Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

November 10, 1995 **BY FAX**

Mr. David Griffin
EBR Co-ordinator
Environmental Assessment Branch
Ministry of Environment & Energy
250 Davisville Avenue, 5th Floor
Toronto, Ontario
M4S 1H2

Publication #272
ISBN# 978-1-77189-455-5

Dear Mr. Griffin:

RE: EBR Registry No. PA5E0026.P: Planning and Approvals Guide for Individual Environmental Assessment Projects

EBR Registry No. PA5E0027.P: Guideline on Bump-ups, Designations and Exemptions

EBR Registry No. PA5E0028.P: Guideline for Preparing Environmental Assessments - Cultural Heritage Resource Component

EBR Registry No. PA5E0029.P: Guideline for Preparing Class Environmental Assessments - Documentation and Procedural Requirements

EBR Registry No. PA5E0030.P: Guideline on Consultation in the Environmental Assessment Process

---

We are writing to provide CELA's comments on the above-noted proposals relating to Ontario's environmental assessment (EA) program.

1. Procedural Concerns Regarding EBR Consultation

At the outset, we strongly question the Ministry's motivation for placing these five EA proposals on the EBR Registry at approximately the same time for the same minimal comment period. But for CELA's lengthy involvement in EA development and reform, including submissions to EAAC on some of the above-noted proposals, we would have found it exceptionally difficult to review and comment upon all of the proposals within the 30 day comment period. It is reasonable to suspect that other stakeholders face the same difficulty, which will undoubtedly result in few public submissions on these proposals.

In the future, if the Ministry truly wishes to solicit public input regarding complex EA-related proposals, then the comment period should either be extended to at least 45 or 60 days, or the EA proposals should be staggered on the EBR Registry over a reasonable period of time rather than lumped together in identical or overlapping comment periods. Such an approach would clearly be more conducive to meaningful public participation, and would be consistent with the public participation principles contained in the EBR and the MOEE's Statement of Environmental Values.

2. Guideline on Bump-Ups, Designations and Exemptions

Given that this proposed guideline has not changed since EAAC's Open Review, the comments and recommendations in CELA's July 1995 submission to EAAC remain relevant and applicable (see attached). CELA's main concerns with the proposed guideline may be summarized as follows:

- the guideline should more accurately describe the nature of projects that are appropriate for the Class EA approach;

- bump-up requests should be considered on their merits, and granted where appropriate, at any stage of the planning process;

- there should be a prohibition against implementing undertakings subject to a bump-up request until the request is finally resolved;

- the question of onus and standard of proof needs to be addressed in the guideline;

- the bump-up, designation, and exemption criteria should be streamlined, expressed in legislative form, and re-directed at the paramount consideration: the environmental significance of the undertaking; and

- conditions attached to bump-up, designation or exemption decisions should be more rigorously monitored and enforced.

The foregoing comments are more fully outlined in the attached CELA brief to EAAC.

3. Guideline for Preparing Class Environmental Assessments - Documentation and Procedural Requirements

Again, this is the same proposed guideline that was considered by EAAC during its Open Review, and CELA's July 1995 comments and recommendations remain relevant and applicable (see attached). CELA's main concerns about this proposed guideline may be summarized as follows:

- there should be an explicit legislative basis for Class EA's, including bump-up provisions;

- the nature of the classes of projects subject to a Class EA should be legislatively limited to those projects that: are similar; recur frequently; are small in scale; and have minor, predictable and mitigable effects;

- the requirements of s.5(3) of the Environmental Assessment Act (EAA) must be accurately and concisely described in the guideline, particularly in relation to alternatives and net environmental effects;

- public participation opportunities should be expanded and made mandatory at both the Class EA level and project level;

- the guideline should provide greater direction to harmonize the description of project categories within Class EA's;

- more detailed reference should be made to related planning processes, particularly under the new Planning Act;

- bump-up requests should be considered on their merits, and granted where appropriate, at any stage of the planning process; and

- monitoring provisions should be strengthened at both the Class EA level and project level.

The foregoing comments are more fully outlined in the attached CELA brief to EAAC.

4. Guideline for Preparing Environmental Assessments - Cultural Heritage Resource Component

This proposed guideline appears to offer proponents more advice on how to conduct on-site surveys of heritage resources or estimates of heritage potential, rather than on how to meet the specific requirements of the EAA (which are rarely mentioned or explained in the guideline). Nevertheless, CELA's comments with respect to this proposed guideline are of an editorial nature and may be summarized as follows:

- the requirements of s.5(3) of the EAA must be accurately described where referenced in the guideline. For example, the second paragraph under section 3.1 of the guideline should include a reference to "alternative methods" and mitigation measures (s.5(3)(c)(iii));

- there is a discrepancy between the use of the term "affected environment" in section 5.1 of the guideline, and the cross-reference to Appendix A, which includes only a definition of

"affected area". The EAA definition of "environment" should be utilized; and

- the current Appendix A definition of "affected area" refers to land "altered" by a proponent's "undertaking";[1] this, in our view, is too narrow since physically altering land is only one way that an undertaking may directly or indirectly affect heritage resources within defined areas. For example, a proponent's undertaking could involve leaving land more or less intact but require the establishment of a temporary or permanent road that could indirectly impact nearby heritage resources through increased public access, theft, or vandalism. On this point, CELA questions why the guideline fails to mention the need in some instances to not disclose the actual location of heritage resources (i.e. artifacts) so as to prevent the loss or degradation of such resources.

5. Planning and Approvals Guide for Individual Environmental Assessment Projects

A generic EA primer, such as this proposed guideline, is an important and long overdue initiative. There are, however, some technical improvements and corrections that must be incorporated into the guideline prior to its final release. Indeed, this proposed guideline is characterized by fuzzy writing, poor editing, and inaccurate or incomplete descriptions of EAA provisions and requirements. CELA's comments and recommendations about this proposed guideline can be summarized as follows:

- the discussion of the EAA's application to public and private proponents is somewhat muddy and misleading (section 1.2). For example, no reference is made to the fact that the EAA applies to public proponents unless exempted, and no reference is made to the wide array of exemptions under EAA regulations. A cross-reference to the new exemption procedure and criteria would be beneficial;

- the definition and discussion of Class EA's (section 1.4) represents an attempt to expand or eliminate the traditional restrictions on the usage of the Class EA approach, as described in CELA's July 1995 brief to EAAC (attached). The bump-up discussion should include the new bump-up criteria or refer to the new guideline on bump-ups, designations, and exemptions. In addition, reference to examples of approved Class EA's -- such as municipal roads, sewer works and water

---

[1] Again, there is a discrepancy between Appendix A and section 5.1 of the guideline, which mistakenly refers to a proponent's "development" rather than "undertaking". "Undertaking", as defined by the EAA (e.g. proposal, plan, or program), does not necessarily mean "development".

works -- would undoubtedly assist many readers;

- contrary to the guideline's assertion, the submission of a "proposal, plan, or program EA" is not optional or dependent upon the wishes of the proponent (section 1.5). The EAA definition of "undertaking" is quite clear: if a public sector proponent comes up with a "proposal, plan, or program" that is not otherwise exempted, the EAA applies and an EA must be prepared, submitted, and reviewed. The fact that many proponents have evaded this EAA obligation does not mean that the guideline should contenance or encourage continued non-compliance with the EAA;

