



August 21, 2020

CAO's Office
Administration
1151 Bronte Road
Oakville ON L6M 3L1

David McGovern, President
Impact Assessment Agency of Canada
160 Elgin Street, 22 Floor
Ottawa, ON, K1A 0H3

Dear President McGovern:

**Re: IAAC Registry #80100 re Proposed CN Milton Logistics Hub (the Project)
Halton Municipalities' Comments on the Potential Conditions under the *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)***

On behalf of the Regional Municipality of Halton, the Corporation of the Town of Milton, the Corporation of the City of Burlington, the Corporation of the Town of Oakville, and the Corporation of the Town of Halton Hills (collectively, the "Halton Municipalities"), I am responding to the July 2, 2020 request for public comments on the potential conditions released by the Impact Assessment Agency of Canada (the Agency).

The Project will impact all Halton Municipalities, but particularly the Town of Milton where twelve schools, two long-term care homes, a hospital, and 34,000 residents are within one kilometer of the Project boundary.

These comments continue the coordinated effort by the Halton Municipalities since 2015 to ensure community interests and the planned visions for the community are heard in the environmental assessment process.

Our comments focus on two main concerns: (1) the Agency's potential conditions are not technically effective to prevent this Project from causing dozens of additional significant adverse environmental effects beyond the six significant effects identified by the Review Panel; and (2) many of the conditions proposed by the Agency are not federally enforceable and cannot be considered by federal decision makers under CEAA 2012.

This Project should not be approved. Under CEAA 2012, Projects causing significant effects cannot proceed unless such effects are justified in the circumstances.¹ The Panel's conclusion that this Project is likely to cause significant adverse health effects on residents is unprecedented. The explicit mandate of CEAA is to protect human health and apply the precautionary principle. The effects on human health and the other significant effects of this Project cannot be justified. CN has a nearby existing site that may accommodate all of its proposed intermodal needs without raising similar issues.

(1) The Agency's potential conditions are not technically effective at avoiding significant adverse environmental effects

¹ Sections 52 – 54

Halton Municipalities reviewed the draft mitigation measures with expert input, applying the CEAA 2012 framework and Agency guidance. **Appendix A** provides our detailed comments on the potential conditions, including an examination of specific draft conditions of concern.² Based on our review, even if the Minister could appropriately apply all of the Agency's potential conditions, the Project would still have significant adverse effects.

The six significant effects identified by the expert review panel are maintained: The independent and expert Panel appointed by the Minister released its report in January 2020. The Panel concluded that, even after taking feasible mitigation into account, the Project would cause significant effects on air quality and human health and cumulative effects on air quality, human health, wildlife habitat and land available for agricultural use. These unmitigable effects include increases in ambient air concentrations of benzo(a)pyrene, benzene, and particulate matter less than 2.5 microns in size (PM_{2.5}) – pollutants that are unsafe at any level of exposure. The effects of Project emissions on residents' health are 17 times the Canadian *de minimus* respiratory cancer risk level.

None of the Agency's proposed conditions alter these conclusions.

The potential conditions are not effective at avoiding dozens of additional significant effects beyond those identified by the Panel: The Panel concluded that the Project would cause multiple other significant effects unless necessary mitigation identified by the Panel were implemented.³ We believe the potential conditions will be ineffective to avoid these significant adverse effects, including additional health effects on residents from nighttime noise from this 24/7 facility and effects on 10 species at risk.

We also note that there are several additional effects that the Panel wrongly excluded from its conclusions – including effects on land use planning, demand for community services and infrastructure, and truck traffic.⁴ With assistance from a team of experienced experts, the Halton Municipalities provided detailed information to the Panel finding that these three additional Project effects were also likely to be significant.

We summarize the key details for each of the likely significant adverse environmental effects of this Project in the 2-page schedule at the end of this letter.

(2) The Agency has proposed potential conditions that are not federally enforceable and cannot be considered by the federal decision makers under CEAA 2012

It is important to distinguish what the Panel did from what the federal decision makers must do in their decisions under CEAA 2012. The Panel gathered information on environmental effects,

² Halton Municipalities' comments on the potential conditions are not intended to indicate any support of federal approval of this Project, subject to these or other conditions. Halton also repeats our concerns that this public comment period has proceeded during the coronavirus pandemic. Halton has regulatory powers, duties and functions respecting many Project effects, and has not had sufficient detail or time to fully understand or assess what these proposed conditions mean or accomplish.

