CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Dear Mr. Rohaly and Ms. Garbot:

RE: DRAFT REGULATION UNDER THE *ENVIRONMENTAL ASSESSMENT ACT* FOR PUBLIC TRANSIT PROJECTS: EBR REGISTRY NO.010-2760; AND DRAFT TRANSIT PRIORITY STATEMENT: EBR REGISTRY NO.010-3128

These are the comments of the Canadian Environmental Law Association ("CELA") with respect to the two above-noted proposals. These comments are submitted to you in accordance with the EBR Registry notices for these proposals.

PART I – GENERAL COMMENTS

(a) Public Transit is an Environmental Priority

At the outset, CELA wishes to emphasize its support for the Ontario government's intent to facilitate the timely and orderly development of environmentally sustainable modes of public transit across Ontario.

As correctly noted in the draft Transit Priority Statement ("TPS"), there are numerous environmental and socio-economic benefits associated with suitably located, well-designed, and properly operated public transit services and systems, particularly within highly urbanized areas. Accordingly, CELA acknowledges and agrees with the overall purpose of the TPS and the draft regulation under the *Environmental Assessment Act* ("EA Act").

Nevertheless, CELA has some specific concerns regarding the proposed content of the public transit assessment process envisioned by the draft regulation, as described below. However, it should be noted that CELA does not object in principle to this important initiative. Thus, our criticism of certain aspects of the assessment process should not be interpreted as opposition to the concept of creating a focused and efficient assessment process for public transit projects.

At the same time, CELA hastens to add that its general support for this new assessment process in the public transit context should not be construed as support for utilizing a similar approach for other projects, or classes of projects, in non-transit sectors.

To the contrary, CELA strongly cautions against using this new approach for any other undertakings that are currently subject to individual EA requirements, Class EA procedures, or prescribed regulatory processes (i.e. O.Reg.116/01 for electricity projects and O.Reg.101/07 for waste management projects). In short, the underlying policy reasons for expediting public transit assessments do not necessarily apply to other types of environmentally significant undertakings (i.e. sewage, waste disposal, 400 series highways, etc.).

CELA RECOMMENDATION #1: The establishment of the public transit project assessment process must not be used as a precedent for reducing, streamlining or eliminating current statutory or regulatory requirements under the EA Act for other undertakings or classes of undertakings.

(b) Future Consultation Opportunities

CELA commends the Ministries of the Environment ("MOE") and Transportation of Ontario ("MTO") for going beyond merely posting notice of these two proposals on the EBR Registry.

For example, CELA staff attended the April 30, 2008 public information session convened by the Ministries, and we found this meeting to be a useful and productive forum for stakeholders to raise questions and exchange information about the two proposals. CELA also appreciates the level of detail provided in the EBR notice for the draft regulation, and we acknowledge the Ministries' decision to provide a 45 day comment period (instead of the usual 30 days) for both proposals. However, it would been helpful if the two public comment periods had been coordinated so that they ran concurrently and ended on the same day, instead of starting and stopping about a week apart.

In any event, we trust that the MOE and MTO commitment to enhanced public consultation will continue in the future as implementation details are developed and released in relation to these two proposals.

For example, unlike O.Reg.116/01 (Electricity Projects) and O.Reg.101/07 (Waste Management Projects), the draft transit regulation does not contain any cross-references to MOE guidance documents or publications. It should be recalled that when these other EA Act regulations were released in draft form, they were accompanied by draft publications (i.e. environmental

screening processes) so that stakeholders had a better understanding of the new regulatory requirements and corresponding MOE expectations.

In contrast, when the MOE unveiled the draft transit regulation in late March, no accompanying guidance documents were released in draft form. However, it is our understanding that the MOE fully intends to develop such guidance materials on both an interim and long-term basis.

Accordingly, CELA recommends that the MOE should proactively solicit input from interested stakeholders on the content of the guidance documentation (i.e. via workshops or meetings), as opposed to internally drafting the guidance document and simply releasing it with little or no public input. In our view, once the draft documentation has been prepared with upfront stakeholder input, a "policy" notice should be posted on the EBR Registry, and an appropriate public comment period (i.e. 45 days) should be provided.

CELA RECOMMENDATION #2: Prior to releasing interim guidelines or guidance documents to accompany the public transit projects regulation, the MOE should proactively solicit input from interested stakeholders on the content of such documentation. The proposed guidance documentation should then be posted as a "policy" on the EBR Registry, and should be subject to an appropriate public comment period (i.e. 45 days).

(c) Legal Rationale for the Transit Projects Regulation

At the public information session held on April 30, 2008, Mr. Rohaly indicated that the new transit assessment process was being framed as a conditional regulatory exemption because in-house legal advice received by the MOE suggests that current regulation-making authority under the EA Act is too constrained to permit other implementation options.

Assuming (without deciding) that this legal advice is correct, CELA submits that it is time for the MOE to develop some long-overdue amendments to the regulation-making authority under the EA Act. Indeed, this recommendation was made over three years ago by the Executive Group of the Minister's EA Advisory Panel (of which CELA was a member),[1] and it is unclear why this important recommendation has not been acted upon to date.

In our view, if such amendments are enacted in a timely manner, the EA Act can more fully realize its intended role as an environmental planning and decision-making regime that ensures the protection, conservation and wise management of the environment (see section 2 of the EA Act). In addition, such amendments would obviate the need for MOE to force-fit important new EA initiatives into a regulation-making framework which the MOE itself regards as unduly constrained or limited in scope.

CELA RECOMMENDATION #3: The MOE should immediately develop and consult upon focused, strategic amendments to Part VI of the EA Act in order to enhance the nature and scope of the regulation-making authority available to the Ontario Cabinet.

[1] See, for example, EA Advisory Panel – Executive Group, *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Vol. I, page 19.

In addition, CELA observes that from a legal perspective, it is unclear why the Ontario government has opted to allow transit project assessments to be conducted pursuant to the new (and as yet untested) regulatory exemption, rather than through the recent amendments to the existing (and widely used) municipal Class EA.

In particular, following the release of the above-noted 2005 report of the EA Advisory Panel (and the related report of the Transportation Sector Table), considerable time and resources have been expended in developing and approving the new transit chapter in the MEA Class EA. However, the draft transit regulation was announced just as these Class EA amendments are now being utilized for public transit projects (including some pre-existing individual EAs for transit projects that have been transitioned into the amended Class EA process). In light of this chronology, it appears to CELA that the release of the TPS and draft transit regulation (and the sudden creation of a whole new assessment process) reflects political, rather than legal, considerations.

In any event, CELA takes no position on whether it is preferable to use a new regulatory exemption, or current Class EAs, in order to facilitate public transit projects. Nevertheless, it is our conclusion that in announcing this new initiative, the MOE has offered little or no legal justification for departing from the well-known and well-used Class EA framework.

In reaching this conclusion, CELA is mindful of the fact that even after the new transit regulation takes effect, it remains open to a proponent, in its discretion, to choose to either conduct an individual EA or follow the applicable Class EA, depending upon the environmental significance and/or public controversy associated with their projects. However, we anticipate that proponents will attempt to utilize the new regulatory process wherever feasible. This likelihood is why CELA submits that the proposed assessment process must be made as open, traceable, predictable and accountable as possible, as described below.

PART II – SPECIFIC COMMENTS ON THE TRANSIT PRIORITY STATEMENT

CELA's specific comments and recommendations on the draft TPS are set out below.

(a) Rationale vs. Policy Direction

It is our understanding that the draft TPS is simply intended to serve as a "companion" document to the draft transit regulation. In other words, the TPS has not been promulgated under the authority of any provincial statute, and it therefore does not have any particular legal weight or status. At best, the TPS briefly summarizes Ontario's current initiatives related to public transit, and it sets out the environmental and socio-economic reasons for ensuring that public transit projects are planned and approved in a timely, efficient manner.

Accordingly, the TPS, by and of itself, will not necessarily have any direct influence on the planning or approval processes which may be triggered when critical transit-related decisions are being considered at the local, regional or provincial level.

