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

August 8, 2008 **BY FAX**

May Lyn Trudelle
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Operations Division
EA and Approvals Branch
Ministry of the Environment
2 St. Clair Avenue West, Floor 12A
Toronto, ON M4V 1L5

Dear Ms. Trudelle:

RE: INTERIM GUIDE: ONTARIO'S TRANSIT PROJECT ASSESSMENT PROCESS EBR REGISTRY NO. 010-3784

These are the comments of the Canadian Environmental Law Association ("CELA") in relation to the above-noted proposal. These comments are being provided to you in accordance with the EBR Registry Notice for this proposal.

Our overall conclusion is that the proposed *Interim Guide: Ontario's Transit Project Assessment Process* dated June 2008 ("the Interim Guide") provides a concise summary of the procedural requirements of the new transit project assessment process established by O.Reg. 231/08. However, we note that the content of the finalized regulation addresses some – but not all – of CELA's previous submissions to the Ministry of the Environment ("MOE") dated May 12, 2008. Accordingly, it remains to be seen whether the new assessment process will actually result in an equitable, effective and efficient mechanism for planning public transit projects across Ontario.

Because of the uncertainty associated with the implementation of this new process, we are pleased that the MOE has decided to provide its guidance documentation on an interim basis. We presume that once sufficient implementation experience has been gained under the new process, the MOE will review and revise the guidance documentation and promulgate the Guide in final form for long-term usage. If so, we would strongly urge the MOE to proactively solicit input from a broad range of stakeholders (not just transit proponents and their consultants) during the review of the Interim Guide and the preparation of the long-term Guide.

In addition, it will be necessary for the MOE to develop comprehensive training opportunities, undertake public outreach activities (e.g. workshops, modules or seminars), and provide educational materials to accompany the regulation and Interim Guide. Given the various planning, documentary, and consultation requirements under the new assessment process, it is important to ensure that proponents and their consultants fully understand and comply with all components of the process. In our view, this objective is unlikely to be achieved if the MOE simply promulgates the 61 page Interim Guide and does nothing else to facilitate proponent or

public understanding of the new process or the MOE's expectations regarding this matter. This is particularly true since the new process is essentially a focused, proponent-driven self-assessment process that depends almost wholly upon the willingness and ability of proponents to implement appropriate planning procedures under the new regime.

In the meantime, CELA's comments on the proposed Interim Guide may be summarized as follows:

1. We note that the Glossary fails to include a definition of the word "environment". Accordingly, CELA recommends that the broad statutory definition of "environment" in the EA Act should be included within the Glossary, particularly since this term appears frequently throughout the Interim Guide. The inclusion of this definition would also safeguard against the possibility that some proponents may incorrectly interpret the new regulation as requiring only consideration of "matters of provincial importance."

2. The introductory section (page 6) suggests that the entire process can be completed within six months. In our view, this oversimplified statement is somewhat misleading and must be qualified by the caveat that certain proponent decisions (e.g. to undertake pre-planning activities, "time outs", etc.) or other developments (i.e. Ministerial direction to revise an Environmental Project Report ("EPR")) may result in additional time to complete the process.

3. The introductory section (page 6) makes the further claim that aspects of the new assessment process "mirror" certain elements of the environmental assessment ("EA") process. In our opinion, any suggestion that the new process duplicates or even resembles the individual EA process is both erroneous and misleading. Thus, this self-serving assertion by the MOE should be deleted from the Interim Guide.

4. There appears to be some internal inconsistency and lack of clarity regarding the consideration of "rationale" and "alternatives to" in the context of transit projects. The introductory section (page 6) correctly notes that the new regulation itself does not expressly require consideration of these important environmental planning matters. On the other hand, in relation to "pre-planning activities", the Interim Guide states that proponents may find it highly advisable to undertake "strategic planning" (e.g. Official Plans, transportation master plans, etc.) to identify need and consider "alternatives to" well before commencing the new assessment process (page 40). More specifically, the Interim Guide provides that:

   > Depending on the scale, scope, level of complexity and potential public interest, a proponent's pre-planning activities <u>may</u> include preliminary planning studies to identify, assess and evaluate rationale for alternatives to the transit project (page 40, emphasis added).