- the rationale for the guideline's inclusion of "master plans" as a separate topic (section 1.6) is unclear, particularly since the phrase is not defined or used in the EAA. Similarly, there is no indication in the text that master plans may be subject to EAA for the reasons described above. In addition, a cross-reference to the new infrastructure planning process under the amended Planning Act would be useful;

- the EA Proposal discussion (section 1.7) should include a cross-reference to the new EAP guideline, and should emphasize the need for meaningful consultation on the EAP;

- the public consultation discussion (section 2.2) should include a cross-reference to the new consultation guideline, once finalized;

- the description of the purpose of the undertaking (section 2.3.1) is generally satisfactory; however, CELA would recommend the omission of Chart 1 (p.11) since it raises more questions than it answers (i.e. why wouldn't a provincial or regional transit master plan be an undertaking subject to EAA?); it includes examples of narrowly defined purposes (which the guideline encourages proponents to avoid); and it seems to suggest that the purpose of the undertaking can only be defined after the alternatives to/alternative methods analysis;

- contrary to the guideline's assertion, the EAA does not provide "flexibility" regarding the consideration of alternatives to/alternative methods. The EAA makes no distinction between private and public proponents for the purposes of s.5(3). As drafted, the guideline will undoubtedly encourage private proponents to arbitrarily narrow the alternatives analysis (i.e. by limiting the site selection process to only sites owned by the proponent, or having the purpose/alternatives dictated by the private proponent's financial or corporate objectives). This type of skewed analysis been properly rejected by the EA Board for

being inconsistent with the EAA, and should not be encouraged by the EA Branch in this guideline;

- inexplicably, the "environmental effects" discussion (section 2.3.4) omits any reference to cumulative impacts. This is a major oversight that must be corrected in the next version of the guideline; and

- it goes without saying that the EAAC discussion (section 4.4) should be omitted in light of the recent and ill-conceived decision to terminate EAAC.

6. Guideline on Consultation in the Environmental Assessment Process

After twenty years of experience under the EAA, it has been clear that meaningful public participation is essential to good EA planning and EA decision-making. Despite the benefits of public participation, however, this proposed guideline merely "encourages"[2] proponents to develop consultation programs as part of the planning process. In CELA's view, an non-enforceable guideline, which simply "encourages" public consultation, is inadequate and perpetuates the uncertainty as to whether consultation is actually required under the EAA.

Accordingly, CELA submits that the EAA should be amended to impose a legal duty on proponents to carry out planning and consultation with interested or affected parties at the earliest possible opportunity, and certainly well before the formal submission of EA documentation for government review. If such an amendment is undertaken, an accompanying regulation could be used to provide more detailed direction on fulfilling the duty to consult (e.g. model notice forms, list of agencies, municipalities or persons who should get notice, etc.). Similarly, if an amendment is undertaken, there would still be some value in having a consultation guideline to offer guidance and assistance on how proponents can satisfy the legal duty to consult. However, a guideline *per se* does nothing to create a firm obligation upon proponents to undertake consultation.

CELA's more detailed comments on the proposed guideline can be summarized as follows:

- the principles for effective consultation (section 2.6) needs to include express reference to three key elements: the need to produce readable, accessible, and traceable EA documentation; the need to provide adequate time for review

---

[2] See section 1.2 of the proposed guideline (p.1), which uses the word "encourage" twice in the first paragraph.

and comment upon EA documentation; and the need to provide adequate resources (e.g. participant funding) where appropriate to facilitate review and comment by non-governmental organizations or individuals;

- incredibly, the guideline simply suggests that the proponent "may" wish to consult on key EA issues during the planning process, including: the planning methodology; the various components of the s.5(3) analysis; final evaluation of alternatives and the selected alternative; and draft technical reports or the draft EA document (section 3.1). In CELA's view, consultation on these critically important matters must be mandatory, not left to the whim, discretion, or goodwill of proponents. Even if the EAA is not amended to include a legal duty to consult, this section of the proposed guideline should be expanded to make it abundantly clear that it is imperative that proponents consult on these matters, or alternatively, that the EA Branch and the EA Board expect proponents to consult on these matters and will looking for evidence of meaningful public participation regarding these issues;

- the guideline offers a succinct list of the proponent's role and responsibilities (section 4.1); however, the last bullet point -- addressing and resolving issues and concerns raised during consultation -- needs to be amplified and expanded. Consultation is not conducted merely for the sake of consultation; instead, it is intended to solicit information, opinions, and perspectives that should influence the planning and decision-making. Too often proponents simply go through the motions of consultation but steadfastly refuse to act upon or even acknowledge legitimate issues and concerns raised by those consulted. The result is often a lengthy, costly, adversarial hearing that essentially amounts to a post-mortem of what went wrong during the planning process. If proponents received more substantive direction on their responsibility to actually address reasonable issues and concerns raised during consultation, the result will likely be fewer hearing requests, or shorter hearings with fewer issues in dispute. Section 5.7 of the proposed guideline touches on this issue, but it appears focused largely on procedural ADR techniques rather than providing substantive direction to proponents to work with interested parties to address issues and conflicts that arise during the planning process;

- with respect to "appropriate resources" for consultation (section 5.3), reference should be made the the value, purpose, and desirability of having proponents provide participant funding where appropriate (e.g. for peer review of technical reports). This concern also ties into the "identification of issues" discussion (section 5.5): how can interested persons realistically identify their potential issues at the outset of the EA process without adequate

funding or access to information? A cross-reference in these two sections to the "participant support" discussion (section 5.8) may help address this concern;

- proponents must not be merely "encouraged" to provide public notice on invite public comments regarding the submission of the EA document, nor should the EA Branch simply "recommend" that this be done by proponents (section 7.1). Again, as described above, these public notice-and-comment opportunities must be made mandatory, not optional;

- given that the Intervenor Funding Project Act is due to expire in less than five months' time, the discussion of intervenor funding (section 7.5) may become an interesting historical footnote. Under separate cover, CELA has made submissions to the Minister of Environment & Energy in support of contining the intervenor funding program in Ontario. In the event that some form of intervenor funding is retained, the guideline's discussion of this topic may have to be re-worked. In addition, this discussion should include reference to the Board's cost powers and to the fact that intervenor funding is paid by proponents, not by the Board or the government at large; and

- the discussion of the Environmental Bill of Rights (EBR) is somewhat misleading. It is true that there are EA-related exemptions under Part II (public notice-and-comment) of the EBR; however, it is inaccurate to suggest in the last line that "further application of the EBR is not required" for EA approvals. In fact, EA approvals are still potential "triggers" for other components of the EBR, such as Part IV (application for review); Part V (application for investigation); or Part VI (right to sue to protect public resources).

In summary, the proposed guideline offers a good rationale for public consultation in the EA planning process, and provides some useful information on consultation techniques. However, the guideline fundamentally fails to ensure that meaningful consultation will, in fact, occur during the planning process. Accordingly, CELA submits that the guideline must be accompanied by appropriate statutory and regulatory amendments to impose a mandatory consultation duty upon proponents.