We are aware that Ontario's *Provincial Policy Statement* ("PPS"), issued under the *Planning Act*, contains a number of general provisions that are intended to facilitate public transit projects (i.e. by requiring compact, transit-supportive development patterns, etc.). However, the PPS is not cross-referenced or adopted by the draft transit regulation. Indeed, the need to more fully integrate the PPS with activities planned under the EA Act has been a long-standing issue that requires immediate provincial attention, as recommended in the 2005 report of the EA Advisory Panel.[2]

Unless and until this integration is achieved, CELA submits that the TPS should be supplemented by a provincial policy pronouncement, issued by the Environment Minister under the EA Act, which proactively promotes or prefers public transit projects over other less desirable forms of transportation (i.e. private automobiles). At a minimum, this pro-transit policy position should be adequately reflected in the TPS, the transit projects regulation, and the forthcoming guidance documentation to be prepared by MOE with stakeholder input.

It could be argued that the EA Act does not currently provide the requisite legal authority for the issuance of a pro-transit policy. However, we would point out that the EA Act does not expressly provide for the issuance of Codes of Practice, and yet the MOE has released three Codes of Practice to date. In any event, if there is insufficient authority under the EA Act for the promulgation of a pro-transit policy by the Minister, then the Act should be amended accordingly.

In addition, this pro-transit policy position should be set out in a "Policy Guideline" issued under section 27.1 of the EA Act. However, on its face, section 27.1 limits the application of such policy guidelines to matters being considered by the Environmental Review Tribunal (ERT), and transit projects are unlikely to even reach the ERT under the current EA regime in Ontario, especially once the transit regulation takes effect. Therefore, consideration should be given by the Ontario government to enacting a housekeeping amendment to section 27.1 to ensure that a pro-transit policy guideline is binding on all proponents, reviewers and decision-makers acting under the EA Act and regulations, not just the ERT.

CELA RECOMMENDATION #4: The Minister of the Environment should:

(a) issue a pro-transit policy statement or guideline under the EA Act; and

(b) take all necessary steps (including legislative amendments) to ensure that all environmental planning decisions made under the EA Act and regulations shall be consistent with the pro-transit policy statement.

<u>(b) Prioritizing Transit Options</u>

Given the limited purpose of the draft TPS, it is not necessary for CELA to offer suggestions for improving the form or content of the document.

[2] *Ibid.*, pages 86 to 88.

However, one of our overarching concerns is that the TPS assumes that all public transit projects are equally benign from an environmental perspective. Similarly, the TPS fails to rank or prioritize transit projects on the basis of energy considerations (i.e. fossil fuel vs. renewable energy), emissions profile, cumulative effects, natural resource implications, or other environmental parameters. These concerns are also true in relation to the draft transit regulation, which makes no attempt to provide substantive direction on the types of public transit projects which should be preferred or pursued by public sector proponents.

Therefore, CELA submits that if the Ontario government acts upon the foregoing recommendation to provide a clearer and more binding pro-transit policy statement or guideline under the EA Act, then this new documentation should entrench a transit "hierarchy" that gives preference to environmentally sustainable modes of public transit. This suggestion was previously made by the 2005 report of the EA Advisory Panel,[3] but has not been acted upon to date.

CELA RECOMMENDATION #5: The Minister of the Environment should take all necessary steps under the EA Act to establish sustainability criteria to assist proponents in siting, designing and implementing public transit projects in a manner which maximizes environmental, energy and societal benefits.

PART III – SPECIFIC COMMENTS ON THE DRAFT REGULATION

CELA's specific comments and recommendations regarding the draft transit regulation are set out below.

As a preliminary observation, CELA strongly advises against calling the new assessment process an "EA process," as some governmental officials deemed it at the April 30, 2008 public information session. As proposed in the draft regulation, the new assessment process does not fully entrench the key components of EA planning (i.e. consideration of "need" or "alternatives to"), presumably because the MOE anticipates that these critical threshold matters will be considered in "pre-planning" activities under other statutes (i.e. official plan review, transportation master plans, etc.), rather than under the EA Act (see below).

Accordingly, the new assessment process is best described as an exercise in impact mitigation, not an EA process. In our view, calling the new assessment regime an "EA process" is not only legally incorrect, but it may also lead to false expectations among proponents that large, significant transit projects (i.e. subway extensions) can now be planned and implemented within the new 6 month deadline prescribed under the regulation.

(a) Definition of "Public Transit"

CELA has several concerns about the proposed definition of "transit project" set out in subsection 1(2) of the draft regulation.

[3] *Ibid.*, Vol. II, pages 20 to 21, "Draft EA Policy Guideline: Transit/Transportation Undertakings".

Subsection 1(2)(a) defines "transit project" as "a facility or service that is used exclusively for the transportation of passengers by bus or rail." CELA generally has no difficulty with the "exclusivity" qualification (see below), but we question why this definition has been deliberately confined to land-based modes of transportation. Given that water-based public transportation services (i.e. ferries) currently exist at the local, regional and provincial level across Ontario, CELA submits that these commuter facilities (or certain aspects thereof) should also be considered as possible candidates for inclusion within the new assessment process.

Indeed, from an environmental perspective, it may make considerable sense to facilitate suitable water-based transit projects through the new assessment process. For example, encouraging appropriate transit-related use of existing navigable waterways may reduce the need for extensive "hard" infrastructure development (i.e. highway expansion, bridge construction, etc.), limit the biophysical or socio-economic impacts, and lessen the significant capital costs associated with land-based modes of transportation.

CELA RECOMMENDATION #6: The MOE and MTO should reconsider whether water-based public transit projects (i.e. municipal or provincial ferry services), or infrastructure ancillary thereto (i.e. docks, terminal buildings, etc.), should be candidates for inclusion within the new assessment process.

More alarmingly, subsection 1(2)(b) of the draft regulation extends the definition of "public transit" to "anything" that is "ancillary", and "used" in relation to, public transit facilities or services. However, this subsection fails to define "ancillary", and further fails to establish any meaningful criteria or indicia to help determine whether a particular development or structure is truly "ancillary" to a proposed public transit project.

In CELA's view, the draft regulation's failure to impose an explicit restriction on what is "ancillary" (or what is not) creates an ambiguous, open-ended loophole that is available to be exploited by proponents.

In particular, we are concerned that proponents may attempt to "back-door" certain non-transit projects as "ancillary" facilities under the new assessment process, or may attempt to undertake "bait-and-switch" tactics (i.e. plan a road-widening project to purportedly accommodate bus service, but then convert that project to another purpose in the future, such as HOV lane or regular lane for private vehicles on the grounds that this will alleviate traffic congestion).

Accordingly, CELA strongly recommends that the draft regulation should specify that "ancillary" means a dedicated facility or infrastructure that is functionally necessary for, and exclusively used by, the public transit project being planned under the new assessment process.

CELA RECOMMENDATION #7: The definition of "transit project" in the draft regulation should be amended to specify that "ancillary" means a dedicated facility or infrastructure that is functionally necessary for, and exclusively used by, the public transit project being planned under the new assessment process.

To address possible future changes in the use or purpose of a transit project planned under the new assessment process (i.e. where a proponent wants to convert a transitway to an HOV lane), consideration should be given to prescribing appropriate safeguards in the regulation (i.e. requirement for the proponent to seek and obtain the consent of the Minister or Director, imposition of suitable terms/conditions, etc.).

We are aware that section 16 of the draft regulation establishes a procedure for the MOE review of certain post-completion changes proposed by a proponent, but it appears to CELA that this review process is largely intended to address situations where the proponent wants to change the particulars of <u>how</u> the transit project is carried, rather than its overall use or original purpose.

CELA RECOMMENDATION #8: The draft regulation should be amended to provide that where, after the filing of a notice of completion, a proponent wants to change the intended use or original purpose of a public transit project planned in accordance with the new assessment process, the proponent must apply for and obtain the consent of the Minister or Director of the MOE's EA and Approvals Branch. If consent is granted, the Minister or Director should be empowered by the regulation to impose such terms and conditions as may be appropriate.

