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RESPONSE OF THE

CANADIAN ENVIRONMENTAL LAW ASSOCIATION (CELA)

TO THE DISCUSSION PAPER

"TOWARD IMPROVING THE ENVIRONMENTAL ASSESSMENT PROGRAM IN ONTARIO"

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EXECUTIVE SUMMARY

Ontario's Environmental Assessment Act (EA Act) is one of the most important pieces of environmental legislation in Canada. As an environmental planning statute it requires the incorporation of environmental considerations into the planning of undertakings in order to anticipate environmental problems and either avoid or mitigate them. In addition, the broad definition of "environment" and the requirement for the considerations of alternatives to the undertaking and alternative means of carrying it out, including the null alternative, greatly increases the chances for achieving the best decision, from an environmental perspective, among the various options available.

The process of reforming the EA Act, largely undertaken by the previous government, and articulated in the Environmental Assessment (EA) Task Force Report ("Toward Improving the Environmental Assessment Program in Ontario"), provided us with a series of recommendations around which we have framed our comments.

The Canadian Environmental Law Association (CELA) contends that Ontario's new government, through the Premier's office, must state its political commitment to the EA Program by requiring all Ministries and agencies to put the necessary resources into implementing their responsibilities under the EA Program. The EA Branch of the Ministry of the Environment should be considerably expanded and report directly to the Deputy Minister as is the case with other major branches of the Ministry.

If this government is serious about increasing certainty, efficiency, fairness and effectiveness in the EA Program, both the preparation and the administration of a reformed EA Program will require significant political, financial and human resource

commitments to accomplish these goals.

We have set out eight key elements of a strong environmental assessment process to guide our analysis. One of these principles, "all in unless exempted out", is embodied in the Ontario EA Act, such that all projects are automatically in the process unless specifically exempted out. The approach is not clearly defined or administered in the EA Program. Hence, a number of reforms are required to the various "levels of assessment" (exemptions, Class EAs, bump-ups and designations) that exist in addition to full EAs of individual undertakings.

Reforms to the different levels of assessment will maintain and improve an important efficiency measure - the ability to efficiently assess large numbers of projects in varying ways according to the environmental significance of the project. Key among these reforms therefore is that a legally enforceable definition of a Class of undertakings must be limited to projects that are similar in nature, occur frequently, are limited in scale and have only minor and relatively predictable effects on the environment. Class EA reform also includes development of a regulation outlining Class EA procedures and a guideline for model parent Class EAs.

Reform of exemption procedures should include development of a regulation to provide for an exemption procedure; public notice of all exemption requests; greater clarity in conditional exemption orders such that those requiring the preparation of detailed documentation be specific as to what the documentation should include, who should have input to its development and that the EA Branch will be responsible for reviewing it. The EA Branch should be able to issue compliance orders to ensure compliance with

CELA endorses the need for requiring proponents to conduct a Planning and Consultation phase. However, in keeping with the goal of early and meaningful planning and consultation, we recommend the EA process begin earlier than suggested, at the stage where the purpose of the study, or planning effort, is known, rather than after a specific undertaking is identified.

We have set out a staged process whereby the Assessment Design Document (ADD) is used as tool to seek early public involvement in the process to develop a reasonable basis of support for the planning effort at each stage of planning. The ADD therefore serves as the overall terms of reference for the EA planning process as well as a detailed, and progressively refined, terms of reference for each planning stage.

The initial stage, or stages, of refining the ADD, is to identify the problem or opportunity that the proponent is interested in addressing and the initial set of alternatives to be considered. The next stage would refine the set of alternatives and select the preferred alternative at which point public notice should be given as to the preferred alternative. The final stage would analyze in detail the implications of the preferred alternative and generate the EA. A participant funding panel of the EA Board should be available to provide funding at stages equivalent to the progress of the ADD.

Under this alternative regime, CELA recommends rejecting the EA Task Force recommendation to provide the EA Board with the power to make a binding decision on the ADD at the point of its initial preparation. Such a binding decision on the terms of reference for the planning effort would unduly restrict the both the planning process and the Board's ability to make sound decisions on the

conditions on exemptions and the Act should impose a duty on the Branch to impose such orders if monitoring reveals non-compliance.

Criteria for evaluating requests for exemptions, bump-ups and private sector designations should include "considerations of urgency" only if it is established that "urgency" has to do only with matters of public health and safety. As well, all such requests should be evaluated in terms of their potential for cumulative effects and review of these requests must be subject to enforceable time limits.

CELA commends the Minister for asking for input on how, not whether the EA Act will apply to the private sector. The proposed Task Force on private sector application must be given clear Ministerial direction; it must be a consensus committee reporting directly to the Minister; it should be limited in size, multistakeholder and be able to review its own terms of reference and suggest modifications, as appropriate, to the Minister; it should be given a one year deadline and it should be provided with a secretariat, an efficient, knowledgeable, impartial chair and members expenses should be covered including honoraria for their time.

The task force should address itself to a phased sector-by-sector application of the Act and to the development of Sectoral Regulations to address the specific needs of different private sectors in satisfying the requirements of Section 5(3) of the Act.

Government policy and planning should be subject to the EA Act using a new EA procedure to be developed as a regulation. A preliminary discussion and set of recommendations is offered to reform the land-use planning process in Ontario.

planning process since this decision would be made too early in the planning process. The terms of reference should be allowed to remain flexible in order to respond to changing circumstances.

The review and approval of the EA should occur in a timely and public manner and recommendations are made for appropriate time limits and public notice requirements. CELA recommends that the analysis in the review of Section 5(3) requirements should be made consistent with recent Board decisions dealing with planning process requirements and therefore that the EA Branch update MOE guidelines (Interim Guidelines on Environmental Assessment Planning and Approvals - July - 1989 and Role of the Review and the Review Participants in the EA Process - November, 1987) accordingly.

CELA recommends elimination of the acceptance decision and restructuring the approval decision such that it is based upon the need for the undertaking, the adequacy of the planning that led to its selection and the environmental consequences of the undertaking as compared with the other alternatives evaluated including the null alternative. If the acceptance decision is not eliminated, the appeal of the Minister's acceptance decision must be open to any party. In addition, if the acceptance decision is not eliminated, the two decisions should be maintained and if there is a hearing, the Board should make both decisions.

Monitoring and follow-up of EAs, individual projects within Class EAs, and projects granted conditional exemptions will be improved by the EA Task Force recommendations. Additionally, the requirements should include provision for public monitoring committees under certain circumstances and the assessment of cumulative impacts.

The Intervenor Funding Project Act should be amended to allow for participant funding after the public notice of the ADD and at stages throughout the ADD process.

This report sets out a detailed analysis of the EA Task Force Report and the EA Program in general and culminates in a set of 77 recommendations for the preparation and administration of a reformed EA Program for Ontario.

1.0 INTRODUCTION

In responding to the paper "Toward Improving the Environmental Assessment Program in Ontario", (hereinafter referred to as the EA Task Force Report), we have grappled with how best to use limited time and resources to respond to a complex set of proposals intended to reform a complex process. We have not responded to each and every proposal in the Report. However, neither have we limited our comments to those areas the Report has covered. In particular, we considered it important to comment, at least in a preliminary way, on the relationship between the EA program and the land-use planning system.

CELA recognizes that the EA Task Force Report is the result of a process undertaken almost entirely by the previous government. After having participated in the Public Advisory Group to the EA Program review, we are aware that the terms of reference for the EA Task Force Report were generated in the aftermath of the controversy surrounding the leaked document that came to be called "Project X". Those terms of reference specified that review of the Environmental Assessment Act (EA Act) was to be distinct from any review of the Planning Act. It is fair to say that most members of the Public Advisory Group (made up of representatives from the private sector, municipalities and non-governmental organizations) were dismayed by this approach. Since that time, as the Environmental Assessment Advisory Committee well knows, the continuing pressure to integrate environmental considerations into land-use planning have led to ever-increasing requests for designations under the EA Act, of projects for which approvals are granted under the Planning Act. As well, the motivation for many bump-up requests of infrastructure projects covered by municipal Class EAs comes from a desire to more fully assess the impacts,

particularly the cumulative impacts, of private sector land developments which the municipal infrastructure will service. We therefore considered it relevant to discuss this issue in our response to the EA Task Force Report.

1.1 GOVERNMENT COMMITMENT TO ENVIRONMENTAL ASSESSMENT

Governmental commitment to environmental protection has increased dramatically in recent years. Unfortunately, resources allotted to the EA Branch of the Ministry of the Environment (MOE) are insignificant in terms of overall MOE expenditures and priorities. Involvement and expertise in the EA Program on the part of other government Ministries, Crown Corporations and Municipalities is inconsistent and sometimes inadequate.

In addition to the detailed package of reforms to the EA Program that this current exercise will generate, several key measures must be taken by the present government to demonstrate its commitment to the principles and practice of environmental assessment. These measures will be a key test of whether this government is serious about one of the oft-stated, but yet to be implemented goals of sustainable development outlined in the Brundtland report and the National Task Force on Environment and Economy: the need to integrate environmental considerations into decision-making at all levels.

CELA contends that it is the Premier's job to state this cross-governmental commitment to the EA Program. Specific direction from the Premier should include a requirement that all ministries and agencies put the necessary resources into implementing their responsibilities under the EA Program. The government commitment therefore must be commensurate with increased staffing and

resources in the EA Branch and the Ministries, including other branches in the MOE.

The broad mandate of the EA Branch to influence all environmentally significant government activities demands a change in the placement and priority of the Branch within the MOE. The EA Branch should be reporting directly to the Deputy Minister rather than to the Executive Director of the Approvals and Engineering Division. Expenditure increases should be commensurate with the staffing and resource commitments that currently exist for the Waste Management Branch or the Water Resources Branch. In addition, the Environmental Assessment Advisory Committee, which has done an excellent job of advising the Minister on EA matters, requires significant increases in staffing and resources to do its work. If this government is serious about increasing certainty, efficiency, fairness and effectiveness in the EA Program, both the preparation and the administration of a reformed EA Program will require significant political, financial and human resource commitments to accomplish these goals.

1.2 EIGHT KEY ELEMENTS OF A STRONG ENVIRONMENTAL ASSESSMENT PROCESS

In recent years as environmental assessment reform has been contemplated at the federal and provincial levels across Canada, environmental organizations and environmental law experts from across Canada have come to a general agreement on the key, interdependent features of a sound environmental assessment process. While some variations in opinion exist as to how these elements would be applied under different circumstances in various jurisdictions, a broad consensus exists in the environmental community around the approach set out in the position paper of the

Environmental Assessment Caucus on the proposed Canadian Environmental Assessment Act, Bill C-78.[1]

Those eight key elements of a strong environmental assessment process developed by the Environmental Assessment Caucus can be summarized as follows:

1.2.1 Mandatory and Independent Process

Environmental assessment legislation must establish a process that is mandatory and subject to review by an independent agency. As such, the process must be independent, accountable, free from political interference and must culminate in a final, binding decision. Cabinet could potentially override the initially binding decision.

1.2.2 Justification of Purpose, Need and Alternatives

Each environmental assessment must justify the proposed activity by showing that its purpose is legitimate, that it will meet an environmentally acceptable need, and that it is the best of the alternatives for meeting the need. In considering alternatives, both alternatives to the proposal and alternative means of carrying out the proposal should be considered. The null alternative should always be considered.

1.2.3 "All in Unless Exempted Out"

The environmental assessment process must define "environment" broadly and be universal in application (all projects in the process unless specifically exempted out) within relevant jurisdictional constraints. In addition, a process for the

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[1]Reforming Federal Environmental Assessment. Submission of the Environmental Assessment Caucus on the Canadian Environmental Assessment Act, Bill C-78. November, 1990.

1.2.7 Implementable and Enforceable Decision

The ultimate decision must be capable of implementation and enforcement. A comprehensive system is required that would include the assessment process, the final decision, and an enforceable (and revocable) licence or permit that would incorporate and ensure implementation of the terms and conditions, including monitoring and follow-up, of the final decision.

1.2.8 Monitoring and Follow Up

Monitoring, follow-up and conditions for abandonment of a proposal must be a mandatory part of the final decision. The public should be entitled to a role in the evaluation of monitoring reports. Those members of the public who were involved in the environmental assessment process should be considered first as candidates of monitoring committees.

An additional principle of equal importance in any EA Program includes the assessment of the cumulative impacts of developments. As well, there is an overall need for predictability, reliability and consistency throughout the process.

Ontario's EA Act is a very progressive piece of legislation and embodies many of these key elements. In fact, the Ontario EA Program was often the starting point in developing many of these points. However, fifteen years of practice have revealed a number of areas requiring reform to address problems with the Act's administration and implementation.

Guided by these key principles and features of a sound environmental assessment process, we have structured our comments around two areas: the various assessment options that exist in the process (in addition to the full EA of individual projects) and

environmental assessment of government policy should be grounded in legislation.

1.2.4 Efficiency; Levels of Assessment; Federal-Provincial Reviews

The process must be efficient. Efficiency can be encouraged by employing the concept of different "levels of assessment" and combining federal and provincial environmental assessment review processes. Classes of proposals, within the "levels of assessment" approach, should include only proposals which are similar, occur frequently, and are of relatively low environmental impact.

1.2.5 Criteria to Guide Discretionary Decision-Making

Specific criteria must be established to guide the planning and assessment of proposals and to ensure accountability whenever discretionary decision making occurs in the process. The Act should ensure a proponent has the financial wherewithal to see a proposal through to its closure.

1.2.6 Significant Public Role

A significant role for the public is essential throughout the environmental assessment process. There must be public rights to notice and adequate time for comment on drafts of changes to the Act or its accompanying guidelines, policies and regulations, and timely notice of and access and/or input to documents and procedures relevant to individual assessment procedures.

Participation must also be guaranteed by a legislated intervenor funding program. Decisions must be made on the basis of a hearing process conducted according to the rules of natural justice including full disclosure of information and cross-examination.

administration of the Act. Since the assessment option (e.g., Class EA, full EA, exemption, etc.) chosen for a particular undertaking is a key decision very early in the EA process, we consider assessment options, or "levels of assessment" first. Hence we consider issues surrounding exemptions, Class EAs, the private sector, government policy and planning and finally, relationships to planning processes under the Planning Act.

In discussing the Act's administration, we consider the new proposals for the Planning and Consultation (PAC) phase including the Assessment Design Document (ADD), the various roles and responsibilities of principles players (including the EA Branch, the public, the EA Board, other Ministries, the Environmental Assessment Advisory Committee and the Minister) particularly as they relate to the various decision making points throughout the process. Of particular concern to public interest organizations are the funding issues surrounding public access to and participation in the process. These issues are considered in their own section.

2.0 LEVELS OF ASSESSMENT

2.1 INTRODUCTION

By the time the EA Act was proclaimed in 1976, considerable effort on the part of the Canadian Environmental Law Association, (CELA), and others, had gone into ensuring that the Act embody the principle of "all in unless exempted out". This approach to application of the Act meant that any public sector project was automatically subject to the Act unless it was specifically exempted. Municipalities came under the Act in 1980 and it was intended that the private sector would eventually be brought under the Act as well. In the meantime, private sector projects could be

individually designated as being subject to the Act's provisions.

2.2 ASSESSMENT OPTIONS

Controversy has arisen from the "all in unless exempted out" approach. In general, there has been an overall lack of clarity and efficiency in both the application and administration of the different "levels of assessment" that arose under this approach to the Act's application. By "levels of assessment" we mean those different means by which projects have come under the purview of the Act. These levels have included full exemption from the Act, exemptions with conditions, the class assessment approach and, of course, full environmental assessments, with or without public hearings. As well, individual private sector projects can be designated under the Act and individual projects within a Class can be bumped-up to a full EA.

A critical element of this round of reform is the need to clarify and streamline the Act's application in each of these assessment areas. Our recommendations should be read as applying to both the public and private sectors.

The "levels of assessment" approach has been gradually and somewhat haphazardly applied. The EA Task Force Report makes recommendations for reform of the various assessment options and our comments on these recommendations address the need to ensure fairness, clarity and consistency when decisions are made as to where projects fit within different levels of assessment or when projects move from one level to another.