   Thus, the Interim Guide leaves it entirely to the proponent's discretion as to when (or if) rationale or "alternatives to" will be considered during the "pre-planning" stage. However, the Interim Guide fails to provide any criteria or illustrative examples of when a transit project is sufficiently large or complex enough to warrant upfront examination of rationale and "alternatives to".

It should be further noted that the Interim Guide (page 7) provides that it is always open to a proponent to avoid the new process entirely by voluntarily conducting an individual EA where rationale and "alternatives to" must be considered pursuant to Part II of the EA Act. Again, however, the Interim Guide provides no meaningful direction to proponents as to when it would appropriate to undertake an individual EA. In the absence of such direction, it appears to CELA that proponents will rarely if ever choose to undertake an individual EA, even in circumstances where an individual EA would be appropriate.

5. We note that Table 1 of the Interim Guide (pages 7-8) sets out the various types of public transit projects (and ancillary facilities) that are subject to the new assessment process. However, while the Interim Guide provides procedural information on how proponents may proceed through the new process, the Interim Guide is bereft of any substantive guidance that will assist proponents in pursuing environmentally sustainable transit projects. In our view, the Interim Guide provides an extremely useful opportunity for the Ontario government to provide clear criteria or direction on public transit projects that should be preferred (or avoided) by proponents.

   Indeed, one of our overarching concerns is that the Interim Guide appears to assume that all public transit projects are equally benign from an environmental perspective. For example, the Interim Guide fails to rank or prioritize transit projects on the basis of energy considerations (i.e. fossil fuel vs. renewable energy), emissions profile, cumulative effects, natural resource implications, or other environmental parameters. Accordingly, CELA submits that the Interim Guide should be revised to include an appropriate transit "hierarchy" that gives preference to environmentally sustainable modes of public transit. This suggestion was previously made by the 2005 report of the EA Advisory Panel,[1] but has not been acted upon to date.

6. CELA remains concerned about the fact that proponents' "time outs" have been limited, *inter alia*, to "matters of provincial importance" (page 9). We are fully aware that this limitation has been imposed by the regulation, but we see no reason why the Interim Guide should not encourage proponents to attempt to resolve matters of regional or local importance raised by stakeholders, even if such matters cannot serve as the basis for a "time out". In addition, the Interim Guide should inform proponents (e.g. pages 44-45) that where it is desirable to resolve matters of regional or local importance, one option is for the proponent to discontinue the current process (i.e. through a Notice of Termination), and to issue a new Notice of Commencement and start a new process when the regional/local concerns have been addressed (e.g. via commitments made by the proponent).

7. CELA remains concerned that during the final 35 day period, the Minister has the option of not making any actual decisions regarding the transit project or the adequacy of the planning documentation completed to date by the proponent. If the Minister fails to make an express decision within the 35 day period, then the proposed transit project may proceed as planned in the EPR. This is true even where objections have been duly filed by stakeholders (pages 11-12). Again, we acknowledge that this result flows from the unfortunate wording of the

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

regulation, but CELA submits that the Interim Guide should indicate that proponents, objectors, stakeholders and the public at large can reasonably expect that the Minister will provide a written decision, with reasons, in relation to the exercise (or non-exercise) of his/her powers within the 35 day period.

