrust of Schedule I 6, is a clear intent to damage the Conservation Authorities Act system. As such, the only appropriate step that can be taken is to remove Schedule 6 from Bill 229 in its entirety. If the government wishes to proceed with the few, marginal aspects of Schedule 6 which do not undermine the conservation authority system, it should do so through a stand-alone bill and through the ordinary legislative process for amendments to the *Conservation Authorities Act* that would follow meaningful public consultation required by the EBR.

1. Schedule 6 would politicize Conservation Authorities and allow politics rather than science to determine issuance of Conservation Authorities Act permits

For a very long time, Ontarians' have relied upon Conservation Authorities to make **necessary** decisions about flood and landslide prevention and all the other inextricably linked aspects of conserving natural resources in watersheds that are **based on science**, in a manner that is structurally **insulated from partisan political calculations**.

In parts of Canada and the U.S. where the final say on such matters rests in the political realm, it is not altogether uncommon to see large swathes of even relatively new development evacuated, and even destroyed due to flooding or landslides. That is precisely what happened when a category 1 storm, which we refer to as Hurricane Hazel, hit the Greater Toronto Area 66 years ago. Situations like this don't happen here as often these days, despite the fact that climate change is increasing the frequency of extreme weather events, in large part because Conservation Authorities have become more independent and authoritative. The ability of conservation authorities to say no to development proposals where the science shows it would worsen or be vulnerable to flooding hazards will be an essential part of minimizing harm the climate change already locked in by past carbon emissions.

In three main ways, Schedule 6 of the Bill 229 removes the independence and authority that have made Conservation Authorities effective protectors of Ontarians and their natural resources

a. Turning Conservation Authorities into Inter-municipal battlefields

The proposed new language of s. 14.1 removes the well-established duty of municipally appointed conservation authority members to actually pursue and prioritize the objectives that *conservation authorities* exist to fulfill: the protection of natural resources (e.g., flood & landslide management), across watersheds as wholes. It does this by newly requiring them to instead act "generally on behalf of their municipalities".



- It is important to note that s. 14.1 of the *Act*, which has not yet been brought into force, merely codifies an **existing** implicit duty of board members that has been recognized by courts in all sorts of contexts. Even where board members of one entity are delegates of another entity, they must nonetheless prioritize the interests of the entity for which they are making decisions. This existing implicit duty is not some vague concept residing on academics' bookshelves. It is a central part of the on-boarding for new conservation authority members across Ontario, and is meant to bear constantly upon members' approach to the issues before them.
- In the case of Conservation Authorities, their interests are prescribed by statute. Conservation authorities exist to provide a watershed approach to management, wherein the course of action which best protects people and resources in the watershed as a whole can be pursued even if the burden of those actions does not fall on the municipalities where the benefits are most manifest. The purpose of having each municipality appoint CA members is simply to provide the conservation authority with the regionally-specific information and insights relevant to maximizing these *watershed-wide* interests.
- Schedule 6 would overturn the established duty to the watershed-wide objects of a conservation authority, and replace it with a duty to act narrowly to advance the agendas and peculiar interests of the municipal councils that appointed to them, even where that agenda conflicts with the very reasons for creating conservation authorities. This would mean the weight Conservation Authorities accorded to the benefits and burdens of a decision becomes a function of the balance raw voting power among the particular municipalities involved.
- This problem would be aggravated by s. 14(1.1), which would require that that all of the conservation authority members, now unleashed from duty to anything other than their own municipality, be actual politicians from those municipalities. At present it is common for conservation authorities to include some experts whose sole obligation is to the watershed-wide public interest objects enshrined in the *Conservation Authorities Act* itself.

Schedule 6 is would also compromise public confidence that decisions under the *Act* are independent of partisan political considerations by inserting a partisan elected provincial official as the final authority on whether and under what conditions to issue each permit, and even allowing the Minister to usurp the entire permitting power of Conservation Authorities.

b. Letting partisan politicians overturn technical CA decisions about permits



Where a conservation authority refuses a permit (for instance, because it would create long-term flooding risk) the proposed language of ss. 28.1(8) would entitle an applicant to circumvent any formal, expert-adjudicated appeal tribunal and to instead resort directly to the Minister.