CELA proposes that the Act should include all of the following

assessment options[2]:

1. individual assessment with or without a public hearing;
2. assessment as a class with or without a public hearing;
3. fast-track assessment of individual items within a class;
4. exemption with conditions;
5. full exemption (either individually or as a class).

Most of these categories will be recognizable from the current approach. For example, the EA Act provides for the individual assessment of undertakings and class assessments with or without public hearings (although only one hearing of a Class EA has ever been conducted and is currently ongoing[3]). "Fast-track assessment" of individual items within a class is discussed below as are additional issues surrounding Class EAs, bump-ups, exemptions and designations.

2.3 EXEMPTIONS

The EA Task Force makes several recommendations for improving the procedures for assessing and granting exemptions under the Act:

- a regulation to provide for an exemption procedure (Recommendation 6.2);
- a policy to guide the evaluation of exemption requests (Recommendation 6.3);
- a policy to limit the time taken to respond to the request (Recommendation 6.4); and

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[2] We also recommend the environmental assessment of government policies and planning but as a separate process - see section 2.7.

[3] The Class EA for Timber Management on Crown Lands in Ontario.

- an amendment to the Act to allow for compliance orders on conditional exemptions (Recommendation 6.5).

Each of these will be addressed below and our comments relate to both individual and class exemptions.

2.3.1 Background

A major area of controversy surrounding the EA Act in the years after it was passed was the abuse of the exemption provision such that major public sector projects, such as the Darlington Nuclear Generating Station, were exempted that should have been assessed. In addition, as the EA Task Force Report points out, exemptions have been granted with conditions attached and no mechanism to follow-up and ensure that those conditions were in fact met.

Controversy over exemptions has been particularly acute when conditions on exemptions have set out requirements for the development of detailed documentation. For example, the exemption order on the Ataratiri Housing proposal in Toronto required a risk assessment of the effects of soil contamination on future land use. In Etobicoke, exemption orders on the Etobicoke Motel Strip Waterfront Public Amenity Scheme and the Lakeshore Project required the preparation of "environmental management master plans". Such detailed requirements can amount to alternative "environmental assessment" documents that have no legal status. The proponent avoids the rigour of the full requirements imposed by the EA Act, such as the consideration of alternatives, including the null alternative, and the review of documents by the EA Branch, the government or the EA Board.

2.3.2 Exemption Procedure

CELA considers the use of exemption orders with conditions to be one of several efficiency tools within the levels of assessment

approach. However, abuse of this measure must be avoided. Public input can be built into the exemption order process and CELA therefore supports recommendation 6.2 to establish a regulation to provide for an exemption procedure. However, we recommend two further steps.

A public notice should be issued for all exemption requests. Unless the community is already very aware of the situation, or notified is some other manner[4], they may never learn of the exemption request without a public notice. In addition, CELA recommends that the requirement imposed by recommendation 6.2 on the proponent and the Minister to report on the result of consultation with various agencies and the affected public should include a rationale for the chosen set of conditions and describe how public input was accepted or rejected and why.

Recommendations 6.2 and 6.3 set out the exemption procedure and its evaluation but additional mechanisms are necessary to avoid a "check list" approach to satisfying the conditions once the exemption is granted. For example, when exemption orders require the preparation of documentation, the exemption order must be specific as to what the documentation should include, who should have input to its development, that the EA Branch will be responsible for reviewing it and what will constitute approval. A similar "fast-track" review process as proposed for individual items within a class EA could be applied by the EA Branch to assess the adequacy of documentation prepared by the proponent to meet the

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[4]for example, exemption requests for interim expansion of waste management sites will very likely occur in a community that is highly sensitized to the issue. In addition, a public notice will be given for an Environmental Protection Act hearing if an EA exemption is granted.

conditions of the exemption order.

2.3.3 Criteria to Evaluate Exemption Requests

CELA is concerned about the final two criteria suggested in Recommendation 6.3 for evaluating exemption requests. First, we would modify "considerations of urgency" to establish that "urgency" has to do exclusively with matters of public health and safety. Otherwise, the criterion is far too subjective to be a useful guide to discretionary decision-making.

Criterion 6.3 E) also raises a red flag. A determination as to whether other legislation is adequate to deal with the issues of concern is also far too subjective. Other legislation does not provide the same rigour in terms of both public and environmental accountability as is provided by the provisions of the EA Act and the administrative process accompanying the Act. Unless and until other legislation provides this rigour, this criterion can be used to inappropriately avoid the EA Act.

We would also add to the end of the list the criterion, "and potential for cumulative effects". In addition, we suggest that these criteria be set out in a regulation rather than a policy. All exemption requests should be reviewed by the EAAC.

2.3.4 Compliance Orders

CELA also strongly supports recommendation 6.5 to amend the Act to authorize the issue of compliance orders to ensure compliance with conditions imposed on exemptions. This amendment should be linked to improvements in monitoring requirements recommended elsewhere in the EA Task Force Report (and discussed in section 3.4 below). In addition, CELA considers that the amendment should impose a duty on the Ministry staff responsible for the Act's administration to

impose such compliance orders should monitoring reveal non-compliance.

2.4 CLASS ENVIRONMENTAL ASSESSMENTS

The EA Task Force makes several recommendations concerning Class EAs:

- an amendment to the Act to provide for Class EAs (Recommendation 6.9);
- a policy to define a Class (Recommendations 6.10);
- a regulation setting out a Class EA procedure for public notice, review of parent Class EAs, and a standard Class EA review procedure (Recommendation 6.11);
- a guideline for a model Class EA document (Recommendation 6.12); and
- the conditions under which a project may commence following release of an ESR (Recommendation 6.15).

Each of these Recommendations is discussed below.

2.4.1 Background

The use of class EAs has been a contentious issue for a number of years. Historically, the class EA Process has been used primarily to establish a common planning process for projects that were similar in nature, occurred frequently, were limited in scale and have only minor and generally predictable effects on the environment. One major exception has been the application of this process to all MNR undertakings regardless of their scale or significance. The most notable example has been the Class EA for Timber Management on Crown Lands in Ontario which does not fit this traditional definition of a class EA.

When this limited definition of a class has been ignored and very

large projects have been placed in a single class, problems and controversy have arisen. CELA considers that these problems are directly attributable to the abuse of an otherwise very important efficiency measure - the grouping of many projects within a class for a single assessment.

As well, one of the most confusing aspects of the Act's administration has arisen from the inconsistent application of Class EA procedures. There are as many interpretations of how to apply a Class EA to a series of projects as there are provincial, municipal and Crown Corporation proponents of Class EAs.

Presently, the status of such assessments is unclear as the EA Act makes no direct referral to the use of class EAs. As the EA Task Force notes a number of people have expressed doubts over whether just the mere mention of "class" in sections 40, 41 and 44 of the Act is sufficient to validate the current use of the class EA procedures.

Phase I of the EAPIP process, which was to have dealt with "non-controversial" issues had made some recommendations to amend the EA Act to deal more specifically with Class EAs. The specific recommendations for change were rejected by the Environmental Assessment Advisory Committee (EAAC) in its report. EAAC noted that the recommendations were the most controversial and should not be dealt with in Phase I. EAAC also concurred with the sentiments of many commentators that the proposal was so broad that it would not provide any safeguards against concerns raised.

2.4.2 Definition of a Class

CELA agrees with the need to clearly establish in the EA Act a definition of a class EA and the process to be followed to gain

approval of a class EA. In that regard, CELA generally agrees with recommendation 6.9. However, as we have stated numerous times in the past, we are very much opposed to the breadth of 6.9 C) which provides that a class may be defined with respect to any attribute, quality or characteristic. Such a definition could allow a class to include all nuclear plants or all waste management facilities, regardless of their size, environmental impact and clear need for individual assessment.

CELA does not agree therefore with Recommendation 6.10 which would provide that the Ministry, by way only of <u>policy</u> would define the general characteristics of projects that may be included under Class EAs. CELA contends that the definition of class EAs should be set out in the legislation. Such a definition should provide that the definition of a class should refer to those undertakings which are "similar in nature, occur frequently, are limited in scale and have only minor and generally predictable effects on the environment." This definition or one to similar effect must be placed in the legislation to avoid application of the class EA process to undertakings that should more properly undergo individual assessments.

The amendments to the Act having to do with Class EAs should specifically state that the Minister should decide what can and cannot be included in a Class. In addition, each Class EA should include a listing of projects that may be included and a clear process to determine at which level (A, B or C)[5] the project will

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[5] Although there is much variability, most Class EAs have three levels of assessment for projects within the Class. The highest degree of assessment - level A - will result in the production of an Environmental Study Report (ESR), while the next two levels will result in varying degrees of screening by the proponent for the purposes of providing public notice, notifying

be assessed. The assessment level within the Class should be based on the anticipated environmental impact of the proposal and the Assessment Design Document for a Class EA should provide the range of projects to be included. The ADD would have to be approved by the Branch.

The Class EA should be clear enough so that proponents can determine for themselves, or with direction from the EA Branch, which Class their particular project falls within and at what level of assessment. Public notice should be given, with thirty days available for input to the Minister, when an individual project within a Class is being considered for assessment. Where uncertainty or a dispute arises as to which level of assessment (within the Class) is appropriate, the EAAC should be asked to make a recommendation to the Minister.

2.4.3 Class EA Procedures

CELA generally agrees with recommendation 6.11 which provides for a regulation outlining the process for class EAs and with the development of a model parent Class EA document as a guideline as recommended in 6.12. We would add however, that an increase in staff commitment and expertise is required in the EA Branch to deal specifically with Class EAs. In addition, the Class EA procedure should clearly set out the content requirements for an ESR to satisfy Section 5(3) requirements.

2.4.4 Commencement of a Project Following Submission of the ESR

In keeping with the levels of assessment approach outlined above,

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the EA Branch, generating documentation, being exempted from further assessment procedures, etc.

CELA agrees with the intent of Recommendation 6.15 but recommends that the specific conditions under which the proponent may commence implementation of a project following the issue of an ESR would include a fast review (see fast-track assessments below) and approval process by the EA Branch to ensure that the ESR satisfies the terms of the Class EA. In addition, CELA recommends that there should be no project implementation pending completion of the bump-up request period (see bump-up recommendations in Section 2.5.2 below).

2.4.5 "Fast-track Assessments"

For individual items within a class, there is currently no assessment process required. Rather, proponents are only required to satisfy the planning procedures laid out in the Class EA document. Without any assessment of whether such projects actually satisfy the requirements of the Class EA (and therefore the Act), the process lacks accountability and rigour. It is difficult, if not impossible, to know if the planning process set out in the Class EA is resulting in good decision-making at the individual project level if there is no further assessment undertaken after the Class EA is approved. Evaluation by the EA Branch of these individual projects on an ongoing basis does not presently occur and should be required. It offers an excellent opportunity to assess the cumulative impacts of many small projects within the class and provides a link, that currently does not exist, between individual projects and the Class EA approval.

2.5 BUMP-UPS

The EA Task Force makes two recommendations concerning bump-ups:

- an amendment to the Act to provide for bump-up (Recommendation 6.13); and
- a guideline to facilitate the bump-up provision (Recommendation

6.14).

Each of these recommendations is discussed below.

2.5.1 Background

The issue of bump-up has also been contentious. To date, there have been 40 bump-up requests and only one request granted since 1983.[6] Many have languished for months on the Minister's desk without a response.

There is a legitimate public expectation that designation/bump up requests, if made will be decided by the Minister of the Environment in a timely fashion, and will be based on rational and cogent grounds. Recommendations 6.13 and 6.14 while providing a starting point do not deal with a number of issues to ensure that the bump-up process is fair, efficient and that bump-ups are dealt with in a timely fashion.

2.5.2 Provision for Bump-up

CELA recommends that the Act be amended to provide for the right of a person to request a bump-up based on certain enumerated criteria. The request should be made in writing to the Minister of Environment and should set out the reasons for the request. Upon receipt of a bump-up request, the Minister of Environment should respond to the request within 90 days. Written reasons must be provided by the Minister. While bump up requests are being considered, the proponent should be prohibited from proceeding with the project in accordance with Section 5(1) of the EA Act. The Minister can have the option to refer particularly controversial requests to EAAC for consideration, however the 90 day timeframe

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[6] Aurilio, Luigi M. (EAPIP) Working Paper #3 " Class Environmental Assessments, Bump-Ups, Exemptions, Designations", November 1989, p.12.

- a guideline for the procedure to request, and decide upon, designation requests (Recommendation 6.6);
- a strategy for ongoing designation of the waste management sector (Recommendation 6.7); and
- designation of non-utility hydro electric generators (Recommendation 6.8).

In addition, Recommendation 2.8 regarding a guideline providing criteria for a proponent to determine "alternatives to", states that for private sector EAs, all alternatives within a private proponent's mission statement be included and that any public sector activity(ies) that have the ability to significantly affect the purpose of the undertaking be included. As well, the Minister's cover letter to the EA Task Force Report states that a Task Force will be established to address how the Act should be applied to the private sector. Each of these recommendations is considered below.

2.6.1 Designations

CELA supports Recommendation 6.6 as a much-needed efficiency measure. However, as discussed above with respect to the criteria to assess exemption requests, we would delete 6.6 E) f), alter 6.6 E) g) to read: "frivolous or vexatious nature of request" and add the criterion, "and potential for cumulative effects".

Also as discussed with respect to exemptions, we consider that for criterion 6.6 E) e), a determination as to whether other legislation is adequate to deal with the issues of concern is far too subjective. Other legislation does not provide the same rigour in terms of both public and environmental accountability as is provided by the provisions of the EA Act and the administrative process accompanying the Act. Unless and until other legislation provides this rigour, this criterion can be used to inappropriately

should extend to no more than 120 days in total to encompass the EAAC process.

2.5.3 Criteria to Assess Bump-up Requests

The EA Task Force has recommended that a guideline be prepared which would set out criteria for assessing bump-up requests. CELA would recommend that the criteria be set out in the Act or regulations. CELA is in general agreement with the criteria suggested with the exception of "considerations of urgency" which we would recommend be modified such that "urgency" would have to do exclusively with matters of public health and safety. In addition, we recommend adding to the end of 6.14 b): "and potential for cumulative effects". In addition, we recommend that 6.14 h) be as follows: "frivolous or vexatious nature of request".

Presently under a number of approved class environmental assessments (GO Transit Class Environmental Assessment, and Class Environmental Assessment for Roads to MNR Facilities) the criteria of "unresolved public concern" and "significant environmental impacts" are used to determine whether a bump up should be given. While there is obviously some latitude for the Minister in determining what is a sufficient level of public concern, the task is made easier by the fact that in most instances, the unresolved public concern will likely focus on the environmental impacts of the proposed operations. The specific criteria delineating significant environmental impacts could be outlined in the Class EA to give guidance to the Minister in reaching this decision.

2.6 PRIVATE SECTOR

The EA Task Force makes a number of recommendations regarding private sector designations:

avoid the EA Act.

Recommendation 6.7 is fairly vague since neither the recommendation nor the text preceding it provides any detail as to what this "comprehensive strategy in the ongoing designation of the waste management sector" would entail. We suggest that the strategy involve the development of a regulation for the waste management sector (see Sectoral Regulations, Section 2.6.5 below).

CELA supports Recommendation 6.8.

2.6.2 Analysis of Alternatives

We support recommendation 2.8 to the extent that guidelines should be developed to outline the alternatives required for each sector. We consider that these guidelines should, however, be enshrined in regulations, for each sector (see Sectoral Regulations below). Development of regulations including this information would greatly ease enforcement of such requirements. It is paramount that application of the Act to the private sector not compromise the important principles embodied in section 5(3) of the Act, including the full examination of alternatives to the undertaking.

We therefore dispute the range of alternatives suggested for the private sector in recommendation 2.8. It is understandable that for private sector projects, proponents will prefer alternatives which are profitable for them, and which can be accomplished on land which they already own. While providing a reasonable basis for preferring such alternatives, the onus should still be on the proponent to demonstrate that their choice is also preferable when all the environmental impacts are considered, and compared to those for other alternatives.