³ Consistent with earlier submissions by the Halton Municipalities, our comments will not address effects on Indigenous communities as CN reached agreement with these communities. On the other hand, turning to the Panel's sixteen categories of effects, we also recognize that the Panel concluded that Project effects on each of ten distinct species at risk were significant absent detailed mitigation.

⁴ See the Schedule to this letter, p.7 and Appendix B, note 7

considered technically and economically feasible mitigation, and assessed the significance of adverse effects in light of feasible mitigation. The Panel included feasible mitigation without any consideration of federal enforceability. The Panel expressly declined Halton Municipalities' request to only consider mitigation that is federally enforceable.

The Panel explicitly left the question of federal enforceability to the federal decision makers and authorities.⁵ In the case where the federal decision makers decided that the mitigation measures cannot be applied or enforced, the Panel acknowledged that the Minister would be required to decide whether the environmental effect would be significant.

However, the Panel has failed to provide the Minister and the public with any answers on the question of federal enforceability. The Agency's document fails to address who has the authority, expertise or resources to apply and enforce all potential conditions.

Appendix B summarizes Halton Municipalities' major legal concerns with the proposed conditions and topics related to federal decision making. The appendix focuses on issues with the enforceability of the potential conditions under CEAA 2012. In brief, the Minister is obliged under section 52 of CEAA 2012 to identify all environmental effects that arise under ss. 5(1) and 5(2), assess their significance, and refer all significant effects to the federal Cabinet. When assessing the significance of these effects, the Minister may not rely on any mitigation that cannot be applied or enforced federally. We emphasize the following constraints on the federal enforceability of conditions under CEAA 2012:

- CEAA 2012 limits Agency enforcement to conditions that are related to s.5(1) effects. This causes concern because, as set out by the Panel and recently confirmed by the Agency, the vast majority of significant effects at issue with this Project are related to s.5(2) effects.
- As the Agency cannot enforce conditions related to s.5(2) effects, it is essential to understand which federal authority can. The Panel – which included a member of the Canadian Transportation Agency (CTA) – advised that numerous s.5(2) effects could be taken into account by the CTA in its consideration of this Project under s.98 of the *Canada Transportation Act*, but did not address conditions. We are concerned the CTA has no authority to enforce many s.5(2) conditions, as they would require it to monitor CN's future day-to-day operations, a requirement that courts have rejected in several cases beginning in 2001 and affirmed in 2018.
- The federal government chose to establish this Panel as a federal-only Panel. Under CEAA 2012, the Minister cannot establish any conditions that rely on mitigation implemented by other jurisdictions. Therefore, the proposed conditions may not rely on other jurisdictions that have the authority, expertise and resources to provide the mitigation measures.

No document before the Panel or on the Agency registry for this Project provides any guidance on who has the authority to regulate the broad array of s.5(2) effects considered by the Panel. The omission of specific information to demonstrate the federal capacity to implement and enforce

⁵ Panel Report pp. 5 & 6

the potential conditions is a fundamental flaw with this consultation. It also raises fundamental problems for any future federal decision that seeks to rely on the proposed conditions.⁶

Our concerns with limits on federal enforcement apply also to several proposed conditions that were not provided, recommended or even considered by the Panel. As identified in Appendix A, three important examples of novel conditions are:

- Condition 4.19 providing a maximum number of daily trucks;
- Condition 2.7 providing emissions limits; and
- Condition 13.3 providing for an independent environmental monitor.

Supplementing our concern that there is no federal authority to enforce these conditions, we also express concern that there has been no transparency on the origin of these conditions or the expertise that has been engaged in their development.

Conclusions

The Halton Municipalities conclude that, taking into account only appropriate, effective and federally enforceable mitigation, the Project is likely to cause numerous additional significant environmental effects beyond the six significant effects identified by the Panel.