- While the criteria applied by the minister are nominally the same, the internal process when a minister makes decisions of this sort are very different than they are at conservation authorities, for the Mining and Lands Commission, or for the Local Planning Appeal Tribunal. A Minister's office is not set up to disregard political calculations and make decisions that are strictly technical. Even where Ministry staff are capable of providing expert analysis recommending a particular outcome, such analysis, and legal advice from Ministry counsel as to what outcome the law demands, are only parts of a decision package that is presented to the Minister by political staff, whose chief concern and expertise is in optimizing the electoral and donor impact of a decision.
- This is a serious problem, no matter how upstanding and well-intentioned the minister of the day, because the effective conservation and management of natural resources, including flood and landslide prevention, very often requires that conservation authorities say no to people with very deep pockets and considerable political influence. The granting of one permit, which ought to be refused in the interests of the public at large, can multiply the value of a plot of land by many orders of magnitude. This would create perverse incentives for landowners and their proprietors, and tremendous moral hazard for the party or parties in power.

c. Allowing politicians to usurp municipalities entire permitting power

Subsection 28.1.1, provides for Ministerial orders to cut Conservation Authorities out of some or all core permitting decisions entirely, with permits issued directly by the Minister instead.

- Allowing the Minister to issue *Conservation Authorities Act* permissions directly would raise, to an even greater degree, all the same moral hazard and capacity problems associated with letting the Minister determine requests for reconsideration.
- However, it would also create a distinct and even more fundamental problem. Because (as ss. 28.1.1(3) makes clear) applicants would be allowed apply to the Minister without any hearing at first instance, or even a processed application before the relevant conservation authority, the minister would lack even the minimum evidence required to make a non-arbitrary decision.
- The required analysis provided by Ministry staff, because Conservation authorities and their staff are the collectors and repositories of all the fine-grained scientific knowledge about each watershed that is required to assess the consequences of granting a permit, or altering its conditions.



- It should be noted that a similar problem might arise to a lesser extent on requests for reconsideration by the minister. That is because the amended Act would not seem to require appellants to stick to the version of their application that was originally considered by the CA, and which was the subject of its technical evaluations. By contrast, for example, someone appealing municipal refusal of a planning application is (outside of very narrow circumstances) required to stick with the proposal considered by Council.

2. Schedule 6 would allow conservation authorities to be stymied by fragmentation of municipal jurisdiction, ownership, and technical discipline.

A second factor which has allowed conservation authorities to be effective in protecting Ontarians from the most hazardous forms of damage to natural resources is the fact that their objects, and the scope of their powers to advance them, reflect the intertwined nature of natural resources issues within a watershed. Schedule 6 would undermine the effectiveness of conservation authorities by artificially compartmentalizing their objects and restricting their power to act to geographical boundaries that do not align with the connected hydrological, geological and biological phenomena that make conservation authorities exist to manage.

The conservation authority system is premised on a recognition that things which occur at one place in a watershed, including on private property, may have hard-to-explain but nonetheless real and significant impacts on a wetland, creek, or even another private property far removed from them. To identify these spatially distant causal relationships, and protect Ontario's people and natural resources from the dangers they can create, the *Conservation Authorities Act* and related legislation such as the *Planning Act* equip authorities to act across boundaries, including ownership boundaries, that would otherwise make timely action impossible.

a. Allowing landowners to refuse access for testing

Schedule 6 would amend ss. 21(1)(b) of the *Conservation Authorities Act* so that an Authority would **require the advance permission of a lot's owner to enter and assess** its condition and or how it is connected to other parts of the watershed.

- This would prevent Authorities from discovering some instances when developing conditions on one site require protective measures elsewhere in the watershed.
- This proposed change would also have an even more serious consequence: it is bound to be exploited cynically by landowners wishing to enrich themselves by doing things that endanger the public. That is because



landowners are only required to obtain a permit for development, and thus to demonstrate that proposed development won't adversely affect flood control, erosion, and pollution, and other conservation matters, if their property has particular physical characteristics, enumerated in the regulations that make such adverse effects very likely. Many of these characteristics can only be identified through on-site evaluation. Where a landowner knows or suspects that its property has features that subject it to a permitting requirement, it could, just by refusing access, prevent the conservation authority from finding out about them.

b. Letting bad actors hold hostage low-value land required to protect the public

Schedule 6 also modifies clause 21(1)(c) of the *Conservation Authorities Act* to **deny Authorities the power to expropriate land** to accomplish their legislated objects. If Conservation Authorities do not have access to the expropriation process and its process for determining price, there will be nothing to prevent bad actors from holding hostage lands which are of little market value, but indispensable to the protection of the public interest.