***

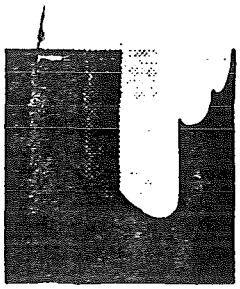
We trust that CELA's comments will be taken into account as these various guidelines are finalized and released. Please contact the undersigned if you have any questions or comments arising from this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Ms. Eva Ligeti, ECO
Ms. Cathy Taylor, OEN



Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ENVIRONMENTAL ASSESSMENT ADVISORY COMMITTEE REGARDING DRAFT GUIDELINES FOR CLASS EA's AND BUMP-UPS, DESIGNATIONS, AND EXEMPTIONS

Prepared by: Richard D. Lindgren
Counsel
Canadian Environmental Law Association

July 1995

TABLE OF CONTENTS

SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ENVIRONMENTAL ASSESSMENT ADVISORY COMMITTEE REGARDING DRAFT GUIDELINES FOR CLASS EA's AND BUMP-UPS, DESIGNATIONS AND EXEMPTIONS

By
Richard D. Lindgren[1]

PART I - INTRODUCTION

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

CELA has been particularly active in the area of environmental assessment, and CELA was instrumental in securing passage of Ontario's Environmental Assessment Act (EAA) in 1975. Since the enactment of the EAA, CELA has been involved in various EA reform initiatives and has submitted numerous briefs on improving Ontario's EA process.[2] CELA has also acted on behalf of clients in a variety of EA-related matters, including court proceedings, EA hearings, bump-up requests, designation requests, exemption requests, and Class EA's, including the first Class EA hearing held

---

[1] Counsel, Canadian Environmental Law Association.

[2] See, for example, "Principles for Environmental Impact Assessment" (1973); "Environmental Impact Assessment: The Law as It Is and Should Be" (1974); "Are Ontario's Proposals for Environmental Assessment Adequate?" (1974); "Criteria for an Environmental Impact Hearing Procedure" (1974); "Submissions on the Proposed Environmental Assessment Act Regulation for Municipalities" (1978); "Comments Regarding Proposed Recommendations of Phase I of EAPIP" (1989); "Reforming Environmental Assessment: EAPIP" (1990); "Submissions to the EA Board Regarding Discussion Papers on Procedural and Legislative Change" (1990); "Response to Toward Improving the EA Program in Ontario" (1991); and "Mega-EA Hearings: Thoughts from the Front" (1993).

by the Environmental Assessment Board.[3]

CELA's EA experience leads us to conclude that while the EAA is fundamentally sound, there are a number of legislative, policy, and administrative changes that are necessary to make the EA process more efficient, effective and equitable. It is from this reform perspective that CELA has reviewed the two draft documents that are the subject-matter of the present referral to the Environmental Assessment Advisory Committee (EAAC): "Guideline for Preparing Class Environmental Assessments: Documentation and Procedural Requirements" (EA Branch, April 1995); and "Guideline on Bump-Ups, Designations and Exemptions" (EA Branch, March 30, 1995).

In analyzing these documents, the fundamental question is: do the proposed guidelines substantively improve the EA process? For the reasons outlined below, it is CELA's conclusion that both documents do not substantively improve the EA process, and that both documents require major revisions if the EA Branch intends to finalize and implement the guidelines.

The purpose of this brief is twofold: to identify and analyze the deficiencies in each of the proposed guidelines; and to propose changes that are necessary to make the proposed guidelines acceptable. Part II of the brief focuses on the draft guideline for Class EA's, while Part III examines the draft guideline on bump-ups, designations and exemptions. Part IV of the brief summarizes CELA's conclusions and recommendations.

PART II - DRAFT GUIDELINE FOR PREPARING CLASS EA's

(a) General

If the objective of this document is to provide clear and explicit guidance to Class EA proponents, government agencies, and members of the public about how to prepare a Class EA that meets the requirements of the EAA, then the document clearly fails to achieve this objective. At various locations, the document is plagued by: overreliance on EA jargon; questionable structure and organization; and misleading, incomplete or incorrect statements about the requirements of the EAA. Similarly, several of the figures and flow charts are problematic, and the document often shifts back and forth between Class EA level planning and project level planning without clearly distinguishing between them. In short, the guideline does not serve as a meaningful template for the preparation of Class EA's. The reasons for CELA's unfavourable assessment are outlined below.

---

[3] Ministry of Natural Resources, Class Environmental Assessment for Timber Management on Crown Lands in Ontario (December 1985).

On a more fundamental level, CELA is uncertain about the overall efficacy of the guideline. CELA certainly supports the goal of ensuring better consistency between and within Class EA's, and it is undoubtedly desirable to provide clarity and direction to proponents on the requirements of the EAA when Class EA's are being developed or renewed. However, it is unclear whether a generic guideline, which attempts to set out a "model" Class EA planning process, can provide a sufficient level of detail to provide any real direction to EA proponents, government agencies, or members of the public. CELA would also prefer to see the passage of a regulation establishing the procedures for developing Class EA's, particularly with enhanced public participation opportunities. Nevertheless, if EA Branch is insistent upon prescribing benchmarks for Class EA's in guideline form, then the guideline must be substantially amended.

Amendments are particularly desirable in relation to two key matters: public consultation; and the scope of the class of undertakings subject to Class EA's. With respect to public consultation, the guideline must incorporate more prescriptive provisions regarding the need for, and implementation of, meaningful public participation opportunities at both the Class EA level and project planning level. Greater thought should be given to using the EBR Registry or GONet (Government of Ontario Network) computer bulletin board for public notice purposes.

With respect to the scope of undertakings subject to Class EA's, the guideline must provide more explicit limitations on the types of projects that may be covered by a Class EA (i.e. projects that are similar and recur frequently; that are small in scale; and that have minor, predictable, and mitigable environmental impacts). Incorporating such amendments will go a long way in addressing many public concerns about the current use (and misuse) of Class EAs, and will restore public credibility in the Class EA process.

The guideline authors should also re-think the "one size fits all" approach to Class EA's. While some classes of projects may be suitable for a Class EA at the provincial scale, there are other classes of projects that are better addressed at a sub-provincial or regional level. For example, assuming that timber management planning is an appropriate candidate for a Class EA (which is highly questionable), then it arguably would have been preferable to approach the issue at a sub-provincial scale (i.e. develop separate Class EA's for the boreal and Great Lakes - St. Lawrence forests), given the enormous range in site conditions, stand types, environmental impacts, required mitigation, and affected stakeholders. As drafted, the guideline does not appear to encourage or even mention this need for greater creativity when determining the proper scale and appropriate level of detail for Class EA's within Ontario.

(b) Section 1.0: Introduction

CELA's comments on Section 1.0 of the guideline are as follows:

Sec. 1.0 This section obliquely refers to s.40 of the EAA and it seems to take as a given that the EAA provides sufficient legislative authority for Class EA's (p.1). In fact, it has long been recognized that the current legal status of Class EA's is uncertain at best, and previous EA reform documents have suggested that the EAA be amended to provide a clear legislative basis for Class EA's.[4] This problem has not been addressed to date, and CELA recommends that the necessary statutory amendments should be enacted. Given the fact approximately 90% of undertakings under the EAA are now processed through Class EA's, one would reasonably expect that EA Branch would be eager to firm up the legislative basis for the elaborate and extensive Class EA program that has evolved in Ontario.

