SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON SOCIAL DEVELOPMENT REGARDING BILL 76 - *ENVIRONMENTAL ASSESSMENT AND CONSULTATION IMPROVEMENT ACT,* 1996

Publication #291
ISBN# 978-1-77189-435-7

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July 1996

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EXECUTIVE SUMMARY

Contrary to assurances provided by the Minister of Environment and Energy, Bill 76 does not guarantee that full environmental assessments (EA) will still be required, even for waste management facilities or other environmentally significant undertakings. Similarly, Bill 76 does not guarantee early or effective public participation in the EA process. In addition, Bill 76 does not reduce uncertainty or unpredictability within the EA process.

In general, the amendments contained in Bill 76 undermine or negate many of the essential elements of the existing EA process. Moreover, the Bill 76 amendments do not properly reflect or implement the reforms recommended by the Minister's Environmental Assessment Advisory Committee (EAAC). Accordingly, Bill 76 represents an unjustifiable rollback of the current EA Act, and Bill 76 should be either withdrawn or substantially amended to address the following concerns:

HARMONIZATION

Bill 76 contains no guarantees that the essential elements of Ontario's EA Act will be maintained where the Minister makes a "harmonization order" to facilitate joint assessments with other jurisdictions. In fact, the Minister is expressly empowered to vary or dispense with any requirement under the EA Act when making a harmonization order, and can grant wholesale exemptions from the Act under the guise of "harmonization". These exceptional powers, together with Bill 76's failure to define "equivalency" or to require adequate public notice regarding harmonization orders, will likely result in "lowest common denominator" harmonization.

CELA RECOMMENDATION #1: **Section 3.1 of Bill 76 must be deleted and replaced by provisions that:**

- **ensure that the essential elements of the EA Act (i.e. existing section 5(3)) are retained in joint assessments;**
- **define "equivalency" (or provide minimum equivalency criteria), and require the Minister to provide written reasons to support findings that other jurisdictions' EA requirements are "equivalent";**
- **permit the making of regulations that prescribe the details of joint assessments; and**
- **ensure that any proposed regulations, policies, or orders concerning joint assessments are subject to public notice and comment, including (but not limited to) the Environmental Bill of Rights (EBR) Registry and other appropriate means.**

EXEMPTION DECLARATIONS

Bill 76 empowers the Minister to grant wholesale exemptions from the EA Act to any proponent, undertaking or class thereof. However, Bill 76 lacks sufficiently detailed exemption criteria or procedures, and further fails to expressly impose public notice-and-comment requirements respecting proposed exemption "declarations". Bill 76 also fails to impose a duty on the Minister to monitor and report upon compliance with terms and conditions attached to exemption declarations. Similarly, Bill 76 fails to provide the Minister with authority to issue enforceable compliance orders against proponents that contravene terms and conditions attached to exemption declarations.

CELA RECOMMENDATION #2: **Section 3.2 of Bill 76 must be deleted and replaced with provisions that give effect to EAAC's recommendations respecting exemption criteria, procedures, and public input. In particular, these**

provisions should:

- **clearly articulate specific statutory exemption criteria that are focused on environmental significance;**
- **establish clear exemption procedures that, among other things, prescribe content requirements for exemption requests;**
- **require meaningful public consultation on proposed exemption requests through the EBR Registry and other appropriate means;**
- **impose a duty on the Minister to monitor and report upon compliance with terms and conditions attached to exemption orders; and**
- **empower the Minister to issue enforceable compliance orders against proponents that contravene terms and conditions attached to exemption orders.**

TERMS OF REFERENCE

Bill 76 provides for the development and approval of binding "terms of reference" (TOR) that establish the scope and direction of the EA process for particular undertakings. However, Bill 76 fails to ensure that there is meaningful upfront public participation in the development of the TOR. Moreover, the Minister is empowered to approve a TOR that does not meet essential EA requirements that are currently mandatory under the existing EA Act. This has the effect of making essential EA requirements (i.e. "alternatives to" and "alternative methods") optional or negotiable rather than obligatory in every case. Similarly, Bill 76 establishes no time limit on how long the TOR can be negotiated between the proponent and the Ministry, and fails to establish a time limit on the lifespan of an approved TOR. Bill 76 also fails to provide a mechanism for amending or updating an approved TOR, and fails to describe the members or mandate of the "core government team" that is supposed to review the TOR within 21 days of its submission to the Minister for approval. In addition, Bill 76 does not require proponents to pay "participant funding" to eligible parties in order to facilitate public participation in the development of the TOR.

CELA RECOMMENDATION #3: **Sections 6, 6.1, and 6.2(2) of Bill 76 must be deleted and replaced by provisions that:**

- **impose public consultation requirements during the negotiation of TOR prior to the submission of the proposed TOR to the Minister;**
- **ensure that the Minister can only approve a TOR that will produce a full EA which addresses all essential EA requirements (i.e. existing section 5(3));**
- **require the provision of participant funding to facilitate public review and comment on the proposed TOR;**
- **impose a time limit on how long that the TOR negotiation can continue prior to submission of the TOR for approval;**

- **impose a time limit on how long the approved TOR remains in effect;**
- **permit modifications to an approved TOR under certain conditions (i.e. changed circumstances, new technology, new alternatives, new information on environmental impacts, etc.), subject to public notice and comment requirements;**
- **require a governmental review of the TOR by relevant agencies and ministries prior to the Minister's decision to approve or reject the TOR;**
- **require a description of net or residual environmental effects after mitigation measures are applied in section 6.2(3);**
- **require a description of compliance and effects/effectiveness monitoring and reporting in section 6.2(3); and**
- **replace the term "other than" with "in addition to" in section 6.2(3).**

PUBLIC CONSULTATION

Bill 76 fails in several respects to ensure early and effective public participation. The Bill 76 "duty to consult" is only triggered when the proponent is preparing the EA document, not at the TOR stage or post-EA submission stage. Similarly, Bill 76 fails to define "consultation", and fails to define who is an "interested person" for the purposes of consultation. In addition, Bill 76 fails to require proponents to pay "participant funding" or "intervenor funding" to eligible parties to facilitate meaningful public participation in the EA process.

CELA RECOMMENDATION #4: **Section 6.1 must be deleted and replaced by provisions that:**

- **require (and define) meaningful public consultation from the earliest stages of EA planning and throughout the entire EA process;**
- **require clear, timely, and appropriate public notices at all key points of the EA planning process;**
- **ensure free and timely public access to all relevant EA documentation; and**
- **require mandatory participant funding and intervenor funding.**

GOVERNMENT REVIEW

It appears that a 45 day "government review" period will be prescribed under Bill 76 to allow interested agencies and ministries to review and comment upon EA's submitted by proponents. A 45 day government review period is too compressed and will result in rushed or superficial reviews, and a 90 day review period is more realistic for most EA applications. In addition, Bill 76 fails to require the Minister to provide written reasons if he/she decides to reject an EA, and fails to require the Director to provide written reasons to support a finding that the EA is

deficient. Bill 76 also gives the proponent an unreasonable timeframe to decide what, if anything, will be to rectify a deficient EA. Finally, Bill 76 fails to describe the members or mandate of the government review team.

CELA RECOMMENDATION #5: **Section 7 of Bill 76 should be amended to include provisions that:**

- **ensure that the prescribed agency/public review period is not less than 90 days;**
- **require the Minister to reject deficient EA's and to provide written reasons for rejection;**
- **require the Director to provide public written reasons for statements of EA deficiency;**
- **extend the timeframe for proponents to undertake remedial work or to file a statement of intent;**
- **establish a "core" agency review team that is integrated and interdisciplinary in nature; and**
- **describe the duties and responsibilities of agency review team members.**

MEDIATION

Bill 76 fixates upon mediation, and fails to provide for other appropriate forms of alternative dispute resolution (ADR) that are appropriate in the EA context. Mediation and other forms of ADR should be available from the earliest stages of the EA process through to the EA hearing stage, including the Class EA regime. Bill 76 fails to require proponents to pay "participant funding" to mediation (or ADR) parties in order to facilitate meaningful public participation in such initiatives.

CELA RECOMMENDATION #6: **Section 8 of Bill 76 should be amended to include provisions that:**

- **ensure that mediation (and other appropriate ADR) is available at every stage of the EA process, including TOR negotiation, EA hearings, and Class EA's;**
- **require proponents to provide participant funding to facilitate public participation in mediation.**

MINISTER'S DECISION ON EA APPLICATIONS

Bill 76 gives the Minister excessively power powers to defer matters or to refer matters to any tribunal or "entity" (which is undefined under Bill 76). Bill 76 also fails to impose public notice-and-comment requirements regarding deferral or referral, and fails to require the Minister to provide written reasons on the public record where the deferral or referral power has been exercised.

CELA RECOMMENDATION #7: **Sections 11.1 and 11.2 of Bill 76 must be amended to include provisions that:**

- **impose public notice and comment opportunities regarding a proposed deferral or referral;**

- **require written reasons on the record where the Minister has exercised the power to defer or refer a matter; and**

- **limit the referral power by establishing detailed referral criteria, limiting the types of issues that may be deferred, deleting or defining the term "entity", and specifying the list of tribunals that are eligible to receive referred matters.**

EA BOARD HEARINGS

Bill 76 empowers the Minister to deny reasonable hearing requests from the public, even where the proposed undertaking is particularly significant or controversial. However, even if a hearing request is granted, Bill 76 fails to require proponents to pay upfront "intervenor funding" to eligible parties in order to facilitate meaningful public participation in EA hearings. Moreover, Bill 76 empowers the Minister to greatly constrain or limit the scope of the EA hearing by dictating the length of the hearing and by directing what testimony or matters can (or cannot) be heard by the EA Board. Bill 76 also empowers the Minister to issue "policy guidelines" that the EA Board "must consider", but Bill 76 fails to ensure public consultation on these documents. In addition, Bill 76 permits a Board decision to be varied or reversed without meaningful public notice or comment, and further empowers the Minister to "reconsider" and amend or revoke a Board decision without meaningful public notice and comment.

CELA RECOMMENDATION #8: **Sections 9(3) to (5), 9(7), 9(8) 9.1, 11.3 and 27.1 of Bill 76 should be deleted and replaced with provisions that:**

- **prohibit the Minister from refusing a hearing request unless the request is frivolous, vexatious, or made solely for the purposes of delay;**

- **require the Board to have regard for the purpose of the Act, the evidence and arguments presented at the hearing, and the proponent's compliance with section 6.2(2);**

- **ensure that "policy guidelines" are defined and developed with full public consultation, and shall be considered by the proponent, the Minister and the Board;**

- **require public notice and comment opportunities where the Minister proposes to vary or substitute a Board decision or to require a new Board hearing; and**

- **impose time limits, impose public notice and comment requirements, and require written reasons, where the Minister proposes to "reconsider" and amend or revoke a previous EA approval or the conditions attached thereto.**

CLASS EA'S

Bill 76 fails to limit the types of projects or undertakings that may be subject to streamlined EA requirements under the Class EA regime established by Part II.1 of Bill 76. In particular, Bill 76 does not restrict Class EA's to minor projects that are similar in nature and have predictable and mitigable impacts. In addition, Bill 76 permits the development and approval of a Class EA TOR that does not include or address essential EA requirements (i.e. "alternatives to" or "alternative methods") that are currently mandatory under the existing EA Act. Similarly, Bill

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by
Richard D. Lindgren[1]

PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest law group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

Since its inception, CELA has advocated the establishment of strong environmental assessment (EA) legislation to ensure rational, sound, and informed environmental planning. Strong EA legislation integrates environmental considerations with other traditional economic, technical, or policy considerations in the decision-making process, which, in turn, assists in anticipating, avoiding or reducing problems before they arise.

In addition, strong EA legislation, among other things, requires proponents to: (1) describe the problem or opportunity to be addressed; (2) identify and evaluate alternative ways of addressing the problem or opportunity, having regard for the full range of broadly defined environmental impacts; and (3) ensure meaningful public involvement and rigorous agency review throughout the EA process. In this way, the perceived need for, and likely impacts of, environmentally significant projects -- such as landfills, highways, or hydro-electric facilities -- are identified and analyzed in a rigorous and public manner before decisions are made on whether or not the project should proceed.