The Halton Municipalities conclude that, contrary to what is provided in the proposed conditions, neither the Minister nor Cabinet can consider any conditions that are not federally enforceable. Only enforceable conditions are eligible to mitigate significant environmental effects under sections 52 and 54 of CEEA 2012.

The Halton Municipalities urge you to ensure that the Minister properly identifies all of the significant effects that are likely to arise in relation to this Project, taking eligible mitigation into account, and thereafter advise Cabinet that these effects are not justified.

Sincerely,

<Original signed by>

Jane MacCaskill, CPA, CA, MBA
Chief Administrative Officer

c.c. Tim Commisso, City Manager, City of Burlington
J. Clohecy, CAO, Town of Oakville
A. Siltala, CAO, Town of Milton
B. Marshall, CAO, Town of Halton Hills

⁶ Note that Appendix A identifies multiple examples where, by contrast to the federal situation, municipalities, regional conservation authorities like Conservation Halton, and the Province of Ontario have exercised jurisdiction, retained expertise, and applied enforcement resources to broadly address s.5(2) effects.

Schedule of Significant Adverse Environmental Effects

Significant adverse environmental effects that are not mitigable:

1. **Project Effects on air quality:** The Project is likely to cause significant adverse effects as there is no safe level of PM2.5 and diesel particulate matter. The environmental effects on local air quality will “result in a high magnitude effect”. There is no safe level of PM2.5 and diesel particulate matter.
2. **Project Effects on human health:** Increased exposure of Halton residents, including the approximately 34,000 residents within 1km of the Project boundary, to the three priority pollutants that are unsafe at any level of exposure. The effects of Project emissions on residents are 17 times the Canadian *de minimis* respiratory cancer risk level and 170 times the Ontario *de minimis* respiratory cancer risk level even with mitigation. Other likely measurable adverse health effects include an increase of approximately two heart attack deaths per 100,000 affected residents per year and some 3.2 new asthma cases per 1000 local child residents between 10-14 years of age.
3. **Cumulative effects on air quality:** The combination of future Project emissions and existing ambient concentrations will increase the significance of the adverse effects on air quality.
4. **Cumulative effects on human health from air quality:** As there is no safe level of PM2.5 concentrations, the combination of future Project emissions and existing ambient concentrations of PM2.5 emissions will increase the significance of adverse effects on human health.
5. **Cumulative effects on wildlife habitat:** The Project will result in the removal of 50.9 hectares of grassland habitat and 3.7 hectares of wetland habitat. These habitat losses would result in the displacement of over 400 pairs of breeding birds. These losses are significant when combined with losses resulting from past and proposed urbanization of the area.
6. **Cumulative effects on the availability of agricultural land:** The Project will permanently remove 147 hectares of agricultural land from production, including 30 hectares of Prime Agricultural Land. These losses are significant when combined with losses resulting from past and proposed urbanization of the area. Greater future losses are likely if the Project proceeds.

Significant adverse environmental effects because the necessary mitigation is not contained in the proposed conditions or is not demonstrably enforceable by federal authorities.

7. **Project effects on noise:** The Project will operate 24hours per day resulting in notable noise effects throughout points of reception in the residential neighborhoods adjacent to the Project.
8. **Project effects on nighttime lighting:** Nighttime light trespass, glare and sky glow from Project operations – the Project will function 24/7, lit by 30-metre high mast light fixtures

on the pad area and 15-metre high light fixtures along roadways. The proposed light fixtures and lights are taller and more powerful than other types of lighting in the area.