In making the foregoing recommendations, CELA hastens to add that the restricted definition of "ancillary" does not mean that a public transit project can be planned without having regard for facilitating non-motorized (or "human-powered") movement (i.e. walking or cycling).

To the contrary, CELA submits that walkways, bike paths/networks, and similar matters should be considered as "ancillary" facilities that can be planned in conjunction with public transit projects where appropriate. In our view, it would make no sense for these additional facilities to be planned through an entirely different process if they are reasonably related to a public transit project or system.

It should be further noted that the PPS already provides provincial direction regarding the need to enhance walking and cycling opportunities for the purposes of planning healthy, active communities.[4] Accordingly, we see no legal or policy reason why walking/cycling facilities could not themselves be defined and planned as stand-alone "public transit projects" for the purposes of the new assessment process.

CELA RECOMMENDATION #9: In restricting or defining what is "ancillary" to public transit projects, the draft regulation (and accompanying guidance documents) should make it clear that facilities intended to facilitate pedestrian and non-motorized movement may be planned an adjunct to public transit projects, or may be independently planned, under the new assessment process.

[4] PPS, section 1.5(a) provides that "healthy, active communities should be promoted by planning public streets, spaces and facilities to be safe, meet the needs of pedestrians, and facilitate pedestrian and non-motorized movement, including, but not limited to, walking and cycling."

(b) Process and Timing Considerations

Section 6 of the draft regulation sets out the sequential planning, consultation and documentary steps which must be followed if a proponent of a Schedule 1 public transit project intends to take advantage of the new assessment process pursuant to subsection 2(1) of the regulation.

We note that subsection 2(1) provides that as long as the proponent complies with the new assessment process, then the transit project is exempt from Part II of the EA Act. Significantly, Part II of the EA Act contains a general prohibition against the issuance of other permits, approvals or licences for an undertaking unless an EA has been completed and approval to proceed has been granted to the proponent (see subsection 12.2(2) of the EA Act). Similarly, Part II of the EA Act generally prohibits the provision of provincial funding assistance with respect to an undertaking unless an EA has been completed and approval to proceed has been granted to the proponent (see subsection 12.2(4) of the EA Act).

At the April 30, 2008 public information session on the draft regulation, Mr. Rohaly's presentation suggested that until a statement of completion is filed pursuant to section 15 of the regulation, no other provincial instruments can be issued in relation to the public transit project.[5] However, neither section 6 nor section 15 of the draft regulation actually contains such a prohibition. Moreover, by conditionally exempting public transit projects from Part II of the EA Act, the safeguards contained in the general prohibitions under subsections 12.2(2) and (4) of the EA Act also appear to be inapplicable to public transit projects being planned under the new assessment process.

Therefore, under the regulation as drafted, there seems to be no legal constraint on the ability of provincial officials to issue project-related approvals, or to provide loans, grants, subsidies or fiscal guarantees, prior to the completion of the assessment process. In CELA's view, this apparent oversight should be rectified via amendments to section 6 and/or section 15 to indicate that no provincial approvals can be issued, and no provincial funding assistance can be provided, unless and until the proponent files a satisfactory statement of completion.

CELA further submits that to the extent that a proponent may have contravened another environmental statute prior to, during or after the completion of the assessment process, the filing of the statement of completion (or the issuance of the Minister's notice to proceed) should not serve as a "bar" to a prosecution (or other mandatory abatement measures) under these other statutes. Thus, the draft regulation should be amended accordingly (see section 12.3 of the EA Act).

CELA RECOMMENDATION #10: Section 6 and/or section 15 of the draft regulation should be amended to provide that:

(a) until a statement of completion has been filed by the proponent,

[5] MOE, *Proposed Regulation under the EA Act for Public Transit Projects* (Information Session: April 30, 2008), page 11.

(i) no person shall issue a document evidencing that an authorization required at law to proceed with the public transit project has been given; and

(ii) the Crown or a Crown agency shall not give or approve a loan, grant, subsidy or guarantee with respect to the public transit project;

(b) no person shall issue an authorization described above, and no Crown or Crown agency shall provide financial assistance described above, upon terms or conditions which would require a public transit project to be carried out in a manner that is inconsistent with obligations imposed upon the proponent by:

(i) the environmental project report prepared under section 10 of the regulation; or

(ii) the Minister's notice to proceed issued under section 13 of the regulation;

(c) the filing of a statement of completion under section 15, or the issuance of a Minister's notice to proceed under section 13, does not preclude a proceeding for contravention of the *Environmental Protection Act*, the *Ontario Water Resources Act*, or regulations thereunder.

The transit project assessment process summarized in section 6 of the draft regulation appears to be heavily dependent upon certain notices (and other documents) which will be routinely filed by proponents (i.e. notice of commencement, notice of completion of environmental project report, statement of completion, notice of addendum, etc.). However, the draft regulation does not append any prescribed forms, and to date no MOE guidance documents have been released in relation to the form or content of such notices under the regulation.

To ensure that there is some degree of consistency in proponent notices across Ontario, and to ensure that such notices contain appropriate information at a sufficient level of detail, CELA strongly suggests that the MOE should develop some prescribed forms for the notices required under the transit regulation. Additional information regarding the content of notices (and other documents) can be set out in the forthcoming MOE guidance documentation.

CELA RECOMMENDATION #11: The MOE should develop prescribed forms for the various notices required under the transit regulation, and should provide further explanatory information about notice content in the forthcoming guidance documents.

(c) Notice of Commencement

At the April 30, 2008 public information session, Mr. Rohaly's presentation included a schematic overview of the proposed six-month assessment process. According to this overview, it is anticipated (at least by the MOE) that proponents may engage in certain "pre-planning activities" prior to the formal commencement of the new assessment process.[6]

[6] *Ibid.*, page 8.

In particular, these pre-planning activities were described by Mr. Rohaly as potentially including:

- ”preliminary studies to identify, assess and evaluate rationale for, alternatives to transit project”;

- “analysis of existing environmental conditions”;

- “analysis of potential negative impacts and potential mitigation measures of preferred transit project”; and

- “consultation with regulatory agencies, aboriginal communities, adjacent property owners, interested persons”.[7]

It goes without saying that these important environmental planning considerations are essentially identical to those set out in the mandatory content requirements for individual EAs under Part II of the EA Act (see subsection 6.1(2) of the EA Act).

Moreover, given the size, scale, cost and complexity of certain public transit projects (i.e. rapid rail transit within or between urbanized areas), CELA firmly maintains that these are precisely the kinds of threshold questions that should be asked and answered in an open, robust and accountable process, long before a proponent selects a preferred alternative and starts developing project-specific mitigation measures.

However, by conditionally exempting Schedule I public transit projects from Part II of the EA Act, and by providing proponents with a choice of either utilizing the applicable Class EA or following the new assessment process, the MOE cannot guarantee that proponents will address these critical upfront planning matters adequately or at all. If this is, in fact, the public policy objective that underlies this transit initiative, then the draft regulation will likely achieve this result. Indeed, there is nothing in the draft regulation that prevents proponents from issuing a notice of commencement and carrying out the assessment process without conducting any “pre-planning activities” whatsoever.

Having said this, we note that as a practical matter, a prudent proponent will likely wish to undertake some form of “pre-planning” before embarking upon costly, controversial or environmentally significant transit projects. Similarly, we acknowledge that it is certainly open to proponents to consider “need” or “alternatives to” in the transit context during official plan reviews or the development of transportation master plans.

Nevertheless, it must be recalled that these municipal planning activities have been traditionally conducted outside the auspices of the EA Act. Moreover, neither the *Planning Act* nor the *Municipal Act* mandate the systematic evaluation of “need” or “alternatives to” in the manner required under Part II of the EA Act. In short, these other statutory regimes are not EA processes, nor should they be regarded as substantially equivalent to the EA Act.