As described below, the societal and environmental benefits of comprehensive EA planning

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[1] Counsel, Canadian Environmental Law Association. The assistance of Judy Simon, Pam Wheaton, Michelle Swenarchuk, Kathleen Cooper, Lisa Wong, and D'Arcy Nordick during the preparation of this brief is acknowledged and appreciated by the author.

procedures have long been recognized across Canada,[2] and EA methodology was endorsed by the Brundtland Report as an essential tool for ensuring environmental sustainability.[3]

Within Ontario, CELA has been actively involved in the development and application of the province's EA process since the early 1970's. CELA was extensively involved in the enactment of the Environmental Assessment Act (EA Act) in 1975, and CELA helped secure key amendments to the proposed EA Act to ensure wider application of the EAA to the public sector.[4] Since the passage of the EA Act, CELA has participated in numerous EA proceedings, including the first landfill hearing under the Act[5] and the first class EA hearing under the Act.[6] CELA has also been involved in, or commented upon, various governmental initiatives to reform Ontario's EA process, such as the "Environmental Assessment Program Improvement Project" (EAPIP), the EA Task Force Report entitled Toward Improving the EA Program in Ontario (1990), and the public consultation that resulted in Report #47 by the Environmental Assessment Advisory Committee (EAAC) entitled Reforms to the Environmental Assessment Program (1991-92). CELA was also involved in, and commented extensively upon, the efforts by the Sewell Commission regarding the integration of Ontario's EA process with Ontario's land use planning process under the Planning Act.

In light of this extensive EA background and experience, CELA has carefully reviewed the Environmental Assessment and Consultation Improvement Act, 1996 (Bill 76) and has found it to be seriously flawed from both a procedural and substantive perspective. In particular, CELA's main concerns about Bill 76 may be summarized as follows:

1. **Bill 76 does not guarantee that "full environmental assessments" will still be required, even for waste management facilities. To the contrary, Bill 76 contains provisions that:**

   - **empower the Minister to approve EA "terms of reference" and EA**

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[2] See, for example, D. Estrin and J. Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), pp.189-90; R. Gibson and B. Savan, Environmental Assessment in Ontario (CELRF, 1986), pp.414-16.

[3] See Our Common Future (World Commission on Environment and Development, 1987), pp.57-65. In Annexe I of Our Common Future, the WCED Experts Group on Environmental Law proposed two key principles regarding EA: "States shall make or require prior environmental assessments of proposed activities which may significantly affect the environment or use of a natural resource"; and "States shall inform in a timely manner all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings".

[4] See D. Estrin and J. Swaigen, Environment on Trial (Emond Montgomery, 1993), pp.194-95.

[5] Re Regional Municipality of Halton Sanitary Landfill Application (Joint Board, February 24, 1989, File #CH 86-02).

[6] Re Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario (Environmental Assessment Board, April 20, 1994, File #EA 87-02).

applications that do not include or address essential EA requirements that are currently mandatory under section 5(3) of the existing EA Act;

- empower the Minister to make "harmonization" orders that vary or dispense with any requirements under the EA Act; and

- empower the Minister to grant wholesale exemptions from the EA Act to any proponent, undertaking, or class thereof.

2. Bill 76 does not guarantee early or effective public participation in the EA process. To the contrary, Bill 76 contains provisions that:

- do not require upfront public consultation during the development of the critically important EA "terms of reference";

- do not define what constitutes "consultation", nor define who is an "interested person" for the purposes of consultation;

- do not expressly require upfront public consultation on proposed exemption declarations, harmonization orders, or EA policy guidelines or regulations; and

- do not require proponents to provide "participant funding" or "intervenor funding" to facilitate public participation under the EA Act.

3. Bill 76 does not reduce uncertainty or unpredictability within the EA process. To the contrary, Bill 76 contains provisions that:

- confer numerous discretionary powers upon the Minister and the Director without detailed criteria (or public notice requirements) to govern the exercise of such powers;

- confer broad powers upon the Minister to delegate authority to non-Ministry personnel, and to refer any matter to any "entity" for a decision; and

- empower the Minister to deny reasonable EA hearing requests, to scope or narrow the matters to be considered in EA hearings, and to dictate the length of EA hearings.

Accordingly, CELA does not support Bill 76 as drafted, and CELA recommends that Bill 76 should not be enacted unless it is substantially amended to address each of the above-noted concerns.

The purpose of this brief is threefold:

1. To review the benefits and essential components of an effective EA process;

2. To provide a detailed critique of Bill 76; and

3. To provide CELA's proposed amendments to Bill 76.

CELA's specific recommendations and proposed amendments regarding Bill 76 are summarized in Part IV of this brief.

PART II - BENEFITS AND ESSENTIAL ELEMENTS OF EFFECTIVE EA

Ontario's existing EA Act is fundamentally sound, and the current EA process is clearly superior to other processes that merely require project-specific assessment of narrowly defined biophysical impacts.[7] As described below, the current EA process has screened out or rejected numerous environmentally undesirable or unjustifiable undertakings. At the same time, the EA Act has resulted in the approval (with appropriate safeguards) of undertakings that demonstrably contribute to "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management" of Ontario's environment (EA Act, section 2).

In short, because Ontario's current EA process requires a full public examination of purposes and assessment of alternatives, proponents are directed towards finding environmentally preferable solutions to problems or opportunities. For example, in the waste management context, the EA process has fostered greater attention to the 3R's rather than merely encouraging better landfill design. Thus, the EA process helps ensure positive steps towards sustainability, rather than simply mitigating the worst environmental excesses of "business as usual".

The purpose of this Part of CELA's brief is to outline the essential components, and the various benefits, of Ontario's existing EA Act. As described in Part III of this brief, however, the important components and benefits of the existing EA Act are undermined by the provisions of Bill 76, which, among other things, effectively make essential EA requirements (i.e existing section 5(3) requirements under the current EA Act) optional or negotiable rather than mandatory in every case. Accordingly, if Bill 76 is enacted as drafted, there is no guarantee that full EA's will be required, even for environmentally significant undertakings such as landfills, incinerators, and other waste management facilities.

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[7] Such as Part V of Ontario's Environmental Protection Act.

(a) Benefits of Effective EA

In essence, Ontario's existing EA process is an environmental planning procedure that, among other things, is intended to identify and evaluate the impacts that a project (or "undertaking") may have on the environment. The EA process is predictive and preventative in nature since the assessment of environmental effects, and the determination of whether the project should proceed, generally occurs before the project is undertaken. The EA process is intended to be iterative and dynamic, and requirements exist for interested or affected stakeholders to help identify environmental impacts, identify and assess various possible alternatives, or suggest necessary conditions of approval to avoid, minimize, or mitigate environmental effects. Accordingly, the underlying premise of EA is that "environmental problems can be averted if likely environmental consequences are identified and considered before, rather than after, decisions are taken to proceed with undertakings".[8]

For example, as a result of comprehensive and public review of a proponent's EA documentation, the Minister (or the EA Board) may determine that the proposed project will cause significant adverse environmental effects. If so, the project may be rejected, abandoned, re-designed, or approved subject to stringent mitigation measures. This "anticipate and prevent" approach is necessary to avoid undesirable environmental or socio-economic effects that may be extremely costly or impossible to rectify.

Twenty years of experience under Ontario's EA Act have amply demonstrated the various benefits and advantages of an effective EA process. In some cases, for example, the rigours of the EA process have forced proponents to refine, modify, or improve their projects to make them more acceptable and less harmful to the environment. In other cases, proponents have voluntarily withdrawn ill-conceived mega-projects during the EA process, thereby avoiding the considerable environmental, economic, or social impacts associated with such undertakings.[9] Similarly, the EA Act has been used by the EA Board to deny approval to environmentally undesirable undertakings, such as waste disposal facilities proposed in hydrogeologically unsuitable locations.[10] In other cases, the EA Board has invoked the EA Act to approve undertakings

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[8] D. Smith, "Concept of EA and EA Program Structure" (EAPIP, 1989), p.1.

[9] Re Ontario Hydro Demand Supply Plan (Environmental Assessment Board, January 27, 1993, File # EA 90-01). Despite the cost and length of the DSP hearing, the EA process must be regarded as successful and effective by saving countless millions of dollars for Ontario's electrical ratepayers (and avoiding adverse environmental impacts) when the proponent ultimately withdrew its application (which had, among other things, contemplated the construction of additional nuclear generation stations and associated transmission facilities).

[10] Such as the proposed West Burlington landfill site (Re Regional Municipality of Halton Sanitary Landfill Site (Joint Board, February 24, 1989, File # CH 86-02)); and the proposed Steetley Quarry Site (Re Steetley Quarry Products Inc. (1995), 16 C.E.L.R. (N.S.) 161 (Joint Board). Similarly, the Ontario Waste Management Corporation's proposed hazardous waste facility was rejected due to unresolved environmental concerns (Re Ontario Waste Management Corporation Application (Township of West Lincoln) (Joint Board, November 23, 1994, File #CH 87-02).

subject to terms and conditions that protect the environment and conserve resources, such as landfilling conditions that: protect surface water and groundwater; protect and conserve natural heritage; require 3R's activities; impose operational restrictions to prevent nuisance impacts; establish public liaison committees; and impose various monitoring and reporting requirements.[11]

In short, the EA process ensures that informed choices are made about proposed undertakings, and ensures that the biophysical and socio-economic benefits of a proposed undertaking are carefully scrutinized and weighed against the biophysical and socio-economic costs. The EA process also ensures that persons who may be interested in, or affected by, a proposed undertaking have an opportunity to participate in the decision whether the undertaking should proceed, and if so, whether appropriate terms and conditions should be imposed.

(b) Essential Elements of Effective EA

As environmental assessment has evolved at both the federal and provincial levels over the past two decades, a general consensus has emerged in relation to the essential components of an effective EA process.[12] In particular, there are eight key elements of an effective EA process, which are summarized below in order to provide a benchmark or analytical framework for CELA's critique of Bill 76.

1. Mandatory and Independent Process

EA legislation should establish an EA process that is mandatory and subject to review by an independent agency. The EA process must be independent and free from undue political interference or influence. Decision-making under the EA process should be open, accessible, traceable, and culminate in an enforceable decision that is final and binding.

2. Justification of Purpose, Need, and Alternatives

EA legislation must require proponents to justify proposed undertakings by demonstrating three things: (1) that the purpose of the proposed undertaking is legitimate and consistent with the public interest; (2) that the proposed undertaking will meet an environmentally acceptable need; and (3) that the proposed undertaking is the best of the various alternatives for meeting the need. When comparing and contrasting the alternatives, proponents must be required to consider the environmental impacts of: the alternatives to the proposed undertaking; the alternative methods

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[11] Re Expansion of Storrington Landfill Site (Environmental Assessment Board, May 7, 1993, File #EA 91-01).

[12] See Reforming Federal Environmental Assessment (EA Caucus of the Canadian Environmental Network, 1990), and K. Cooper et al., Response of CELA to the Discussion Paper "Toward Improving the EA Program in Ontario" (CELA, 1991), pp.4-7.

of carrying out the proposed undertaking; and the null (or "do nothing") alternative.[13]

3. "All In Unless Exempted Out"

EA legislation should define "environment" broadly to ensure that proponents consider the full range of direct, indirect, and cumulative impacts upon the natural, social, economic, cultural, and built environments. Subject to jurisdictional constraints, the EA process must apply universally to all environmentally significant undertakings, unless the undertakings have been specifically exempted out in an open process using clear criteria. In addition to applying to specific projects, the essential elements of the EA process should apply to environmentally significant governmental policies or programs.

4. Efficiency and Levels of Assessment

The EA process should be timely and efficient. Efficiency can be obtained by various means, including promulgating clear deadlines, facilitating joint provincial and federal EA's, and providing for EA's of classes of undertakings that are similar, small-scale, recur frequently, and pose minor, predictable and mitigable environmental impacts.

5. Criteria to Guide Discretionary Decision-Making

Specific EA criteria should be publicly developed in order to guide the planning, review, and approval of proposed undertakings. Such criteria promote predictability, certainty, and accountability within the EA process.

6. Significant Public Role

EA legislation must ensure meaningful opportunities for public participation throughout the EA process, particularly during the early stages of EA planning where critical and often irrevocable decisions are being made. In particular, EA legislation must entrench public rights to notice and comment on EA documentation, regulations, policies, guidelines, and exemptions.

Public participation opportunities must be accompanied by legislative provisions that require proponents to provide funding (i.e. participant funding or intervenor funding) to eligible persons or groups. Where an EA hearing is required, the hearing process must be conducted in accordance with the principles of fairness and natural justice, including full and timely disclosure of evidence and the examination and cross-examination of witnesses.