8. We understand that Table 2 in the Interim Guide (page 13) is intended to serve as an illustrative list of items relevant to what might constitute a "matter of provincial importance". However, our concern is that some proponents may view this list as the entire suite of prescribed matters, and may refuse to consider other relevant, non-listed matters of provincial importance. For example, Table 2 fails to include "vulnerable areas" as defined under the *Clean Water Act* (e.g. wellhead protection areas, surface water intake protection zones, areas of significant groundwater recharge, and highly vulnerable aquifers). Similarly, Table 2 fails to include: (a) floodplains (e.g. Regulation Limits) as delineated under the *Conservation Authorities Act*; (b) beds of navigable waterways; (c) energy facilities or infrastructure; (d) brownfields; (e) "conservation land" as defined under the *Conservation Land Act*; or (f) "shorelands" as defined under the *Public Lands Act*. Therefore, CELA submits that Table 2 should be carefully reviewed and expanded to include other matters of provincial importance, and should be amended to repeat the text's caveat that this list is not intended to be exhaustive in nature.

9. We note that the Interim Guide "expects" proponents to maintain mailing lists of interested persons to be consulted (page 24), but contains insufficient expectation that proponents will post notices or other required documentation on their websites. Because not everyone has internet access or navigation skills, we do not suggest that proponents should solely rely upon the internet for disseminating public notices under the new assessment process. However, given that the internet is increasingly relied upon by stakeholders for review/comment purposes, CELA submits that the Interim Guide should specify that as a "best practice", proponents should establish and maintain project-specific websites (if they do not otherwise have a general website presence) for posting of all project-related documentation. We are aware that the Interim Guide contains some brief references to this issue (e.g. page 32), but we submit that this direction needs to be enhanced and repeatedly re-emphasized throughout the Guide.

10. We defer to the views of First Nations and aboriginal organizations on the adequacy (or inadequacy) of the Interim Guide's abbreviated content in relation to "consultation with aboriginal communities" (pages 27-28). Nevertheless, CELA has three general concerns regarding this matter. First, it is unclear to us why the Interim Guide couches its brief discussion in such ambiguous terms (e.g. the Crown "may" have a duty to consult) when recent jurisprudence has made it abundantly clear that the provincial Crown does indeed have a duty to consult/accommodate in relation to constitutionally protected aboriginal or treaty rights.

    Second, the Interim Guide states that it is not intended to "describe fully" how this important duty is triggered, satisfied, or delegated (pages 27-28), but CELA is unaware of any other document or protocol under the EA Act that "fully" addresses this matter in the transit context. In the absence of comprehensive (and legally sound) direction on this critical matter, we anticipate that some proponents and/or the provincial Crown may undertake

inadequate aboriginal consultation where proposed transit projects potentially impact constitutionally protected aboriginal and treaty rights.

Third, even if potentially affected First Nation or aboriginal communities are notified under the new assessment process, the Interim Guide fails to direct proponents to provide these communities with participant funding to allow them to participate meaningfully in the planning process (e.g. funding to commission peer reviews of proponent studies or reports). We hasten to add that this significant deficiency also exists in relation to non-aboriginal communities or stakeholders who may be interested in, or adversely affected by, a proposed transit project. In our view, the Interim Guide's failure to mention participant funding at all is a serious omission which needs to be remedied as soon as possible.

11. In our view, the discussion of monitoring within the Interim Guide (pages 43-44) is too limited to provide meaningful direction to proponents. In our view, the Interim Guide should be amended to make it abundantly clear to proponents that their EPR's must make adequate provision for three types of monitoring: (a) effects monitoring (e.g. were the proponent's impact predictions accurate in terms of nature, extent, magnitude or frequency of environmental effects , or are new or unanticipated effects being detected?); (b) effectiveness monitoring (e.g. are the mitigation measures working as predicted, or are further or other corrective actions required?); and (c) compliance monitoring (e.g. how will the proponent itself ensure that it is complying with all commitments or statutory/regulatory requirements?). For the reasons stated in our May 2008 submission on the draft regulation, CELA submits that it is difficult to take seriously the MOE's suggestion (page 44) that its provincial monitoring program will detect and remedy proponent non-compliance with O.Reg. 231/08.

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We trust that the foregoing comments will be taken into account as the MOE proceeds to finalize the content of the Interim Guide. Please contact the undersigned if you have any questions about this submission.

Yours truly,

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