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[7] *Ibid.*

Therefore, while in some instances the MOE may prefer or expect EA-style "pre-planning" to occur, this largely remains at the proponent's discretion under the draft regulation. At the very least, CELA recommends that the forthcoming MOE guidance documentation should provide clear direction on the types of transit options which may warrant a more thorough or rigorous EA analysis before the new assessment process is triggered by the notice of commencement for a particular project.

In addition, as described below, CELA is recommending that the draft regulation be amended to preserve the Minister's ability to order a proponent to undertake an individual EA in appropriate circumstances to ensure that need and alternatives are properly considered.

CELA RECOMMENDATION #12: The MOE's forthcoming guidance documentation should provide clear direction on when, how, and to what extent EA-style "pre-planning activities" should be undertaken by a proponent prior to the issuance of the notice of commencement under the transit regulation.

Subsection 7(1) of the draft regulation requires the proponent to simply publish the notice of commencement in a local newspaper, and to provide copies to landowners within 30 metres of the proposed project site and to other "interested persons." In our view, these notice requirements are extremely modest (if not entirely unsatisfactory), and should be viewed as the minimum steps for distributing the notice of commencement.

Accordingly, CELA submits that the methods of notice distribution should be expanded in the regulation to include signage, web-posting (i.e. on the proponent's website and/or the MOE's EA Branch website), email listserves, and other means of efficiently delivering actual notice to persons who may be interested in, or potentially affected by, the proposed transit project (including tenants as well as property owners).[8] Not only should these enhanced forms of notice be explained in the MOE guidance documentation, but should be reflected in the regulation itself.

We are also unclear why the MOE has selected 30 metres as the geographic restriction for notice distribution to adjoining landowners. In our experience, the potential off-site impacts of large transit projects (i.e. noise, vibration, visual concerns, etc.) are unlikely to be confined to a 30 metre zone from the transit project location or corridor. At the very least, the regulation should be amended to bring it into conformity with *Planning Act* notice requirements respecting official plans (i.e. 120 metres).[9]

CELA RECOMMENDATION #13: The draft regulation should be amended to prescribe further methods of distributing the notice of commencement (including electronic means and signage), and it should require notice to be given to all landowners/tenants within 120 metres of the proposed transit project.

In addition, CELA finds that the proposed content requirements for the notice of commencement are extremely limited. At a minimum, the draft regulation should be amended to include

[8] See, for example, section 28 of the *Environmental Bill of Rights*.
[9] O.Reg. 543/06, subsection 3(4).

additional relevant information within the notice of commencement, such as: date/time of planned public meetings or open houses; other statutory approvals that may be necessary; description of the lands proposed for the transit project/corridor; current official plan/zoning designations for the lands in question, etc.). Subsection 7(2) of the draft regulation should also be amended to include a residual "basket clause" (i.e. such further information as may be prescribed).

CELA RECOMMENDATION #14: The draft regulation should be amended to expand the content requirements of the notice of commencement.

Section 8 of the draft regulation specifies the types of information that a proponent must make available to the public. To preclude the possibility that a proponent may charge money for copies of the specified studies and reports (or may force interested persons to file FOI requests), CELA submits that the regulation should be amended to expressly require proponents to provide this information forthwith and without charge to any person requesting such information.

CELA RECOMMENDATION #15: The draft regulation should be amended to require proponents to provide copies of requested information forthwith and free of charge.

(d) Consultation Process

Section 9 of the draft regulation imposes a general duty upon proponents to "consult" with "interested persons," including "aboriginal communities." However, subsection 9(2) goes on to provide that the consultation shall be conducted "in the way the proponent considers appropriate."

In CELA's view, this "consultation" process is arguably the most deficient aspect of the draft regulation. The MOE's existing "Code of Practice: Consultation" (June 2007) recognizes that "consultation is essential," but the draft regulation fails to provide sufficient prescriptive detail to ensure that meaningful public/agency consultation will occur under the new assessment process. In fact, subsection 9(1) does not even specify the matters upon which the proponent should be consulting interested persons and aboriginal communities, although we presume that the consultation will focus upon the issues that will be reflected in the environmental project report prepared at or near the end of the assessment process (see below).

Even if it is appropriate to grant public transit projects a conditional exemption under the EA Act, it does not necessarily follow that the nature, scope or extent of the resulting consultation process should be left solely to the discretion of the proponent. In addition, we seriously question whether the Ontario's government's legal and/or fiduciary duty to consult aboriginal communities (and to accommodate aboriginal concerns) can be simply delegated to the absolute discretion of proponents.

We are aware that the MOE's Code of Practice is intended to provide some general guidance to proponents when they are designing and implementing their consultation programs. We further anticipate that the transit project consultation process will be addressed in the forthcoming MOE guidance material. However, it must be noted that neither of these documents are legally binding

or enforceable against proponents, and, based upon our experience, we are greatly concerned that some proponents will attempt to undertake the most perfunctory or unacceptable forms of public consultation.

Accordingly, CELA strongly recommends that the draft regulation must be amended to include further and better regulatory direction to proponents regarding the consultation process. Among other things, the regulation should require the proponent to undertake one or more of the following consultation steps, depending on the environmental or socio-economic significance of the proposed project: public meeting, open house, workshop, focus group, mediation, or any other process to facilitate more meaningful public participation in the consultation process.[10]

Similarly, the draft regulation should be amended to address the resource needs of residents or groups involved in the consultation process.[11] In particular, the regulation should ensure that adequate participant funding is available to eligible parties in appropriate cases. Otherwise, the right of the public to participate in the new assessment regime is illusory at best.

In summary, the draft regulation fails to recognize that while streamlined consultation procedures may be appropriate for relatively minor transit facilities with highly localized potential impacts (if any), more extensive, effective and fair consultation procedures should be required for larger or more complex transit projects, particularly those which may involve environmentally sensitive lands or traverse different jurisdictions.

CELA RECOMMENDATION #16: The draft regulation should be amended to require the proponent to undertake one or more of the following consultation steps, depending on the environmental or socio-economic significance of the proposed project: public meeting, open house, workshop, focus group, mediation, or any other process to facilitate more meaningful public participation in the consultation process. In addition, the regulation should be amended to ensure that proponents provide adequate participant funding to eligible public interest representatives in appropriate cases.

(e) Environmental Project Report

Section 10 of the draft regulation sets out the content requirements for the environment project report ("EPR"). CELA does not object in principle to the proposed use of the EPR mechanism, but we offer the following suggestions and observations intended to improve the EPR documentation.

CELA is fully aware that the new assessment process is intended to be proponent-driven, but if there is going to be meaningful consultation, then CELA submits that there must greater opportunities for upfront public input into the critical planning decisions that will eventually be recorded in the EPR.

For example, subsection 10(2) of the draft regulation states that the EPR should describe the proponent's preferred method for carrying out the transit project, and should also describe other

[10] See, for example, section 24 of the *Environmental Bill of Rights.*
[11] On participant funding generally, see EA Advisory Panel – Executive Group, *supra*, Vol. I, pages 74 to 77.

alternative methods considered (but rejected) by the proponent. However, there appears to be no explicit requirement upon the proponent to consult interested persons on whether a reasonable range of alternative methods has been considered by the proponent.

Similarly, there appears to be no explicit requirement upon the proponent to consult interested persons on the adequacy of the information base upon which the alternative methods are to be evaluated. In addition, there appears to be no explicit requirement on the proponent to consult interested persons on the evaluation criteria to be used to assess or rank the alternative methods (or proposed mitigation measures).

In our view, proponents must be legally obliged under the transit regulation to consult upon these (and other) threshold matters long before final and potentially irreversible decisions are made by the proponent (and recorded in the EPR) regarding its preferred alternative. As a practical matter, this requirement could be satisfied by the circulation of a draft EPR by the proponent, or by the preparation of a pre-EPR workplan or background report(s) by the proponent.

Otherwise, if the proponent is allowed to come into the assessment process *ab initio* with a pre-determined outcome, then the fairness, credibility, and integrity of the assessment process will be highly suspect, to say the least. Indeed, where a proponent is already committed to its pet project before consultation commences under the regulation, then the proponent will be able to unilaterally proceed with the project (without MOE or Cabinet approval) by simply "stonewalling" and resisting public concerns for four months (see our comments below regarding "time outs" and objections). Faced with this kind of scenario, we anticipate that interested persons may be tempted to boycott the assessment process altogether, and may look for other legal or political means to delay or stop the impugned project.