7. Implementable and Enforceable Decision

The EA process should culminate in a decision that is capable of being implemented and enforced

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[13] For example, in the landfill context, proponents must be required, among other things, to examine the "alternatives to" (i.e. expanded 3R's programs) as well as "alternative methods" (i.e. alternative sites or designs).

(including any terms and conditions that may be attached to the decision). Significant changes to approved undertakings or conditions of approval must be subject to public notice and comment.

8. Monitoring and Follow-Up Activities

Monitoring and other follow-up activities (i.e. annual reporting, public liaison committees, etc.) should be mandatory components of all EA decisions, including exemption decisions. Monitoring reports (i.e. compliance monitoring and environmental effects/effectiveness monitoring) should be publicly available upon request.

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It is clear that Ontario's existing EA Act embodies many of these essential components. The effect of Bill 76, however, undermines or negates several of these essential components, as described below. Accordingly, if Bill 76 is enacted as drafted, Ontario's EA Act will be transformed from the strongest EA law in Canada (at least with respect to the public sector)[14] to one of the weakest EA laws in the country. Such a retrogressive step is both undesirable and ironic, given that it was the Progressive Conservative government that originally enacted the EAA in 1975.

(c) Progressive Conservative Support for "Full EA"

The passage of Bill 76 would also be inconsistent with statements made by members of the Progressive Conservative party who frequently endorsed the application of EA to environmentally significant undertakings such as landfills and incinerators.[15]

Indeed, the current Premier of Ontario, while in opposition, frequently supported the application of "full EA" to waste management facilities. In June 1991, for example, the current Premier objected to the Hon. Ruth Grier's decision to permit the expansion of the Keele Valley and Britannia Landfills without an environmental assessment that examined other alternatives:

> **Mr. Harris:** Why did the Minister dismiss the Kirkland Lake proposal out of hand, without examining the merits and without permitting a full environmental assessment to proceed on that proposal?

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[14] Other jurisdictions, including the federal government, have processes that arguably do a better job in applying EA to the private sector. Significantly, Bill 76 contains provisions that offer opportunities for public sector proponents in Ontario to avoid all or part of their current EA obligations.

[15] See, for example, the comments made by Mr. Cousens, Mr. Tilson, Mr. Arnott, Mrs. Marland, and Mr. Brandt during the Hansard debates regarding Bill 143 and the GTA landfills.

> ... Subsection 5(3) of the Environmental Assessment Act states:
>
> An environmental assessment submitted to the Minister... shall consist of,
> (a) a description of the purpose of the undertaking;
> (b) a description of and statement of the rationale for,
> (i) the undertaking;
> (ii) the alternative methods of carrying out the undertaking; and
> (iii) the alternatives to the undertaking.
>
> The Environmental Assessment Act states that all sites have to be considered and the best solution is the one that must be selected. How can the Minister rule out sending waste to Kirkland Lake, outside the GTA, when the EA Act stipulates that all alternatives must be explored?[16]

The current Premier made similar comments several months later in the context of Bill 143, which restricted the consideration of alternatives for the GTA landfills:

> **Mr. Harris:** My question is to the Minister of the Environment regarding her commitment to improve the environmental assessment process. Under the existing Environmental Assessment Act, all alternatives must be considered when establishing a waste disposal site. Her proposed legislation, as I understand it, steamrollers over this provision by excluding the Brittania, Keele Valley and Durham sites from this process. In other words, she no longer has to look at the best options for the environment; in fact, she must look only at her options.
>
> I can see how the Minister's proposal will speed up the environmental assessment process. I wonder if she can tell me how this very heavy-handed, dictatorial, "it's my way" actually improves the environmental assessment process from an environmental point of view?
>
> ... Can the Minister tell me why the most effective way of managing the environment in the short-term is to say: "It's my way or the highway. You can no longer consider the best environmental alternative. In fact, you must not take time to find the best answer for the environment. You must do it my way"? Can she tell me how, in the short term, expressly telling people, "Don't look for the best solution", is good for the environment?[17]

In October 1992, the current Premier criticized the NDP government for its alleged failure to live up to election campaign promises in support of full EA's for waste management facilities:

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[16] Hansard (June 27, 1991), p.2399. See also the current Premier's comments in June 1992: "I thought the purpose of an environmental assessment was to pick the best site for the environment. In not considering Kirkland Lake, you're eliminating that as a possibility in favour of the Rouge": Hansard (June 10, 1992), p.1245.

[17] Hansard (October 28, 1991), p.3177.

Mr. Harris: However, let me clearly get on the record what you are not doing and what we object to. You did not live up to your commitment that any new landfill sites would be subject to the fullest kind of environmental assessment. You will not consider all the alternatives. You will not allow to be considered alternatives that may be vastly superior for the environment to those which you have ordered to take place through your Interim Waste Authority...

We've seen this government, this party that ran around the province. I remember in the 1990 campaign, because I travelled this province as well as on behalf of my party, I can recall going to Durham and York Regions. Along the way they said: "Will you promise, as Bob Rae promised, no dump here? Bob Rae promised, Mr. Harris, no dump here. Will you make that promise?" I said: "No, I can't lie to you. I will commit that there will be a full environmental assessment, that all alternatives must be considered"...

Now I'm asking you to live up to my commitment of a full environmental assessment and you won't even live up to that commitment, but now you say: "Dump where we tell you, full environmental assessment or not."

That betrayal of the people of this province... is what is intolerable, is what is insufferable and is what I am speaking against today (emphasis added).[18]

Similar comments were made by the current Premier in November 1993:

As we're dealing with the environment and putting processes in place, the public of this province is indeed, as has been witnessed since 1985 by the Liberals, who circumvented the EA process altogether, and now the NDP, who want to limit the EA process and eliminate options, faith in that process is diminishing at the same time as faith in politicians is diminishing.

I think it's absolutely disgraceful what's happened for the sake of the environment and what's happened for the sake of the integrity of the political process...

The member for Markham has led the fight throughout the whole Vaughan region and as former critic on behalf of our caucus and indeed beyond on behalf of the people of Ontario; the member for Mississauga South, when the Liberals were in office, led the fight against the complete ignoring of the Environmental Assessment Act. It's hard to know which process was worse: forget the EAA and just order dumps wherever you want, or this government that essentially gutted the EA process and eliminated so many options that the net effect was the same.[19]

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[18] Hansard (October 15, 1992), p.2723.

[19] Hansard (November 22, 1993), p.4200.

After winning the 1995 provincial election, the current Premier has continued to endorse full EA, particularly for waste management facilities:

> **Mr. Dalton McGuinty (Ottawa South)**: My question, Premier: Do you still, today, believe that Ontario's dumps ought to be the subject of full and public hearings under the Environmental Assessment Act?
>
> **Hon. Michael D. Harris (Premier):** Yes, I do.... In spite of the fact that we felt the previous government was proceeding in error with their mega-dump proposal, at least they were having full environmental assessment, not trying to short-circuit the process, not going without any full environmental assessment....(emphasis added).[20]

Accordingly, CELA calls upon the Premier to live up to his commitment to "full EA" by ensuring that Bill 76 is amended to delete the Minister's ability to dispense with the essential requirements of the EA Act, as described below.

PART III - DETAILED CRITIQUE OF BILL 76

(a) General

When Bill 76 was introduced for First Reading, the Minister of Environment and Energy stated, among other things, that the Bill was intended to:

- "guarantee" public consultation for all affected parties "right from the earliest stages of the process";
- provide "early and clear direction to all stakeholders"; and
- make the EA process more "timely", "certain", "effective", and "accessible to everyone".[21]

The Minister further commented that:

> A full environmental assessment will still be required, and the key elements of EA are maintained, including the broad definition of environment, the examination of alternatives,

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[20] Hansard (October 23, 1995), pp.375-76.

[21] The Hon. Brenda Elliott, "Statement to the Ontario Legislature on the Environmental Assessment and Consultation Act, 1996" (June 13, 1996).

and the role of the EA Board as an independent decision-maker (emphasis added).[22]

CELA is strongly committed to accessibility, public consultation, full alternatives analysis, and the other EA principles espoused by the Minister of Environment and Energy. However, for the following three reasons, CELA submits that Bill 76 does **not** achieve these important principles:

First, Bill 76 does not guarantee effective early public consultation. For example, Bill 76 does not require public participation during the upfront negotiations between the proponent and the MOEE on the critically important "terms of reference" required under section 6(1) of Bill 76. Similarly, the "duty to consult" imposed upon proponents by section 6.1 of Bill 76 is only triggered during the preparation of EA documentation, not the critical earlier stages of the process. Moreover, Bill 76 fails to provide any definition or direction as to what constitutes meaningful public consultation, nor does the Bill define or describe who constitutes an "interested person" for the purposes of public consultation. It is also unclear whether Bill 76 requires upfront public consultation on proposed exemptions from the EA Act, or on proposed "harmonization" orders. Most alarmingly, the Bill fails to require proponents to provide "participant funding" or "intervenor funding" to ensure that members of the public can actually exercise the few public participation rights granted under Bill 76.

Second, Bill 76 does not result in more certainty or predictability. To the contrary, Bill 76 will likely result in **greater** uncertainty and unpredictability by, among other things, overpoliticizing the EA process through excessive Ministerial and bureaucratic discretion. In fact, there are over 30 separate discretionary powers given to the Minister under Bill 76. More often than not, these discretionary powers are not accompanied by detailed criteria (or public notice requirements) that help structure or limit the exercise of such powers. In addition, Bill 76 permits the Minister to delegate these broad powers to other persons such as the Director, who also enjoys his/her own list of discretionary powers under Bill 76. Bill 76 even permits the delegation of many of these discretionary powers to non-MOEE employees. CELA is unclear as to the rationale or intended purpose of these sweeping delegation powers; however, if the intent is to eventually delegate EA powers and duties to proponent ministries or agencies whose activities require EA approvals,[23] then CELA is fundamentally opposed to this abdication of Ministerial responsibility (and resulting self-regulation by proponents) under the EA Act. A full list of the extensive discretionary powers conferred upon the Minister and/or Director under Bill 76 is found in Appendix I of this brief.

Third, Bill 76 contains various means to avoid full EA's, even for waste management facilities. For example, section 6.2(3) permits the Minister to approve as "exceptions" proposed

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[22] Ibid.

[23] Does this mean, for example, that the Ministry of Transportation would administer the EA Act in respect of highway EA's, or that the Ministry of Natural Resources would administer the EA Act in relation to its programs currently covered by EA requirements? Does it mean that GO Transit would do so for its activities? What would prevent EA Act powers and duties from being delegated to municipalities?

terms of reference that do not meet current section 5(3) requirements [now section 6.2(2)]. Similarly, the Minister is empowered to approve proposed terms of reference for Class EA's that do not meet current section 5(3) requirements. In addition, while making a "harmonization" order, the Minister is empowered to dispense with legal requirements under the Act. Moreover, the Minister is empowered to grant wholesale exemptions from the EA Act for any proponent, undertaking, or class thereof. As long as the Minister has broad powers to dispense with essential EA requirements (such as the requirement to examine "alternatives to" or "alternative methods"), there is no guarantee that full EA's will be required for waste management facilities or any other undertaking subject to the EA Act. In CELA's view, the failure of Bill 76 to guarantee full EA's is the most significant and objectionable aspect of Bill 76. If the Ontario government is truly committed to full EA's, then these exceptional powers must be deleted from Bill 76.

It is CELA's understanding that some MOEE officials have attempted to rationalize Bill 76 by indicating that the Bill merely incorporates the various EA reforms recommended by EAAC in Report #47. While some aspects of Bill 76 bear a conceptual relationship to some EAAC recommendations, the implementation details of Bill 76 depart significantly from the EA reforms recommended by EAAC, as outlined below. Accordingly, in CELA's opinion, it is erroneous (if not misleading) to suggest that Bill 76 simply reflects EAAC's recommended reforms.

CELA's specific concerns and recommendations regarding Bill 76 are outlined below.