Given the broad purpose of the EA Act, alternatives outside of the mission of the proponent will often have to be explored. This issue will be one of many for the Task Force investigating private sector application to explore. It is critical however, that the Task Force not compromise the requirements of Section 5(3).

For example, if a mine in a particular location were not developed, there might be the potential for establishing a provincial park in the same area. The economic, social and bio-physical implications of this alternative should not be ignored merely because the mining company is not in the business of park management. Instead, government ministries with responsibilities in the area of the alternatives should be responsible for drafting the portions of the document describing these alternatives and their anticipated impacts. Because there is no assurance that these alternatives would indeed be implemented if they do appear to be those which best fulfil the public interest, the ministries drafting these sections of the EA document would not become true co-proponents. Rather, they would be responsible for ensuring that the best alternative is not overlooked or prevented by the necessarily narrow mandate of private sector proponents.

In areas where Crown land is not at issue, the public and private sectors will have to consider co-proponency. For example, in the area of waste management, a private company has a corporate mandate to carry out a function for which a municipality or the province has responsibility. The regulation for the Waste Management Sector would allow for the private company and the relevant public sector to be co-proponents. The private company would consider the alternative for which it has a corporate mandate and the public sector would consider the other alternatives.

2.6.3 Task Force on Private Sector Application

The Minister's intention to establish a Task Force to address, not whether, but how the EA Act should be applied to the private sector is to be commended. The discussion in the EA Task Force Report regarding further private sector application is fairly weak and offers only a starting point for the proposed Task Force's deliberations.

CELA has had extensive experience with such multistakeholder consultations. We have a number of recommendations regarding the make-up, direction, administration, and terms of reference for the Task Force which are intended to avoid the many pitfalls that can beset such a process.

The Task Force should be a multistakeholder group made up of industry, government and non-governmental organizations and should be limited in size to a maximum of 15 people. A working committee of greater size is unmanageable for many reasons such as scheduling and budgetary considerations and the ability to participate effectively in a small group. The Task Force should be a consensus committee while allowing individual members to submit minority reports. The Task Force should report directly to the Minister of the Environment.

The Task Force should be able to review its terms of reference and make suggestions to the Minister for modifications before they are finalized. It requires an efficient secretariat, an effective, knowledgeable, impartial chair, and members should have expenses covered including honoraria for their time.

Most important, the Task Force requires clear direction from the

Minister as to what is required and when. We suggest a deadline of one year. We further suggest that the Minister direct the Task Force to address itself to a staged sector-by-sector application of the Act and to the development of regulations for each sector as they come under the purview of the Act. These two approaches are discussed further below.

2.6.4 Phasing in Application to the Private Sector

Application of the EA Act to the private sector in a staged, sector by sector approach will ensure that the increased administrative burdens on MOE staff are manageable and will allow all parties to learn from experience gained during the early stages.

This staged application will require the development of a sectoral classification scheme to determine which kinds of undertakings fall into which sectors. For example, it will be necessary to define sectoral categories when boundaries between sectors are not entirely clear and to list which enterprises fall into such categories. Certain sectors will be easily characterized at the outset and these should be the first candidates for private sector application of the Act.

2.6.5 Sectoral Regulations

Regulations should be developed for each sector setting out key interpretations of the Act. In particular, the regulations should list those undertakings that fall within the sector and requirements for satisfying Section 5(3) of the Act. Sectoral regulations should address issues unique to each sector. For example, if Class EAs are to be used, criteria within each sectoral regulation will need to establish how projects could be combined into a single class of undertakings and who the proponent would be. Criteria should include the significance of the impacts, and the

potential for cumulative impacts.

Clarity and certainty require that there be a broadly consistent approach to regulation of the different private sectors. Similar criteria of environmental significance, geographic scale, cost and cumulative effects should be used to determine the range of activities in each sector which should be exempted, placed under Class EA's, or individual EA's. A consistent approach to screening should speed pre-submission consultation and streamline the decisions regarding application.

2.7 GOVERNMENT POLICY AND PROGRAMS

The discussion in the EA Task Force Report as to how Cabinet-approved policies and programs could be assessed for their environmental impact offers a very weak starting point to this discussion. For example, it is fair to say that very little action would occur if Cabinet maintains its discretion as to whether to apply EA to selected policies or programs. More important, such discretion as to whether selected policies and programs would be assessed or not defeats the purpose of integrating environmental considerations into government decision-making at all levels.

CELA recommends that the EA Act be amended to require the environmental assessment of government policy and programs. We recognize the difficulty of conducting EAs on policies and programs through the application of the standard procedures under the Act and therefore recommend that this mandatory requirement should refer to a new EA procedure, to be developed as a regulation. Consultation on this approach should consider but not be at all constrained by the approach suggested in the Task Force Report. These new requirements should include public disclosure of

information including the full background analysis of policy assessments undertaken by Cabinet when new policy decisions are announced.

It will be necessary to clarify what policies and programs are included for assessment. Neither term is easily defined. In general, government policy refers to statements - both written and oral - made by the government of the overall intent and direction of its administration. Programs are usually announced in the Throne Speech, they are accompanied by an itemized budget and they often implement policies. Major policies are approved by Cabinet. Many other policies simply follow the mandate of individual ministries and do not go to Cabinet for approval.

A staged approach to policy and program assessment is advisable for reasons similar to staging private sector application. Major policies and programs requiring Cabinet approval and that have clearly recognizable impacts on the environment should be assessed first. Further assessment of major policies with less immediately obvious environmental impacts should then be assessed. Finally, smaller policies and programs should be evaluated as to whether assessment is necessary. In order to avoid the controversy that has surrounded application of the Act to the public sector, clear criteria will need to be developed for which policies and programs require assessment.

2.8 LAND-USE PLANNING

2.8.1 Introduction

Calls for the reform of the land-use planning process, governed primarily by the Planning Act, have increased dramatically in recent years. Concerns exist with respect to the lack of meaningful

public participation within the process, the apparent influence of large developers on municipal politicians and their staff, and the inability of reviewing agencies and the planning process in general to adequately account for environmental concerns, including cumulative impacts.

Concerns exist as well about the rapid loss and/or degradation of natural areas in Southern Ontario such as wetlands, woodlots, head water areas, cold water streams, river valleys and other significant landscapes and topography, as well as the continued loss of productive agricultural land. Environmentally and/or culturally significant areas are being lost to development, and many public interest groups believe that such areas should be protected from all forms of development. In addition, in other natural areas where certain kinds of compatible development may be appropriate, objections are raised with respect to <u>how</u> development should occur. Presently, little regard appears to be given to environmental concerns such as provision of greenspace, efficient coordination with public transit and other infrastructure developments, ground water recharge, maintenance of indigenous species habitat, and general aesthetic appeal.

One strategy employed by many citizen's groups concerned about the deficiencies in the planning process to address the environmental impacts of development proposals has been to request some form of EA involvement. For example, groups have requested EA Act designation of environmentally significant private sector developments requiring official plan amendment, zoning changes or subdivision approval. However, it must be noted that, to our knowledge, no private sector urban development proposal has been designated under the EA Act. As well, new or expanded public infrastructure to service these private developments has been the

subject of bump-up requests. In both cases, additional motivation arises from the potential for a Ministerial referral of these requests to the Environmental Assessment Advisory Committee (EAAC) for a public hearing and report.

Since publishing its report on The Adequacy of the Existing Environmental Planning and Approvals Process for the Ganaraska Watershed, involvement of the EAAC has come to be viewed as an excellent opportunity to place additional pressure on the province to resolve the problems arising from the lack of integration of these two planning processes.

In addition to the public airing of views generally afforded by an EAAC referral and the high quality of work generated by the committee, the EA process is seen as more accessible since intervenor funding is available at hearings where the EA Board is involved. Most important, the EA process is seen as the only process that offers a meaningful opportunity to rigorously address environmental concerns.

2.8.2 The Planning Act

2.8.2.1 Policy Statements

The Planning Act does not contain any statement of purpose but rather provides for a process of planning and development to be administered by organized municipalities. When considering planning matters, Section 2 of the Act directs both provincial and municipal authorities to have regard to matters of provincial interest, such as environmental protection, but there is no requirement to do so. Section 3 of the Act allows the province to issue policy statements on matters that are of provincial interest. Municipal planning decisions must then have regard to these policy statements. In

natural resources, such as farmland and wetlands, facing such strong development pressure. This statutory protection is urgently needed before these natural areas are lost under the present system, and it must be legislatively-based rather than policy-based to be effective in the short- and long-term. The protection afforded by such measures must also extend further than "areas of provincial interest" so that municipal authorities do not ignore those areas of regional or local significance.

2.8.2.2 Public Input

An overall lack of opportunities for effective public input is a problem throughout the planning process. The public lacks money and resources and their opportunities to participate occur far too late in the process. As well, large scale development is often fragmented by the phasing of approvals such that small portions of much larger developments can be approved in small parcels with no consideration given to the cumulative impact of the entire development. This overall impact is often what the public is most concerned about but no opportunity exists to consider these overall issues.

For example, approvals for the Lagoon City development within and adjacent to a Class 2 wetland beside Lake Simcoe are occurring in a multi-staged fashion. The private developer is seeking approval for separate parcels of development under different applications. The municipality is seeking approval for expansion of sewage and water facilities to service an unspecified - and as yet unapproved - amount of increased development. Under the present planning process, it is exceptionally difficult for local citizens, ratepayer groups and reviewing agencies to address the overall cumulative impacts of the entire development. These parties are notified, if at all, of each stage of the proposal on a case-by-

addition, the direction given in Section 2 is further weakened by the decision of the Divisional Court in 1987[7] which held, on appeal, that Sections 2 and 3 of the Act are inextricably linked such that the Minister need not have regard for the matters of provincial interest specified in Section 2 unless a Policy Statement issued under Section 3 exists with respect to the matter.

Policy statements have been issued for mineral aggregate extraction, housing and flood plains. Draft policy statements exist for wetlands and agricultural lands. These latter two policy statements have evolved in various draft forms for close to ten years. This delay and the fact that neither comes close to providing adequate protection illustrate the lack of political will that has existed to see such natural areas protected under this approach. For example, the draft Wetlands Policy Statement protects only Class I and II wetlands (out of seven levels of significance); this protection is not absolute[8]; and the largest source of wetland loss - drainage for agricultural purposes - is excluded from the Policy Statement altogether.

To date, the Policy Statements approach has failed dismally to provide the necessary level of environmental protection and resource conservation. From an environmental perspective, the statements are neither effective nor enforceable and can only be viewed as an interim step towards legislative protection for those

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[7] Brennan v. Minister of Municipal Affairs, (1987), 63 O.R. (2d) 236 (Div. Ct.).

[8] For example, development may be permitted if the municipality deems it to be a land use that is "compatible" with the wetland. In the recent case of the Eagle Creek golf course development in the Township of West Carleton, the local and regional municipalities approved a golf course as a "compatible" use in a Class I (provincially significant) wetland.

case basis and this occurs very late in the planning process. In addition, the public lacks adequate time and resources to fully participate.

Earlier and more effective public involvement can be achieved through a formal requirement of early notification of all developments and plans or plan amendments requiring Planning Act approval. Municipalities should prepare notices advising citizens about their rights and options under various statutes, including the Planning Act and the EA Act. During the review of these applications, public input should be similarly formalized. Notices should state that a proposal is circulating to the reviewing agencies, and a meaningful opportunity should be given for public review and comment. The agencies' decisions should also be made public and should be circulated to those who made submissions and they should include a rationale for the decision describing how public input was accepted or rejected and why. Participant funding may need to be considered for proposals that are particularly large. In addition, intervenor funding legislation should be extended to include the Ontario Municipal Board so that intervenor funding is available to the public in appropriate cases.

2.8.2.3 The Review Process

All official plans, official plan amendments, plans of subdivision and zoning by-laws are subject to review by provincial agencies and ministries. There are no guidelines or criteria to guide these reviewers and there is a clear need for such ground rules. Understaffing is also a serious problem. Individual reviewers are not required to consider the proposal as it relates to issues beyond their agency mandate or to consider the cumulative impacts of the proposal. Most important, there is no overall integration of reviewers input. A comprehensive overview of the proposal from the

perspective of all agencies is required.

2.8.2.4 Short-term Reforms

Our comments and suggestions for change represent preliminary thoughts surrounding reform of the land-use planning process. The EAAC report on The Adequacy of the Existing Environmental Planning and Approvals Process for the Ganaraska Watershed set out fourteen excellent recommendations regarding the Ganaraska Watershed, the Oak Ridges Moraine and the provincial planning process in general. These recommendations, if implemented as the first step towards a package of reforms, would help to provide the kind of coordinated land use planning that is critically needed in Ontario. It has been over a year and a half since the report was released. It is high time the province acted upon it.

Critical among the EAAC recommendations and echoed many times around the province is the immediate need for biological inventories. Geographic Information System (GIS) mapping will provide considerable assistance in this matter, particularly as municipalities become accustomed to GIS mapping and as the cost of GIS continues to decrease.[9]

2.8.2.4 Longer-term Reforms

We see such inventories as essential to providing critically needed input to a longer-term strategy of developing new regionally, preferably ecosystem-based, plans to guide future development. Overall policies (and new protective legislation for natural areas) to guide the development and implementation of these regionally based plans could establish targets for preservation (and

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[9] see Lindgren, R.D. 1991, Submissions on behalf of the Canadian Environmental Law Association to the Standing Committee on Government Agencies Regarding the Ontario Municipal Board.

restoration in many cases) of significant natural areas within each region. We see these new plans as setting out the mix of landscapes and development options that can occur within a given region. The amount of land available for preservation, restoration and development can be specifically allocated in the plan. The amount of land to be preserved and/or restored can be linked directly to the inventories.

For example, a region with very few remaining wetlands would place a much higher priority on complete preservation than a region with extensive wetlands. The latter region could decide to preserve only those wetlands that are of regional or provincial significance whereas the first region ought to preserve all wetlands, notwithstanding their level (local, regional, etc.) of biological significance.

An additional, longer-term reform that should be encompassed by this revised regional planning is improvements to zoning designations. Currently, zoning categories are heavily weighted towards urban land use. Even those categories which are frequently used to denote environmentally significant areas such as steep slopes in river valleys or wetlands, are classified as "hazard" lands, the implication being that they are hazardous for urban forms of development. Unfortunately, even when zoning does afford some protection for natural areas, it is so easily changed under the current regime that the protection is rarely permanent.

Zoning designations for environmentally significant lands should be geared to providing protection for the ecological integrity of these areas. Anyone wanting to develop these lands would have to show that this integrity could be protected. Hence a reversal of onus from the current situation is required such that it would no

longer be up to the public to show that environmental damage would occur from the development.

CELA considers that a reformed Planning Act should continue to govern the process of land-use planning and approvals for small-scale, private sector developments such as housing. We see the role for EA in the land-use planning process at this new regional, preferably ecosystem-based level of planning. These new plans should be subject to environmental assessment. Public involvement in the development of regional plans should be early and often. Individual undertakings within these regional plans or undertakings that would be out of compliance with the terms of the regional plan should be automatically subject to the Act. As well, large scale, individual projects with environmentally significant impacts should also be subject to the EA Act.

The proponents of these regional or ecosystem-based plans would have to be regional governments. Given that the jurisdictional boundaries of most regional governments bear little or no relation to ecosystem boundaries, it may be worthwhile to reconsider these boundaries particularly in areas like the Greater Toronto Area where the density of government is particularly high, even excessive, for the needs of the region.

3.0 ADMINISTRATION OF THE ACT

3.1 PLANNING AND CONSULTATION

3.1.1 Introduction

The EA Task Force makes several recommendations for improvement to the pre-submission consultation phase of the EA process. Key recommendations include:

- having a public consultation phase during planning (recommendations 2.1, 2.2, 2.3, and 2.4)

- having a public notice by the proponent once the purpose of the undertaking has been identified (recommendation 2.2)
- requiring an Environmental Design Document (ADD) (recommendations 2.7 and 2.8)
- requiring a public notice to all those directly affected once the preferred alternative is selected (recommendation 2.8)
- improving guidelines and training on EA for MOE staff, other government ministries and agencies, and proponents (recommendations 2.16 and 2.17)

Each of these will be addressed below.