CELA RECOMMENDATION #17: The draft regulation should be amended to ensure that before the EPR is finalized, the proponent shall consult interested persons and aboriginal communities, *inter alia*, in relation to:

(a) the range of alternative methods under consideration;

(b) the adequacy of the information base for the analysis of alternative methods; and

(c) the evaluation criteria upon which the alternative methods will be assessed or ranked.

(f) Notice of "Time Out"

Section 11 of the draft regulation enables a proponent to take a "time out" (i.e. suspend the running of the four month assessment process) in order to take steps which more fully address certain concerns raised by interested persons or aboriginal communities.

Conceptually, this novel "time out" provision offers some intriguing potential for the consensual resolution of issues raised during the assessment process. However, CELA is concerned about

the apparent inflexibility of the "time out" proposal, as currently envisioned by the draft regulation.

For example, subsection 11(1) specifies that the "time out" can only be triggered where the proponent opines that the proposed project may have a "negative impact" on a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest, or on an established or asserted aboriginal or treaty right.

Leaving aside the ambiguous legislative drafting (i.e. does "provincial importance" qualify "cultural heritage value or interest"?), CELA is concerned that none of the grounds justifying a "time out" have been adequately defined in the regulation. In our view, the definition of what is (or is not) caught by these terms should not be left to the subjective whims or vagaries of individual proponents.

At the very least, this critically important terminology should be defined in the regulation itself so that proponents and other parties have a better upfront understanding of when a "time out" may be warranted. For example, environmental matters of provincial interest could be defined via cross-references to the relevant energy or natural heritage provisions of the PPS.

In making this recommendation, CELA does not concede that "time outs" should be expressly limited to matters of provincial significance. To the contrary, CELA submits that since local stakeholders are being encouraged to participate in the new assessment process, then it should be open to the proponent to take advantage of the "time out" provision (perhaps with the concurrence of the Director) in order to more resolve concerns that are local or regional in nature (i.e. protection of locally significant wetland or woodlot).

Not only will non-provincial "time outs" improve the quality and credibility of decision-making under the assessment process, but they may also obviate the need for aggrieved residents to file objections (or pursue other avenues) if their concerns are not satisfactorily addressed by proponents.

CELA RECOMMENDATION #18: The draft regulation should be amended in order to:

(a) more precisely define what constitutes a "negative impact" upon on "a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest, or on an established or asserted aboriginal or treaty right"; and

(b) allow proponents to utilize the "time out" provisions where it is reasonable to do so in order to address stakeholder issues which are local or regional in nature.

(g) Notice of Completion of EPR

After completing consultation steps and preparing the EPR, proponents are required by section 12 of the draft regulation to publish, circulate and file a notice of completion of the EPR.

For the reasons outlined above in relation to the notice of commencement, CELA submits that the manner of publication and service of the notice of completion of the EPR is far too limited and needs to be revised accordingly.

CELA RECOMMENDATION #19: The draft regulation should be amended to prescribe further methods of distributing the notice of completion of the EPR (including electronic means and signage), and it should require notice to be given to all landowners/tenants within 120 metres of the proposed transit project.

We note that subsection 12(1)(c) requires the notice of completion to be filed with the Director of the EA and Approvals Branch. In our view, all regulatory notices or filings by proponents under the regulation should not get "buried" in MOE filing cabinets; instead, in order to facilitate public accessibility and accountability, all regulatory filings received by the Director should be web-posted by the MOE in a centralized on-line registry, which should be searchable by project type, location, and other parameters. The need to upgrade and improve the MOE's extremely limited "EA Activities" internet presence was identified years ago by the EA Advisory Panel,[12] but has not been adequately acted upon to date.

CELA RECOMMENDATION #20: The draft regulation should be amended to require the Director of the EA and Approvals Branch to web-post all regulatory notices or filings submitted by proponents under the new assessment process.

(h) Objection Process

Under section 13 of the draft regulation, interested parties can file with the Minister written "objections" to the proposed transit project, provided such objections are filed within one month of the published notice of completion of the EPR. Upon consideration of the objection, the Minister may, within 35 days, grant notice to proceed with the transit project (with or without conditions), or may order further consideration of the transit project.

However, subsections 13(3) and (4) provide that the Minister can only impose conditions or require further consideration where the Minister opines that the transit project may have a "negative impact" upon on a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest, or on an established or asserted aboriginal or treaty right.

CELA has several concerns in relation to the proposed objection process. First, as described above, section 13 fails to define the matters of provincial significance which may warrant conditions or reconsideration. In our view, the determination of such matters can not be simply left to subjective Ministerial discretion on a case-by-case basis -- a matter is either provincially significant, or it is not. Therefore, to promote the interests of certainty and accountability within the new assessment process, CELA recommends that the regulation must be amended (i.e. in the definition section) to define these important terms with greater specificity.

[12] EA Advisory Panel – Executive Group, *supra*, Vol. I, page 100, Recommendation 22.

CELA RECOMMENDATION #21: For the purposes of section 13, the draft regulation should be amended to more precisely define what constitutes a "negative impact" upon on "a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest", or "on an established or asserted aboriginal or treaty right."

Second, we note that subsection 13(1) merely provides that the Minister "may" (not "shall") issue a notice in relation to an objection. In other words, the determination of a duly filed objection appears to be optional rather than mandatory under the draft regulation. We further note that subsection 15(1)(d) of the draft regulation suggests that a proponent may issue a statement of completion of the assessment process if the Minister has failed or refused to decide an objection within the 35 day window of opportunity.

In our view, these proposed arrangements regarding Ministerial decision-making are unacceptable. In particular, as a matter of fairness and in accordance with the principles of natural justice, CELA submits that the Minister should be under a positive duty to decide, with reasons, each objection that may be received under the new assessment process.

Moreover, while we generally agree with the imposition of a 35 day deadline for the Minister's decision, we do not agree that the proponent should be able to issue a statement of completion unless and until the objection has been decided on its merits. If, for whatever reason, the Minister needs additional time to render the decision, then he or she should be obliged to notify the proponent and objector of this fact, and should establish a new deadline for his/her decision on the objection. Given the Ministerial track record in deciding bump up requests under Class EAs, we are not entirely confident that 35 days provides sufficient time to properly consider an objection. CELA further submits that under no circumstances should a proponent be permitted to file a statement of completion while the Minister's decision on the objection is still pending.

In the event that the draft regulation is not amended to correct this situation, it is quite likely that repeated failures by the Minister to render timely decisions on objections will bring the new assessment process into serious disrepute, and will create considerable uncertainty (and judicial review opportunities) that may result in significant planning and construction delays.

Moreover, given the draft regulation's pressure upon proponents to complete the assessment process within four months (which itself seems to be an unduly ambitious timeline), we anticipate that a sizeable number of objections will be filed where complainants believe their concerns have been ignored, discounted or glossed over in the proponent's rush to meet the regulatory deadline.

CELA RECOMMENDATION #22: Section 13 of the draft regulation should be amended in order to:

(a) require the Minister to make an actual decision, with reasons, on the objection within 35 days;

(b) empower the Minister to extend this timeframe where necessary, upon notice to the proponent and objector(s); and

(c) prohibit the proponent from filing a statement of completion of the assessment process where the Minister's decision on an objection is still pending.

In relation to the Minister's powers regarding objections, we strongly support the creation of new regulatory authority to permit the Minister to issue a notice to proceed, subject to appropriate terms and conditions imposed under subsection 13(1)(c) of the draft regulation. This proposal, however, begs the question of whether the MOE is capable, from an institutional and administrative perspective, to undertake robust post-notice monitoring, investigation and enforcement steps to ensure proponents actually comply with conditions imposed on their notices to proceed.