(b) Harmonization

Section 3.1 of Bill 76 permits "harmonization" between the Ontario EA process and the EA requirements of other jurisdictions under certain circumstances. In CELA's view, it is desirable to avoid unnecessary overlap or duplication respecting undertakings that are subject to Ontario's EA Act and other federal or provincial EA requirements. This was also the view of EAAC, which made the following recommendation:

> The Act should be amended to allow for joint assessment processes with other jurisdictions, provided that such joint assessments are at least equivalent to the Ontario EA Act requirements. The details of joint processes should be set out in regulation (Recommendation #29, emphasis added).[24]

The intent of this EAAC recommendation was to ensure that section 5(3) planning requirements were adhered by proponents subject to joint assessment. However, section 3.1 of Bill 76 lacks the necessary safeguards recommended by EAAC to ensure that the essential requirements of the EA Act are not scuttled under the guise of "harmonization". For example, section 3.1(b) of Bill 76 purports to limit "harmonization" to jurisdictions whose EA requirements are considered by

[24] EAAC Report #47 (1991-92), p.88.

the Minister to be "equivalent". However, Bill 76 fails to define equivalency for the purposes of section 3.1, nor does Bill 76 contain any detailed criteria to govern the exercise of the Minister's discretionary power to deem other EA requirements as "equivalent". In CELA's view, "equivalency" must be defined in Bill 76 to mean having identical or substantially similar requirements as existing section 5(3) [proposed section 6.2(2) of Bill 76].

More alarmingly, section 3.1(2) goes on to empower the Minister to vary or dispense with the requirements of Ontario's EA Act in order to facilitate joint assessment. Among other things, this means that the Minister can eliminate the requirement for a full EA (i.e. by dispensing with the requirement that the proponent examine socio-economic impacts, "alternatives to", alternative methods, or other EA content requirements prescribed by section 6.2(2) of Bill 76). Similarly, section 3.1(3) empowers the Minister to unilaterally declare that the Ontario EA Act does not apply at all to the proposed undertaking. These features of Bill 76 will undoubtedly lead to "lowest common denominator" harmonization, and they are contrary to EAAC's position that "it is crucial that any joint process ensures application of at least the minimum requirements for all aspects of Ontario's EA process".[25]

In addition, it does not appear that the details of joint review will be set out in regulations under Bill 76, which, again, is contrary to EAAC's recommendation. Similarly, Bill 76 contains no explicit requirement for public notice and comment on these partial or wholescale exemptions from the EA Act in the name of "harmonization". In CELA's opinion, the lack of public notice and comment regarding "harmonization" orders aggravates the above-noted concern about the highly discretionary nature of such orders, and, more importantly, the Minister's ability to subvert or negate the EA Act requirements through "harmonization" orders.

CELA RECOMMENDATION #1: **Section 3.1 of Bill 76 must be deleted and replaced by provisions that:**

- **ensure that the essential elements of the EA Act (i.e. existing section 5(3)) are retained in joint assessments;**
- **define "equivalency" (or provide minimum equivalency criteria), and require the Minister to provide written reasons to support findings that other jurisdictions' EA requirements are "equivalent";**
- **permit the making of regulations that prescribe the details of joint assessments;**

[25] Ibid.

- **ensure that any proposed regulations, policies, or orders concerning joint assessments are subject to public notice and comment, including (but not limited to) the Environmental Bill of Rights (EBR) Registry and other appropriate means.**

(c) Exemption Declarations

Section 3.2 of Bill 76 permits the Minister, with the approval of the Lieutenant Governor in Council or designated Ministers of the Crown, to "declare" that the EA Act, regulations, or other requirements do not apply to specified proponents, undertakings, or classes thereof. This section appears to entrench and expand the Minister's current power under section 29 of the EA Act to exempt proponents or undertakings from the requirements of the EA Act.

In CELA's view, the most fundamental threshold question under Ontario's EA process is whether or not a proponent will be required to prepare and submit the prescribed EA documentation. It should also be noted that a decision to grant an exemption to a proponent effectively strips away the public right to an environmental assessment of the proposed undertaking. While exemptions may be necessary in limited circumstances (i.e. environmentally insignificant projects or clear emergencies), CELA shares EAAC's conclusion that "it is critical that taking away this right only occurs when it is justified".[26] It is therefore crucial that the EA Act contains a clearly defined, open and fair process with explicit criteria for exemption decision-making.

A careful review of the exemption track record under section 29 of the EA Act reveals that numerous exemptions have been granted for highly significant undertakings (i.e. the Darlington nuclear generating station[27]), or for reasons unrelated to the environmental significance of the proposed undertakings (i.e. the total cost of the undertaking, or the identity of the public proponent).[28] Historically, most of these exemptions were granted without any meaningful notice or comment opportunities, particularly with respect to terms and conditions that may be attached to exemptions. In recent years, however, there have been increased efforts by EA Branch to ensure public consultation occurs in relation to particularly significant exemptions, or

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[26] EAAC Report #47 (1991-92), p.166.

[27] This exemption order was subsequently interpreted to cover not only the Darlington NGS but also the later construction of a tritium removal facility at Darlington to service other Hydro NGS's: see Energy Probe v. Ontario (Minister of the Environment) (1988), 2 C.E.L.R. (N.S.) 161 (Ont. Div. Ct.).

[28] For example, municipal undertakings costing less than $3.5 million, and all undertakings by the Ministry of Agriculture and Food, have been exempted from the EA Act regardless of the environmental significance of individual projects falling within these exemptions: see EA Act General Regulation, R.R.O. 1990, Reg.334, sections 5(2) and 6(1).

proposed terms and conditions attached thereto.[29] Nevertheless, even where appropriate terms and conditions have been attached to exemption decisions, there has traditionally been little monitoring activity to ensure compliance with these terms and conditions.

Not surprisingly, then, the issue of EA exemptions has remained one of the most controversial aspects of Ontario's EA process since 1975. In order to prevent the overuse and abuse of the exemption power, EAAC made several recommendations that attempted to circumscribe the exemption power, such as:

- amend the EA Act to include specific exemption criteria (Recommendation #70);
- publicly develop a regulation that establishes more specific criteria for particular types of exemption requests (Recommendation #71);
- publicly review and revise the current exemptions provided in the EA Act General Regulation [now Regulation 334] (Recommendation #72);
- amend the EA Act and publicly develop a regulation to establish content requirements and procedures for the submission of exemption requests, including public notice and comment opportunities (Recommendation #73);
- require a decision, with written reasons, on an exemption request within 120 days of the submission of the request (Recommendation #74);
- amend the EA Act to require all exemptions orders to include conditions requiring compliance monitoring, time limits, or periodic review, and further amend the EA Act to empower the Minister to issue compliance orders to secure compliance with terms and conditions of exemption orders (Recommendation #75);
- amend the EA Act to remove the authority to grant partial exemptions (Recommendation #76);
- amend the EA Act to allow the Minister, without requiring Cabinet approval, to withdraw previously granted exemptions (Recommendation #77); and
- amend the EA Act to require public disclosure of EA Branch's reports on exemption requests, including the analysis of the request and recommendations to the Minister (Recommendation #93).[30]

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[29] Such as public consultation that occurred prior to the issuance of the conditional EA Act exemption for the decommissioning of the former Toronto Refiners & Smelters Ltd. site in the Niagara Neighbourhood in Toronto.

[30] EAAC Report #47 (1991-92), pp.166-83 and p.195.

In contrast to these detailed EAAC recommendations, section 3.2 of Bill 76 simply confers broad discretion to exempt proponents, undertakings, or classes thereof, "where the Minister considers that it is in the public interest to do so having regard to the purpose of this Act and weighing it against the injury, damage or interference that might be caused to any person or property by the application of this Act to the undertaking or class." This terminology (which simply replicates the existing language of section 29 of the EA Act) provides only general guidance to the Minister, and constitutes an inadequate substitute for clear and specific criteria regarding exemption requests.[31]

From time to time, the EA Branch of the MOEE has developed unenforceable guidelines and policies regarding exemption criteria and procedures. However, CELA submits that specific exemption criteria and procedures should be expressed in statutory and/or regulatory form, and further submits that the exemption criteria should focus on the paramount consideration -- the environmental significance of the proposed undertakings covered by the exemption request.

Aside from the lack of specific exemption criteria and procedures under Bill 76, CELA is greatly concerned about Bill 76's failure to expressly require public notice and comment opportunities regarding exemption orders. Contrary to the above-noted EAAC recommendations, there is nothing in section 3.2 of Bill 76 that expressly requires public input respecting proposed exemption orders. In addition, section 3.2(2) of Bill 76 provides that the Regulations Act does not apply to an exemption order, and Bill 76 goes on to make a similar amendment to section 1(6)(c) of the EBR. Given the controversy, complexity, and public interest in exemption orders, CELA submits that Bill 76 must expressly require mandatory and meaningful public notice and comment opportunities in relation to proposed exemption orders.

The need for mandatory public notice and comment in relation to proposed exemption orders is particularly acute with respect to applications for interim expansions of existing landfills. To ensure that adequate landfill capacity exists while proponents proceed with EA planning, the MOEE has frequently granted conditional exemptions for time-limited interim expansions of the landfills. These proposed exemptions are often subject to public consultation, and they usually include conditions requiring environmental protection measures (i.e. leachate control) and procedural safeguards (i.e. public liaison committees, monitoring and reporting, EA submission dates, etc.) often requested by the public. This common sense approach results in both better crafted exemption orders and shorter, focused and less expensive public hearings on the interim expansion application under Part V of the Environmental Protection Act.

Accordingly, Bill 76's failure to guarantee public consultation on exemption orders is inconsistent with the EA Branch's recent practices, contrary to the relevant EAAC recommendations, and contrary to the existing public expectation that meaningful consultation will occur in relation to exemptions. It is also contrary to the Minister's professed commitment to public consultation at the earliest stages of the EA process.

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[31] Ibid., p.166-67.

CELA RECOMMENDATION #2: **Section 3.2 of Bill 76 must be deleted and replaced with provisions that give effect to EAAC's recommendations respecting exemption criteria, procedures, and public input. In particular, these provisions should:**

- **clearly articulate specific statutory exemption criteria that are focused on environmental significance;**
- **establish clear exemption procedures that, among other things, prescribe content requirements for exemption requests;**
- **require meaningful public consultation on proposed exemption requests through the EBR Registry and other appropriate means;**
- **impose a duty on the Minister to monitor and report upon compliance with terms and conditions attached to exemption orders; and**
- **empower the Minister to issue enforceable compliance orders against proponents that contravene terms and conditions attached to exemption orders.**

(d) Terms of Reference and EA Content Requirements

Section 6 of Bill 76 provides for the development and approval of binding "terms of reference" (TOR) that govern the preparation of the EA documentation for undertakings subject to the EA Act. Conceptually, the TOR proposal under Bill 76 appears to be analogous to the "Assessment Design Document" (ADD) previously recommended by the EA Task Force Report,[32] and the "Environmental Assessment Proposal" (EAP) recommended by EAAC.[33] In each case, the underlying premise was that section 5(3) requirements are mandatory and binding on proponents, and this upfront documentation would describe the framework or process for meeting all section 5(3) requirements. In other words, the upfront documentation was intended to show how the

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[32] Toward Improving the EA Program (EA Task Force, 1990).

[33] EAAC Report #47 (1991-92), pp.24-29.

proponent would comply with (not evade) section 5(3) requirements.

In particular, EAAC recommended that the EA Act be amended as follows:

- the proponent prepares an EAP that describes, among other things, purpose and rationale; study area; alternatives; and the proposed EA planning process, including public consultation plans;

- detailed EAP content requirements and procedural obligations (i.e. notice) are prescribed in a regulation under the EA Act;

- the proponent submits the proposed EAP to the EA agency, provides public and agency notice, and distributes the EAP for a review and comment period of 45 days;

- if any person or agency requests a review of the EAP by the EA Board, then the Minister must refer the matter to the EA Board, subject to certain exceptions; and

- after Ministerial or EA Board review of the EAP, the proponent proceeds with EA planning on the basis of the EAP with a view to identifying the preferred alternative, but the proponent may diverge from the EAP if necessary and with written reasons (Recommendation #1, para.2).[34]

Regardless of whether the document is labelled as TOR, ADD, or EAP, CELA supports the requirement that proponents prepare formal documentation at the outset of the EA process in order to provide early direction on the proposed planning process. However, the TOR proposal under Bill 76 is seriously flawed and omits several key safeguards that are necessary to ensure that existing section 5(3) requirements will be met by proponents. Accordingly, the TOR proposal is unsupportable in its present form because it provides no guarantee that proponents will have to undertake a full EA that satisfies section 5(3) requirements.

CELA's concerns with the TOR proposal are largely based on two fundamental problems: (1) the lack of meaningful public consultation on the TOR proposed by proponents; and (2) the ability of the Minister to approve a TOR that does not meet essential EA requirements currently described in section 5(3) of the EA Act. This second problem is particularly objectionable since it has the effect of making the essential requirements of full EA (i.e. existing section 5(3) of the EA Act) optional or negotiable rather than mandatory in every case. This unjustifiable change to the core features of the EA Act is arguably the most serious flaw within Bill 76, and signals a virtual "gutting" of the EA process in Ontario. In addition to these fundamental problems, CELA has several practical and interpretive concerns regarding the timing, development and approval of the TOR, which are described below.