3.1.2 Start of Consultation Process

CELA supports an amendment to the EA Act which would require the proponent to carry out a planning and consultation phase with affected parties before formal submission of the EA. This amendment would eliminate any uncertainty that now exists regarding whether or not the EA Act requires public consultation.

3.1.2.1 Principles

CELA supports the principles in the MOE Guidelines on Pre-Submission Consultation in the EA Process (November 1987) and recommends that they be used as the basis for developing policies on how the consultation phase should work.

Policies on this consultation phase should stress ease of accessibility to easy to read, clear, concise reports with sufficient time provided for all parties to review and provide input on the documentation before decisions are finalized. At each planning stage, the proponent should be required to document the input received, the concerns raised, and the proponent's response to how the concerns will be addressed. This type of documentation

is now required for all Waste Management Master Plans funded by MOE.

Recommendations on intervenor funding as a principle at the consultation stage are discussed in section 3.5 below.

3.1.2.2 Public Notice to Announce the Start of the EA Process

CELA concurs with the need to have a public notice which announces the start of the consultation phase. The EA Act should be amended to require that such a notice be prepared and a regulation should be used which describes its required content. The public notice would be prepared by the proponent and would be advertised widely within the proposed study area. CELA concurs that the notice should also be sent to the affected municipal clerks and any other affected public as determined by the proponent in consultation with MOE's EA Branch.

The notice would be used to announce the commencement of the EA planning process. Since the ADD is to be the terms of reference for that planning (see below), the completion of the ADD by the proponent would be the legislative trigger for the preparation of the notice, informing all affected parties that an EA planning process for an individual EA had begun. Once the proponent had identified the problem or opportunity to be responded to through an individual EA planning process, the proponent would prepare the ADD and issue the notice. This type of notice is designed to advise the public about the purpose of the planning effort, rather than the purpose of the undertaking.

To assist proponents in the preparation and distribution of the notice, the EA Branch would provide guidance on these matters

through guidelines and direct assistance as well as through the preparation of a model notice, which would be readily available for use.

The regulation would require the notice to contain the following:

- how an individual could obtain further information on the planning effort, including how to become an active participant;
- a description of the problem or opportunity which has lead the proponent to initiate an EA planning effort;
- a map of the proposed study area, which clearly delineates study boundaries;
- alternatives currently under consideration by the proponent;
- an outline of the contents of the ADD, making it clear that the ADD is the terms of reference for the EA planning effort and that it will be revised as planning proceeds from stage to stage; and
- how the ADD can be obtained and reviewed.

Requiring this notice once the proponent has identified the purpose of the undertaking, as suggested by the Task Force, is far too late in the planning process, since this implies that the proponent already knows what the undertaking is. By the time the proponent has identified the purpose of the undertaking, decisions on alternatives have been made and the EA planning effort becomes focused on justifying the decisions that have already been made.

3.1.3 The Assessment Design Document (ADD)

CELA supports the preparation of an ADD. In order to ensure that a proponent prepares an ADD at the start of the planning process, CELA recommends that the EA Act be amended to contain a provision similar to that for the preparation of the review, which would require that an ADD be prepared. A regulation should be used to

describe the required content of the ADD.

However, CELA has serious concerns regarding the recommendations of the Task Force which deal with the purpose, content and ability of the ADD to bind future decisions.

3.1.3.1 The ADD as the Study Terms of Reference

CELA suggests that the ADD be used as a tool to seek early public involvement in the process and to develop a reasonable basis of support for the planning effort at each stage of planning. The ADD would describe each proposed planning stage and update the purpose and description of the stages as the planning progresses from stage to stage. In other words, the ADD would serve as overall terms of reference for the EA planning process as well as detailed terms of reference for each planning stage.

In the case of a public sector proponent, the trigger for the preparation of the ADD would be the need to respond to, for example, a resource, transportation, energy or waste management opportunity or problem. In the case of the private sector, the trigger would be the point in time when the proponent realized that a business opportunity or problem had a reasonable likelihood of leading to a solution which would require compliance with the EA Act for the preparation of an individual EA. In both examples, the proponent is making assumptions about possible undertakings and using the EA process as the decision-making framework in response to the problem or opportunity, rather than making a decision on the undertaking and embarking on an EA process to justify it.

3.1.3.2 Content of an ADD

The ADD would serve as the terms of reference for the EA planning effort from the start of the EA planning process to the formal

It is premature at this point in the planning process to be able to list and describe alternatives to the undertaking and alternative methods of carrying out the undertaking, since the undertaking will not be known this early in the planning effort. Instead, the ADD should document the range of alternatives to be investigated at each stage and ensure that it is broad enough to meet EA requirements. The labelling of alternatives more appropriately takes place once the undertaking has been selected. Then it is clear what the alternatives to and alternative methods are.

Having an ADD which requires the description of the purpose of the undertaking as well as both the alternatives to and alternative methods as the trigger for the initiation of the EA process will mandate a process which begins late in the proponent's planning effort. This will undermine the intent of the EA Act and lead to a process of assessment that is more akin to the narrower impact assessment approaches of other jurisdictions.

3.1.3.3 Intervenor Funding and the ADD

It is essential that the ADD clearly describe the planning stages to be followed. The description of the first stage should be used as the basis for triggering intervenor funding (see section 3.4 below). Based on the proposed content of each stage, intervenors would make submissions to an Intervenor Funding Panel of the Board and would be awarded funding based on their proposed contribution to that planning stage. This approach accommodates the entry and exit of intervenors as well as the coalescing of groups as planning progresses.

By providing for funding at each stage, intervenors will be judged on their previous contributions as well as their proposals. This should facilitate more responsible and effective participation by

submission of the EA to the Minister of the Environment. The ADD would divide the planning effort into manageable planning stages which would be used as the basis for the proponent to make planning decisions and to seek public input.

The ADD regulation would codify specific requirements to add more certainty to the planning process, while ensuring that adequate flexibility in the planning process remains to stimulate innovative approaches and respond to unusual situations.

The regulation should specify that the ADD contain, at minimum, the following:

- the problem or opportunity which has triggered the planning - the purpose of the study;
- the study area, with a map clearly delineating study boundaries and the rationale for the boundaries chosen;
- a description of the stages of planning to be followed in order to come to a decision on the preferred alternative - the undertaking. The description of each stage should include the public consultation process proposed, preliminary criteria for alternatives identification and evaluation, the proposed methodology for evaluating the alternatives based on the criteria generated, and the proposed method for documenting, addressing and integrating public concerns into the planning process. In most cases, the proponent will only be able to reasonably describe proposed alternatives to be studied for the current stage. The expected timing of each stage should also be documented and explained; and
- a preliminary listing of issues and studies to be conducted at each stage.

intervenors and enable them to more fairly participate throughout the planning process. Better guidance to proponents should result.

In addition, providing funding at the consultation stage will streamline the formal review process. Less time will be required by intervenors to gain an understanding of the EA and to make constructive comments. A shorter formal review period should result.

3.1.3.4 Implementing the ADD

3.1.3.4.1 EA Branch Role

The EA Branch should prepare supporting policies and guidelines which provide detailed guidance to proponents and the public on how to meet the content requirements of the ADD at each planning stage. The ADD regulation would require that the Branch endorse the ADD for each stage before the proponent could proceed with the planning for that stage. This would add some certainty to the quality of the ADD, while still providing adequate planning flexibility.

An adequate balance between certainty and planning flexibility would be maintained because the endorsement of the ADD would be based on preliminary criteria for alternatives identification and evaluation as well as a proposed planning methodology. These aspects would get finalized and applied as planning proceeded within the stage and public input on these matters was sought.

3.1.3.4.2 The Board and the ADD

Providing the Board with the power to make a binding decision on the ADD at the point of its initial preparation is inappropriate. Such a binding decision on the terms of reference for the planning effort would unduly restrict both the planning process and the Board's ability to make sound decisions on the planning process

since this decision would be made too early in the planning process. The terms of reference should be allowed to remain flexible in order to respond to changing circumstances.

If a proponent or intervenor is going to have the right to go to the Board at any time during the consultation phase to get a ruling, then this ruling should not be confined to the range of alternatives issue. A proponent or intervenor should be able to go to the Board to get a ruling on any planning matter covered by the ADD (content as described by CELA above) at the current stage of planning. For most EAs, the Board would likely be called upon to make planning decisions at each stage of planning. This would result in planning certainty at each stage, while greatly increasing the time and costs of the consultation phase. This model would not streamline the EA process. Rather it would add several additional Board approval levels to the process.

Providing direction on the adequacy of the ADD throughout the planning process should be the responsibility of the EA Branch. The Branch should be able to deliver this function in an efficient and effective manner, provided that the Branch is properly staffed and given appropriate resources.

3.1.3.5 The Need for Certainty - Sectoral Regulations

CELA recognizes the need for greater certainty in EA planning so that proponents as well as intervenors have a clear understanding of what is expected and can respond accordingly. CELA is also aware that there is too much uncertainty in this regard at the present time. However, CELA believes that the most efficient way to gain adequate certainty on the range of alternatives required for analysis is through sectoral regulations for both public sector and private sector undertakings. These regulations would provide

an interpretation of Section 5(3) for each sector by setting out the minimum range of alternatives required to plan for specific activities. The content of these regulations is also discussed in Section 2.6.5.

3.1.4 Notice of Selection of Preferred Alternative

CELA supports the requirement in the EA Act for a notice by the proponent announcing the preferred alternative to all directly affected parties and other interested parties identified up to that point in the planning process. As with the notice announcing the start of the EA process, the content of this notice should be described by regulation and prepared by the proponent. The EA Branch should provide guidance to proponents on how to prepare and distribute the notice, including a readily available model notice for use.

This notice must describe the undertaking and its location. The location must be clearly delineated on a map in the notice. In addition, the notice must provide a brief description of the rationale for the undertaking and indicate how further information on the undertaking and the planning process can be obtained. This notice must be sent to all affected property owners and municipalities and to anyone else who has expressed an interest in the planning to date.

Having this notice is important. Currently, during PSC, people directly affected often do not know that their property is under consideration for expropriation or that the property adjacent to them is being considered for a different land use. This notice should minimize these problems and also ensure that people that have expressed an interest in the study are kept up to date on its progress.

3.1.5 Improving Training and Guidelines on EA

CELA supports the recommendations for more guidelines and improved training on EA. These initiatives should improve the level of understanding of EA and provide better guidance to EA participants on EA requirements. This should lead to the production of better quality EAs and improved decision-making on EA matters. However, CELA recommends that the training be available to any party interested in EA, not just proponents and government agencies.

As noted in Section 1.1 CELA supports initiatives to improve the amount and quality of resources being applied to EA by government ministries. More and better trained personnel are needed in MOE as well as in ministries participating on the Government Review Team to ensure the adequate advice is provided to all parties at every stage of the EA process.

While the need for consistent and effective guidelines and sound training is important, the need for a consistent approach to the application of the EA Act as a first step should not be overlooked. Currently, the Act is not consistently applied, with the differing requirements for Class EAs being a case in point. A consistent application of the Act would eliminate much of the confusion experienced by both proponents and intervenors regarding the EA Act and would streamline both the consultation and approval stages of the EA process.

3.2 THE REVIEW PROCESS

3.2.1 Introduction

The Task force makes several recommendations dealing with improvements to the review process. Key recommendations include:

- Notice of Submission of an EA (recommendation 3.1);
- Referral of the hearing request to the Board once the proponent requests the hearing (recommendation 3.2);
- Policies on the administration of the review to expedite the process (recommendations 3.3, 3.5);
- Regulation for distributing the EA by the proponent (recommendation 3.6);
- Improvements to guidelines and training (recommendations 3.7 and 3.8); and
- Changes to Section 10 and 11 of the EA Act (recommendation 3.14).

Each of these recommendations will be addressed below.

3.2.2 Notice of Submission and Distribution of the EA

CELA supports the preparation of a notice by the proponent which announces the formal submission of the EA to the Minister. CELA also recommends that the proponent be required to distribute copies of the EA to the Government Reviewers and to directly affected municipalities and property owners.

The notice would also indicate that the EA had been submitted to the Minister and outline the next steps in the formal approvals process; the notice would briefly describe the undertaking, including a clear map; and explain how additional copies could be obtained and where they could be reviewed.

The notice would be published by the proponent on the date that the proponent formally submits the EA to the Minister of the Environment. As with the other notices, this notice should be referred to in the EA Act and its content should be specified in a regulation. The EA Branch should be responsible for providing

guidance on the notice preparation and distribution and should have a model notice available for use.

In addition, the regulation for the notice would indicate that the proponent was to distribute copies of the EA to directly affected municipalities and citizens. Before distributing the EAs, MOE policy would dictate that the proponent should consult with the EA Branch. The Branch should have clear guidelines for the EA distribution to facilitate this process.

3.2.3 Time Limits for the Review

Time limits for the publication of the Government Review should be included in the EA Act. The normal time frame for the publication of the review would be within 120 days of the formal submission of the EA. To deal with more urgent situations, there should be a provision in the Act to tighten the timetable at the discretion of the Minister based on written reasons provided by the proponent at the time of the formal EA submission.

Over the years, the EA Branch has had a number of policies which have tried to set time limits on the review. These policies have not worked because of lack of government resources as well as a lack of commitment to the policy by MOE and other members of the Government Review Team. Mandating the time limits in the statute will add certainty to the schedule for all parties and should provide the Government with adequate incentive to ensure that the government ministries affected are properly resourced to fulfil their responsibilities in a timely and responsible manner.

3.2.4 Referral of the Hearing Request to the Board

In order to save time, the Task Force recommends that upon receipt of the request for a hearing by the proponent, the matter should be

referred to the Board instead of waiting for the publication of the review. It would enable the Board and other parties to begin administrative preparations early, including a pre-hearing.

CELA only supports this recommendation if these early preparations deal strictly with administrative matters. This early start should not undermine the role of the Review in the EA process and the proceedings should not begin without the Review.

3.2.5 Analysis in the Review

Changes in the way the review is carried out are required. The EA Branch's analysis of Section 5(3) of the EA Act should be made consistent with recent Board decisions dealing with planning process requirements. Based on how well these requirements are met, the Branch should come to a conclusion on whether or not the undertaking should be approved. (For further details on this point, please consult the chapter on the acceptance and approval decisions.)

In order for the Branch to be more consistent with the planning requirements of the Board, the Branch should revise immediately its approach for coming to conclusions on Section 5(3) in the Review. At minimum, as outlined in the Halton, SNC, North Simcoe and Meaford Decisions, this requires that in order to meet Section 5(3), the planning process must:

- be technically sound, logical and consistently applied;
- be traceable; that is, easy to follow and understand;
- be replicable; that is, a different person could reasonably come to the same conclusion as the proponent if the person were to duplicate the planning approach which was taken;
- have an evaluation framework which includes criteria for the

identification and evaluation of alternatives. The reasons for the selection of the criteria and the determination of their relative importance must be reasonable and clearly explained; and
-consist of the evaluation of a reasonable range of functionally different and functionally similar alternatives.

The above list is not exhaustive, but illustrates the breadth of the planning guidance provided by the Board. As well, these decisions provide specific guidance on social impact assessment and hydrogeological requirements for landfill siting. For further details, each decision should be consulted.

3.2.5.1 Guidelines and Training

MOE should update its Interim Guidelines on Environmental Assessment Planning and Approvals (July 1989) and the Role of the Review and the Review Participants in the EA Process (November 12, 1987) to better reflect the above planning requirements.

As well, government reviewers should be required to prepare guidelines which cover their EA requirements. These should be used as the basis for consultation in the consultation phase as well as their contribution to the formal EA review. MOE should ensure that the guidelines, in total, cover the broad definition of the environment in the EA Act.

CELA recommends that sufficient resources and training be provided to develop and implement these guidelines in an effective and responsible manner.

