Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

October 4th, 2012

Agatha Garcia-Wright, Director
Environmental Approvals Branch
Ministry of the Environment
2 St. Clair Avenue West, Floor 12A
Toronto, Ontario M4V 1L5

Via e-mail

Re: Proposed Class EA for Certain Activities of the MNDM under the *Mining Act*

Dear Ms Garcia-Wright,

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization founded in 1970. CELA is an environmental law clinic – within Legal Aid Ontario – dedicated to providing legal services to low income people and disadvantaged communities, and advancing the cause of strong environmental protection through advocacy, education and law reform.

CELA is supportive of the Ministry of Northern Development and Mine's ('MNDM') decision to finally replace the temporary Declaration Orders 3 and 4, which exempt MNDM from environmental assessments ('EA's) when disposing of Crown resources and activities related to mine rehabilitation. These Declaration Orders were designed to be temporary measures while MNDM designed environmental assessment parameters, but have been extended for almost a decade and are both finally due to expire this December; as such MNDM's proposed Class EA is significantly overdue, but welcome.

Although the government is currently soliciting comments on the proposed Class EA, the proposed Terms of Reference, and the Review by the Ministry of the proposed Class EA, the following comments will be limited to the proposed Class EA.

It is CELA's opinion that the proposed Class EA does not fully achieve MNDM's intent of 'protecting the environment' for the following reasons:

- The unduly narrow scope of activities covered by the proposed class EA;
- The inappropriate application of class environmental assessments to mineral development activities that are inherently large-scale, complex, and have variable environmental effects; and

- The discretionary nature of key ministerial decisions and resulting difficulty in providing judicial scrutiny.

I- THE NARROW SCOPE OF THE PROPOSED CLASS EA

The proposed mining Class EA is said to replace the MNDM Declaration Orders 3 and 4. MNDM 4 applies to "all activities of MNDM related to its mine hazard rehabilitation projects under the Abandoned Mines Rehabilitation Fund." MNDM 3 applies to the "disposition by [MNDM] of certain or all rights to Crown Resources." MNDM 3's conditions only apply to dispositions for which MNDM has 'discretion' by statute or regulation to grant. Equally, the proposed Class EA will only apply to *discretionary* tenure decisions or *discretionary* rehabilitation activities. The proposed Class EA clarifies at page 11 that:

> The statutory entitlements to make a *mining claim*, and to be issued a *mining lease*, where no decision or approval by MNDM is required, are not subject to the Environmental Assessment Act or the requirements of this Class EA.

In other words, the proposed Class EA will not cover 'non-discretionary' mineral development or mine rehabilitation decisions, which MNDM considers to include such major mineral development undertakings as the granting of mining claims or the granting of mining leases. It is unclear whether such decisions will be subject to *any* environmental assessment whatsoever, other than if the project is large enough to have been designated under the federal EAA, which is subject to its own limitations, discussed below.

The type of tenure dispositions of Crown resources that *will be* subject to the terms of the proposed Class EA are limited to 'discretionary' decisions such as allowing staking on lots with a registered plan of subdivision, and granting surface rights for mining operations on agricultural lands. It is clear that such decisions make up the minority of mineral development activities.

It is our submission that where a Minister is required to grant a mining lease or claim, a decision is in effect being made as to whether the specified criteria under the Act and relevant policies have been met. A proponent is only 'entitled' to a mining lease, for example, if the Minister has *decided* that the proponent has met the Act's criteria as clarified in relevant policy.

Furthermore, we submit that decisions to grant mining leases or claims may not be exempt as a result of EAA Regulation 334, section 9, which provides:

> The undertaking of making a loan, giving a grant, giving a guarantee of debts or issuing or granting a licence, permit, approval, permission or consent is exempt from section 5 of the Act.

To rely on the difference between a discretionary versus a non-discretionary decision for the purposes of whether or not the EAA applies to a MNDM mining decision appears to be a poor

approach for important environmental decisions normally subject to EA. Indeed, Mining Watch has refused to even comment on the proposed Class EA due to this major deficiency.[1]

Recommendation 1: The Class EA should apply to undertakings which include MNDM decisions, whether discretionary or not, made at each phase of the mining cycle; particularly those decisions that have the greatest environmental impacts, such as the granting of mining claims and leases.