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[34] Ibid., pp.43-46.

1. Need for Public Consultation on the TOR

With respect to public consultation on the TOR, there is nothing in section 6 that requires a proponent to provide public notice or comment opportunities on the TOR prior to Ministerial approval. CELA notes that section 6.1 imposes a general obligation on proponents to undertake public consultation. However, this obligation is only triggered when the proponent is preparing the EA document itself, not the TOR. Given the fundamental importance and apparently binding nature of the TOR, CELA submits that Bill 76 must require meaningful public consultation on the proposed TOR before it is submitted or approved by the Minister.

CELA also notes that the explanatory material released by the MOEE in conjunction with Bill 76 appears to contemplate the posting of proposed TOR on the EBR Registry for 28 days. Given that the EBR prescribes a minimum comment period of at least 30 days, CELA is unclear why the drafters of Bill 76 selected a comment period that contravenes the statutory requirements of the EBR. In any event, even 30 days is far too short for public comment purposes, and CELA submits that the public comment period on the TOR should be at least 45 to 90 days.

It should also be recalled that the EBR itself stipulates that the EBR Registry is not intended to be the sole means of providing public notice on particularly significant proposals. Accordingly, CELA submits that other appropriate means of public consultation (i.e. open houses, public meetings, workshops, seminars, focus groups, etc.) should also be mandatory. In addition, CELA submits that the existence of the EBR Registry must not be used as a pretext for terminating other traditional means of providing notice (i.e. newspaper ads, mail outs, media outlets, etc.), particularly to persons within the proposed study area who do not enjoy ready access to a computer and modem. Indeed, it is somewhat ironic that the MOEE may now be relying exclusively upon perfunctory EBR Registry notices, despite the fact that for the past decade the EA Branch has constantly exhorted proponents to enhance and expand their public consultation efforts.

The preceding comments regarding the EBR are premised on the assumption that the drafters of Bill 76 actually meant for the EBR to apply to the proposed TOR. However, it is far from clear that the EBR legally requires the posting of the proposed TOR on the Registry. CELA is unaware of any provisions in Bill 76 that amends the EBR or the underlying regulations (i.e. O.Reg. 681/94) so as to prescribe and classify the TOR as a Class I, II, or III "instrument" for the purposes of Part II of the EBR. Similarly, the TOR does not appear to fit within the EBR definitions of "Act", "regulation", or "policy", particularly since the TOR is prepared and submitted by proponents, not the MOEE. Moreover, sections 30 and 32 of the EBR (which provide for exceptions to EBR notice and comment requirements) may be used by proponents who balk at posting EBR notices respecting the TOR.

Rather than rely upon limited EBR Registry notices, Bill 76 must expressly require mandatory public and agency consultation during the preparation of the proposed TOR, and prior to the submission of the proposed TOR to the Director or Minister. Such a requirement would be

analogous to (and ultimately enhance) the pre-submission consultation (PSC) frequently espoused by EA Branch and articulated in provincial EA policy for numerous years. Once the proposed TOR has been submitted for government review, then it may be appropriate to use the EBR Registry to consult a wider range of persons (i.e. outside the proposed study area), provided that O.Reg. 681/94 is amended to make it abundantly clear that the TOR is an "instrument" for the purposes of the EBR.

2. Using the TOR to Restrict or Eliminate EA Content Requirements

Section 6(2)(c) and Section 6.2(3) of Bill 76 provide the Minister with virtually unfettered discretion to approve a TOR, including a TOR that does not meet current section 5(3) requirements [proposed section 6.2(2)]. Before approving a TOR, the Minister is only required to be "satisfied" that an EA prepared in accordance with the TOR "will be consistent with the purpose of this Act and with the public interest". These provisions are so vague and general so as to provide no meaningful guidance at all, and they will undoubtedly result in greater, not less, uncertainty, unpredictability and inconsistency within Ontario's EA process. In CELA's view, these provisions must be re-worded to ensure that the Minister can only approve a TOR that will produce a "full EA" which addresses all existing section 5(3) requirements.

If these Bill 76 provisions remain intact, then the Minister, in his/her absolute discretion, can narrow or eliminate current legal requirements upon proponents to examine "alternatives to" or "alternatives methods", and to examine the full range of ecological, socio-economic or cultural impacts of proposed undertakings. In the landfill context, this means that municipalities or private waste companies could be directed by the Minister not to identify or examine alternative sites (i.e. sites that may be safer or more suitable than the preferred site), or not to identify or examine "alternatives to" (i.e. enhancing 3R's programs and infrastructure). Such an approach would mark the end of comprehensive environmental planning required under the EA Act, and is inconsistent with government commitments to "full EA's" for waste management facilities.

3. Timing, Development and Approval of the TOR

In addition to the fundamental concerns described above in relation to the TOR proposal, CELA has other practical or interpretive concerns about the TOR. First, Bill 76 imposes no time limits on how long the Director and the proponent can secretly negotiate the TOR before it gets submitted to the Minister (and possibly posted on the EBR Registry). This seems to be inconsistent with the MOEE's professed commitment to "timeliness" and establishing clear deadlines under the EA Act. In CELA's view, Bill 76 should place an outside limit on how long the TOR negotiation can last once initiated by the proponent (i.e. no more than six months). Indeed, given the fact that the TOR negotiation and the subsequent EA preparation (both of which lack prescribed deadlines under Bill 76) will, in many cases, still require many months (if

not years) to complete, it is quite misleading for the MOEE's Bill 76 explanatory materials to suggest that EA decisions will now take less than one year under Bill 76.

Second, the negotiation of TOR's will likely involve counsel, consultants, and professional representatives retained by proponents (who generally enjoy greater resources than individuals or public interest groups). As described below, this reality underscores the need to ensure that participant funding is provided at the earliest possible stages in order to facilitate public participation in the development of the critically important TOR. Indeed, EAAC made a specific recommendation that proponents be encouraged to provide funding for the public during planning and consultation on TOR documentation; however, Bill 76 fails to incorporate this recommendation.[35]

Third, Bill 76 fails to impose a time limit how long an approved TOR can remain in effect without being acted upon by proponents. Without an expiry date (or "shelf life"), a TOR could be approved in 1996, but the proponent may not prepare, finalize and submit an EA until the year 2000 or beyond. By this time, the perceived need for the undertaking could be changed, or the undertaking could involve technology that has become outdated and could result in unnecessary environmental harm. In CELA's view, Bill 76 must impose a clear time limit on how long that an approved TOR can remain in force before it expires or must be re-submitted for approval (i.e. 2 years). This would ensure that changed circumstances, new technology, new alternatives, or new information about environmental impacts, can be properly incorporated into the EA planning process.

Fourth, Bill 76 fails to provide the Minister with the power to permit modifications to an approved TOR in order to take into account new circumstances, new technology, new alternatives, or new information about environmental impacts brought forward by persons participating in the EA planning process. The TOR should not be cast in stone once approved, and the TOR should not be absolutely binding on all subsequent EA planning and decisions. This is particularly true since not all members of the affected public may be involved (or even known) at the time that the TOR is negotiated, submitted and approved. Thus, CELA submits that Bill 76 must provide some flexibility to modify an approved TOR where necessary and with appropriate public notice and comment requirements. Consideration should be given to delegating the issue of approving TOR modifications to the EA Board. Permitting TOR amendments, in CELA's view, would be entirely consistent with the iterative and dynamic nature of EA planning, and is consistent with EAAC's comments on the need to avoid rigidity or inflexibility in EA planning.[36]

Finally, Bill 76 fails to identify or describe the members of the "core government team" that is supposed to review (within 21 days) the TOR once submitted to the Minister. Indeed, Bill 76 does not appear to expressly require a review of the TOR once submitted. CELA submits that this drafting oversight must be corrected to ensure that a review of the TOR is conducted by

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[35] EAAC Report #47 (1991-92), p.75, Recommendation #19.

[36] EAAC Report #47 (1991-92), p.27.

representatives of the agencies and ministries interested in the proposed undertaking.

CELA further submits that the list of essential EA requirements in section 6.2(2) should be expanded slightly to require: (1) a description of the net or residual impacts that are expected to remain after the actions in section 6.2(2)(c)(iii) are carried out; (2) a monitoring program providing for the submission of reports to the Director (and available to the public) on compliance and effects/effectiveness monitoring undertaken by the proponent 30 days after completion of construction, after the first and fifth years of operations, and upon closure. In section 6.2(3), the term "in addition to" should replace the term "other than".

CELA RECOMMENDATION #3: **Sections 6, 6.1, and 6.2(2) of Bill 76 must be deleted and replaced by provisions that:**

- **impose public consultation requirements during the negotiation of TOR prior to the submission of the proposed TOR to the Minister;**
- **ensure that the Minister can only approve a TOR that will produce a full EA which addresses all essential EA requirements (i.e. existing section 5(3));**
- **require the provision of participant funding to facilitate public review and comment on the proposed TOR;**
- **impose a time limit on how long that the TOR negotiation can continue prior to submission of the TOR for approval;**
- **impose a time limit on how long the approved TOR remains in effect;**
- **permit modifications to an approved TOR under certain conditions (i.e. changed circumstances, new technology, new alternatives, new information on environmental impacts, etc.), subject to public notice and comment requirements;**
- **require a governmental review of the TOR by relevant agencies and ministries prior to the Minister's decision to approve or reject the TOR;**

- **require a description of net or residual environmental effects after mitigation measures are applied in section 6.2(3);**

- **require a description of compliance and effects/effectiveness monitoring and reporting in section 6.2(3); and**

- **replace the term "other than" with "in addition to" in section 6.2(3).**

(e) Public Consultation

Section 6.1 of Bill 76 provides that when preparing its EA, the proponent "shall consult about the undertaking with such persons as may be interested". In CELA's view, there can be little doubt that public consultation should be mandatory under the EA Act. The past two decades of EA experience in Ontario have amply demonstrated the need for, and value of, meaningful public participation throughout all stages of EA planning. The purpose, principles, and benefits of public participation in EA planning have been articulated in several provincial EA policies and guidelines over the years,[37] and need not be repeated here.

On the issue of public consultation, EAAC made several recommendations to amend the EA Act in numerous areas, such as:

- require public consultation during planning;

- require clear and appropriate notification to the public, at specified points in the process;

- ensure greater public accessibility to relevant documents;

- provide for public notice of the preferred alternative during the planning and consultation;

- require opportunities for the public to review the EA document as soon as it is submitted to the government; and

- require mandatory intervenor funding for hearings under the Act; and

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[37] See, for example, Guidelines on Pre-Submission Consultation in the EA Process (MOEE, 1987).

- require mandatory participant funding throughout the EA process where appropriate.[38]

Compared to EAAC's numerous recommendations regarding public consultation, the single-sentence endorsement of public consultation in section 6.1 of Bill 76 is woefully inadequate. This is particularly true since this "duty to consult" only appears to be operative during the preparation of the EA, rather than at the TOR stage or post-submission stage. It is also curious that the proponent is only obliged by section 6.1 to consult "about the undertaking", rather than alternatives, environmental impacts, or mitigation. In CELA's view, the limited scope of this duty to consult is unacceptable if the Minister is seriously committed to ensuring and enhancing public access within the EA process.

CELA acknowledges that section 6.1 should not be read in isolation from other sections of Bill 76 which require public notices or which confer public rights to inspect the proponent's EA and the government review. For the most part, however, these provisions appear to do little more than duplicate current notice and inspection requirements under the existing EA Act.[39] Moreover, section 6.1 is deficient since it fails to define "public consultation", which, in CELA's submission, should be specifically defined in Bill 76 (i.e. methods or programs undertaken to elicit and coordinate input from persons interested in, or affected by, the proponent's undertaking, such as advisory committees, working groups, open houses, meetings, workshops, seminars, or any other process that would facilitate more informed public participation in the EA planning process). The objective here is to ensure that the proponent demonstrates that public concerns have been carefully listened to and have been incorporated within the EA planning process.

Similarly, section 6.1 fails to define "interest" for the purposes of Bill 76. CELA remains concerned that nothing in section 6.1 would prevent a proponent (or EA Branch) from narrowly interpreting "interested person" to mean only those persons with a direct personal, pecuniary, or proprietary interest in the proposed undertaking. Accordingly, CELA recommends that section 6.1 be amended to ensure that persons, groups, agencies or Ministries representing the broader public or community interest (i.e. local, regional or provincial) are also consulted by proponents.