- For example, the owner of land where it was necessary to undertake work in order to prevent severe flooding upstream could leverage that danger to extract a windfall from land ill-suited to development.
- Even if we are willing to accept this extra cost to the public, Ontario does not provide conservation authorities with the funding to pay such ransoms. In practice, CAs will be rendered unable to make necessary interventions.

c) Strip Authorities of the legal standing in watershed Planning Act decisions

Third, schedule 6 would deprive conservation authorities of any standing to prevent environmental problems, including threats to public safety, which have roots in development decisions outside the boundaries of physical features enumerated in O. Reg. 97/04 s.3.

- Presently, conservation authorities are able to accomplish this by becoming parties to, or else initiating appeals under the Planning Act. "[P]rotection of ecological systems, including natural areas, features and functions" and "conservation and management of natural resources" are matters which, pursuant to s. 2 of the Planning Act, and the Provincial Policy Statement requires among other things that planning authorities take a watershed approach to protecting and improving water quality. Consequently, the same sorts of problems which might lead to a conservation authority's own refusal of permit *within* protected features can, through the Authority's presentation of these factors in an appeal, prevent development approvals in other parts of the watershed.
- Schedule 6 would remove this important lever for environmental protection and often deprive the *Planning Act* process and decision-makers of the best



evidence and most principled perspective on questions they must address in determining an appeal.

d) Cancelling the Stop Work Order power

In addition to depriving conservation authorities of their existing capacities to tackle problems that cross boundaries of ownership and jurisdiction within watersheds, Schedule 6 would prevent the closure of a long-standing and problematic gap in authority that had been on course to be closed. The absence of a power to issue stop work orders for unpermitted development on private land that, for example, could lead to silting or obstruction of a waterway, has posed a growing problem given the increasing frequency of severe weather events. This was set to be remedied through s. 30(4) of the Act, but Schedule 6 would repeal this provision before it is even brought into force.

d) Arbitrarily narrowing and compartmentalizing the objects of Conservation Authorities

Separate from the reduction of Conservation Authorities' powers themselves, there is reason for concern that Schedule 6 will lead to narrow and siloed interpretations of Authorities' objects, and thus to the abandonment of natural resources matters with very real but hard-to-explain connections to enumerated service and program areas.

- Superficially distinct natural systems within watersheds interact with one another and with human interests in complex and varied ways that aren't obvious, and which may only be revealed through an Authority's own research. For example, the ornamental use of some non-native species in residential neighbourhoods within watersheds can lead to their spread into ravines, to the suppression of understory plants, and, in turn, to significant and hazardous erosion of slopes.
- In order to avoid excluding key aspects of this relationship, the objects of a conservation authority are defined broadly. An Authority is to provide, within its watershed, any "programs and services" that are "designed to further the conservation, restoration, development and management of [non-mineral and non-hydrocarbon] natural resources".
- With its complete rewrite of ss. 20(1) and introduction of s. 21.1(1) and s.21.1(2) Schedule 6 replaces this sound holistic understanding of what conservation authorities' programs and services must accomplish with a set of arbitrary silos.

3. Other Concerns



This submission is not a comprehensive enumeration of Environmental Defence's concerns regarding Bill 229. We share the concerns that have been raised by other witnesses regarding the implications of these changes for aboriginal and treaty rights, and the substitution of this rushed and forced process for the duty to consult.

A number of other measures - most notably, the various timelines that would be imposed by Schedule 6 - also merit closer scrutiny than can be given to them in view of the condensed budget process being used inappropriately to amend the *Conservation Authorities Act*.

Conclusion

Concerned citizens who contact the government with their own concerns about Schedule 6 are being told that it delivers what was requested by some participants in earlier consultations regarding the *Conservation Authorities Act*. We have no difficulty accepting that this is true of some participants. . There is no shortage of speculative landowners and similar interests who wish to profit from dumping, excavation and other development that endangers people and natural systems. What we do have trouble accepting, and to which no evidence to the contrary has been presented by the government is this view is representative of all or even most participants in previous consultations.

In view of the extensive and pervasive problems with Schedule 6 , the only defensible course of action for a member of this committee is to remove Schedule 6 from Bill 229 in its entirety. To the extent that there are secondary aspects of the schedule that can be extricated from the provisions we have flagged, the appropriate way of introducing them is as a stand alone bill, and the normal, non-budget process of reviewing a proposed amendment to the *Conservation Authorities Act*.

Sincerely,

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Executive Director

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Ontario Environment Program Manager