Sec. 1.1 CELA has no objection to the stated purpose of the guideline (p.1). However, CELA has some concern about the implementation provisions contained in the sidebar (p.2). In particular, we are not aware of any compelling legal or policy reasons why unapproved Class EA's that are "in the mill" should not be subject to the guideline. Application of the guideline to all new and as yet unapproved Class EA's (or renewals of approved Class EA's) is desirable and legally permissible, and would constitute retrospective, not retroactive, application of the guideline. By analogy, the new Wetlands Policy Statement applied to all new or outstanding planning applications that had not been finally approved prior to the effective date of the policy statement. We see no reason to depart from this common sense principle in order to ensure that "in the mill" Class EA's comply with current regulatory or policy requirements.

Sec. 1.2 CELA has no reason to dispute the factual or

---

[4] See Toward Improving the Environmental Assessment Program in Ontario (MOEE), Recommendation 6.9; Kathy Cooper et al., "Response to a Discussion Paper Toward Improving the EA Program in Ontario (CELA, 1991), pp.14-15; and "Reforming the EA Program: Parts 1 and 2" (EAAC, 1991/92), p.145 and Recommendation #53. One leading text has correctly declared that there is "no explicit authority to carry out a class assessment": see Estrin & Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.229, f.n.70.

statistical information contained in this background section. However, this section runs into serious difficulty when it attempts to describe and analyze the historical context and legal requirements respecting Class EA's. For example, the section states that "historically" Class EA's have been "expected" to satisfy the same s.5(3) requirements as individual EA (p.3). In CELA's view, this is not merely a "historical expectation"; this is a requirement of law. The section then goes on to provide an apologia for unfortunate Class EA proponents who allegedly have difficulty meeting s.5(3) requirements for classes of specific projects "that will not be carried out until some time in the future" (p.3). In CELA's view, this is an overstated and unpersuasive argument for streamlining or gutting s.5(3) requirements for Class EA proponents -- most proponents of individual EA's are also faced with the requirement of predicting net environmental effects of undertakings not yet underway.

The quotation from the Environmental Assessment Board correctly states the law: Class EA's must meet the substantive requirements of the EAA before they can be approved. Thus, the planning process in a Class EA must not only provide for site specific consideration of alternatives, environmental effects, mitigation, and environmental advantages and disadvantages (p.4), but it must also provide for other matters (i.e. monitoring) and require documentation of "need",[5] as described below.

In summary, we are unclear as to the value or purpose of the sec.1.2 "background", and would respectfully suggest that this section be deleted or relegated to an appendix without the misstatements noted above.

(c) Section 2.0: Class EA's

CELA's comments on section 2.0 of the guideline are as follows:

---

[5] CELA was astounded to read the rather glib assertion in the guideline's glossary that "need" is a term no longer used by the EA Board. Our reading of recent Board decisions suggests that "need" is still a paramount consideration for Board members acting under the EAA. The glossary's implication that "need" is now an outmoded or unnecessary consideration is therefore incorrect and misleading.

Sec. 2.1

At the risk of perpetuating more cryptic EA jargon, CELA has no objection to the use of the terms "Class EA parent document" and "Class EA project". However, CELA submits that the definitions proposed in the guideline need to be revised. For example, the sidebar in section 2.0 (p.6) states that the Class EA parent document sets out a planning process for a class of undertakings that have "predictable and mitigable" environmental effects, and that are "not of a size or scale warranting an individual EA". In CELA's view, this deliberately ambiguous definition represents an objectionable attempt to expand the scope of projects that may be subject to Class EA's. As Class EA's have evolved in Ontario, there has been a common understanding that only projects having the following characteristics could be covered by a Class EA:

- the projects were similar and recurred frequently;
- the projects were small in scale; and
- the projects' environmental impacts were minor, predictable and mitigable.[6]

It is readily apparent that the guideline is attempting to evade the "similar", "recur frequently", "small in scale", and "minor impact" criteria in order to improperly open up the Class EA vehicle to a variety of environmentally significant undertakings. We are aware that some recently proposed or approved Class EA's have included large-scale and environmentally significant activities (e.g. timber management). We are also aware that widening the class in the manner proposed by the guideline would please many proponents. However, CELA submits that this proposed expansion of the class is inconsistent with the original justification for Class EA's and amounts to a misuse of the Class EA process.

We note that the guideline goes on to mention in passing that Class EA approvals are more appropriate for small scale projects (p.7), but this and other fundamentally important limitations are conspicuously absent from the above-noted

---

[6] See, for example, Kathy Cooper et al., supra, f.n. 4, at p.15. See also Estrin & Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.204 and f.n.71.

definition and the glossary definition of Class EA parent document. Failure to expressly emphasize these limitations in the guideline will undoubtedly result in further abominations like the Timber Management Class EA and other sweeping sectoral Class EA's covering projects which are not appropriate for a provincial Class EA approach. CELA derives little comfort from the guideline's brief assurance that it will be the responsibility of the proponent to justify the types of projects comprising the class (p.7). In our view, the above-noted constraints on the nature of the class need to be expressed in legislative form.[7]

With respect to the definition of Class EA project, we would suggest some additional wordsmithing as follows: a Class EA project is an individual project that may proceed without project-specific approval under the EAA, provided that the project has been planned in accordance with the requirements of the approved Class EA parent document, and provided that the project has not been bumped-up to an individual EA.

Sec. 2.2 CELA strongly disagrees with the MOEE view that bump-ups are a mechanism of "last resort" (p.7). As described below, CELA submits that bump-ups should be available from the earliest planning stages to the final public comment period. It should also be recognized that in rare circumstances, proponents themselves may voluntarily bump-up projects ab initio rather than waiting until the end of the planning process.

(d) Section 3.0: Developing a Class EA Parent Document

CELA's comments on section 3.0 of the guideline are as follows:

Sec. 3.1 The guideline is particularly weak in its direction regarding public consultation during the development of Class EA's. Unenforceable and equivocal words, such as "encourages", "should", and "recommends", are used throughout the guideline to describe public consultation obligations. More prescriptive terms, such as "shall" or "will", are notably absent. In CELA's view, public participation during the development

---

[7] See Kathy Cooper et al., supra, f.n. 4, at p.15, and "Reforming the EA Program: Parts 1 and 2" (EAAC, 1991/92). Recommendation #53.

of a Class EA is critically important and should be mandatory, not discretionary. The guideline's cross-reference to EA Branch's equally anemic consultation guidelines is insufficient (p.8). Legislative amendments and guideline reforms are necessary to make meaningful public consultation an integral and enforceable part of EA planning.[8]

Sec. 3.2

Arguably, the most deficient component of the guideline is this section's attempt to translate s.5(3) requirements into the Class EA context. For example, we are puzzled by the comment that "MOEE recognizes that some content requirements can only be met in a "generic manner" as "the specific class [of] EA projects will not be known until some future time" (p.9). How can a Class EA be conceptualized and developed without some idea of what the actual class will be? Indeed, the very next page of the guideline properly stipulates that the Class EA must provide a clear and detailed description of the activities that constitute the class (p.10).