II- THE EA VACUUM CREATED BY THE RECENT OVERHAUL OF THE CEAA

The federal government recently overhauled their environmental assessment legislation, the *Canadian Environmental Assessment Act* (CEAA); significantly narrowing its coverage and scope. As a result, only activities designated by the Regulations are subject to the federal EA process, the listed environmental effects considered no longer include sustainability or socio-economic issues, and the scope of the mandated EA has been significantly narrowed. Changes also included granting more discretion to the Minister of the Environment and Cabinet in the federal EA process, as CELA recently highlighted in a June 2012 letter to Stephen Harper:

> Even if a particular project is "designated" under CEAA 2012, there is no legal guarantee that a federal environmental assessment of the project will actually be conducted under the new Act. For example, for designated non-energy projects, the new Act gives the Canadian Environmental Assessment Agency ("Agency") 45 days to "screen" the project and to determine whether an environmental assessment will be required (see section 10).[2]

Mining activities that have been designated under the CEAA Regulations are limited to mines with high production levels and do not include diamond mines.[3]

These various changes result in significantly reduced federal environmental assessments of mining.

Recommendation 2: To effectively protect the environment from mineral development activities, undertakings of private proponents should be designated by the Minister under EA regulation in order to provide for necessary environmental oversight due to the significantly weakened CEAA, 2012.

III- THE INADEQUACY OF A CLASS EA FOR MINING ACTIVITIES

Class EAs are a more efficient and less onerous environmental assessment process designed for those projects with "routine, manageable and predictable environmental effects."

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[1] Mining Watch letter to Andrea Berenkey, Project Officer, Environmental Assessment and Approvals Branch Ministry of the Environment , from Ramsey Hart, June 6, 2011, EBR registry # 011-2369.
[2] CELA publication #844, p.4.
[3] Regulations Designating Physical Activities (SOR/2012-147), ss. 1, 15-17.

However, the MOE has a poor oversight record for Class EAs, which means they are a relatively ineffective tool for environmental protection, even for those projects with limited and manageable environmental impacts which qualify for the application of a class EA regime. The Environmental Commissioner of Ontario commented in its 2001-2002, 2003-2004, and 2007-2008, 2008-2009 Annual Reports about the MOE's inability to effectively oversee compliance in the various class EAs, which are increasingly being used as an environmental assessment tool in Ontario.[4] ECO further commented that the MOE relies on a complaints-based compliance model, and that the MOE is practically unable to prosecute proponents for failure to comply with the EAA.[5] CELA counsel Rick Lindgren commented in 2010 that "[t]hese observations suggest that MOE does not have sufficient resources to properly monitor the large number of Class EA approvals being issued under the EAA."[6]

Furthermore, Class EAs are not the appropriate tool for the complex nature of, and significant and varied environmental impacts posed by, mineral development activities. For example, a streamlined, pre-approved process is inadequate for significantly different geographical areas, such as northern Ontario, which is said to be disproportionately affected by climate change and isostatic adjustment.[7] Northern Ontario is also facing a unique situation in its Ring of Fire, which is on the precipice of a mining boom that presents major potential human and environmental health issues, some of which were recently flagged by Environment Canada.[8] As noted by Maureen Carter-Whitney in her March 2011 comments on behalf of the Canadian Institute for Environmental Law and Policy on the Proposed Terms of Reference for the MNDM Class EA:

> Mineral development cannot be considered within the [Class EA] framework because there is little routine or predictable about the activities involved. As MNDMF states in the proposed Terms of Reference:
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> > The Potential environmental effects of MNDMF's activities subject to the Environmental Assessment Act vary based on location, history, and environmental setting of a particular site. […] …The potential net effects of MNDMF's activities can only be assessed on a site-by-site basis.

Recommendation 3: Individual EAs, rather than a Class EA, are more appropriate for mineral development activity, given their complexity and the site specific nature of their potential environmental effects. As such, **rather than a "bump up" procedure** for undertakings subject to the proposed Class EA, all mineral development undertakings (whether discretionary or not) of MNDM should be subject to an individual EA, unless MNDM can establish that the decision is purely administrative and presents either no or minimal

[4] ECO annual Report, 2007-2008, at 30.
[5] ECO Annual Report 2003-2004, at 57, 150.
[6] ECO, Annual Report 2008-2009, at 36-37.
[7] Masters Thesis of Jessica N. McEachren, 'Provincial Class Environmental Assessment: The Examination of Whether the Process can be effectively Applied in a Northern Ontario Context", presented to the University of Waterloo, 2010.
[8] Environment Canada to the Canadian Environmental Assessment Agency letter, dated September 12, 2011.

potential environmental impacts, in which case the undertaking could be **"bumped down**" to a Class EA, category A or B.

It should be noted that although we would prefer that all mineral development decisions of MNDM be subject to stringent and individualized environmental assessment, we would see the following recommendation as an improvement to the current proposed Class EA.