Of course, public participation rights are meaningless without adequate resources or funding with which to exercise those rights. Contrary to the above-noted EAAC recommendations, Bill 76 fails to make participant funding or intervenor funding mandatory under the EA Act. In CELA's opinion, this omission is one of the most objectionable aspects of Bill 76, particularly since the current government recently decided to let the Intervenor Funding Project Act (IFPA) expire on April 1, 1996. The government's deliberate refusal to renew or extend the IFPA, together with Bill 76's failure to require participant or intervenor funding, casts serious doubt on the Minister's professed commitment to entrenching and enhancing public participation rights under the EA Act.

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[38] EAAC Report #47 (1991-92), pp.22-24 and p.75, Recommendations #20, 21, and 22.

[39] See, for example, existing sections 7, 9, 10, and 11 of the EA Act.

The value, utility, and societal benefits of participant and intervenor funding have been fully documented by EAAC,[40] various studies and reports,[41] and the independent IFPA review which was commissioned by the Ontario government, and which recommended the continuation of Ontario's intervenor funding program.[42] Thus, CELA recommends that Bill 76 must be amended to include participant and intervenor funding provisions; otherwise, public participation rights under Bill 76 are illusory at best for most Ontario residents and non-governmental organizations.

CELA RECOMMENDATION #4: **Section 6.1 must be deleted and replaced by provisions that:**

- **require (and define) meaningful public consultation from the earliest stages of EA planning and throughout the entire EA process;**
- **require clear, timely, and appropriate public notices at all key points of the EA planning process;**
- **ensure free and timely public access to all relevant EA documentation; and**
- **require mandatory participant funding and intervenor funding.**

(f) Government Review

Sections 7, 7.1, and 7.2 of Bill 76 require the MOEE to conduct a review of the EA once it submitted by the proponent. Several of these provisions appear to be based, at least in part, on

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[40] EAAC Report #47 (1991-92), pp.72-75.

[41] See, for example, Canadian Environmental Defence Fund, Intervenor Funding and the Intervenor Funding Project Act in Ontario (CEDF, 1991); R. Anand and I. Scott, "Financing Public Participation in Environmental Decision-Making" (1982), 60 Can. Bar Rev. 81; and D. Curran, Participant Funding - A Discussion Paper (CIELAP, 1991).

[42] W.A. Bogart and M. Valiante, Access and Impact - An Evaluation of the Intervenor Funding Project Act (1992).

EAAC recommendations on the need for an open, timely and comprehensive review process.[43] While Bill 76 establishes no specific time limit for the completion of the public/agency review, CELA notes that the Bill 76 explanatory materials indicate that the review period is only 45 days. In CELA's experience, 45 days is exceedingly unrealistic, especially for particularly significant or controversial undertakings or Class EA's. Recent staff reductions and budget cuts at the MOEE and other agencies and Ministries cast further doubt on the ability to complete a meaningful government review within 45 days. Prescribing an unrealistic 45 day timeframe will inevitably result in rushed or superficial government review documents of dubious value or usefulness. In CELA's view, a more realistic timeframe is 90 days for most routine applications.

CELA supports the new power in section 7(6) of Bill 76 that permits the Minister to reject a deficient EA. Rejection, however, should be mandatory rather than optional (i.e. "shall" should replace "may" in section 7(6)), and the Minister should be able to reject an EA irrespective of the Director's opinion. The Minister, however, should be obliged to provide written reasons on the public record if the EA is rejected. Similarly, under section 7(4) the Director should be required to provide written reasons in support of a statement of deficiency. In CELA's view, it is unreasonable to expect a proponent to remedy substantive EA deficiencies within 7 days, as is contemplated by subsections 7(5) and (6) of Bill 76). Either the time for remedial work should be extended (i.e. 30 to 60 days), or the proponent should be required to file a statement of intent describing what it proposes to do (i.e. remedy the deficiency, withdraw the EA, etc.) within 14 days of receiving a statement of deficiency.

It would also be desirable to amend Bill 76 to expressly require the establishment of an integrated and interdisciplinary review team of relevant agencies and ministries to conduct the actual review. Review team responsibilities should be generally described in Bill 76 and elaborated upon in regulations (i.e. providing written comments to the Director, on the public record, assessing the EA's compliance with section 6.2(2) requirements from their agency's perspective).

CELA RECOMMENDATION #5: **Section 7 of Bill 76 should be amended to include provisions that:**

- **ensure that the prescribed agency/public review period is not less than 90 days;**
- **require the Minister to reject deficient EA's and to provide written reasons for rejection;**
- **require the Director to provide public written reasons for statements of EA deficiency;**

[43] EAAC Report #47 (1991-92), pp.32-36.

- **extend the timeframe for proponents to undertake remedial work or to file a statement of intent;**

- **establish a "core" agency review team that is integrated and interdisciplinary in nature; and**

- **describe the duties and responsibilities of agency review team members.**

(g) Mediation

Section 8 of Bill 76 permits the Minister to appoint a mediator to resolve issues in dispute regarding the undertaking. Under the right circumstances,[44] CELA agrees that mediation is a potentially useful tool that could resolve some limited or technical EA planning disputes. At the same time, however, it must be noted that mediation is only one of several alternative dispute resolution (ADR) methods that can be used in the environmental context.[45] In addition, Bill 76's specific reference to mediation rather than to ADR generally is far narrower than the approach proposed by EAAC, which had recommended the establishment of an Office of Environmental Dispute Resolution to facilitate ADR in environmental disputes.[46]

In any event, CELA's principal concern with section 8 is that it generally seems to contemplate the appointment of mediators at a very late stage in the EA planning process (i.e. after the EA has been submitted and the Minister's decision is pending). CELA notes that mediation also appears to be an option prior to the Minister's decision to approve or reject the TOR: see section 6(4) of Bill 76. In CELA's view, mediation should be available at every stage of the EA planning process, commencing from the TOR negotiation stage right through to the EA hearing stage. Mediation should also be made available within the Class EA regime under Bill 76.

CELA further submits that proponents should be required to pay the costs and expenses of the mediators, but must also be required to provide participant funding to permit individuals or non-governmental organizations to participate effectively in mediation sessions. This is particularly true where the issues are complex and the participants may require technical or legal advice in

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[44] Such as disputes that involve small numbers of parties; that involve issues which are technical rather than policy-based; or that essentially focus on terms and conditions rather than whether or not the undertaking should be approved.

[45] Other ADR tools include conciliation, facilitation, arbitration, and other negotiated settlement models: see H.I. Rounthwaite, "Alternative Dispute Resolution in Environmental Law: Uses, Limitations and Potentials", in Hughes, Lucas & Tilleman, Environmental Law and Policy (Emond Montgomery, 1993), chapter 11.

[46] EAAC Report #47 (1991-92), pp.76-78.

order to reach an informed decision on whether to sign off on a mediated settlement.

CELA RECOMMENDATION #6: **Section 8 of Bill 76 should be amended to include provisions that:**

- **ensure that mediation (and other appropriate ADR) is available at every stage of the EA process, including TOR negotiation, EA hearings, and Class EA's; and**
- **require proponents to provide participant funding to facilitate public participation in mediation.**

(h) Minister's Decision on the EA Application

Where the Minister has not otherwise referred an application to mediation (see above) or to a hearing before the EA Board (see below), section 10 of Bill 76 provides the Minister with discretionary power to: approve the undertaking; approve the undertaking subject to conditions; or refuse to approve the undertaking. In so deciding, the Minister is required by section 10(2) to consider a number of factors, including the purpose of the EA Act, the TOR, the EA, the government review, and public comments. Thus, section 10 appears to be consistent with the EAAC recommendation that the two separate questions under existing section 12(2) (i.e. is the EA acceptable, and should the undertaking be approved?) be merged into a single approval decision.[47]

Bill 76, however, goes on to provide the Minister with two new powers not recommended or proposed by EAAC. First, under section 11.1, the Minister is given a broad **deferral** power which allows the Minister to defer his/her decision on matters relating to the application in certain circumstances. CELA is unclear on how frequently the need to defer a matter would arise, but has no objection in principle to the deferral power, provided that the Minister is obliged to provide public notice and comment opportunities as well as written reasons for a deferral.

Second, and more alarmingly, under section 11.2, the Minister is given a broad **referral** power which allows the Minister to refer a matter not just to the EA Board, but to any other tribunal or "entity" (which is undefined but could conceivably include a municipality, conservation authority, corporation, or association).
CELA has no objection to a referral power that is limited to referrals to the EA Board. However,

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[47] EAAC Report #47 (1991-92), pp.36-37.

section 11.2 is too broadly worded since it could be used to, in essence, delegate the Minister's decision-making responsibility under the EA Act to unspecified agencies, boards, commissions, or "entities" with little environmental expertise or political accountability.

Extensive use of the referral power could undermine the integrity and certainty of the EA process, and could lead to a multiplicity of proceedings. Accordingly, CELA submits that the section 11.2 referral power must be substantially limited (i.e. by omitting or defining the term "entity", prescribing which matters (i.e. narrow technical issues) can be referred, establishing specific criteria governing the referral power, requiring public notice and regarding proposed referrals, requiring written reasons for referral, etc.). These comments apply, with necessary modifications, to section 11.2's attempt to give the EA Board itself a broad referral power.

CELA RECOMMENDATION #7: **Sections 11.1 and 11.2 of Bill 76 must be amended to include provisions that:**

- **impose public notice and comment opportunities regarding a proposed deferral or referral;**
- **require written reasons on the record where the Minister has exercised the power to defer or refer a matter; and**
- **limit the referral power by establishing detailed referral criteria, limiting the types of issues that may be deferred, deleting or defining the term "entity", and specifying the list of tribunals that are eligible to receive referred matters.**

(i) EA Board Hearings

Under Bill 76, there are two ways to refer an application to the EA Board for a hearing: (1) under section 9, the Minister, in his or her discretion, may refer the matter to the Board; or (2) under section 9.1, the Minister shall refer the matter to the Board where a person files a hearing request, unless the Minister opines that request is frivolous or vexatious, or that a hearing is unnecessary or may cause undue delay. This latter provision is analogous to the test in existing section 12(2)(b) of the EA Act, which EAAC had regarded as "open to abuse" since it had been used to deny reasonable hearing requests (i.e. the Red Squirrel Road undertaking in the Temagami area or more recently, the Taro landfill proposal).[48]

[48] EAAC Report #47 (1991-92), p.37.

CELA shares EAAC's conclusion that public hearings are an important right under the EA Act:

> While unnecessary hearings should be avoided, the right of the public or proponent to have a hearing before an independent tribunal is a fundamental principle of the EA Act which should not be eroded.[49]

EAAC went on to propose a more restrictive test for refusing hearing requests, but Bill 76 fails to include the EAAC test and instead retains the existing language of the EA Act. CELA recommends that section 9.1 of Bill 76 be amended so as to include a variation of the EAAC test that prohibits the Minister from refusing a hearing request unless the request "is frivolous and vexatious or is made solely for the purpose of delay."

Of course, public hearing rights may be largely illusory without the provision of intervenor funding by proponents. CELA's recommendations regarding intervenor funding are outlined above in the discussion under "Public Consultation".

CELA remains concerned about Bill 76 provisions that empower the Minister to greatly constrain the scope of EA hearings by dictating the length of the hearing, and by directing what testimony and matters can be heard by the Board: see sections 9(3) and 9(8) of Bill 76. At the outset, it must be noted that these new powers were <u>not</u> recommended by EAAC. In fact, EAAC expressly rejected the notion that the Minister should be able to scope the issues and areas to be considered by the EA Board:

> The Committee agrees with the EA Board submission that was explicit in its objection to this proposal:
>
> > As the tribunal charged with the responsibility of adjudicating on the impacts of an undertaking, the EAB should not be placed in the untenable position of having issues, which it concludes are relevant and important to the proper exercise of its jurisdiction, hidden from scrutiny as a result of this proposed authority. The Board is concerned about the possible perception of political interference. In short, the EAB views the proposed EA Task Force amendment as unnecessary and potentially problematic.
>
> In addition, acceptance of this recommendation would inevitably lead to considerable lobbying of the Minister to constrain the scope of hearings, which would exacerbate the potential for political abuse of this provision. Furthermore, the time required for the Minister to make a scoping decision could be considerable, resulting in unnecessary delays to the start of a hearing.
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> <u>The Committee firmly believes that scoping of issues and areas to be considered by the</u>

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[49] <u>Ibid.</u>

> Board should take place through open consultation at the EAP [now TOR] stage, during planning and consultation, and at the Board hearing itself (emphasis added).[50]

CELA concurs with these comments, and further notes that the EA Board has recently released its revised rules of practice which, among other things, significantly enhance the Board's ability to: scope, narrow or settle issues in dispute; limit hearing length; limit evidence-in-chief; and limit cross-examination. CELA therefore recommends that sections 9(3) to (5), 9(7), and 9(8) must be deleted from Bill 76 in order to maintain the independence and integrity of the EA hearing.