At a broader level, this same concern exists in relation to the MOE's capability to ensure that proponents actually comply with all aspects of the new assessment process, not just conditions imposed after a successful objection. Indeed, given the relatively low fines available under the EA Act[13] (particularly in comparison to other environmental statutes), CELA questions whether the current Act itself provides sufficient deterrence against proponent non-compliance. Similar concerns were expressed three years ago by the EA Advisory Panel.[14]

However, to our knowledge, the resources available to MOE's EA and Approvals Branch have not been significantly increased in relation to EA-related monitoring, investigation and enforcement. In addition, the EA Act has not been amended to strengthen the tools available for monitoring, investigation and enforcement activity under the EA Act, contrary to recommendations from the EA Advisory Panel.

In CELA's view, if the MOE wants to create a proponent-driven, self-assessment process for public transit projects, then the *quid pro quo* should be the enhancement of the MOE's capacity (and willingness) to ensure proponent compliance with all aspects of this conditional regulatory exemption under the EA Act. As noted by the EA Advisory Panel, the need to facilitate and enhance MOE's supervisory oversight over EA-related matters will require a mix of legislative, regulatory, policy, technical and administrative reforms. Ideally, these reforms should be in place well before the transit regulation takes effect.

CELA RECOMMENDATION #23: Before the transit regulation takes effect, the MOE, at a minimum, should:

(a) update and enhance its EA compliance strategy in relation to the transit regulation and other conditional regulatory exemptions;

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[13] Section 38 of the EA Act prescribes a maximum fine of $10,000 for a first offence, and a maximum fine of $25,000 for a second offence, where a defendant has been convicted for contravening the Act or regulations.

[14] EA Advisory Panel - Executive Group, *supra*, Vol. I, pages 105 to 107, Recommendations 26 to 31. Similar concerns about the MOE's capacity to enforce its legislation were also expressed in a recent special report by the Environmental Commissioner of Ontario.

(b) develop appropriate amendments to the EA Act to bring its investigation and enforcement provisions into line with those found in other environmental statutes administered by the MOE;

(c) ensure adequate training of MOE staff in relation to monitoring, investigation and enforcement under the transit regulation and other conditional regulatory exemptions; and

(d) ensure that notices and documents arising under the transit regulation are integrated within the MOE's internal EA information management system so that such documents are accessible by all MOE regional and district offices.

With respect to the ability of the Minister to require the proponent to "further consider" the proposed transit project pursuant to subsection 13(1)(b), CELA submits that reconsideration does not pose a realistic deterrent to poor planning, inadequate consultation, or deficient documentation under the new assessment process.

At most, a notice to reconsider the project will likely require a revision to the EPR, subject to any directions provided by the Minister under section 14. However, it is reasonable to anticipate that a proponent who did not adequately deal with matters of provincial interest or aboriginal concerns during the first assessment round may be still unable or unwilling to do so properly in the second round.

Therefore, CELA recommends that the list of potential remedies available to the Minister under section 13 should be expanded to include imposing consequences that proponents will generally find undesirable and will strive to avoid. In particular, in response to an objection, the Minister should be empowered under section 13 to issue an order requiring the proponent to follow the applicable Class EA, or requiring the proponent to prepare and submit an individual EA under Part II of the EA Act.

CELA firmly believes that either possibility should be sufficient to persuade proponents to properly discharge their duties and obligations under the new assessment process. At the same time, this expanded power provides the Minister with residual discretion to order an individual EA in circumstances where a more rigorous examination of need and alternatives may be appropriate (i.e. costly, complex, and environmentally significant public transit proposals).

RECOMMENDATION #24: Section 13 of the draft regulation should be amended to expand the powers of the Minister in relation to an objection. In particular, the Minister should be empowered to order the proponent to:

(a) follow the applicable Class EA; or

(b) prepare an individual EA in accordance with Part II of the EA Act.

CELA's foregoing recommendations assume that the Minister will, in fact, serve as the administrative decision-maker who considers objections and issues appropriate notices under

section 13. It appears to us that this arrangement was patterned upon "bump up request" and "elevation request" mechanisms that currently exist within Class EAs and other conditional regulatory exemptions (i.e. O.Reg.116/01 and O.Reg.101/07).

However, as noted by the EA Advisory Panel, these kinds of institutional arrangements (i.e. where the Minister or Director decides the issue in dispute) are objectionable for various reasons (i.e. lack of certainty, transparency, timeliness, etc.). Accordingly, the EA Advisory Panel recommended that these kinds of political or bureaucratic mechanisms should be replaced by the creation of a formal adjudicative process to be administered by the ERT (i.e. written hearings and expedited timelines).[15]

In CELA's view, the creation of an adjudication process before the independent and expert ERT would be particularly appropriate for the determination of objections under the new transit regulation. Upon request by the proponent, interested persons or aboriginal communities, the ERT could also hear and decide summary applications for interim directions during the completion of the EPR or during a "time out" situation.

In our submission, this kind of arrangement is far superior to, and would enjoy more public credibility, than the much-maligned "bump up" and "elevation request" mechanisms that are currently in use under the EA Act. This is particularly true in the transit context, as the Minister may be called upon to determine an objection where a fellow Cabinet Minister is the proponent of the impugned project (i.e. MTO), or where other Ministers are supportive of the project for its perceived fiscal benefits. In such situations, it would be highly preferable to de-politicize the dispute (and avoid perceived conflicts of interest) by taking the matter out of the Minister's hands and allowing the ERT to adjudicate the objection on its merits. This procedure should be used to adjudicate objections filed in relation to the EPR or an addendum to the EPR (see below).

CELA RECOMMENDATION #25: In the alternative, the draft regulation should be amended in order to:

(a) ensure that objections are adjudicated by the ERT (rather than the Minister) in an expedited manner; and

(b) empower the ERT to hear and decide summary applications for interim directions at any time prior to the completion of the assessment process, or in relation to any significant changes to the project that may be subsequently proposed by the proponent.

(i) Statement of Completion

Section 15 of the draft regulation prescribes the circumstances in which the proponent may file a statement indicating that the assessment process has been completed for the public transit project. Thereafter, the proponent is free to commence the construction or installation of facilities for the transit project, and is free to start, stop or alter services as part of the project, provided that all other necessary approvals are in place.

[15] EA Advisory Panel – Executive Group, *supra*, Vol. I, pages 90 to 99, Recommendations 18 and 19,

CELA's main concern about section 15 is its apparent failure to specify a "shelf life" for the proponent's ability to proceed with the project on the basis of the completed EPR. On its face, there is nothing in the draft regulation that would prevent the proponent from completing the assessment process, but then declining to commence the projects for years or even decades.

In CELA's view, allowing a proponent to defer its project in this manner is contrary to the Ontario government's rationale for the new assessment process. If there is truly an urgent need to expedite public transit projects, then it is counterproductive to allow the proponent to indefinitely "sit" on projects that have completed the assessment process.

Accordingly, CELA submits that section 15 should be amended to impose an outside limit for the project commencement date (i.e. 5 years following the statement of completion). If the project has not been started within this timeframe, then a new notice of commencement should be issued and a new assessment process should be completed if the proponent still intends to proceed with the project.

Undertaking a fresh assessment of "old" projects ensures that any material changes in circumstances, or recent technological developments, are taken into account, particularly where the original EPR may be stale-dated or rendered questionable due to the passage of time. In our view, if the proponent has not started the project within five years, or has been unable to secure other statutory approvals or sufficient funding within five years, then it is entirely appropriate to reconsider the project.

CELA RECOMMENDATION #26: Section 15 of the draft regulation should be amended to specify that unless the project is started within 5 years after the statement of completion was filed, then the proponent shall undertake a new assessment to take into account material changes in circumstance or recent technological developments.

(j) Changes to the Project

Section 16 of the draft regulation enables the filing of an "addendum" where the proponent wishes to make a change in the transit project after the statement of completion has been filed.

Given the dynamic nature of planning large infrastructure projects, and given the likelihood of subsequent changes where a transit project is not commenced right away, CELA does not fundamentally object to the creation of an addendum process. However, we do have considerable concern about an addendum process that is left largely to the discretion of the proponent, as appears to be the case under the draft regulation.