3.2.6 Role of the Public in the Preparation of the Review

The prime purpose of the Review should be to effectively inform the public of the concerns that ministries and agencies have regarding

the planning and the undertaking that has resulted and how the Government believes these should be resolved. In addition, the Review should summarize and highlight the concerns expressed to date by the public up until the final drafting of the Review. Based on the findings in the Review, citizens would be able to make an informed decision whether or not to request a hearing.

3.2.7 Notice of Completion of the Review

The Notice of Completion of the Review should be published by the Director of the EA Branch. The EA Act should be amended to provide for this delegation of authority. This would expedite the publication of the Review.

If the Review concludes that the inadequacies in planning can be addressed by further work to be carried out by the proponent, then the Review should clearly indicate what work is required and the reasons why it is required. When the Director issues the notice that the review is complete, this notice would also contain an Intent by the Director to Order Further Work.

This would require an amendment to Section 11 of the EA Act to allow the Director to carry out this order. The Act should define the Order broadly to ensure that it would capture any work that might be required to improve the proponent's planning and decision-making. The proponent and members of the public would have 30 days to respond to this intent, after which the Director would make a decision on the order and its content.

If the Review concludes that further work would not remedy a situation or if the Review concludes that the undertaking should be approved, then the Director would just issue a simple Notice of Completion of the Review.

Upon release of the simple Notice of Completion, the public would be given 30 days to request a hearing.

3.3 ACCEPTANCE AND APPROVAL DECISIONS

3.3.1 Introduction

The Task Force makes several recommendations regarding the acceptance and approval decisions in the EA Act. Key recommendations include:

- Provide the Minister with the authority to accept/refuse the EA and to delegate the authority (recommendation 3.9);
- Enable the Minister to ask the Board for a hearing on approval after the Director or the Board has either accepted or refused acceptance of the EA (recommendation 4.3);
- Give the Board the same powers as the Minister or delegate (recommendation 4.4);
- Give the Minister the power to scope the issues to be considered by the Board. (recommendation 4.5); and
- Broadening the criteria for deciding on a hearing based on guidelines (recommendation 4.6).

Each of these recommendations will be discussed in this chapter.

3.3.2 Eliminating the Acceptance Decision

CELA recommends that the EA Act be amended to delete the acceptance decision and to restructure the approval decision so that this decision is tied more closely to Section 5(3). The approval decision should be based on the need for the undertaking, the adequacy of the planning that led to its selection and the environmental consequences of the undertaking as compared with the other alternatives evaluated including the null alternative.

Having acceptance and approval decisions force a clear decision between form and substance, form being the acceptance decision and approval being the substantive one. Experience has clearly shown that having to make such decisions is extremely difficult, not very meaningful and unduly constrains the approval decision.

Recent Board decisions as well as the Highway 89 have brought this issue into focus. The North Simcoe and Meaford Decisions have made it clear that it is very difficult and not very productive to separate the merits of the undertaking from the planning that led to its identification. In both decisions, inadequate planning was the basis for turning down the undertaking and the identification of inadequacies was related to the requirements of Section 5(3).

The Highway 89 Decision revealed that having the acceptance decision made by the Minister before the matter was referred to the Board put the Board in an untenable situation with respect to judging the merits of the undertaking. In that decision, approval was granted to the endpoints of the highway, but not to the middle piece, because of inadequate planning and analysis carried out on the middle portion. In this case, the Board found it impossible to untie the acceptance decision from the approval one and turned down a portion of the undertaking based on inadequate analysis.

In recognition of the difficulties surrounding the disentanglement of the two decisions from a practical and legal point of view as revealed in the Highway 89 case, the EA Branch for years had an unwritten policy to ensure that the Board always dealt with both decisions rather than just the decision on approval. This policy should be maintained until the statute can be properly amended to eliminate the acceptance decision and tie the approval decision

more closely to Section 5(3), planning requirements and the need for the undertaking.

3.3.3.1 Appealing Acceptance

If EAAC decides not to endorse the elimination of the acceptance decision, then CELA urges EAAC to have the appeal of the Minister's acceptance decision open to any party. Restricting the appeal to the proponent is unfair to the other parties who have participated in the consultation process. The Task Force recommendation limiting the appeal is counter to the spirit and intent of the EA Act and would undermine the consultation measures proposed by CELA as well as by the Task Force.

If the power to appeal is granted to intervenors, they are likely to appeal a favourable decision on the acceptance of the EA. Therefore any potential gains in streamlining the hearing process by having the Minister or Director make the acceptance decision first would be lost.

If EAAC chooses not to endorse the recommendation on the elimination of the acceptance decision, then CELA urges EAAC to maintain the two decisions and require, through legislative reform, that both decisions be made by the Board, when a hearing on an EA is to take place.

3.3.3 Ministerial Scoping of Hearings Issues

CELA supports the principle of scoping the issues to be addressed at an EA hearing. However, CELA believes that this scoping function is more appropriately carried out by the Board once the Board becomes seized of the matter.

3.3.4 Board Powers

CELA endorses the Task Force recommendation that the powers of the Minister or designate be directly transferrable to the Board, including the ability to Order Further Work. While the Board has adopted the an interpretation of the EA Act which gives the same powers as the Minister, clarifying the legislation would remove any doubt surrounding this interpretation.

3.3.5 Criteria for Deciding on a Hearing

The Task Force recommends the use of criteria for making a decision on a hearing request. The criteria include the existing statutory requirement (a request which is frivolous, vexatious or cause undue or unnecessary delay) as well as the extent of public concern, the overall public interest being served and the urgency of the undertaking.

CELA does not support the use of criteria other than the ones outlined in the Section 12 of the EA Act. Urgency should not be used to deny people the right to a hearing. Other provisions in the EA Act, such as Section 29 and Section 40 as well as measures proposed in this paper to streamline all aspects of the EA process, give the Minister sufficient latitude to deal with matters of an urgent nature.

As the Board has indicated in the North Simcoe Decision (pp.88-89, North Simcoe Decision), the number of people affected or the overall public interest being served is not the deciding issue. What is important is how the undertaking will impact on those directly affected by its implementation compared with the benefits that the undertaking will create. Therefore, the extent of public concern and overall public interest are not appropriate criteria.

3.4 MONITORING AND FOLLOW-UP

The EA Task Force makes eleven recommendations concerning monitoring:

- amend the Act to require monitoring by proponents with respect to EA commitments, EA terms and conditions and compliance orders Recommendation 5.1) and guidelines to govern an internal MOE program for compliance monitoring and reporting (Recommendation 5.2);
- amend the Act to require timely reporting and documentation of monitoring of individual EAs (Recommendation 5.3) and that all documentation be on the public record (Recommendation 5.4);
- measures to ensure who should be responsible for verification of compliance monitoring, and linking issues raised during planning and consultation to the desirability of clear and specific requirements at the monitoring stage (Recommendations 5.5 and 5.6);
- a regulation setting out monitoring requirements (Recommendation 5.7), a guideline outlining MOE interests in effects monitoring (Recommendation 5.8), and encouragement of effects monitoring studies to support planning predictions and to assist with scoping (Recommendation 5.9); and
- that the Ministry promote multi-sectoral research into effects monitoring (Recommendation 5.10) and research to support cumulative effects assessment (Recommendation 5.11).

Each of these is discussed below.

3.4.1 Monitoring Compliance with Conditions and Standards

CELA generally supports these monitoring recommendations as they pertain to individual EAs. We have some additional suggestions to

make the process more publicly accountable. For example, the monitoring results to be generated by Recommendations 5.1 and 5.2 ought to be publicly reviewable. While Recommendation 5.3 and 5.4 set out a process for annual reporting and a requirement for results to be in the public record, CELA suggests that a monitoring committee be one of the conditions of approval for very large undertakings which have received a very high degree of public scrutiny during the planning and approval process. Such monitoring committees should be open to the public, in particular, those members of the public who were involved in the environmental assessment process should be considered first as candidates of monitoring committees.

3.4.2 Verification

CELA supports Recommendations 5.5 and 5.6 regarding verification of compliance with individual conditions. These and many other recommendations highlight the need for greater commitment of staff and resources to the EA Branch.

3.4.3 Environmental Effects Monitoring

CELA disagrees with the text that precedes Recommendation 5.7 which states that "...it is hardly reasonable to make effects monitoring mandatory..." We cannot think of an instance when such monitoring should not be mandatory. We would support Recommendation 5.7 if it were to be clarified to state that the regulation to which it refers, would require a "listing of commitments, proposed terms and conditions, and proposed plans for monitoring compliance and effects monitoring".

3.4.4 Cumulative Effects Monitoring

We find the EA Task Force Recommendations 5.10 and 5.11 regarding cumulative effects research to be extremely weak. While more

research will certainly be valuable, there is a precedent in the Niagara Escarpment Plan to require the assessment of cumulative impacts[10]. We see no reason for not recommending, as EAAC did throughout its report on the Ganaraska Watershed, that the cumulative impacts of undertakings be considered when decision-making occurs.

We are additionally concerned that all of the EA Task Force recommendations appear to refer only to individual EAs. As noted in Section 2.4.5 regarding "fast-track assessments", it is necessary to assess whether individual projects within a Class EA satisfy the requirements set out in the parent Class EA document. Similarly, monitoring of these individual projects is equally as important as monitoring of individual EAs. As well, monitoring of all projects within a Class would provide an assessment of the cumulative effects of many small, but similar, projects.

3.5 PARTICIPANT/INTERVENOR FUNDING

3.5.1 Introduction

The EA Task Force has recommended that:

- proponents be encouraged to provide funding during planning and consultation and that the Board be involved in funding allocations if requested (Recommendation 2.14); and
- that any funding decision under the Intervenor Funding Project Act take into account earlier funding (Recommendation 2.15).

In addition, the EA Task Force has recommended a process that will involve the public early on in the process and that requires a considerable amount of consultation and scoping prior to the review

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[10] the provision states : The cumulative impacts of development will not have serious detrimental effects on the Escarpment environment (e.g. water quality, vegetation and landscape).

and possible hearing stages. Specific recommendations include the requirements for an Assessment Design Document, mandatory meetings with the public and early scoping sessions, including possible scoping hearings before the Board. The Task Force recognizes the importance of involving the public in "planning the laws, policies and projects that will effect their lives and the environment." It also correctly postulates that in order to effectively participate in the process, the public must be adequately informed and have access to documentation early on in the process. In return, the public is expected to make its views known to the proponent during the planning and consultation phase. However, the Report falls short in dealing with the issue of participant funding at this stage.

3.5.2 Making Participant Funding Mandatory

While recognizing the need for the public to retain expert, independent advice in evaluating complex, highly technical material, the report recommends only that the proponents "be encouraged" to provide participant funding during the planning and consultation phase and that the EA Board be given the authority if requested by the proponent to make recommendations as to the distribution of any such funding. CELA contends that if the reforms to the process are to encourage early consultation to avoid costly hearings later, there must be adequate funding provided to participants early on in the process. Encouraging proponents to voluntarily come forward with funds is not an appropriate strategy.

Unfortunately, while the Intervenor Funding Project Act (IFPA) has been an important step forward in ensuring that intervenors receive funds, the Act only applies in a hearing situation and intervenors can only apply for funds after intervenor status has been given by a Board. In the case of environmental assessment hearings, this

decision occurs after the Minister of the Environment has released the Government Review of the Environmental Assessment required under the Act.

The opportunity to apply for funding comes too late in the process and will not assist in trying to scope issues and shorten the hearing process.

CELA recommends that the IFPA should be amended to allow participants in an environmental assessment process to apply to the Board for funds from the proponent at any time after the mandatory public notice has been filed by the proponent. The same financial and other criteria (with some necessary modifications) as are presently set out in the IFPA should apply. A funding order can specify what the funds would be applied to and can ensure that a full accounting will take place. The Board can early on encourage participant groups to form coalitions and can ensure that duplication of efforts does not take place. As well, in line with the staged approach to planning and consultation outlined in Section 3.1 above, we further recommend that funding be staged with the planning stages.

The IFPA should also be amended to allow for agreements to be made with proponents as to participant funding which can be filed with the Board and could then be taken into account in further applications for funds under the IFPA.

The value of participant/intervenor funding has been recognized for a number of years. Specifically, funding will allow the provision of viewpoints and information not otherwise available to the Minister and tribunal where appropriate, leading to more efficient and better decision-making; enhancing the public acceptance of

decisions taken through greater public participation; and fostering of agency and proponent accountability. CELA believes this government is committed to these principles and that participant/ intervenor funding must become a key component in any reform of the EA process.

CELA also recommends that the IFPA be made permanent after 3 year pilot project expires in April 1992. In the interim, an advisory groups should beset up to review this Act since it was set up as a pilot project. This review should address the need to more comprehensively address participant/intervenor funding issues by extending its purview to the Environmental Appeal Board and the Ontario Municipal Board. This advisory group should include the Chairs of the Environmental Assessment Board, Ontario Municipal Board and the Ontario Energy Board as well as representatives from the office of the Attorney General, intervenor groups and proponents.

Finally, provisions for participant and intervenor funding should apply equally to joint federal-provincial EA proceedings.

3.6 THE HEARING PROCESS

In September of 1990, the Environmental Assessment Board released a series of papers entitled "The Hearing Process: Discussion Papers on Procedural and Legislative Change". CELA responded in detail to those papers and that response is appended to this brief.

4.0 CONCLUSIONS AND RECOMMENDATIONS

4.1 CONCLUSIONS

To summarize our recommendations to reform the administration of the EA Program, we have prepared a revised version of the EA Task Force schematic flow chart of a "Proposed Environmental Assessment Process" (Appendix A in the EA Task Force report and Appendix A herein). In keeping with the goal of an early and meaningful Planning and Consultation phase for the EA Program, we recommend the process begin with an identification of the purpose of the study, or planning effort, rather than after a specific undertaking is identified.

Our recommendation for a staged process of developing the Assessment Design Document would lead to a progressive refinement, through public consultation, of the terms of reference for the planning effort. The initial stage, or stages, would identify the problem or opportunity that the proponent is interested in addressing and the initial set of alternatives to be considered. The next stage would be a refinement of the set of alternatives and the selection of the preferred alternative. The final stage would be a detailed analysis of the implications of the preferred alternative and the preparation of the EA. Public notice would occur when the preferred alternative is selected and mandatory participant funding should be available from a funding panel of the EA Board staged with the refinement of the ADD.

The review and approval of the EA should occur in a timely and public manner. We recommend eliminating the acceptance decision and making a single restructured approval decision based upon the need for the undertaking, the adequacy of the planning that led to its

4.2 LIST OF RECOMMENDATIONS

GOVERNMENT COMMITMENT TO ENVIRONMENTAL ASSESSMENT

1. CELA recommends that the Premier should state a cross-government commitment to the EA Program with specific direction to all ministries and agencies to put the necessary resources towards implementing their responsibilities under the EA Program.

2. CELA recommends that the EA Branch report to the Deputy Minister of the Environment and that expenditure increases to the Branch be commensurate with the staffing and resource commitments that currently exist in other high priority branches of the Ministry such as Waste Management and Water Resources.

3. CELA recommends that the Environmental Assessment Advisory Committee receive significant increases in resources to do its work.

APPLICATION OF THE ACT

4. CELA recommends the following levels of assessment for the screening process to direct projects into the EA process:
   1. individual assessment with or without a public hearing;
   2. assessment as a class with or without a public hearing;
   3. fast-track assessment of individual items within a class;
   4. exemption with conditions;
   5. full exemption (either individually or as a class).

EXEMPTIONS

5. CELA recommends the adoption of Recommendation 6.2 in the EA Task Force Report to establish a regulation to provide for an exemption procedure.

6. CELA recommends that a public notice should be issued for all exemption requests.

7. CELA further recommends that the requirement imposed by Recommendation 6.2 on the proponent and the Minister to report on the result of the consultation with various agencies and the affected public should include a rationale for the chosen set of conditions and describe how public input was accepted or rejected and why.

selection and the environmental consequences of the undertaking as compared with the other alternatives evaluated including the null alternative.