CELA is also concerned about the Minister's power under Bill 76 to promulgate "policy guidelines" that the Board "shall consider" when making its decision: see 27.1 of Bill 76. The term "policy guideline" is undefined under Bill 76, and CELA is unclear whether this term includes the existing hodgepodge of assorted MOEE policies, guidelines, manuals, or procedures, or whether it refers to new documents that have yet to be released. It is also unclear why these "policy guidelines" are limited to those of MOEE origin, since it may be desirable to give the Board the ability to consider and rely upon other provincial policies (i.e. land use planning policy or natural resources policy) of other Ministries if relevant to the undertaking. Among other things, such an approach would assist in the better integration of EA planning with other planning policies and provincial interests.

While EAAC recommended the development of provincial policies under the EA Act, Bill 76 does not include the EAAC proviso that these policies be developed with full public consultation, and further that proponents and the Minister (not just the Board) should have regard for these documents.[51] Until these necessary safeguards are included in Bill 76, CELA recommends that section 27.1 be deleted.

Under Bill 76, the Board is empowered to make any decision that the Minister can make under section 10: see section 9(2). In making its decision, the Board shall consider the various factors set out in section 9(6). Strangely enough, the Board is not obliged to consider "the purpose of the Act", although the Minister is bound to do so under section 10(2). CELA assumes that this is a drafting error, and that the Board, too, will be required to consider the purpose of the Act. CELA would suggest the inclusion of two additional items in the section 9(2) list of relevant factors: (1) the evidence and argument presented by hearing parties and participants; and (2) the proponent's compliance with section 6.2(2) of Bill 76.

Section 9(2) of Bill 76 retains the existing power under the EA Act to overturn a Board decision within 28 days of the decision. However, this section omits the EAAC recommendation that hearing parties be given an opportunity to make submissions prior to any decision to vary or alter

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[50] Ibid., pp.38-39.

[51] Ibid., pp.57-58.

a Board decision.[52] In CELA's view, the wording of section 9.2(3) does not necessarily guarantee prior notice or comment before an order is made to vary or alter the decision.

CELA has considerable concern about the Minister's similar power to "reconsider" and amend or revoke a Board decision where there is a "change in circumstances", "new information", or it is "appropriate to do so": see section 11(3) of Bill 76. For greater public and proponent certainty, there should be an outside time limit on when this power can be exercised. This would also ensure that public participation in EA hearings (and reliance upon resulting conditions of approval) does not become a meaningless or wasteful exercise. In addition, section 11.3 must impose mandatory public notice and comment requirements where the Minister proposes to reconsider a previous EA approval, and furthermore must require written reasons from the Minister, on the record, where the EA approval is being amended or varied.

CELA RECOMMENDATION #8:

Sections 9(3) to (5), 9(7), 9(8) 9.1, 11.3 and 27.1 of Bill 76 should be deleted and replaced with provisions that:

- **prohibit the Minister from refusing a hearing request unless the request is frivolous, vexatious, or made solely for the purposes of delay;**
- **require the Board to have regard for the purpose of the Act, the evidence and arguments presented at the hearing, and the proponent's compliance with section 6.2(2);**
- **ensure that "policy guidelines" are defined and developed with full public consultation, and shall be considered by the proponent, the Minister and the Board;**
- **require public notice and comment opportunities where the Minister proposes to vary or substitute a Board decision or to require a new Board hearing; and**
- **impose time limits, impose public notice and comment requirements, and require written reasons, where the Minister proposes to "reconsider" and amend or revoke a previous**

[52] Ibid., p.40.

EA approval or the conditions attached thereto.

(j) Class EA's

Part II.1 of Bill 76 contains several provisions that attempt to entrench the Class EA model upon a firmer legislative basis. In principle, the Class EA model is a useful mechanism to ensure that streamlined EA planning requirements are applied to classes of "minor" undertakings that are similar in nature, limited in scale, recur frequently, and generally have limited, predictable and mitigable environmental effects. Current Class EA's typically require proponents to classify projects within the prescribed class in accordance with their environmental significance (i.e. whether the specific project raises no environmental concern, has minimal potential for adverse effects, or has more significant impacts). Depending on the project's significance, the Class EA will prescribe the appropriate planning procedure, and the most detailed documentary requirements (i.e. preparation of an Environmental Study Report (ESR)) are reserved for the more significant projects. These reports are directed to ensure that the essential EA requirements (i.e. existing section 5(3)) are addressed by the proponent. Class EA's also include "bump-up" provisions that permit the Minister to order a full individual EA for particularly significant projects that may create substantial environmental impacts or generate significant public controversy.[53]

EAAC made ten specific recommendations regarding Class EA's, which included the following proposed amendments to the EA Act:

- provide authority for the Class EA model, and specify that the classes of undertakings must be limited to projects that are sufficiently similar in nature and that have predictable environmental effects that are responsive to accepted mitigation measures (Recommendation #53, emphasis added);

- require that the preparation, submission, review and approval of a Class EA process must generally comply with the same EA process prescribed for individual EA's (i.e. compliance with existing section 5(3)) (Recommendation #55);

- provide for a statutory "bump-up" mechanism, together with statutory bump-up criteria that may be augmented by more specific criteria in regulation (Recommendation #55, #70, #71);

- establish 5 year time limits on Class EA approvals (Recommendation #59).[54]

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[53] See D. Estrin and J. Swaigen, Environmental on Trial (Emond Montgomery, 1993), pp.204-06; and EAAC Report #47 (1991-92), pp.142-43.

[54] EAAC Report #47 (1991-92), pp.143-57.

While Part II.1 of Bill 76 appears to place Class EA's on a firmer legislative basis, it is clear that the provisions of Part II.1 do not implement several important EAAC recommendations regarding Class EA's. For example, Part II.1 does not impose time limits on the approval period for Class EA's. More importantly, Part II.1 does not limit Class EA's to minor projects that are similar in nature and that have predictable and mitigable effects. This omission is undoubtedly the most objectionable aspect of Part II.1 since it leaves the Minister free to approve Class EA's for groups of highly significant undertakings (i.e. all landfills or incinerators in Ontario? all nuclear generating stations?) in order to avoid full individual EA's for such undertakings. Among other things, this omission will likely lead to renewed interest in developing highly inappropriate Class EA's, such as the Timber Management undertaking (which essentially was a policy EA disguised as a Class EA of related (but highly significant) activities).

CELA's concern about the failure to limit the scope of Class EA undertakings is compounded by Part II.1's failure to guarantee full consideration of essential EA requirements [now section 6.2(2)]. In many respects, the Bill 76 regime for Class EA's suffers from the same problems that plague the individual EA process under Bill 76. For example, under section 13.1, there is no mandatory, upfront public notice and comment requirements on the proposed TOR for a Class EA, nor are there any participant funding requirement at the TOR stage. In addition, the Minister has the authority under section 14(3) to approve a Class EA TOR that does not meet the essential requirements prescribed in section 14(2). Indeed, section 14(2) itself does not appear to incorporate the essential elements of existing section 5(3) [now section 6.2(2)] since, for example, this section makes absolutely no reference to "alternatives to" or "alternative methods". Similarly, this section makes no reference to the clear need for systematic monitoring and reporting of cumulative effects at both the individual project level and overall class level.

CELA RECOMMENDATION #9:

Part II.1 of Bill 76 must be deleted and replaced with provisions that better reflect EAAC recommendations regarding Class EA's. In particular, Bill 76 should include Class EA provisions that:

- **include clear definitions or criteria that limit Class EA undertakings to minor projects which are similar in nature and which have predictable and mitigable impacts;**
- **impose public consultation requirements during negotiation on the Class EA TOR and prior to submission of the TOR to the Minister;**
- **require full consideration of essential EA requirements (i.e. existing section 5(3)), including consideration and evaluation of alternatives, their**

environmental effects, and mitigation measures;

- **require the projects caught by the "class" to be categorized on the basis of environmental significance, with appropriate levels of assessment and documentary requirements for each project category;**
- **establish detailed bump-up criteria and procedures;**
- **ensure free and timely public access to all class EA documentation, including the ESR;**
- **require the provision of participant funding;**
- **permit mediation at both the individual project level and Class EA level; and**
- **impose 5 year time limits on Class EA approvals;**

(k) Compliance, Effects and Effectiveness Monitoring

Bill 76 is largely silent with respect to the important issues of compliance and effects/effectiveness monitoring and reporting. This is in contrast to EAAC's detailed recommendations on these issues, which, among other things, called for statutory and regulatory reforms to improve the current state of compliance and effects monitoring.[55] CELA's recommendations regarding monitoring and reporting are outlined above in the discussion under "Other Concerns Regarding the TOR".

However, section 5(5) of Bill 76 provides that where a proponent cannot comply with its EA approval, it must "promptly" notify the MOEE. The consequences of such a notice are unclear: will it prompt investigation and enforcement activity, or (perhaps more likely) will the Minister entertain an application to "reconsider" and revoke the problematic conditions of approval pursuant to section 11.3 of Bill 76? At the very least, section 5 should be amended to expressly authorize the Minister to issue a binding "compliance order" against proponents who contravene their EA approvals. Such an administrative order may be a cost-effective alternative to a quasi-criminal prosecution against the proponent.

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[55] EAAC Report #47 (1991-92), p.71.

CELA RECOMMENDATION #10: **Section 5 of Bill 76 should be amended to include provisions that empower the Minister to issue enforceable "compliance orders" against proponents which contravene their approvals, or other requirements of the EA Act or regulations.**

(l) Pre-Approval Activities

Section 12.2 of Bill 76 gives greater leeway to proponents who want to acquire property or undertake feasibility studies prior to obtaining the necessary EA approval. Once again, however, this provision does not include the specific safeguards recommended by EAAC, such as:

- expressly provide that these pre-approval activities are taken at the risk of the proponent, and that they do not affect or influence the EA approval decision;
- prohibit pre-approval site alteration (i.e. grading, vegetation removal, or other forms of site preparation); and
- authorize the Minister to order the restoration of the environment that was unlawfully altered, disturbed, or degraded without EA approval.[56]

CELA concurs with these reforms and recommends their inclusion within Bill 76.

CELA RECOMMENDATION #11: **Section 5 of Bill 76 must be amended to include provisions that:**

- **provide that pre-approval activities by the proponent shall not affect or influence the Minister's or Board's decision on the EA application;**
- **prohibit pre-approval site alteration; and**
- **authorize the Minister to issue restoration orders.**

[56] Ibid., p.70.

(m) Reforms Omitted from Bill 76

As noted above, it is CELA's understanding that Bill 76 is rationalized by the MOEE, at least in part, on the grounds that it merely reflects EAAC's recommendations for reform. In fact, as noted throughout this brief, the drafters of Bill 76 were quite selective in choosing the few EAAC recommendations that are actually recognizable within Bill 76. For the most part, however, Bill 76 omits, distorts, or modifies key EAAC recommendations, particularly with respect to the implementation details.

This situation becomes abundantly clear when one reviews EAAC Report #47 and finds a number of important recommendations (particularly in Part 2 of the Report) that are wholly absent from Bill 76, such as:

- phasing in the application of the EA Act to the private sector. This phase in (i.e. through individual and sectoral designations) is critically important and long overdue, and yet Bill 76 does not even mention designation criteria, procedures or regulations;

- enhancing the application of the EA Act to government policies and programs (with possible linkages to Class EA's for specific projects falling within the policy or program);

- ensuring the consideration of cumulative effects and the ecosystem approach under section 6.2(2) of Bill 76;

- better integrating the EA Act with the Planning Act; and

- restoring EAAC in order to provide ongoing EA advice and recommendations, particularly in relation to bump-up, designation, and exemption requests.

If the Ontario government is genuinely interested in environmental protection and better EA planning, then CELA strongly recommends that Bill 76 be opened up to deal with these long overdue reforms.