For example, the proponent is required by subsection 16(2) to issue a notice of EPR addendum, but only if the proponent itself opines that the change is "significant." However, the draft regulation fails to include any criteria or indicia which delineate the "significance" of the change. In the absence of such guidance, it reasonable to anticipate that proponents will frequently claim the changes are insignificant so as to avoid the requirement to publish and circulate the notice of EPR addendum pursuant to subsection 16(3). Such claims are likely to be buttressed by

suggestions from the proponent that the potential impacts are fully mitigable, thereby resulting in no net environmental impacts and rendering the change insignificant.

Accordingly, CELA recommends that section 16 should be amended to include qualitative or quantitative criteria to define what constitutes a "significant" change to the transit project. Further direction on "significance" may be provided in the forthcoming MOE guidance documentation. As an alternative to using "significance" language, consideration could be given to classifying changes into "major" or "minor" categories, and prescribing a more robust and public process for an addendum dealing with major changes.

CELA RECOMMENDATION #27: Section 16 of the draft regulation should be amended to include criteria which define what constitutes a "significant" change to the transit project.

For the reasons outlined above, CELA submits that the notice of EPR addendum should be circulated to a broader range of interested persons through additional means.

CELA RECOMMENDATION #28: The draft regulation should be amended to prescribe further methods of distributing the notice of EPR addendum (including electronic means and signage), and it should require notice to be given to all landowners/tenants within 120 metres of the proposed transit project.

Similarly, for the reasons stated above, the amendments that CELA is recommending in relation to objections should be applicable, with necessary modifications, to objections filed in relation to an addendum to the EPR.

CELA RECOMMENDATION #29: For the purposes of section 16, the draft regulation should be amended to more precisely define what constitutes a "negative impact" upon on "a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest", or "on an established or asserted aboriginal or treaty right."

CELA RECOMMENDATION #30: Section 16 of the draft regulation should be amended in order to:

(a) require the Minister to make an actual decision, with reasons, on the objection within 35 days;

(b) empower the Minister to extend this timeframe where necessary, upon notice to the proponent and objector(s); and

(c) prohibit the proponent from proceeding with the proposed change to the transit project where the Minister's decision on an objection is still pending.

RECOMMENDATION #31: Section 16 of the draft regulation should be amended to expand the powers of the Minister in relation to an objection. In particular, the Minister should be empowered to order the proponent to:

(a) follow the applicable Class EA; or

(b) prepare an individual EA in accordance with Part II of the EA Act.

(k) Other Matters

There are three additional matters that CELA wishes to raise in relation to the new assessment process.

First, it is self-evident that the new assessment process is untested, and it includes some novel elements not found in existing Class EAs or other conditional regulatory exemptions. In accordance with the principles of adaptive management, CELA submits that the implementation of the transit regulation should be carefully monitored and formally reviewed by the MOE in five years' time to determine whether the new assessment process is working as anticipated, or whether further adjustments are necessary. On this point, it should be noted that precedents for periodic review of laws and regulations already exist within Ontario.[16]

CELA RECOMMENDATION #32: The draft regulation should be amended to include a new provision which requires the MOE to conduct a formal public review of the regulation by 2013 to determine if the regulation should be retained, amended or repealed.

Second, the MOE has provided little public direction to date regarding the relationship between the new assessment process with federal EA procedures which may be applicable under the *Canadian Environmental Assessment Act* ("CEAA"). Given that public transit projects may involve one or more CEAA triggers (i.e. federal funds, lands or permits, or effects upon aboriginal lands or interests), CELA submits that the forthcoming MOE guidance materials should explicitly address opportunities to integrate or coordinate federal and provincial assessment requirements.

CELA RECOMMENDATION #33: The forthcoming MOE guidance documentation should address the relationship between the new assessment process and federal requirements under CEAA, and should explain how the two procedures can be integrated or coordinated where appropriate.

Third, the legal effect of the draft regulation is to grant a conditional EA Act exemption for Schedule I public transit projects. Accordingly, this exemption triggers the "EA exception" found in section 32 of the *Environmental Bill of Rights* ("EBR"). In essence, this provision exempts prescribed instruments from the mandatory public notice/comment requirements under Part II of the EBR where such instruments are necessary to implement undertakings which have been approved or exempted under the EA Act.

In the instant case, given that public transit projects are being conditionally exempted from the EA Act, section 32 of the EBR has the unfortunate (and unintended) consequence that other key environmental approvals (i.e. noise or air approvals under the *Environmental Protection Act*)

[16] See, for example, section 10 of O.Reg.681/94 under the *Environmental Bill of Rights.*

required for transit projects will not be subject to public notice/comment under Part II of the EBR. In our view, section 32 has the undesirable effect of shielding critical project details from meaningful public scrutiny.

Thus, the EA Advisory Panel recommended that section 32 of the EBR should be amended to prevent the frustration of public participation rights on instruments needed to implement EA-related undertakings.[17] Since this important recommendation has not been acted upon to date, it is necessary for CELA to repeat this recommendation at this time.

CELA RECOMMENDATION #34: The Ontario government should amend section 32 of the EBR to ensure that public notice/comment opportunities are available under Part II of the EBR in relation to prescribed instruments needed to implement Schedule I public transit projects which have been conditionally exempted from the EA Act.

PART IV – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA submits that as a class of undertakings, public transit projects generally warrant special treatment under the EA Act for public policy reasons. Whether it is preferable to plan transit projects under existing Class EAs or under the new assessment process remains to be seen, but the above-noted formal review of the transit regulation five years from now should reveal some answers to this key question. In the meantime, CELA recommends that the draft regulation should be amended in relation to the matters outlined above in order to improve the effectiveness, efficiency, and enforceability of the new assessment process.

In particular, CELA makes the following recommendations:

CELA RECOMMENDATION #1: The establishment of the public transit project assessment process must not be used as a precedent for reducing, streamlining or eliminating current statutory or regulatory requirements under the EA Act for other undertakings or classes of undertakings.

CELA RECOMMENDATION #2: Prior to releasing interim guidelines or guidance documents to accompany the public transit projects regulation, the MOE should proactively solicit input from interested stakeholders on the content of such documentation. The proposed guidance documentation should then be posted as a "policy" on the EBR Registry, and should be subject to an appropriate public comment period (i.e. 45 days).

CELA RECOMMENDATION #3: The MOE should immediately develop and consult upon focused, strategic amendments to Part VI of the EA Act in order to enhance the nature and scope of the regulation-making authority available to the Ontario Cabinet.

CELA RECOMMENDATION #4: The Minister of the Environment should:

(a) issue a pro-transit policy statement or guideline under the EA Act; and

[17] EA Advisory Panel – Executive Group, *supra*, Vol.I, pages 89 to 90, Recommendation 17.

(b) take all necessary steps (including legislative amendments) to ensure that all environmental planning decisions made under the EA Act and regulations shall be consistent with the pro-transit policy statement.

CELA RECOMMENDATION #5: The Minister of the Environment should take all necessary steps under the EA Act to establish sustainability criteria to assist proponents in siting, designing and implementing public transit projects in a manner which maximizes environmental, energy and societal benefits.

CELA RECOMMENDATION #6: The MOE and MTO should reconsider whether water-based public transit projects (i.e. municipal or provincial ferry services), or infrastructure ancillary thereto (i.e. docks, terminal buildings, etc.), should be candidates for inclusion within the new assessment process.

CELA RECOMMENDATION #7: The definition of "transit project" in the draft regulation should be amended to specify that "ancillary" means a dedicated facility or infrastructure that is functionally necessary for, and exclusively used by, the public transit project being planned under the new assessment process.

CELA RECOMMENDATION #8: The draft regulation should be amended to provide that where, after the filing of a notice of completion, a proponent wants to change the intended use or original purpose of a public transit project planned in accordance with the new assessment process, the proponent must apply for and obtain the consent of the Minister or Director of the MOE's EA and Approvals Branch. If consent is granted, the Minister or Director should be empowered by the regulation to impose such terms and conditions as may be appropriate.