This revised EA Process should be applied in the same manner to full EAs and Class EAs. For other levels of assessment such as exemptions, individual items within a Class, bump-up and designation requests, we have made detailed recomendations to streamline decision-making and make it fairer and more efficient. In particular, we strongly dispute the EA Task Force recommendation for defining Class EAs in a policy. It cannot be emphasized enough that our limiting definition of a Class be contained in the Act and not as a separate, and unenforceable policy.

The EA Task Force recommendations for monitoring are, on the whole, an important and long-needed addition to the EA Program. We have made some recommendations for improving them including the need to require the assessment of cumulative impacts.

Finally, there is an overwhelming need for a cross-governmental commitment to environmental assessment. We believe that, on the whole, the environmental planning process imposed by the EA Act has resulted in improvements in environmental protection and decision-making in Ontario that would not have otherwise occurred. However, improvements are necessary. Our recommendations are intended to provide these improvements, both in terms of better decisions and a better process. It is clear however, that if this government is serious, as we think it should be, about increasing certainty, efficiency, fairness and effectiveness in the EA Program, both the preparation and the administration of a reformed EA Program will require significant political, financial and human resource commitments to accomplish these goals.

8. CELA further recommends that the exemption procedure and its evaluation set out in Recommendations 6.2 and 6.3 need to be expanded to ensure that for those exemption orders that require the preparation of detailed documentation, the exemption order must be specific as to what the documentation should include, who should have input to its development and that the EA Branch will be responsible for reviewing it.

9. CELA recommends that the EA Task Force Recommendation 6.3 regarding criteria for evaluating exemption requests be modified such that "considerations of urgency" establish that "urgency" has to do exclusively with matters of public health and safety; that criterion 6.3 E) be deleted; that the criterion "and potential for cumulative effects" be added; that the criteria be set out in a regulation rather than a policy; and that all exemption requests be reviewed by the EAAC.

10. CELA recommends the adoption of Recommendation 6.5 in the EA Task Force Report to amend the EA Act to authorize the issuance of compliance orders to ensure compliance with conditions imposed on exemptions.

11. CELA further recommends that the amendment be linked to monitoring requirements and that the amendment should impose a duty of the Ministry staff responsible for the Act's administration to impose such compliance orders should monitoring reveal non-compliance.

CLASS ENVIRONMENTAL ASSESSMENTS

12. CELA recommends that the EA Act be amended to define a Class of undertakings to include projects that are similar in nature, occur frequently, are limited in scale and have only minor and generally predictable effects on the environment.

13. CELA recommends that the EA Task Force Recommendations 6.9 (C) and 6.10 be rejected.

14. CELA recommends that the Minister should decide what can and cannot be included in a Class and that each Class include a listing of projects and project types that may be included in the Class with clear criteria to determine at which level individual projects will be assessed.

15. CELA recommends that public notice be given, with thirty days available for input to the Minister, when an individual project within a Class is being considered for assessment.

16. CELA recommends that adoption of the EA Task Force Recommendations 6.11 providing for a regulation outlining the process for Class EAs and with Recommendation 6.12 providing for the development of a guideline for model parent Class EA documents.

17. CELA recommends that the EA Task Force Recommendation 6.15 regarding inclusion in the Parent Class EA document the conditions under which the proponent may commence implementation of the project following the issue of an ESR, refer specifically to an EA Branch assessment of the adequacy of the ESR in meeting the requirements of the Parent Class EA.

BUMP-UPS

18. CELA recommends that the EA Act be amended to provide for the right of a person to request a bump-up based on clearly enumerated criteria set out in the Act or regulations.

19. CELA recommends that, upon receipt of a bump-up request, the Minister have 90 days to respond in writing to the request and if an EAAC referral occurs that the 90 day timeframe be extended to no longer than 120 days.

20. CELA recommends that while a bump-up request is under consideration, the proponent be prohibited from proceeding with the project in accordance with Section 5(1) of the EA Act.

21. CELA recommends that criteria to evaluate bump-up requests be included in the Act or regulations and that the criteria set out in EA Task Force Recommendation 6.14 be modified such that "considerations of urgency" establish that "urgency" refers only to matters of public health and safety; that "and potential for cumulative effects" be added to criterion 6.14 b); and that criterion 6.14 h) be modified to "frivolous or vexatious nature of request".

PRIVATE SECTOR

22. CELA recommends that criteria to evaluate designation requests be included in the Act or regulations and that the criteria set out in EA Task Force Recommendation 6.6 be modified such that 6.6 E) e) is deleted; 6.6 E) f) establishes that "urgency" refers only to matters of public health and safety; 6.6 E) g) is limited to "frivolous or vexatious nature of request"; and the criterion "and potential for cumulative effects" be added.

23. CELA recommends that EA Task Force Recommendation 6.7 involve development of a regulation for the waste management sector.

24. CELA recommends that all private sector application be required to meet the existing requirements of section 5(3) of the EA Act but that a regulation be developed for each sector in recognition of the varying manner in which different sectors will be able to satisfy the requirements of section 5(3).

25. CELA recommends that the analysis of alternatives required under Section 5(3) not be limited as suggested in the EA Task Force Recommendation 2.8 but that relevant government departments assist with drafting the assessment of alternatives that are outside of the mandate of the private sector proponent.

26. CELA recommends that the proposed Task Force to address application of the EA Act to the private sector be given clear Ministerial Direction as to what is required and when; that it be a consensus committee (with minority report privilege) reporting directly to the Minister; that it be limited in size to no more than 15 individuals and specifically include industry, government and public representatives; that it be given a one-year deadline for its deliberations; that it be able to review its terms of reference and suggest modifications to the Minister before they are finalized; and that it be provided with a secretariat, an efficient, knowledgeable impartial chair and that members expenses be covered including honoraria for their time.

27. CELA recommends that the Private Sector Task Force address itself to a phased, sector-by-sector application of the Act to the private sector.

GOVERNMENT POLICY AND PROGRAMS

28. CELA recommends that the EA Act be amended to require the environmental assessment of government policy and programs using a new EA procedure, to be developed as a regulation.

LAND-USE PLANNING (Preliminary Recommendations)

29. CELA recommends that Policy Statements for environmental protection be viewed as an interim step towards legislative protection for natural areas, such as wetlands, facing development pressures.

30. CELA recommends that municipalities be required to prepare notices advising the public about their rights and options under various statutes including the Planning Act and the EA Act when development applications arise.

31. CELA recommends that early public notice be required for all developments and plans or plan amendments requiring Planning Act approval and that similar public notice occur during the review of these applications and after the review is complete.

32. CELA recommends that intervenor funding legislation be extended to include the Ontario Municipal Board.

33. CELA recommends that the government immediately act upon the recommendations set out in the EAAC report on The Adequacy of the Existing Environmental Planning and Approvals Process for the Ganaraska Watershed.

ADMINISTRATION OF THE ACT

PLANNING AND CONSULTATION

START OF THE CONSULTATION PROCESS

34. CELA recommends adoption of the EA Task Force Recommendations regarding amendment to the EA Act to require the proponent to carry out a planning and consultation phase with affected parties before formal submission of the EA.

35. CELA recommends that proponents should be required, at each planning stage, to document the input received, the concerns raised, and the proponent's response to how the concerns will be addressed.

PUBLIC NOTICE TO ANNOUNCE THE START OF THE EA PROCESS

36. CELA recommends that the EA Task Force Recommendation to require public notice to announce the start of the consultation phase be achieved by amending the EA Act to require such a notice be prepared and a regulation should be used which describes the required content of the notice.

37. CELA further recommends that the completion of the Assessment Design Document should be the legislative trigger for the preparation of the notice, informing all parties that an EA planning process for an individual EA has begun.

38. CELA further recommends that the EA Branch provide guidance on notice preparation through guidelines, direct assistance and a readily available model notice for use by proponents.

THE ASSESSMENT DESIGN DOCUMENT

39. CELA recommends that the EA Act be amended to contain a provision similar to that for preparation of the review, which would require that an ADD be prepared.

40. CELA further recommends that a regulation be used to describe the content of the ADD.

THE ADD AS THE STUDY TERMS OF REFERENCE

41. CELA recommends that the ADD be used as a tool to seek early public involvement in the process and to develop a reasonable basis of support for the planning effort at each stage of planning.

42. CELA further recommends that the ADD serve as an overall terms of reference for the EA planning process as well as a detailed terms of reference for each planning stage.

CONTENT OF AN ADD

43. CELA recommends that an ADD regulation codify specific requirements to add more certainty to the planning process while ensuring that adequate flexibility in the planning process remains to stimulate innovative approaches and respond to unusual situations.

44. CELA recommends that the ADD should document the range of alternatives to be investigated at each stage and ensure that it is broad enough to meet EA requirements while the actual labelling of alternatives would take place once the undertaking has been selected.

PARTICIPANT FUNDING AND THE ADD

45. CELA recommends that the first planning stage described in the ADD be used as the basis for triggering participant funding availability (see Funding Recommendations below).

46. CELA further recommends that, based on the proposed content of each planning stage, participants would make submissions to a Funding Panel of the Board and would be awarded funding based on their proposed contribution to that planning stage.

IMPLEMENTING THE ADD

47. CELA recommends that the EA Branch prepare supporting policies and guidelines to provide detailed guidance to proponents and the public on how to meet the content requirements of the ADD at each planning stage.

48. CELA further recommends that the ADD regulation (recommendation 43 above) require the EA Branch to endorse the ADD for each stage before the proponent proceeds with the planning for that stage.

49. CELA recommends rejection of the EA Task force recommendation to provide the EA Board with the power to make a binding decision on the ADD at the point of its initial preparation.

50. CELA recommends that provision of direction on the adequacy of the ADD throughout the planning process should be the responsibility of the EA Branch.

51. CELA recommends that Sectoral regulations be developed for both public and private sector undertakings to guide the interpretation of Section 5(3) requirements.

NOTICE OF SELECTION OF PREFERRED ALTERNATIVE

52. CELA recommends adoption of the EA Task Force Recommendation that the EA Act be amended to require notice by the proponent announcing the preferred alternative to all directly affected parties.

53. CELA further recommends that the notice content be described by regulation and prepared by the proponent with guidance from the EA Branch on notice preparation (model notice) and distribution.

IMPROVING TRAINING AND GUIDELINES ON EA

54. CELA recommends adoption of the EA Task Force Recommendations for more guidelines and improved training in EA but recommends further that this training should be available to any party interested in EA, not just proponents and government agencies.

THE REVIEW PROCESS

NOTICE OF SUBMISSION AND DISTRIBUTION OF THE EA

55. CELA recommends adoption of the EA Task Force Recommendation requiring the preparation of a notice by the proponent which announces the formal submission of the EA to the Minister.

56. CELA recommends that the EA Act be amended to provide for the notice requirement and that the content of the notice be specified in a regulation.

TIME LIMITS FOR THE REVIEW

57. CELA recommends that the EA Act be amended to assert limits (120 days with provision for shortening the review timeframe at the discretion of the Minister based on reasons supplied by the proponent) on the publication of the Government Review to provide the Government with adequate incentive to ensure that the government ministries affected are properly resourced to fulfil their responsibilities in a timely and responsible manner.

REFERRAL OF THE HEARING REQUEST TO THE BOARD

58. CELA recommends that the EA Task Force recommendation to refer a hearing request to the Board before the publication of the review be supported only if early preparations at the Board deal strictly with administrative matters and that the hearing should not begin until publication of the review.

ANALYSIS IN THE REVIEW

59. CELA recommends that the EA Branch analysis of Section 5(3) requirements should be made consistent with recent Board decisions dealing with planning process requirements and update MOE guidelines (Interim Guidelines on Environmental Assessment Planning and Approvals - July 1989 and Role of the Review and the Review Participants in the EA Process - November, 1987) accordingly.

NOTICE OF COMPLETION OF THE REVIEW

60. CELA recommends that the EA Act be amended to give the EA Branch Director the authority to publish the Notice of Completion of the Review.

61. CELA further recommends that when the Review concludes that inadequacies in planning can be addressed by further work by the proponent, the Review should clearly indicate what work is required, the reasons why it is required and the Director's Notice of Completion of the Review would also contain an Intent by the Director to Order Further Work.

62. CELA further recommends that Section 11 of the EA Act be amended to allow the Director to carry out such an order; that the amendment allow a definition of the Order to be sufficiently broad to ensure that it would capture any work that might be required to improve the proponent's planning and decision-making, and that the proponent and the public have 30 days to respond to this intent, after which the Director would make a decision on the order and its content.

63. CELA further recommends that if the Review concludes that further work would not remedy a situation or if the Review concludes that the undertaking should be approved, the Director's Notice of Completion of the Review should be issued and the public would then have 30 days to request a hearing.

ACCEPTANCE AND APPROVAL DECISIONS

ELIMINATING THE ACCEPTANCE DECISION

64. CELA recommends that the EA Act be amended to delete the acceptance decision and to restructure the approval decision to tie it more closely to Section 5(3) requirements so that this decision is based on the need for the undertaking, the adequacy of the planning that led to its selection and the environmental consequences of the undertaking as compared with the other alternatives evaluated including the null alternative.

65. CELA recommends that if the acceptance decision is not eliminated, that the appeal of the Minister's acceptance decision (made by the Director as recommended by the EA Task Force) be open to any party.

66. CELA further recommends that if the acceptance decision is not eliminated, that the two decisions be maintained and that if there is a hearing that the Board make both decisions.

BOARD POWERS

67. CELA recommends adoption of the EA Task Force Recommendation that the powers of the Minister or designate be directly transferrable to the Board, including the ability to order further work.

CRITERIA FOR DECIDING ON A HEARING

68. CELA recommends that criteria for making a decision on a hearing request should not be expanded beyond those already set out in Section 12 of the EA Act.

MONITORING AND FOLLOW-UP

69. CELA recommends that EA Task Force Recommendations 5.1 and 5.2 be adopted but that the monitoring results generated be publicly reviewable.

70. CELA recommends that EA Task Force Recommendations 5.3 and 5.4 be adopted but that provision also be made for conditions of approval of an undertaking to specify the establishment of monitoring committees to be open to the public and that those members of the public who were involved in the environmental assessment should be considered first as candidates for these committees.

71. CELA recommends that the EA Task Force Recommendations regarding verification be adopted.

72. CELA recommends adoption of EA Task Force Recommendation 5.7 if it were to be clarified to state that the regulation to which it refers would require a "listing of commitments, proposed terms and conditions, and proposed plans for monitoring compliance and effects monitoring".

73. CELA recommends that the cumulative effects of undertakings be considered throughout the EA decision-making process.

74. CELA recommends that the final set of monitoring reforms to the EA process include a system of monitoring the individual projects within Class EAs.

PARTICIPANT/INTERVENOR FUNDING

75. CELA recommends that the Intervenor Funding Project Act (IFP Act) be amended to allow participants in an environmental assessment process to apply to the Board for funds from the proponent after the mandatory public notice and at appropriate stages in the planning process.