Similarly, in the discussion of "purpose and rationale" (p.9), the guideline carefully avoids referring to consideration of "need". It is now well understood that "need" is a fundamentally important consideration in EA planning: without a demonstration of need, environmentally risky undertakings are not in the public interest and should not be approved.[9] The guideline must be amended accordingly to require proponents to demonstrate "need" at the Class EA level, the project-specific level, or both.

The guideline goes on to direct proponents to categorize activities within the class of undertakings (e.g. "pre-approved" or "reduced documentation" categories)(Sec.3.2.2, p.10). We note, however, that this section fails to mention one of the most important categories: the ESR category. Similarly, the guideline fails to provide sufficient guidance in how to conduct this

---

[8] See "Reforms to the EA Program: Parts 1 and 2" (EAAC, 1991/92), pp.23-24; and see "Environmental Assessment Reform: A Report on Improvements in Program Administration" (MOEE, 1993), pp.12-14.

[9] M. Jeffrey, Environmental Approvals in Canada (Butterworths), Sec. 5.23 to 5.31.

classification exercise, and fails to describe the full range of possible categories or sub-categories. In CELA's view, the guideline should provide criteria or illustrative examples to assist in harmonizing the muddled, haphazard mix of categories currently found in approved Class EA's. A cross-reference to section 4.2.1 of the guideline would also be beneficial. The bottom line is that members of the public reading a Class EA should be able to tell precisely which project falls into which category, and which documentation requirements and notice-and-comment opportunities are applicable. Among other things, this approach will require clearly articulated descriptions of both the projects and the categories within a Class EA.

The guideline's definitions of "alternatives to" and "alternative methods" are correct (p.10). Technically speaking, however, alternatives described in a Class EA do not get "approved"; instead, they merely provide a starting point for the examination of reasonable alternatives. In addition, the "do nothing" or null alternative should be explicitly referenced in this section.

With respect to the environments affected by the class of undertakings, the guideline directs proponents to "attempt to provide a general description (i.e. urban vs. rural areas, along watercourses, agricultural lands, etc.)"(p.11. emphasis added). Even in Class EA's, overgeneralized descriptions of the environments affected are essentially meaningless and provide little substantive guidance to project-level proponents. CELA submits that the guideline should be going in the other direction: Class EA proponents should be directed to provide descriptions that are as detailed as possible, keeping in mind that the environments affected will vary from project to project. In CELA's view, one of the primary purposes of a Class EA is to "flag" these matters in a sufficiently detailed manner so that project-level proponents are alerted to the full range of direct, indirect and cumulative environmental effects that may be caused by the project.

CELA agrees with the guideline's stipulation that appropriate mitigation measures should be described in the Class EA document (p.12). Again, more detail is preferable to bland generic descriptions.

As a final comment, we would point out that s.5(3) is the heart of the EAA. It is also apparent that some proponents would benefit from further and more explicit direction in meeting the requirements of s.5(3), particularly with respect to alternatives. However, the guideline reduces this important subject to a small number of paragraphs, and limits the discussion of alternatives to a few sentences. In CELA's view, this component of the guideline needs to be substantially beefed up and expanded.

Sec. 3.3.1

This section correctly states that effective and meaningful public consultation is an essential part of planning Class EA projects (p.12). The section goes on to prescribe the "minimum" and "optional" consultation opportunities that should be provided. With respect to the mandatory notification requirements, CELA has no objection to the list of prescribed information for the "Notice of Intent" and "Notice of Filing" (p.13). However, it is not clear how and where these notices will be placed (Ontario Gazette? Newspapers? Mail outs? EBR Registry?). The Notice of Intent should also include the Minister's address to which bump-up requests may be submitted. The rationale for not requiring formal RDR notice is unclear (p.14).

With respect to optional consultation, the guideline surprisingly suggests that proponents should at least consider incorporating consultation opportunities "during, or at the completion of, the evaluation of alternatives" (p.15). In CELA's view, the evaluation of alternatives, which will presumably lead to the identification of a preferred alternative, is fundamentally important -- consultation must therefore be mandatory, not optional. Similarly, CELA supports the suggestion that consultation should be carried out during or after project construction (p.15), but submits that the guideline's monitoring provisions must be strengthened, as described below.

CELA submits that the guideline should also discuss the relationship between public consultation occurring under the Class EA and consultation that may be required under other related processes, notably the new Planning Act (e.g. land use planning decisions such as official plans, official plan amendments or plans of subdivision). Given the potential overlap between infrastructure planning under Class EA's (e.g. sewers and roads) and land use planning under the Planning Act, it

would be highly desirable for the guideline to contain a separate section discussing this matter.

Sec. 3.4

CELA supports the mandatory inclusion of bump-up provisions in every Class EA. However, the wording suggested by EA Branch (pp.16-18) is inadequate. For example, while paragraph 2 states that bump-up requests can be made at any time, paragraph 3 states that such requests will "only" be considered by MOEE after the Notice of Filing in Phase 4 and after the proponent indicates that the bump-up request cannot be otherwise resolved. If the objective is to make proponents more responsive and willing to accomodate public concerns as early as possible, then paragraph 3 will not achieve the objective. Telling proponents and the public that bump-up requests will only be seriously entertained at the end of the planning process sends the wrong signal and only serves to reinforce the "bunker mentality" displayed by many proponents. In short, proponents will be encouraged to hunker down and refuse to negotiate in good faith because when the bump up request is finally considered, proponents will urge the dismissal of the bump-up request on the grounds that the planning has been completed and all consultation requirements have been complied with by the proponent. Indeed, bump-up requesters are prejudiced by this approach since a proponent's compliance with planning requirements is proposed as a key criterion for assessing bump-up requests.[10]

In CELA's view, bump-up requests should be considered on their merits and granted where appropriate at any stage of the planning process. Significantly, the EA Board has also found that it may be appropriate in some circumstances to grant a bump-up request before the end of the planning process.[11] Making bump-ups more of a "wild card", in the sense that the requests could be granted at any time, should bring recalcitrant proponents to the table at an earlier stage in order to avoid the delay, cost and ignominy of a successful bump-up request. In addition, granting meritorious bump-up

---

[10] See Appendix A, "Guideline on Bump-Ups, Designations and Exemptions" (March 30, 1995).

[11] Reasons for Decision and Decision (April 20, 1994), p.107. See also "Reforms to the EA Program: Parts 1 and 2" (EAAC, 1991/92), at pp.190-91.

requests at the earliest possible opportunity will ensure that time and money are not wasted where proponents follow the ESR process to its conclusion, only to have the matter bumped-up to an individual EA. Where an early bump-up request is considered but rejected, the rejection should not preclude subsequent bump-up requests later in the process if, for example, the ESR ends up being fundamentally deficient.

The EA Branch's proposed wording for bump-up provisions also fails to expressly prohibit the proponent from conducting operations in the area covered by the bump-up request while the request is pending. This has proven to be a significant problem, particularly in the context of timber management planning where roads have still been planned and cleared into areas subject to a bump-up request. In CELA's view, the guideline must strictly prohibit such operations until the bump-up request has been finally determined.[12] The guideline should also refer to the possibility of using alternative dispute resolution (ADR) techniques to settle bump-up requests.

CELA's further comments on bump-up matters are found below in Part III of this brief.