CELA RECOMMENDATION #9: In restricting or defining what is "ancillary" to public transit projects, the draft regulation (and accompanying guidance documents) should make it clear that facilities intended to facilitate pedestrian and non-motorized movement may be planned an adjunct to public transit projects, or may be independently planned, under the new assessment process.

CELA RECOMMENDATION #10: Section 6 and/or section 15 of the draft regulation should be amended to provide that:

(a) until a statement of completion has been filed by the proponent,

(i) no person shall issue a document evidencing that an authorization required at law to proceed with the public transit project has been given; and

(ii) the Crown or a Crown agency shall not give or approve a loan, grant, subsidy or guarantee with respect to the public transit project;

(b) no person shall issue an authorization described above, and no Crown or Crown agency shall provide financial assistance described above, upon terms or conditions

which would require a public transit project to be carried out in a manner that is inconsistent with obligations imposed upon the proponent by:

(i) the environmental project report prepared under section 10 of the regulation; or

(ii) the Minister's notice to proceed issued under section 13 of the regulation;

(c) the filing of a statement of completion under section 15, or the issuance of a Minister's notice to proceed under section 13, does not preclude a proceeding for contravention of the *Environmental Protection Act*, the *Ontario Water Resources Act*, or regulations thereunder.

CELA RECOMMENDATION #11: The MOE should develop prescribed forms for the various notices required under the transit regulation, and should provide further explanatory information about notice content in the forthcoming guidance documents.

CELA RECOMMENDATION #12: The MOE's forthcoming guidance documentation should provide clear direction on when, how, and to what extent EA-style "pre-planning activities" should be undertaken by a proponent prior to the issuance of the notice of commencement under the transit regulation.

CELA RECOMMENDATION #13: The draft regulation should be amended to prescribe further methods of distributing the notice of commencement (including electronic means and signage), and it should require notice to be given to all landowners/tenants within 120 metres of the proposed transit project.

CELA RECOMMENDATION #14: The draft regulation should be amended to expand the content requirements of the notice of commencement.

CELA RECOMMENDATION #15: The draft regulation should be amended to require proponents to provide copies of requested information forthwith and free of charge.

CELA RECOMMENDATION #16: The draft regulation should be amended to require the proponent to undertake one or more of the following consultation steps, depending on the environmental or socio-economic significance of the proposed project: public meeting, open house, workshop, focus group, mediation, or any other process to facilitate more meaningful public participation in the consultation process. In addition, the regulation should be amended to ensure that proponents provide adequate participant funding to eligible public interest representatives in appropriate cases.

CELA RECOMMENDATION #17: The draft regulation should be amended to ensure that before the EPR is finalized, the proponent shall consult interested persons and aboriginal communities, *inter alia*, in relation to:

(a) the range of alternative methods under consideration;

(b) the adequacy of the information base for the analysis of alternative methods; and

(c) the evaluation criteria upon which the alternative methods will be assessed or ranked.

CELA RECOMMENDATION #18: The draft regulation should be amended in order to:

(a) more precisely define what constitutes a "negative impact" upon on "a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest, or on an established or asserted aboriginal or treaty right"; and

(b) allow proponents to utilize the "time out" provisions where it is reasonable to do so in order to address stakeholder issues which are local or regional in nature.

CELA RECOMMENDATION #19: The draft regulation should be amended to prescribe further methods of distributing the notice of completion of the EPR (including electronic means and signage), and it should require notice to be given to all landowners/tenants within 120 metres of the proposed transit project.

CELA RECOMMENDATION #20: The draft regulation should be amended to require the Director of the EA and Approvals Branch to web-post all regulatory notices or filings submitted by proponents under the new assessment process.

CELA RECOMMENDATION #21: For the purposes of section 13, the draft regulation should be amended to more precisely define what constitutes a "negative impact" upon on "a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest", or "on an established or asserted aboriginal or treaty right."

CELA RECOMMENDATION #22: Section 13 of the draft regulation should be amended in order to:

(a) require the Minister to make an actual decision, with reasons, on the objection within 35 days;

(b) empower the Minister to extend this timeframe where necessary, upon notice to the proponent and objector(s); and

(c) prohibit the proponent from filing a statement of completion of the assessment process where the Minister's decision on an objection is still pending.

CELA RECOMMENDATION #23: Before the transit regulation takes effect, the MOE, at a minimum, should:

(a) update and enhance its EA compliance strategy in relation to the transit regulation and other conditional regulatory exemptions;

(b) develop appropriate amendments to the EA Act to bring its investigation and enforcement provisions into line with those found in other environmental statutes administered by the MOE;

(c) ensure adequate training of MOE staff in relation to monitoring, investigation and enforcement under the transit regulation and other conditional regulatory exemptions; and

(d) ensure that notices and documents arising under the transit regulation are integrated within the MOE's internal EA information management system so that such documents are accessible by all MOE regional and district offices.

RECOMMENDATION #24: Section 13 of the draft regulation should be amended to expand the powers of the Minister in relation to an objection. In particular, the Minister should be empowered to order the proponent to:

(a) follow the applicable Class EA; or

(b) prepare an individual EA in accordance with Part II of the EA Act.

CELA RECOMMENDATION #25: In the alternative, the draft regulation should be amended in order to:

(a) ensure that objections are adjudicated by the ERT (rather than the Minister) in an expedited manner; and

(b) empower the ERT to hear and decide summary applications for interim directions at any time prior to the completion of the assessment process, or in relation to any significant changes to the project that may be subsequently proposed by the proponent.

CELA RECOMMENDATION #26: Section 15 of the draft regulation should be amended to specify that unless the project is started within 5 years after the statement of completion was filed, then the proponent shall undertake a new assessment to take into account material changes in circumstance or recent technological developments.

CELA RECOMMENDATION #27: Section 16 of the draft regulation should be amended to include criteria which define what constitutes a "significant" change to the transit project.

CELA RECOMMENDATION #28: The draft regulation should be amended to prescribe further methods of distributing the notice of EPR addendum (including electronic means and signage), and it should require notice to be given to all landowners/tenants within 120 metres of the proposed transit project.

CELA RECOMMENDATION #29: For the purposes of section 16, the draft regulation should be amended to more precisely define what constitutes a "negative impact" upon on "a matter of provincial importance that relates to the natural environment, or has cultural heritage value or interest", or "on an established or asserted aboriginal or treaty right."

CELA RECOMMENDATION #30: Section 16 of the draft regulation should be amended in order to:

(a) require the Minister to make an actual decision, with reasons, on the objection within 35 days;

(b) empower the Minister to extend this timeframe where necessary, upon notice to the proponent and objector(s); and

(c) prohibit the proponent from proceeding with the proposed change to the transit project where the Minister's decision on an objection is still pending.

RECOMMENDATION #31: Section 16 of the draft regulation should be amended to expand the powers of the Minister in relation to an objection. In particular, the Minister should be empowered to order the proponent to:

(a) follow the applicable Class EA; or

(b) prepare an individual EA in accordance with Part II of the EA Act.

CELA RECOMMENDATION #32: The draft regulation should be amended to include a new provision which requires the MOE to conduct a formal public review of the regulation by 2013 to determine if the regulation should be retained, amended or repealed.

CELA RECOMMENDATION #33: The forthcoming MOE guidance documentation should address the relationship between the new assessment process and federal requirements under CEAA, and should explain how the two procedures can be integrated or coordinated where appropriate.

CELA RECOMMENDATION #34: The Ontario government should amend section 32 of the EBR to ensure that public notice/comment opportunities are available under Part II of the EBR in relation to prescribed instruments needed to implement Schedule I public transit projects which have been conditionally exempted from the EA Act.

We trust that the foregoing recommendations will be taken into account as your respective Ministries finalize the TPS and the EA Act regulation. If requested, we would be pleased to meet with you to further discuss CELA's comments regarding these matters.

Yours truly,

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cc. Gord Miller, Environmental Commissioner of Ontario