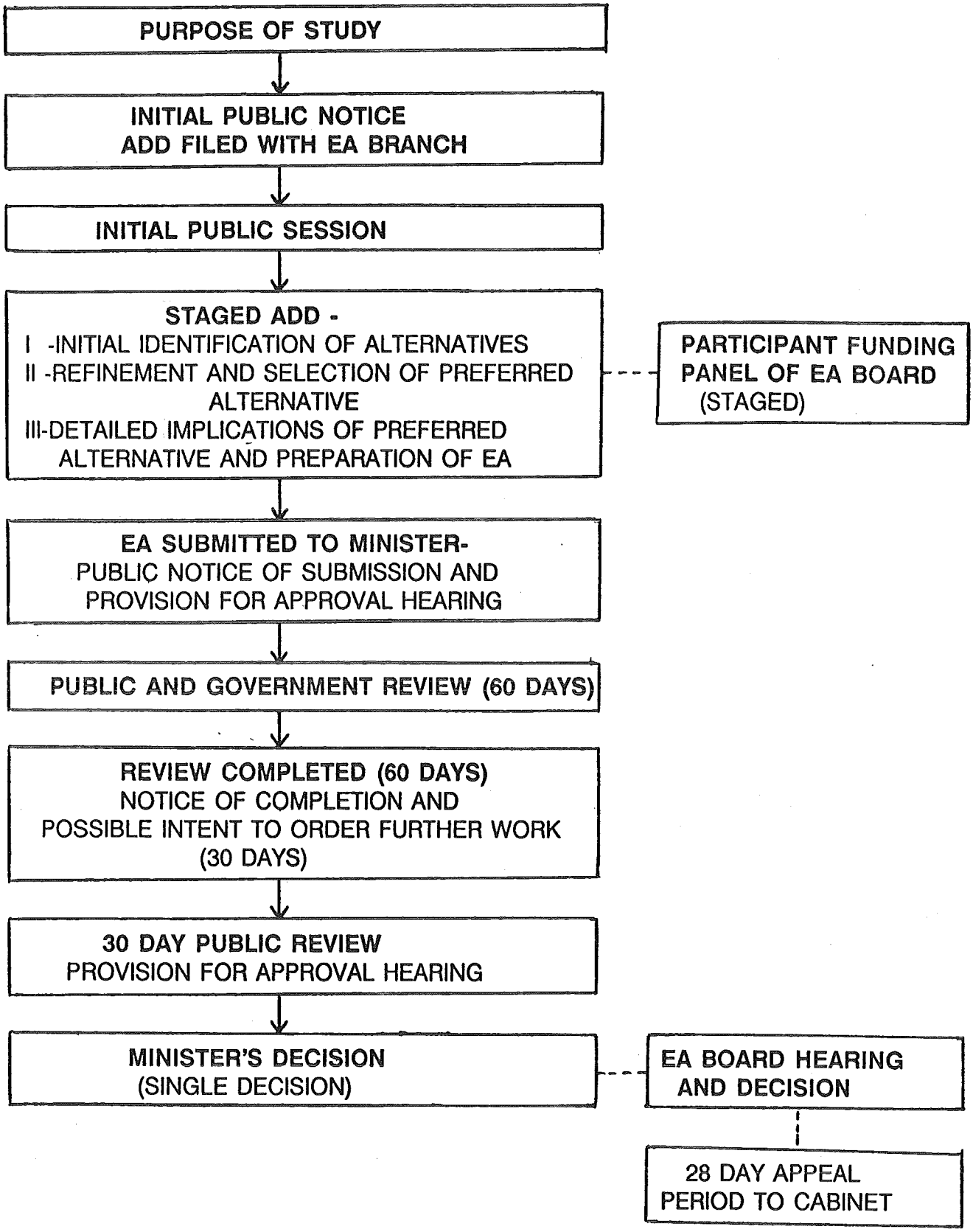
76. CELA recommends that the IFP Act be amended to allow for agreements to be made with proponents as to participant funding which can be filed with the Board and could then be taken into account in further applications for funds under the IFP Act.

77. CELA further recommends that the IFP Act should be reviewed with the intent of making the Act permanent after the three year pilot project expires in April 1991.

THE HEARING PROCESS

CELA's brief responding to the Board's discussion papers on procedural reforms is appended to this submission.

APPENDIX A: PROPOSED ENVIRONMENTAL ASSESSMENT PROCESS



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APPENDIX B

SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ONTARIO ENVIRONMENTAL ASSESSMENT BOARD IN RESPONSE TO: "THE HEARING PROCESS: DISCUSSION PAPERS ON PROCEDURAL AND LEGISLATIVE CHANGE"

Prepared by:

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Executive Director
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Law Association

with the assistance of
Zen Makuch and CELA staff

November, 1990

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I. INTRODUCTION

For the past two decades, the Canadian Environmental Law Association (CELA) has advocated the need for effective environmental assessment legislation in all jurisdictions to ensure that undertakings that might have adverse environmental effects are thoroughly assessed as early as possible in the planning process. CELA, on behalf of its clients, has also appeared before the Ontario Environmental Assessment Board and the Joint Board on many of the major hearings that have taken place during the past few years. Most notably, these include the Halton landfill hearing and the ongoing Timber Management Class Environmental Assessment hearings. As well, a CELA staff person has sat on the Public Advisory Group involved in the Environmental Assessment Program Improvement Project and subsequent Task Force review of the Environmental Assessment Act (EAA). We therefore welcome the Board's initiative in seeking public input regarding proposed changes to the hearings process. We share the concern that the length and cost of these hearings has become prohibitive. However, we believe that any reforms to shorten the hearing process should be done without compromising principles of fairness and the rights of the parties. It is our contention that a number of proposals set out by the Board in its discussion paper (September, 1990) do not meet this objective.

Our comments below will detail our specific concerns with the proposed changes and offer additional suggestions for reform.

Because CELA is a legal aid clinic that represents clients who cannot afford private lawyers, we always represent intervenors in the hearing process. The Intervenor Funding Project Act has been extremely valuable in beginning to address the issue of the imbalance of resources between proponents and intervenors and making the input of intervenors more meaningful. A number of the reforms suggested for pre-hearing scoping can only be effective if intervenor funding is provided at an earlier stage in the process than is contemplated by the existing legislation. To accomplish this goal, consideration should therefore be given to recommending amendments to the Intervenor Funding Project Act when it is reviewed.

At the outset, we also want to raise concerns about the Board's various proposals to amend the Statutory Powers Procedure Act (SPPA). As the Board is aware, the SPPA codifies certain rules of natural justice and fairness which CELA believes need to remain intact. Further, the SPPA applies to a host of adjudicative and administrative proceedings under other statutes. We would object to any proposals to amend the SPPA or to otherwise modify the rules of natural justice as they apply to Board proceedings. Any proposal to amend the SPPA would require the broadest public inquiry given the diverse and varied proceedings that would be potentially affected.

II. POSITION OF CELA IN RELATION TO THE EAB PROPOSALS FOR REFORM OF THE HEARING PROCESS

The following are CELA's comments on the specific suggestions set out in the discussion paper.

1. Requirements for Meetings of Expert Witnesses Without Counsel

CELA agrees that meetings of technical experts among themselves can be a useful technique to shorten hearing time, and that such meetings can be used not only to identify issues in contention but may also be used, where appropriate, to develop terms and conditions that could ultimately form the basis of an approval of the undertaking. This process was recently used in the Maidstone landfill case where a series of meetings were held between the proponent's experts and the intervenor's experts (both in the presence of counsel and without counsel) to narrow the issues in contention and to agree on terms and conditions of approval for those issues not in contention. Similarly, a series of expert meetings occurred among parties in the Timber Management hearing in order to agree upon the methodology to be used by the proponent to answer a specific interrogatory. Again, these meetings were held with and without counsel. Accordingly, it is our submission that no legislative amendment is necessary to allow these meetings to take place and that if a written agreement were reached to the parties' satisfaction, that this could be put before the Board for consideration. It would be expected that the parties would abide by such an

agreement.

We are concerned with the Board's suggestion (at p.4) that a binding agreement between experts would not need to be ratified by counsel or more importantly by the parties involved in the hearing. We submit that such a proposal would breach fundamental principles of fairness. First of all, it is the client's interests that are at stake, not the expert's. The problem here concerns the nature of the relationship between clients and experts or counsel. The latter two only have the authority their clients delegate. It is unrealistic and unjust to propose that somehow the parties can be coerced into delegating more authority than they choose to. Second, experts are often retained to deal with one facet of a complex technical case and may not be aware of other considerations that may impact on the client's decision whether to agree to a certain proposed resolution of an issue.

In addition, we submit that it is unrealistic to expect that the experts' positions will be "based on technical rather than adversarial considerations." It has been evident in many hearings that experts often act as advocates for their clients rather than as neutral or disinterested participants; in fact, this was expressly recognized by the Joint Board in the Halton landfill decision (p.55).

We are also concerned with the Board's proposal (p.5) that the Board's rules be amended in order that experts "be <u>required</u> to meet with each other, in the absence of

counsel, in order to define the technical issues in contention." First, it is unclear whether this would be "required" by the Board on its own initiative or upon a motion by one of the parties. Second, such a proposal would breach the principles of fairness for the reasons outlined above.

Because CELA does not support mandatory "expert-only" meetings nor "binding expert-only" agreements, it follows that we do not support the proposed limits on cross examination set out on page 5 of the Board's discussion papers.

2. Meetings of Parties for the Purpose of Preparing a Statement of Agreed Facts and a List of Outstanding Issues

CELA agrees that it is helpful to delineate the issues in dispute and to also discuss potential conditions, where appropriate, prior to the presentation of evidence. It is our opinion that the SPPA would not have to be amended to accomplish this end, since it is clear that the Board presently enjoys the power to fashion an appropriate "scoping" mechanism. The type of "scoping" procedure will vary from hearing to hearing, depending on the nature of the undertaking, the hearing structure (i.e. regular versus phased), the number of parties, and so on. We also wish to stress that in order for issues to be delineated it is necessary to ensure: (1) full production of the proponent's case well in advance of the hearing; (2) answers to interrogatories filed in a timely fashion; and (3) provision of intervenor funding early in the process to enable the intervenors to retain their experts and to be able to narrow the issues.

We would point out, however, that our experience with the "statement of issues/scoping" exercises in the Timber Management hearing suggests that this procedure has not led to any appreciable shortening of the proceedings. This may be partly due to the fact that this procedure was not implemented at the beginning of the hearing, but rather, was initiated only after the hearing was well underway. It should also be noted that most Statements of Issues have been marked "without prejudice", or have otherwise reserved the right to cross-examine on issues not delineated in the Statements of Issues. In the result, few issues seem to be eliminated through this scoping process, and it is our view that this exercise has generated more paper and used up additional hearing time without demonstrably shortening the proceedings.

CELA does not support the proposal (at p.8) that Rule 49 be amended to allow Board counsel to act as a facilitator to secure agreement on facts and issues in contention. In our view, this proposal represents an unwarranted and problematic expansion of the role of Board counsel; in particular, Board counsel is retained for the single purpose of advising and assisting the Board in matters of law. We are therefore concerned that encouraging Board counsel to delve into the facts of the case would require counsel to acquire considerable knowledge of the merits of the case, and would give rise to the perception that the Board is akin to a party in the case rather than an independent adjudicator.

3. Pre-Hearing Mediation and Conciliation by Board Members or Staff

CELA agrees that a pre-trial conference may be a useful technique. In civil litigation, a pre-trial conference is held before a different judge than ultimately hears the case. The Board does not make a specific recommendation in this regard but instead discusses mechanisms for mediation and conciliation. In our view, mediation will only be effective if it is undertaken at the request of the parties; it cannot be forced upon unwilling parties by the Board on its own initiative, for this process is likely to fail in such circumstances. There must also be provision for the parties, if mediation breaks down, to return to the Board for adjudication of the matter. The Board, of course, should always confirm any mediation order. The Board's proposal is also not clear as to who pays for mediation.

4. Use of Pre-Filed Evidence

CELA has some concerns with the discussion and proposal in relation to the use of pre-filed evidence. While we agree that full and early production of the proponent's case and supporting documents is a necessity, and that oral examination should not repeat in detail material that has been filed, we disagree with the proposal to put the onus on intervenors early on in the process to either accept pre-filed evidence "as read" or face potential cost liability, and to then forego rights to cross-examine or present argument at the end of the hearing. We believe this proposal is extremely prejudicial to intervenors who, at the preliminary stages of a hearing, may not have received answers to interrogatories, may have just received their intervenor funding and do not

have all their experts in place. No party can make such final conclusions regarding evidence at this early stage of the hearing. Such a one-sided proposal should not be endorsed or pursued by the Board.

5. Motions for "Non- Suit"/Early Dismissal of Application

CELA agrees that the ability of the EAB to order an early dismissal of an application is desirable, whether it be at the end of a phase or the end of the proponent's case, depending on how the evidence is adduced. The OMB has also granted motions for non-suit in proceedings before it. For example, CELA, on behalf of its client was successful before the OMB in 1978 in having applications for official plan and zoning changes dismissed prior to any evidence being called by opponents to the proposal. While it is submitted that the Board already has the jurisdiction to dismiss an application early in the process, CELA would not object to an amendment to clarify the situation.

6. Alternative Means of Examination of Expert Evidence

We would, first of all, reiterate some of our comments made in relation to proposal #1 respecting the "requirements for meetings of expert witnesses without counsel."

In addition to having experts meet at the pre-hearing stage without counsel, the Board has proposed that witnesses on all sides of an issue could be called to testify together before the Board with minimal intervention by counsel (p. 16). CELA does not

support this proposal for a number of reasons.

First, this proposal denies parties the fundamental right to present evidence to the Board as they consider most reasonable, within the limits of the law. Second, this proposal seems to be based on assumptions that lawyers are responsible for "blockage of information" and that experts, left on their own, will not take adversarial positions. In light of our experience in the hearing process, we strongly disagree with this suggestion.

This proposal will also be prejudicial to intervenors who often elicit important information during cross-examination of the proponent's witnesses. This information is often commented on by the intervenor's own expert in testimony and subsequent reports. On this point, it should be recalled that there is generally a two-fold purpose in cross-examination: to test the proponent's evidence, and to elicit admissions supportive of the intervenor's case. Further, in some cases, a particular intervenor may not have a witness or may await the outcome of cross-examination of a proponent's witness before determining whether to call a witness.
By calling all the witnesses in one panel, the intervenor's witnesses would not be able to reflect upon and respond to points elicited during questioning.

CELA also questions the Board's proposal to allow counsel to only pursue "certain areas" of cross-examination. It is our submission that cross-examination of expert

witnesses should only be restricted where it is irrelevant, or involves repetitive questioning: see s. 23(2) of the SPPA. At common law, there is no absolute obligation on tribunals to allow cross-examination of witnesses in oral hearings. However, the rules of procedural fairness guarantee parties the right to rebut opposing evidence and to correct or contradict prejudicial statements. In light of this right, the Board's attempted restrictions on counsel presence during expert testimony before the Board and restrictions on cross-examination of expert witnesses deprives parties of the only available method for meeting the case made against it where expert testimony challenges their case.

It should be noted that the closer a tribunal's procedures follow that of a court, the more likely it will be that restrictions on cross-examination of witnesses will constitute a breach of procedural fairness. As de Smith states in Judicial Review of Administrative Action," Seldom can such a refusal be justified if a witness has testified orally and the party requests leave to confront and cross-examine him" (p.214).

In Inisfil v. Vespra[1], the Supreme Court of Canada pointed to the similarities between the Ontario Municipal Board hearings and court proceedings as one reason for holding that the board was obliged to permit cross examination of witnesses tendering evidence at the hearings. Estey J., delivering the judgment of the court, stated that

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1 [1981] 2 S.C.R. 145.

where a board determines "the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which it will rely", the provision of a right to cross-examination is obligatory, unless there is the "clearest statutory curtailment" of the right.

Similarly, Reid and David point out that cross examination is particularly important when vital facts are contested. In this regard, these authors dismiss the concern that lawyers might exploit expanded opportunities to cross-examine "to indulge in an orgy of cross-examination", thereby interfering with the tribunals proceedings. It is their view that a properly instructed tribunal is perfectly capable of imposing reasonable restraints on the availability of cross examination.

The effect of sections 10(c) and 23(c) of the SPPA is to enable tribunals to restrict needless and repetitive questioning while at the same time affording an opportunity for proper cross- examination. Thus, tribunals can ensure that proper cross-examination is used to elicit further information relevant to the issues in the proceedings or to test the reliability of the evidence a witness has given, including the credibility of the witness himself, while preventing witnesses from being harassed or hearings being unnecessarily prolonged due to repetitious questioning.

In the Inisfil case, supra, the Supreme Court of Canada relied upon section 10(c) as an additional ground for holding that the Ontario Municipal Board erred in denying the

parties before it the opportunity to cross-examine a witness' testimony. Estey J. stated that the effect of this section is to deny tribunals covered by the SPPA of any discretion in this area; they are mandated to permit reasonable cross-examination, absent any other statutory provision expressly abrogating this right. It is CELA's position that the proposed amendments to the SPPA and other legislation should not be pursued. The Board should not limit the public's rights to effectively test the evidence of the proponent. It is CELA's opinion that the public hearings with the full right to cross-examine witnesses has led to better decisions and a greater protection of the environment.