Sec. 3.5 While there is a need to include amendment procedures within a Class EA, CELA has considerable difficulty with the wording proposed within the guideline (pp.20-21). As drafted, the wording fails to distinguish between relatively minor amendments (i.e. correction of clerical or semantic errors) and more significant amendments (i.e. expanding the geographic application of the Class EA, or extending the scope of projects subject to the Class EA). Moreover, the guideline would appear to permit proponents to substantially amend the undertaking with little or no public notice or input during the review period. If the MOEE is committed to the EA principle that parties help plan an undertaking, then significant amendments must trigger mandatory public consultation opportunities. The guideline must also be

---

[12] The need for such a prohibition was recognized by the EA Board in the Timber Management decision, where the Board imposed a general restriction on operations in areas subject to a bump-up request: see Reasons for Decision and Decision (April 20, 1994), p.108, Condition 71, and Appendix 15.

consistent with section 17 of the EAA, which applies the full force of the EAA, including s.5(3), to changes in proposed or approved undertakings. In CELA's view, significant amendments should not be processed through an expedited administrative process without meaningful public participation. Merely conferring discretion upon the Minister to defer such amendments until the next scheduled renewal of the Class EA is not a sufficient safeguard or an adequate substitute for public involvement.

Sec. 3.6 CELA supports an approval period not exceeding five years for all Class EA's (p.23). Approval periods longer than five years generally run the risk of having the Class EA become dated and out of step with technological developments and changing environmental priorities of both the government and the public at large.

Sec. 3.6.2 The guideline proposes that proponents should be able to "sit" on an approval for a Class EA project for up to five years (p.24). In CELA's view, this is an excessive length of time -- two or three years should be the absolute limit that an approved project can wait without being undertaken. Failure to undertake the project within this timeframe should result in the lapse of the "approval" and re-application of the Class EA planning process. By analogy, we note that certain land use approvals under the Planning Act can lapse if the development is not undertaken within the prescribed timeframe.

Sec. 3.7 CELA recognizes the need for a "phase-in provision" to govern projects being planned while Class EA's are being renewed, although it would be more accurate to refer to this as a "transitional" provision rather than "phase-in" (p.25). Moreover, CELA submits that proponents with projects "in the mill" should be required to follow new Class EA provisions unless their projects have completed at least Phase 4 and/or a project completion notice has been filed. As described above, projects which have not yet received final Class EA clearance should be subject to, and comply with, the latest expression of Class EA policy and procedure.

Sec. 3.9 CELA strongly supports the proposal that Class EA proponents be required to undertake monitoring (p.27). However, CELA submits that this requirement must include three types of monitoring

-- compliance, effects, and effectiveness -- not just the effectiveness monitoring contemplated by the provision. It may also be appropriate to expand the cross-reference to project-level monitoring, as described below.

Sec. 3.11 — Given that the guideline attempts to ensure that the requirements of s.5(3) of the EAA are met in the Class EA context, CELA was surprised to see that the possibility of deviating from the guideline is curtly discussed and permitted in a single sentence (p.29). Numerous or substantial deviations from the guideline will undermine the purpose and utility of the guideline. At a minimum, the guideline should provide particulars or criteria as to what types of deviation may be appropriate or acceptable.

Table 2 — Because the consideration of alternatives and environmental impact is the cornerstone of EA, CELA submits that the guideline should prescribe as many specific content requirements for s.5(3) as possible, rather than leaving this all-important matter as a mere "generic requirement" (p.30). Similarly, the guideline should provide more prescriptive direction for consultation during Class EA preparation, and for Class EA monitoring.

(d) Section 4.0: A "Model" Class EA Planning Process

CELA's comments on Section 4.0 of the guideline are as follows:

Sec. 4.0 — CELA submits that this entire section, including Figure 4 and Table 3, is mistitled and misleading. What is being proposed in this section is a "model" planning process for Class EA projects, not Class EA parent documents (p.31-34). This section represents one of the more glaring examples of jumping back and forth from the Class EA level to the project level without adequately distinguishing between them. As described above, we also note that the so-called "model" process carefully avoids any reference to the issue of need, and further lacks reference to related planning processes such as the Planning Act.

Moreover, CELA submits that additional key items in Table 3 -- such as alternatives to and methods; evaluate alternatives; and consultation on evaluation -- need to be subject to specific requirements, not generic requirements. We are

also concerned that the process depicted in Figure 4 attempts to constrain or bifurcate the analysis required by s.5(3): not only do proponents have to simply consider "alternatives to", but they must also identify and analyze affected environments, environmental impacts, and mitigation measures for the undertaking, alternative means, and alternatives to. By attempting to break this important matter into two distinct steps (i.e. Phases 2 and 3), CELA is concerned that the guideline overlooks the dynamic, interative, and interrelated nature of the s.5(3) analysis. Figure 4 appears to overlook the fact that a bump-up request can be made at any time, not just at the end of the ESR component of Phase 4.

Sec. 4.2.1

With respect to the relationship between Class EA projects and "higher level plans" (p.35), the guideline should expressly remind proponents that such plans may themselves be "undertakings" to which the EAA applies. For too long, many of these higher order plans have evaded EAA requirements, particularly through the ruse of calling plans "guidelines" or "objectives".[13] In CELA's view, the EAA should apply to both higher level plans (i.e. Ontario Hydro's Demand Supply Plan) and specific projects intended to implement such plans (i.e. individual power plants or transmission corridors). CELA further submits that it would be appropriate to require Class EA proponents to have strategic plans (which fully consider alternatives to) in place to provide proper context and direction for Class EA parent documents. For example, there should be a provincial (or regional) strategic transportation plan to ensure that MTO or municipal Class EA's do not simply become technical road planning manuals.

The guideline similarly fails to mention or describe the need for Class EA projects to comply with other relevant provincial policies (e.g. the Comprehensive Set of Policy Statements under the Planning Act). For public sector proponents subject to the Environmental Bill of Rights (EBR), the Class EA's should refer to, and comply with,

---

[13] See Chapter 8 and Appendix 14 in Final Report: Royal Commission on the Northern Environment (June 1985) for an insightful analysis of how the Ministry of Natural Resources attempted to avoid the EAA by changing the name of its district land use plans to "guidelines".

the provisions of the Statement of Environmental Values adopted by the proponents.

Sec. 4.2.2 Again, the proposed Phase 2 overlooks the question of documenting the "need" for the particular project. CELA also objects to the guideline's suggestion that "alternatives to" should be looked at in a generalized, less detailed fashion (p.40). The proposed use of screening criteria to weed out unreasonable alternatives is supportable in principle (p.41), but only if there are adequate public comment opportunities, either at the Class EA level or project level, on the acceptability of the proposed criteria or their suggested rating or weighting.

CELA is particularly surprised to see no reference to the issue of cumulative environmental effects in the list of prescribed steps for evaluating alternatives to (p.41) and alternative methods (pp.42-43). Consideration of cumulative effects is especially important in the Class EA context, where, by their very nature, projects recur frequently and have varying degrees of environmental significance.[14] This omission is a major oversight which must be corrected.

CELA is also concerned about the optional nature of consultation during the evaluation of alternatives to (p.42). Presumably, this process leads up to the selection of a preferred alternative, and it is unacceptable that consultation during this process is optional rather than mandatory.