Recommendation 4: In the alternative, we recommend that the Class EA be amended to ensure that mineral development projects in the Ring of Fire be subject to comprehensive individual EAs due to the major environmental risks posed by mineral exploration and extraction presented by the area's unique geography and socio-economic climate.

IV- THE DISCRETIONARY NATURE OF KEY DECISIONS

Discretionary elements of laws detract from the certainty necessary for the business community to make investment decisions and undermine environmental protection efforts. Furthermore, discretionary decisions are more difficult to review than those based on specific criteria.

The proposed Class EA has a number of discretionary elements, most notably:

- MNDM's discretion to address input received during the consultation processes of the various categories of projects and, "if necessary", develop additional mitigation measures, conditions, consultation, studies, or reassigning the project to a higher or lower Category; and
- MNDM's discretion to 'bump up' projects that have high enough impacts that are not "predictable and manageable", as identified by the proponent or brought to light through the project's review period from the public, to an individual EA (Category E).

The major issue lies with the discretion involved in MNDM's interpretation and application of the terms "necessary" and "predictable and manageable."

As mentioned in CELA publication 766, published in October 2010:

> Courts are reluctant to judicially review Ministry refusals to "bump up" projects to individual EA, or proponents' decisions as to which Class EA category or schedule is applicable to their projects.
>
> Similarly, The EA Advisory Panel concluded that there were no meaningful mechanisms under the existing Class EAs for effectively resolving "differences of opinion between

> the proponent and others as to the proper project schedule, the appropriate level of public consultation, or adequacy of studies required to comply with the parent Class EA."[9]

The 2008 ECO Annual Report also identified the fact that the Minister of the Environment rarely approves a request to bump up a project.[10]

Amendments to the Class EA that might ensure the reviewability of the Minister's decision not to 'bump up' requests from one Category to another could include a transparent process for reviewing comments received by the public as well as establishing a procedure by which the Minister is required to respond to those comments that provide new evidence that an undertaking was improperly categorized or was ineffectively scoped within the selected Category's parameters, for example, the adequacy of studies, consultation, or mitigation measures.

Recommendation 5: Clear criteria for the review, consideration and response by the Minister of public comments, specifically, those public comments that provide evidence of improper categorization or scoping of the EA.

In closing, CELA supports MNDM's efforts in publishing a thorough draft Class EA, which represents a significant improvement over the Declaration Orders currently in place. Indeed, the proposed Class EA could be a beneficial tool if it were to apply to the full gambit of MNDM mineral exploration activities and its discretionary elements were redrafted to allow for judicial scrutiny. An even more effective and appropriate tool would be comprehensive individual EAs for mineral development activities, which are widely known to pose major human health and environmental risks, particularly in sensitive ecosystems, such as the Ring of Fire in the far North. Finally, effective environmental assessments for mineral development activities are all the more critical in light of the federal government's weakened EA process for those mining activities designated under the CEAA 2012 regulations.

SUMMARY OF RECOMMENDATIONS

1. The Class EA should apply to undertakings which include MNDM decisions, whether discretionary or not, made at each phase of the mining cycle; particularly those decisions that have the greatest environmental impacts, such as the granting of mining claims and leases.

2. To effectively protect the environment from mineral development activities, undertakings of private proponents should be designated by the Minister under EA regulation in order to provide for much needed environmental oversight due to the much reduced scope of CEAA 2012.

[9] Lindgren and Dunn, 'Environmental Assessment in Ontario: Rhetoric v. Reality', at 295.
[10] 2008 ECO Annual Report, at 30, 42.

3. Individual EAs, rather than a Class EA, are more appropriate for mineral development activity, given their complexity and the site specific nature of their potential environmental effects. **As** such, **rather than a "bump up" procedure** for undertakings subject to the proposed Class EA, all mineral development undertakings (whether discretionary or not) of MNDM should be subject to an individual EA, unless MNDM can establish that the decision is purely administrative and presents either no or minimal potential environmental impacts, in which case the undertaking could be **"bumped down**" to a Class EA, category A or B.

4. In the alternative, we recommend that the Class EA be amended to ensure that mineral development projects in the Ring of Fire be subject to individual comprehensive EAs due to the major environmental risks posed by mineral exploration and extraction presented by the area's unique geography and socio-economic climate.

5. Clear criteria should be adopted for the review, consideration and response by the Minister of public comments, specifically, those public comments that provide evidence of improper categorization or scoping of the EA.

Should you have any questions about the above comments, please contact Kyra Bell-Pasht at (416) 960-2284 ext. 224 or at kyra@cela.ca.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Kyra Bell-Pasht
Counsel