CELA RECOMMENDATION #12: **Bill 76 should be amended to include provisions that reflect EAAC recommendations relating to:**

- **private sector application of the EA Act;**
- **assessing government policies and programs;**
- **cumulative effects and ecosystem approach;**
- **integration of EA and land use planning; and**

- **restoring and maintaining EAAC itself.**

PART IV - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA regards Bill 76 as an unjustifiable rollback of existing protections and provisions under the existing EA Act. Despite assurances from the Minister and the Premier, Bill 76 does not guarantee "full EAs", does not guarantee early and effective public participation in the EA process, and does not reduce uncertainty or unpredictability within the EA process.

Accordingly, it is CELA's position that Bill 76 must not be enacted unless and until the following recommendations have been accepted and incorporated into Bill 76:

CELA RECOMMENDATION #1:

Section 3.1 of Bill 76 must be deleted and replaced by provisions that:

- **ensure that the essential elements of the EA Act (i.e. existing section 5(3)) are retained in joint assessments;**
- **define "equivalency" (or provide minimum equivalency criteria), and require the Minister to provide written reasons to support findings that other jurisdictions' EA requirements are "equivalent";**
- **permit the making of regulations that prescribe the details of joint assessments; and**
- **ensure that any proposed regulations, policies, or orders concerning joint assessments are subject to public notice and comment, including (but not limited to) the Environmental Bill of Rights (EBR) Registry and other appropriate means.**

CELA RECOMMENDATION #2:

Section 3.2 of Bill 76 must be deleted and replaced with provisions that give effect to EAAC's recommendations respecting exemption criteria, procedures, and public input. In particular, these provisions should:

- **clearly articulate specific statutory exemption criteria that are focused on environmental significance;**

- **establish clear exemption procedures that, among other things, prescribe content requirements for exemption requests;**

- **require meaningful public consultation on proposed exemption requests through the EBR Registry and other appropriate means;**

- **impose a duty on the Minister to monitor and report upon compliance with terms and conditions attached to exemption orders; and**

- **empower the Minister to issue enforceable compliance orders against proponents that contravene terms and conditions attached to exemption orders.**

CELA RECOMMENDATION #3:

Sections 6, 6.1, and 6.2(2) of Bill 76 must be deleted and replaced by provisions that:

- **impose public consultation requirements during the negotiation of TOR prior to the submission of the proposed TOR to the Minister;**

- **ensure that the Minister can only approve a TOR that will produce a full EA which addresses all essential EA requirements (i.e. existing section 5(3));**

- **require the provision of participant funding to facilitate public review and comment on the proposed TOR;**

- **impose a time limit on how long that the TOR negotiation can continue prior to submission of the TOR for approval;**

- **impose a time limit on how long the approved TOR remains in effect;**

- **permit modifications to an approved TOR under certain conditions (i.e. changed circumstances, new technology, new alternatives, new information on environmental impacts, etc.), subject to public notice and comment requirements;**

- **require a governmental review of the TOR by relevant agencies and ministries prior to the Minister's decision to approve or reject the TOR;**

- **require a description of net or residual environmental effects after mitigation measures are applied in section 6.2(3);**

- **require a description of compliance and effects/effectiveness monitoring and reporting in section 6.2(3); and**

- **replace the term "other than" with "in addition to" in section 6.2(3).**

CELA RECOMMENDATION #4: **Section 6.1 must be deleted and replaced by provisions that:**

- **require (and define) meaningful public consultation from the earliest stages of EA planning and throughout the entire EA process;**

- **require clear, timely, and appropriate public notices at all key points of the EA planning process;**

- **ensure free and timely public access to all relevant EA documentation; and**

- **require mandatory participant funding and intervenor funding.**

CELA RECOMMENDATION #5: **Section 7 of Bill 76 should be amended to include provisions that:**

- **ensure that the prescribed agency/public review period is not less than 90 days;**

- **require the Minister to reject deficient EA's and to provide written reasons for rejection;**

- **require the Director to provide public written reasons for statements of EA deficiency;**

- **extend the timeframe for proponents to undertake remedial work or to file a statement of intent;**

- **establish a "core" agency review team that is integrated and interdisciplinary in nature; and**

- **describe the duties and responsibilities of agency review team members.**

CELA RECOMMENDATION #6: **Section 8 of Bill 76 should be amended to include provisions that:**

- **ensure that mediation (and other appropriate ADR) is available at every stage of the EA process, including TOR negotiation, EA hearings, and Class EA's; and**

- **require proponents to provide participant funding to facilitate public participation in mediation.**

CELA RECOMMENDATION #7: **Sections 11.1 and 11.2 of Bill 76 must be amended to include provisions that:**

- **impose public notice and comment opportunities regarding a proposed deferral or referral;**

- **require written reasons on the record where the Minister has exercised the power to defer or refer a matter; and**

- **limit the referral power by establishing detailed**

referral criteria, limiting the types of issues that may be deferred, deleting or defining the term "entity", and specifying the list of tribunals that are eligible to receive referred matters.

CELA RECOMMENDATION #8:

Sections 9(3) to (5), 9(7), 9(8) 9.1, 11.3 and 27.1 of Bill 76 should be deleted and replaced with provisions that:

- **prohibit the Minister from refusing a hearing request unless the request is frivolous, vexatious, or made solely for the purposes of delay;**
- **require the Board to have regard for the purpose of the Act, the evidence and arguments presented at the hearing, and the proponent's compliance with section 6.2(2);**
- **ensure that "policy guidelines" are defined and developed with full public consultation, and shall be considered by the proponent, the Minister and the Board;**
- **require public notice and comment opportunities where the Minister proposes to vary or substitute a Board decision or to require a new Board hearing; and**
- **impose time limits, impose public notice and comment requirements, and require written reasons, where the Minister proposes to "reconsider" and amend or revoke a previous EA approval or the conditions attached thereto.**

CELA RECOMMENDATION #9:

Part II.1 of Bill 76 must be deleted and replaced with provisions that better reflect EAAC recommendations regarding Class EA's. In particular, Bill 76 should include Class EA provisions that:

- **include clear definitions or criteria that limit Class EA undertakings to minor projects which**

are similar in nature and which have predictable and mitigable impacts;

- **impose public consultation requirements during negotiation on the Class EA TOR and prior to submission of the TOR to the Minister;**
- **require full consideration of essential EA requirements (i.e. existing section 5(3)), including consideration and evaluation of alternatives, their environmental effects, and mitigation measures;**
- **require the projects caught by the "class" to be categorized on the basis of environmental significance, with appropriate levels of assessment and documentary requirements for each project category;**
- **establish detailed bump-up criteria and procedures;**
- **ensure free and timely public access to all class EA documentation, including the ESR;**
- **require the provision of participant funding;**
- **permit mediation at both the individual project level and Class EA level; and**
- **impose 5 year time limits on Class EA approvals;**

CELA RECOMMENDATION #10: **Section 5 of Bill 76 should be amended to include provisions that empower the Minister to issue enforceable "compliance orders" against proponents which contravene their approvals, or other requirements of the EA Act or regulations.**

CELA RECOMMENDATION #11: **Section 5 of Bill 76 must be amended to include provisions that:**

- **provide that pre-approval activities by the proponent shall not affect or influence the**

Minister's or Board's decision on the EA application;

- **prohibit pre-approval site alteration; and**
- **authorize the Minister to issue restoration orders.**

CELA RECOMMENDATION #12: **Bill 76 should be amended to include provisions that reflect EAAC recommendations relating to:**

- **private sector application of the EA Act;**
- **assessing government policies and programs;**
- **cumulative effects and ecosystem approach;**
- **integration of EA and land use planning; and**
- **restoring and maintaining EAAC itself.**

All of which is respectfully submitted.

July 30, 1996

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Counsel

APPENDIX I - SUMMARY OF THE POWERS OF THE MINISTER AND THE DIRECTOR UNDER BILL 76

Bill 76 provides the Minister and the Director with numerous discretionary powers. Bill 76 also permits the Minister to appoint, and delegate powers to, "an employee or class of employees" or, with Cabinet approval, to non-Ministry persons: see section 31.1. The following list summarizes the Minister's and Director's powers under Bill 76.

(a) Minister's Powers

Harmonization

1. The Minister may vary or dispense with a requirement under the Act with respect to an undertaking in order to facilitate the effective operation of the requirements of both jurisdictions: section 3.1(2).

2. The Minister may declare that the Act does not apply to the undertaking: section 3.1(3).

Declaration (Exemption)

3. The Minister may, with the approval of the Lieutenant Governor in Council or designated Ministers, declare that the Act or regulations do not apply to a proponent, undertaking, or classes thereof: section 3.2(1).

Terms of Reference

4. The Minister shall approve the proposed terms of reference under certain conditions: section 6(3).

5. The Minister may refer to mediation any matter arising from the proposed terms of reference: section 6(4).

Amendment or Withdrawal of EA

6. The Minister may impose conditions upon a proponent that amends or withdraws an EA after the deadline for the completion of the government review: section 6.3(3).

7. The Minister may amend or revoke conditions imposed under section 6.3(3): section 6.3(4).

Ministry Review of EA

8. The Minister may reject the EA if the Director is not satisfied that deficiencies have been remedied: section 7(6).

Mediation

9. The Minister may appoint mediators to resolve matters identified by the Minister: section 8(1).

10. The Minister may appoint the Board to act as mediator: section 8(2).

11. The Minister may identify the mediation parties and the manner in which they are to be identified and invited to participate: section 8(4).

12. The Minister may prescribe an earlier deadline than the prescribed 60 days for the mediation report: section 8(7).

13. The Minister may make public any portion of the mediation report: section 8(8).

Board Hearings: Referrals, Scoping, and Review

14. The Minister may refer an application to the Board for a decision: section 9(1).

15. The Minister may scope the matters to be heard by the Board: section 9(3).

16. The Minister may review a Board decision within 28 days, and may, with the approval of the Lieutenant Governor in Council or designated Ministers, vary the Board decision, substitute a decision for the Board's decision, or require a new hearing before the Board: sections 9.2(1) and 9.2(2).

Application Decisions by Minister

17. The Minister may, with the approval of the Lieutenant Governor in Council or designated Ministers, decide to approve, approve with conditions, or refuse to approve an application: section 10(1).

Deferral or Referral of Part of Application Decisions

18. The Minister may defer deciding a matter if appropriate because the matter is being considered in another forum, or for scientific, technical or other reasons: section 11.1(1).

19. The Minister may refer to the Board, another tribunal or another entity a matter related to an application if appropriate: section 11.2(1).

20. The Minister may impose conditions on the referral and may direct that the matter be decided without a hearing, whether or not a hearing is otherwise required: section 11.2(2).

21. The Minister may, in referring a matter, select a tribunal or entity other than the one authorized under law to decide the matter, if the Minister has a reason to do so: section 11.2(3).

Reconsideration of Decisions, Revocation, and Amendment

22. The Minister may reconsider a previous Board decision or Ministerial decision if there is a change in circumstances, new information, or the Minister considers appropriate to do so: section 11.3(1).

23. The Minister may request the Board to determine if it is appropriate to reconsider a decision: section 11.3(2).

24. The Minister may amend or revoke a decision in accordance with such rules or restrictions as may be prescribed: section 11.3(3).

Transition

25. The Minister may direct that all or any portion of Part II or Part II.1 applies to a previously submitted EA: section 12.4(2).

Class EA's

26. The Minister has the same powers with respect to class EA's as individual EA's under Part II, with necessary modifications: section 15.

27. The Minister may require a proponent to comply with Part II (individual EA's) before proceeding with an undertaking to which a Class EA would otherwise apply: section 16 (1).

28. The Minister may, when ordering a proponent to comply with Part II, set out directions regarding the terms of reference, or declare that the proponent has satisfied specified requirements: section 16(2).

29. The Minister may impose conditions in addition to those set out in an approved Class EA: section 16(3).

30. The Minister may order a proponent to prepare an individual EA on his or her own initiative or upon a request from any person: section 16(5).

31. The Minister may refer a matter to mediation: section 16(6).

Policy Guidelines

32. The Minister may issue policy guidelines concerning the protection, conservation, and wise management of the environment: section 27.1.

(b) Director's Powers

Public Notice of EA Submission

33. The Director may prescribe the manner of, and deadline for, public notice of the submission of an EA: section 6.4(1).

34. The Director may require the proponent to provide information contained in the public notice to other persons: section 6.4(3).

Ministry Review

35. The Director may extend the deadline for completing the review if there is a compelling reason to do so: section 7(3).

36. The Director may give the proponent a statement to the proponent that its EA is deficient: section 7(4).