Sec. 4.2.3 The guideline suggests that once the preferred alternative is selected, then a more detailed analysis of environmental effects and mitigation measures is required (p.43). If this means that environmental effects and mitigation measures do not have to be analyzed for all alternatives to and alternative methods, then CELA wishes to draw the EA Branch's attention to the clear wording of s.5(3)(c): the proponent must describe the environment affected, environmental impacts, and the mitigation measures for <u>each</u> of the undertaking, alternatives to, and alternative methods. Confining this analysis to only the preferred alternative amounts to non-compliance

---

[14] "Reforms to the EA Program: Parts 1 and 2" (EAAC, 1991/92), p.149.

with s.5(3).

With respect to the issue of the appropriate level of detail, CELA is concerned about the reference to "projects with significant, long-term or unmitigable effects" (p.43). Such projects clearly do not belong in the Class EA process, as described above.

Consultation during the evaluation of alternative methods must be mandatory, not optional (p.45).

Sec. 4.2.4

CELA supports the view that the proponent's documentation must reflect a "traceable" decision-making process (p.45), but would add the additional proviso that the decision-making should also be logical, reasonable, and consistent with the purpose of the EAA.

With respect to Environmental Study Reports (ESR), CELA submits that the minimum content requirements in the sidebar (p.48) must more clearly and accurately reflect the requirements of the EAA. For example, "need" should be referenced, and alternatives to and alternative methods must be more carefully distinguished. The ESR itself, not just the filing notice, should include reference to bump-up opportunities and deadlines.

As described above, CELA disagrees with the suggestion that bump-up requests should be made or considered only during the final 45 day review period (p.49).

We are unclear as to the rationale for not requiring some form of notice or publication of the project planning completion form (pp.49-50). In CELA's view, consideration should be given to employing appropriate means to provide public notice whether final "approval" has been granted or whether any special terms or conditions have been imposed.

The guideline argues that section 6 of the EAA does not apply to prohibit the issuance of other statutory licences where a project is planned in accordance with an approved Class EA (p.50). This is a debatable interpretation of the EAA, since it appears to CELA that a proponent must demonstrate completion of, not just compliance with, the planning process before other statutory licences may be issued. It is not enough to simply leave it

to the proponent to declare that planning has reached a "sufficient" or "reasonable" stage under the Class EA in order to obtain other statutory approvals (p.51). This is particularly true where a bump-up request has been made; under the proposed guideline, the bump-up request will not be finally determined until the very end of the planning process. Permitting the issuance (and implementation?) of other statutory approvals while a bump-up request is pending will undoubtedly influence if not pre-determine the outcome of the request.

In CELA's view, this section of the guideline also requires a concise discussion of the Planning Act, which is perhaps the most frequent example of where Class EA projects directly or indirectly bump into "other legislation". For example, specific reference to the new "optional" planning process under s.16.1 of the Planning Act should made in the guideline.

The guideline hints that "completion of the first required point of public contact" may be an appropriate time for the issuance of other statutory approvals (p.51). We are unclear what this cryptic phrase actually means -- does it refer to the "Notice of Intent" published at the outset of the planning process? Does it refer to public consultation respecting alternatives to or alternative methods, which, after all, is described as "optional" rather than required?

Sec. 4.2.5 As drafted, the guideline appears to treat project-level effects, effectiveness, and compliance monitoring as somewhat discretionary (p.52). In CELA's opinion, project-level monitoring should be the rule, not the exception. The guideline should not just merely provide monitoring "objectives", but should include much more substantive direction regarding monitoring. In addition, some reference should be made to the need for independent monitoring or audits where appropriate, as is currently required under the Timber Management Class EA.[15] Monitoring results should be available upon request to any member of the public, not just those who participated in the planning process (p.53).

---

[15] See Reasons for Decision and Decision (April 20, 1994), Conditions #85 and 86.

CELA has no comments on Sections 5.0 and 6.0, which merely attempt to summarize various parts of the guideline.

PART III - DRAFT GUIDELINE ON BUMP-UPS, DESIGNATIONS AND EXEMPTIONS

(a) General

In CELA's opinion, there is an undeniable need to tighten up the current process for submitting and determining requests for bump-ups, designations and exemptions under the EAA. The track record regarding such requests has been abysmal and predictable: most bump-up and designation requests have been refused, while most exemption requests appear to be readily granted. The bump-up and designation request procedures, in particular, have not worked efficiently or fairly and they have inspired little public confidence in the EA process. Accordingly, these much-hyped procedures are viewed as hollow and meaningless remedies by many members of the public.

The draft guideline enjoys limited success in dealing with some of the problems currently associated with bump-ups, designations, and exemptions. In particular, CELA supports the guideline's use of plain language and a question-and-answer format, which should make the guideline more user-friendly and accessible. However, it is unclear whether the guideline will actually result in any substantial improvements in the track record for bump-up and designation requests. Indeed, given the wording of the criteria in Appendix A, B, and C, it appears reasonable to expect that we will see the same results, albeit with more "bullet-proof" decision letters from the Minister.

With respect to bump-up, designation and exemption criteria, CELA agrees with EAAC's previous recommendation that the relevant criteria be expressed within the EAA itself rather than by guideline or policy.[16] This approach would enhance the status and effectiveness of the criteria, and would inject greater certainty and predictability into the process, particularly since it is more difficult and time-consuming to change legislation than guidelines or policy. However, if EA Branch insists on expressing the criteria in the form of a guideline, then the criteria must be amended, as described below.

CELA's detailed comments on the guideline are as follows:

---

[16] "Reforming the EA Program: Parts 1 and 2" (EAAC, 1991/92), p.175.

(b) Bump-Up Requests

Para.1 This paragraph states that Class EA's are "appppropriate for classes of undertakings which have predictable and mitigable effects" (p.2). For the reasons outlined above, CELA submits that this statement misconstrues the nature of projects that are amenable to the Class EA approach, and further submits that the paragraph must be re-written to include the other key constraints -- "recur frequently"; "small in scale"; and "minor environmental impact". Similarly, this paragraph begs an important legal question discussed above: is there adequate legal authority for Class EA's under the current EAA?

Para.3 The guideline states that if proponents and concerned citizens discuss their differences prior to a bump-up request, "such involvement may resolve issues" (p.2). Given the intractable positions often staked out by proponents, this statement strikes CELA as wishful thinking. This paragraph goes on to suggest ways that individuals can get involved in EA planning, which is useful but one-sided information -- proponents should also receive direction on how to interact with concerned individuals and, more importantly, how to listen to and act upon public concerns wherever possible.

Para.4 CELA submits that it is incorrect to imply that bump-up requests can generally only be made during the first three phases of the Class EA planning process (p.4). As described above, bump-ups should be available from the first Notice of Intent right through to the final comment period.

Para.5 As described above, CELA strongly disagrees with the MOEE's contention that bump-up requests should be considered as "premature" until the very end of the planning process. The MOEE position places members of the public into an impossible Catch-22 situation: if the bump-up request is made too early, it will be disregarded as being premature; if the request is made near the end of the planning process, it may be viewed as coming too late, particularly since the prescribed planning process will likely have been followed by the proponent. In CELA's view, members of the public are entitled to make bump-up requests directly to the Minister at any time, and such requests should be considered on their merits and granted where appropriate at <u>any</u> stage of the planning process. As described above, where an early bump-up request is dismissed, members of the public should be able to file subsequent bump-up requests as may be required.