9. **Project effects on surface water** – There is considerable uncertainty about the capacity of Project lands to store and convey water arising from a Regional Storm or larger flood event, and the magnitude of the effects on neighbouring and downstream lands.
10. **Project effects on groundwater** – Measures are necessary to maintain existing groundwater infiltration and flow patterns.
11. **Project effects on wetlands** – The Project will result in loss on-site of 3.7 hectares of wetlands that provide important habitat for species at risk and migratory birds.
12. **Project effects on the terrestrial environment** – Through site clearing and grading, the Project will alter 54.6 hectares of terrestrial habitat, including 50.9 hectares of grassland and 3.7 hectares of wetlands.
13. **Project effects on fish and fish habitat** – The Project will eliminate 1,075 metres of Indian Creek, and replace it with 571 metres of constructed channel.
14. **Project effects on Western chorus frogs** - Threatened under the federal *Species at Risk Act*. Construction will disturb important breeding sites and lead to mortality and morbidity of individuals.
15. **Project effects on Eastern Meadowlarks** - Threatened under the federal *Species at Risk Act* and the Ontario *Endangered Species Act*. This species is in serious decline. The Project would result in the loss of 40.7 hectares of its grassland habitat.
16. **Project effects on Bobolinks** - Threatened under the federal *Species at Risk Act* and the Ontario *Endangered Species Act*. This species is in serious decline. The Project would result in the loss 40.7 hectares of its grassland habitat.
17. **Project effects on Snapping turtles** – Species of special concern under the federal *Species at Risk Act* and the Ontario *Endangered Species Act*. Indian Creek likely provides a movement corridor between critical habitats for this species. Proposed work on Indian Creek is likely to result in loss of habitat and mortality of individuals.
18. **Project effects on Midland painted turtles** – Recommended for special concern status under the federal *Species at Risk Act*. Living in the online pond in Tributary A as well as in ponds outside the Project Development Area. Proposed work on Indian Creek is likely to result in loss of habitat and mortality of individuals.
19. **Project effects on Bank swallows** – Threatened under the federal *Species at Risk Act*. Project construction effects on nests and mortality.
20. **Project effects on Barn swallows** - Threatened under the federal *Species at Risk Act*. A shed housing this species is being removed from the Project Development Area. Loss of appropriate habitat is likely to lead to species mortality.

21. **Project effects on Monarch butterflies** - Species of special concern under the federal *Species at Risk Act* and the Ontario *Endangered Species Act*. There will be a loss of 10.8 hectares of Monarch habitat within the Project Description Area.
22. **Project effects on Eastern milksnakes** – Species of special concern under the federal *Species at Risk Act*. The Panel found prior surveys inadequate. Properly conducted surveys and fencing are required to prevent mortality of individuals.
23. **Project effects on Little brown myotis** – Endangered under both the federal *Species at Risk Act* and the Ontario *Endangered Species Act*. The Panel found prior surveys inadequate. In the absence of properly conducted surveys, there would likely be disruption of habitat and mortality of individuals or inadvertent destruction of roosts.
24. **Project effects on migratory birds** – Migratory birds, particularly grassland birds, are under severe pressure from habitat loss and change. The Project will result in the loss of 50.9 hectares of grassland habitat and 3.7 hectares of wetland habitat, all of which is used by migratory birds. These habitat losses would result in the displacement of over 400 pairs of breeding birds. Project operations and collisions with buildings would also likely cause additional sensory disturbances and mortality to migratory birds.
25. **Project effects on habitat connectivity** – The Project will affect connectivity due to expansion of the existing mainline railway, construction of multiple linear features such as the tracks, the pad, and access roads, realignment and channeling of Tributary A and Indian Creek, and removal of wetland habitat.
26. **Project effects on cultural heritage** – The Project requires removal of a 19th century heritage building, will expose several cultural heritage properties to vibration effects, and result in demolition by neglect for several heritage buildings.
27. **Project effects on archaeology** – The Project has resulted in the removal of archeological artifacts or human remains and more effects are likely during Project construction.

Adverse effects the panel wrongly excluded from assessment, which are assessed as significant by the Halton Municipalities

28. **Project effects on land use planning** – Project site is subject to high-density employment targets (i.e., 1,500 jobs by 2021 and 1,900 jobs by 2031), whereas the Project would provide low density employment (i.e., 130 jobs). Municipalities must find and designate new lands to address the required targets.
29. **Project effects on demand for community services and infrastructure** – Intense employment uses require major urban infrastructure (road, sewer, water, emergency) and the financing to support that infrastructure. CN's position that the Project is exempt from municipal law includes exemption from municipal servicing standards and development charges.
30. **Project transportation effects from new trucks** – At present scale, CN proposes the addition of 1,600 new trips per day by heavy-duty container trucks. It requires a new entranceway for these trucks and seeks to have this entrance on Britannia Road where

the trucks will interact with pedestrians, transit, and cycling on off-road trails in the Region's planned road allowance.