7. Imposition of Time Limits for the Presentation of Oral Evidence

CELA would support the limitations on the presentation of oral evidence-in-chief. We had some experience with the use of "canned evidence" in the recent alachlor hearing before the Alachlor Review Board established pursuant to the Pest Control Products Act. In that case, all material had to be filed by the applicant prior to the hearing and witness statements provided were in a narrative format. Examination-in-chief rarely went for more than half a day and did not repeat in detail the material filed. The key in making such a process work, is that all documents relied on by the parties must be filed well in advance in the hearing, and that witness statements set out a narrative explanation in some detail of the technical background material. In other words, the witness statements should be a written version of what normally would have been the evidence-in-chief of the witness. CELA, on behalf of its client had suggested such a

procedure for "canned evidence" during the preliminary hearings in the Timber Management hearing. Unfortunately, limits on examination-in-chief were not proposed by the Board until the hearing was well underway, and much of the proponent's case already completed.

CELA, however, does not support the Board's proposed amendment set out on page 21 which states:

> (iii) Despite section 10 [of the existing SPPA],an agency may, by order, restrict or limit the right of a party to call witnesses and to cross-examine witnesses.

First of all, this proposal bears no relation to the background discussion of limiting oral examination-in-chief. It is a sweeping amendment that purports to limit the rights of parties to call witnesses and to cross-examine witnesses and it does not provide any criteria or grounds upon which these rights may be restricted by the Board. Again, the proposal denies parties their fundamental right to present relevant evidence to the Board. We do not believe that such an amendment is desirable. The Board can already control the proceedings and can limit examination-in-chief or cross-examination when it is irrelevant or repetitious. We have already discussed this issue in relation to the Board's proposal #6 above. No unqualified authority to limit the right of a party to call witnesses or to cross-examine should be passed as an amendment to the SPPA.

8. Relegation of Procedural and Other Non-Evidentiary Matters to Consideration Outside the Actual Hearing Hours

This proposal is acceptable and should provide for some time and financial savings as witnesses would normally not have to be present during a discussion of procedural matters. We note that a number of the lengthy procedural matters in the timber management case were related to the fact that the EA document filed by the proponent prior to the hearing was supplemented by thousands of pages of witness statements during the hearing and a motion was brought by the intervenors early on in the hearing to adjourn until all documentation was produced by the proponent. The outcome of the motion was negotiated by the parties and an adjournment took place.

9. Timing of Fairness Challenges

CELA submits that there should be no restriction on the ability of a party to seek judicial review of the Board's decisions, whether such review arises from decisions of the Board during the course of a hearing or from the final decision of the Board. The case law makes no distinction between such types of decisions as they pertain to judicial review opportunities and the right to seek such review is well established. In the Service Employees' International Union v. Nipawin Dist. Staff Nurses Association[2] case, the Supreme Court of Canada discussed the issue of judicial review of statutory tribunals. Mr. Justice Dickson stated:

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[2] [1975] 1 S.C.R. 382 at 388.

> There can be no doubt that a statutory tribunal cannot with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty, and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest.

After the Supreme Court of Canada in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police[3] established the common law duty of fairness, it became clear that the courts have a broader power of supervision and ability to tailor Board procedures and decisions than previously existed. The widening of such power has served judicial notice upon tribunals that rather than seeking to impose limits on fairness challenges (as is the case in the EAB proposal) they must become especially sensitive to this doctrine in their decision-making and be aware of their susceptibility to judicial review on grounds of fairness.

We submit that while it is reasonable to require that objections be raised during the hearings, it would be counterproductive to require that a party immediately proceed to judicial review. This is particularly true since the hearing would likely be stayed pending the outcome of the judicial review application, and it may take years for the hearing to re-commence if the matter winds its way through the appellate courts. As well, it may be the cumulative impacts from a number of Board rulings that give rise to grounds for judicial review, and to require that an application be made to Divisional Court at the first instance would again be prejudicial to the parties.

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[3] [1979] 1 S.C.R. 311.

10. Contempt Powers

CELA submits that the proposal that the Board should have contempt powers as a means of disciplining counsel is too draconian and runs counter to recent legal developments in this area. We submit that the existing powers under the SPPA and the opportunity to state a case to Divisional Court are sufficient. In addition, there are other adequate remedies (i.e. a complaint to the Law Society of Upper Canada) if a lawyer has engaged in conduct unbecoming a solicitor.

The power of an agency to maintain order during its hearings through contempt powers has recently been narrowed significantly by courts on the basis of protections within the Charter of Rights. For example, in Regina v. Kopyto[4], the accused, a lawyer, was charged with contempt of court as a result of comments he made following the dismissal of a case in which he acted as counsel for the plaintiff. It was held that statements of a very sincere belief on a matter of public interest, even if intemperately worded, so long as they are not obscene or criminally libelous, should as a general rule, come within the protection afforded by s. 2(b) of the Charter of Rights. It was found that while the objective of protecting the administration of justice is of sufficient importance to override a constitutionally protected freedom, the means chosen (i.e. a contempt citation) were not demonstrably justified.

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[4] (1987) 62 O.R.(2d) 449 (C.A.).

It should also be noted that even prior to the enactment of the Charter, the power to punish for contempt has traditionally been used cautiously and sparingly. Most of the civil contempt cases have pertained to instances where witnesses or the media were cited for contempt. Only a very few cases have related to the conduct of counsel (the target of the EAB proposals). In some of these old cases, counsel, in the more serious situations, were merely ordered not to appear in the particular court until an apology was made. In other situations, counsel were penalized by a cost order. We submit that there would be very few instances where a contempt order might be necessary, and that in those limited cases, sections 9(2) and 23 of the SPPA provide the Board with adequate tools for handling such matters.

11. Use of Board Counsel and/or Technical Staff and Definition of Their Roles

In regard to the use of Board counsel and/or technical staff, there are three broad principles of natural justice which must be considered in creating legislative or procedural changes. They include the following:

a. the "he who hears must decide" rule;

b. the "delegatus non potest delegare" rule; and

c. the prohibition against bias in the decision-making process.

The "he who hears must decide" rule requires every decision-maker to independently (a) evaluate the relevant evidence placed before it (b) consider the arguments of both

sides, and, finally, (c) to direct its "mind" to the issues at hand so as to render its decision. Accordingly, the participation of non-Board members in the deliberations or decisions of an administrative body may serve to invalidate that body's act. Thus in Leary v. National Union of Vehicle Builders[5], the decision of a union's branch committee was quashed because a non- committee member had participated in formulating it.

Indeed, it may well be the case that even the mere presence of a non-tribunal member while a tribunal's deliberations are ongoing will have the effect of vitiating that tribunal's decision. In Middlesex County Valuation Committee v. West Middlesex Assessment Area Committee[6], for instance, Lord Wright, M.R. said that:

> It would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own should be present at the formulation of a decision.

The "delegatus non potest delegare" rule establishes that a statutory body may not sub-delegate powers which have been conferred upon it in its enabling legislation; the general principle is that such powers must be exercised only by the authority to which they have been legislatively committed. While the Board may delegate administrative functions to others, it is clear that any attempt by a tribunal to delegate its decision-making functions will be struck down. Thus, for instance, a tribunal cannot act solely

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[5] [1971] Ch.34.

[6] [1937] Ch.361 at 376.

on the basis of recommendations made by one of its own inspectors or investigators. In Re Del Core and Ontario College of Pharmacists[7], Finlayson J.A. of the Ontario Court of Appeal cited a trilogy of cases[8] as standing for the proposition that:

> the courts have consistently held the reasons given by discipline committees of self-governing bodies must be the reasons of the committees and cannot be written by counsel or professional staff. (emphasis added)

Prohibition against bias constitutes the third component of administrative law to be applied to the Board's decision-making function. It is a fundamental principle of natural justice that a tribunal must determine the rights and interest of others in a disinterested and impartial manner. The EAB proposals increase the potential for the charge of bias owing to the greater number of non-Board members who may play a role in the decision-making process.

CELA would have no objection to the hiring of a number of the support staff listed by the Board in its proposal. With respect to Board counsel, we believe that such counsel should be personally present to hear and make submissions on motions and other procedural matters if they intend (or are instructed) to give an opinion to the Board on these matters. Any such opinions should be made public and parties should be

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[7] (1985) 51 O.R.(2d)1 (Ont. C.A.).

[8] See, Re Sawyer and Ontario Racing Commission (1979), 24 O.R.(2d) 673; Re Emerson and Law Society of Upper Canada (1983), 44 O.R.(2d) 729; and Re Bernstein and College of Physicians and Surgeons of Ontario (1977), 15 O.R.(2d) 447.

given an adequate opportunity to respond to the submissions of Board counsel. We cannot support the proposal that reports, documents, and other information and material supplied to an agency on a confidential basis are privileged for the purposes of the Ombudsman Act and the Freedom of Information and Protection of Privacy Act. It is our opinion that all parties should have access to all the information relied on by the Board in coming to its decision.

Administrative agencies are required to act fairly in performing all of their functions. Part of this duty entails providing participants in administrative proceedings access to procedural guidelines and other material relied on by an agency in making its decisions. The issue of accountability of non-elected boards and the trend to more open government would seem to run counter to the Board's proposal for more secrecy.

In Dale Corporation and Rent Review Commission[9], a commission refused to disclose portions of its staff manual. The manual contained guidelines which could affect the deliberations of the commission. The court ruled, inter alia, that the failure to disclose the manual was a breach of natural justice. Other cases stand for the proposition that confidentiality is the exception, not the rule.[10] Access to information is all the more

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[9] (1983), 29 R.P.R. 22.

[10] See for example, Magnasonic Canada Ltd. v. Anti-Dumping Tribunal, [1972] F.C. 1239 (F.C.A.) and Sarco Canada Ltd. c. Tribunal Antidumping, [1979] 1 F.C. 247 (F.C.A.).

justified in that it affects the effectiveness of the participation and of the contribution participants can make in helping the decision-maker to arrive at the "right" decision.[11]

It should be noted that the Court of Appeal in the Consolidated Bathurst case referred to by the Board noted that the principle that he who hears must decide was not in issue on the facts of that case. Nor were there any different ideas put forward from those discussed before the hearing panel and there was also no suggestion that anyone but the hearing panel participated in the final decision. The Court does stress that "if new evidence was considered by the entire Board during its discussion, then both parties would have to be recalled, advised of the new evidence and given full opportunity to respond to it in whatever manner they deemed appropriate." Further, "As in any judicial or quasi-judicial proceeding, the panel should not decide the matter upon a ground not raised at the hearing without giving the parties an opportunity for argument. It is also an inflexible rule that while the panel may receive advice, there can be no participation by other members of the Board in the final decision."

12. Use of Costs Powers as a Penalty

The Board has proposed (a) to incorporate procedures in their rules implementing a process analogous to the "Offer to Settle" procedure found in Rule 49 of the Civil Rules of Procedure; and (b) that the EAB and Joint Board should have the express

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[11] See for example, Re Canadian Radio-Television Commission and London Cable TV. Ltd.,[1976] 2 F.C. 621 (F.C.A.).

power to make an order of costs personally against counsel.

In regard to (a), Offers of Settlement are a widely accepted tool for reducing court time and improving case management efficiency. For this reason Rule 49 has been widely accepted as a tactical weapon in civil litigation matters. However, it must be stressed that the civil litigation rule was developed to deal with private disputes primarily about monetary damages, which can be settled. Rule 49 is also to help encourage the settlement of disputes, without trial, which is seen as a legitimate goal of the rules of civil procedure as a whole. On the other hand, in cases involving environmental assessment and protection, the matters before the board are of broad public interest and involve the determination of whether the environmental impacts of a proposed undertaking are acceptable and consistent with the broad purpose of the Environmental Assessment Act. Further, in a case such as the Timber Management hearing, the Board is being asked to determine the details of the planning process that will guide the management of Ontario's Crown forests, which represent over one-half of the province's land base. It is not a case of a traditional "win-lose" situation; instead, it is a question of how we should be best managing our forest resources in the future. In our submission, an Offer to Settle procedure such as laid out in Rule 49 would be impossible to apply.

There is also the problem of applying this procedure to proceedings with many parties, some with "deep pockets" and others with limited resources who are often representing

a public interest. In addition, it is not equitable to apply offer to settle sanctions due to the fact that they are less meaningful to the parties with "deeper pockets." Such a process would be prejudicial to those parties appearing with limited resources, or without counsel and such parties may be more easily influenced to accept an offer to settle.

There is also the possibility that settlements may be against the public interest and have long-term and possible adverse consequences on the environment. For example, under the EAA, the Board has a duty to ensure that its decisions provide for the "protection, conservation and wise management in Ontario of the environment" and to this end it would have to review any settlement offer to see if it adequately protected the environment. The EPA also serves the broader public interest of environmental protection.

CELA submits that the Board should not pursue adaptation of an Offer to Settle Procedure similar to that set out in Rule 49.

In regard to the issue of giving the power to the Board to award costs personally against counsel, CELA believes that this may have a chilling effect on lawyers appearing on behalf of intervenors with limited financial resources. These lawyers, who may already be retained at lower than the market rate pursuant to the Intervenor Funding Project Act, may not want to face the additional prospect of costs awarded

personally against them. Further, it must be stressed that the Board has a duty to ensure that the public interest is protected and will have to conduct a brief public hearing even if a settlement is reached. In contrast, the goal in civil litigation is to avoid a public trial and one purpose of the Rules is to aggressively encourage the settlement of cases. Thus, very different public policy considerations are found within the administrative and judicial contexts, and the rules developed in one context are not readily transferable to the other context.

III. ADDITIONAL RECOMMENDATIONS FOR REFORM

The Board has raised some additional issues for comment in the preamble to the discussion papers. These include the possibility of establishing generic guidelines for specific types of applications (e.g. landfill sites; and the possibility of establishing by legislation, limits to the duration of each Board hearing. The proposal for generic guidelines is a worthy endeavour but should be the mandate of the Environmental Assessment Branch (with public input) and not the EAB. CELA would not support the proposal to limit by legislation the duration of each Board hearing. This would be extremely problematic and it would be difficult to ascertain what portion of hearing time should be allotted to proponents, intervenors and reply evidence. CELA would urge that some consideration be given to limiting the number of witnesses on panels. We would suggest a maximum of 5 witnesses per panel, without leave. Panels with greater numbers add significantly to the time and cost of hearings and make it very

difficult for intervenors, with limited resources to have a number of experts present to hear panels with multiple witnesses.

Finally, while we believe that many of the initiatives proposed by the Board are unnecessary or go too far, we share the concern about the protracted nature of many Board proceedings. Unnecessarily lengthy hearings undermine the value of the participatory rights we have fought so long to establish. For those rights to be meaningful, the hearing process must be an effective and efficient one. In this regard, we believe that a great deal can be done to address the problems that have too often resulted in hearings that have lasted far longer than they should have.

However, the ultimate responsibility for ensuring the efficient course of a particular hearing must rest with the panel that has conduct of that proceeding. With the greatest of deference to the Board's experience and expertise, we believe that it may be helpful for the Board to consider an ongoing program of training for Board members.

One of the key purposes of such training would be to equip Board members with the adjudicative techniques necessary for ensuring the orderly conduct of hearings in a manner that fully respects the legitimate rights of all participants.

If the hearing process is to work, it is essential, in our view, for the Board to assume

a more active role in ensuring that the introduction of evidence, cross-examination and re-examination proceed with some efficiency. Several of the tactics that it has become routine for some counsel to use in proceedings before the Board would simply not be tolerated in a court of law. We suspect that judges of the Supreme Court of Ontario might be happy to share with Board members the skills and techniques that enable them to ensure the efficient conduct of proceedings in that venue.

We note that training is routine for provincial court judges and other adjudicators and believe that an ongoing commitment to such a program would greatly contribute to a more effective and expeditious hearing process.

IV. CONCUSIONS

CELA appreciates the initiative the Board has taken in issuing the discussion papers and in suggesting changes to the hearing process. We have outlined our concerns with a number of the proposals. CELA would be pleased to participate in any roundtable discussions the Board intends to have in the future.