Para.6 In addition to the list of items that should be contained within the bump-up request (p.4), bump-up requesters should also be advised to identify instances, if any, where there has been substantive (not just procedural) non-compliance with the approved Class EA (i.e. inadequate consideration of alternatives, insufficient level of detail regarding environmental impacts, etc).

Para.7 This paragraph indicates that bump-up requests will be evaluated in accordance with the criteria set out in Appendix A (p.5). CELA generally views the Appendix A criteria as cumbersome and misguided. First, Appendix A is not sufficiently clear whether a bump-up request must satisfy each and every bullet point to be successful, or whether satisfying a single bullet point may be sufficient reason to grant the request. We assume that not every bullet point has to be satisfied, yet Section 1.0 of Appendix A commands requesters to "address the following matters and demonstrate that the relevant criteria have been met" (p.16). This would appear to place an unreasonably high burden of proof upon the requestor.

Second, CELA has considerable difficulty with the term "demonstrate" which occurs throughout Appendix A -- does this mean the requester must prove, on a balance of probabilities or beyond a reasonable doubt, that these criteria are satisfied? Alternatively, if the requester demonstrates a prima facie case, does the onus then shift to the proponent to demonstrate why the bump-up request should not be granted? What exactly is the standard of proof contemplated by Appendix A?

Third, CELA submits that many of the proposed criteria are unrelated, or only marginally related, to the central question of the inquiry: is the undertaking environmentally significant enough to warrant an individual EA? Focusing on compliance (or non-compliance) with the minimal consultation requirements under Class EA's, or focusing on "overall benefits of bump ups", is, to a large degree, focusing on the wrong issue. In CELA's view, the most important criterion is set out in Section 1.4 entitled "Assessment of Effects", although this criterion should be expanded to provide further indicia of environmental significance. Other factors, such as the inadequacy of other statutory approval regimes, may be slightly relevant, but they should perhaps be relegated to a second tier of secondary considerations. In summary, the proposed bump-up criteria are skewed towards rejecting bump-up requests and are largely misdirected.

Para.8 This paragraph should be expanded to state that while a bump-up request is pending, operations related or ancillary to the undertaking cannot be carried out by the proponent in the area subject to the bump-up request. In CELA's view, such an explicit provision provides a further incentive for proponents to negotiate in good faith. CELA notes that it may not be possible for proponents to please all people all of the time; however, the purpose of the EAA is the "betterment of the people of the whole or any part of Ontario". This is clearly a public interest test that should drive EA planning, and the self-assessment role of proponents under Class EA's should promote the public interest rather than subvert it. Accordingly, where a person, or a group of persons, raises a reasonable concern about an undertaking, proponents should be directed to act upon that concern wherever possible in a manner consistent with the public interest purpose of the EAA.

Para.10 While CELA agrees that Minister should be able to deny bump-up requests subject to conditions, we note that such conditions are often inadequate and fall far short of properly or comprehensively addressing requestors' concerns. In addition, there appears to be a dearth of follow-up monitoring and enforcement activities to ensure that both the letter and spirit of such conditions are being honoured by proponents. CELA also agrees that the Minister should be able to refer bump-up requests (and designation or exemption requests) to EAAC for review and advice, and we strongly support the continuation of EAAC's role in this regard. EAAC enjoys considerable public support and confidence in relation to EA issues, and CELA would recommend that the criteria and process for referring matters to EAAC be articulated in policy or guideline form. We would also recommend that paragraph 10 should include a more accurate and less perjorative (e.g. "who are not Ontario public servants") description of EAAC's mandate and composition.

Para.11 We note that the guideline prescribes no public notice-and-comment opportunities for bump-up requests (except, perhaps, where the matter has been referred to EAAC for an open review). This is to be contrasted with designations and exemptions, both of which trigger certain public notice-and-comment requirements under the EBR. We are unaware of any persuasive policy reasons why some concise form of public notice cannot be provided where a bump-up request is under consideration by the Minister. This would provide parties interested in, or potentially affected by, the bump-up request an opportunity to make submissions for or against the request, and would certainly provide the Minister with a

better information base for his or her decision.

Para.12 While there may not be a formal "appeal" mechanism per se for bump-up decisions, judicial review is available, at least in theory, where the Minister's discretion has been abused (i.e. where extraneous considerations have been taken into account; where there is no evidence to support the decision; or where there has been a breach of fairness, etc.).

(c) Designation Requests

CELA's comments about the guideline's provisions regarding bump-up also apply to the designation component of the guideline, including Appendix B.

(d) Exemption Requests

Where relevant, CELA's comments about the guideline's provisions regarding bump-up also apply to the exemption component of the guideline, including Appendix C. We would highlight our concern about the general failure to undertake timely and adequate monitoring to ensure compliance with exemption conditions (p.15).

We also note that the EA Task Force previously recommended that the exemption procedure be set out in regulatory form, not a guideline.[17] This recommendation was endorsed by CELA[18] and by EAAC.[19] An appropriate regulation is still preferred by CELA to address exemption-related matters, although we acknowledge that the EBR now covers off the public notice-and-comment concern regarding proposed exemptions.

PART IV - CONCLUSIONS

With respect to the draft guideline on Class EA's, CELA's main concerns and comments may be summarized as follows:

- there should be an explicit legislative basis for Class EA's, including bump-up provisions;

- the nature of the class of projects subject to a Class EA must

---

[17] Toward Improving the Environmental Assessment Program in Ontario (MOEE), Recommendation 6.2.

[18] Kathy Cooper et al., supra, f.n.4, p.11.

[19] "Reforms to the EA Program: Parts 1 and 2" (EAAC, 1991/92), pp.175-76.

be legislatively limited to those projects that: are similar; recur frequently; are small in scale; and have minor, predictable and mitigable effects;

- the requirements of s.5(3) of the EAA must be accurately and concisely described in the guideline, particularly in relation to alternatives and net environmental effects;

- public participation opportunities should be expanded and made mandatory at both the Class EA level and project level;

- the guideline should provide greater direction to harmonize the description of project categories within Class EA's;

- more detailed reference should be made to related planning processes, particularly under the new Planning Act;

- bump-up requests should be considered on their merits and granted where appropriate at any stage of the planning process; and

- monitoring provisions should be strengthened at both the Class EA level and project level.

With respect to the draft guideline on bump-ups, designations and exemptions, CELA's main concerns and comments may be summarized as follows:

- the guideline should more accurately describe the nature of projects subject to Class EA's;

- bump-up requests should be considered on their merits and granted where appropriate at any stage of the planning process;

- there should be a prohibition on operations in areas subject to a bump-up request until the request is finally resolved;

- the question of onus and standard of proof needs to be addressed in the guideline;

- the bump-up, designation, and exemption criteria should be streamlined and re-directed at the primary issue: the environmental significance of the undertaking; and

- conditions attached to bump-up, designation or exemption decisions should be more rigorously monitored and enforced.

For the foregoing reasons, CELA concludes that both guidelines require substantial revision before they are finalized and implemented.

CELA welcomes this opportunity to provide its views to EAAC on the draft guidelines, and we trust that CELA's submissions will be taken into account as EAAC drafts its report on this important referral.