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

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**BY FAX**

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Dear Mr. Feilders:

**RE: DRAFT TERMS OF REFERENCE: PARKS CLASS EA**  
**EBR REGISTRY NO. PB9E6013**

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I am writing to provide the comments of the Canadian Environmental Law Association (CELA) with respect to the draft Terms of Reference (ToR) for the Class EA for Provincial Parks and Conservation Reserves.

These comments are submitted to you in accordance with the EBR Registry Notice for the draft ToR.

CELA is a public interest law group established in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Over the past three decades, CELA has been particularly active in matters involving environmental assessment, Crown land use, resource management, parks and wilderness protection, and related matters.

Our comments on the draft ToR are as follows:

1. In principle, CELA supports the MNR's proposal to use the Class EA mechanism as the means of ensuring long-term Environmental Assessment Act (EA Act) coverage of parks planning and management. In our view, it is highly desirable to end the decades-long history of EA Act exemptions and declaration orders for these important matters. Having said this, however, CELA has some concerns about the class of undertakings that the MNR is proposing to include within the scope of the Class EA, as described below.
2. We note that at this stage, the MNR is inviting public comment on its draft ToR, which is described as a proposed "policy" in the EBR Registry Notice. We also understand that the draft ToR may be revised in light of public comments received by the MNR. Thereafter, the MNR intends to submit the finalized ToR to the Minister of Environment for approval; however, the draft ToR vaguely hints that only an "Information Note" will be posted on the EBR Registry at that time. In our view, a perfunctory "Information Note" is clearly

inadequate and contrary to Part II of the EBR. Once the MNR has formally applied for approval of its ToR, there must be proper EBR notice, and more importantly, there must be a proper public comment period on the ToR prior to the Minister's decision under the EA Act. On this point, we note that the Minister has placed such EBR Registry notices prior to approval of ToR's for individual EA's, and we see no reason to depart from this practice for ToR's for Class EA's. After all, the MNR's ToR may be significantly changed as a result of public and agency comments on the draft, and Ontarians should have a formal opportunity to advise the Minister, prior to his approval/disapproval decision on the ToR, whether these changes are positive or negative.

3. Under section 13.2 of the EA Act, a proponent submitting a proposed ToR for a Class EA must clearly indicate whether the Class EA will be prepared in accordance with:
  - all mandatory requirements set out in section 14(2);
  - such requirements as may be prescribed by regulation for such undertakings; or
  - requirements other than those set out in section 14(2).

The draft ToR for the Class EA For Provincial Parks and Conservation Reserves states that "as required by section 14(2), the Class EA will include" the various matters set out in that subsection (i.e. description of class; rationale for Class EA approach; predicted range of environmental effects; mitigation measures; public consultation program; and evaluation methodology). We therefore conclude that the MNR is properly refraining from submitting a "scoped" ToR pursuant to section 14(3) of the EA Act.

4. With respect to the "Purpose of the Class EA", section 2.2 of draft ToR indicates that the "Class EA will describe how the principle elements of environmental assessment (as set out in section 6.1 of the Act) can be addressed in the planning process" (emphasis added). We submit that this commitment should be reworded to ensure that the Class EA describes how the principles of EA shall be incorporated into the planning process. In our view, the application of essential EA elements in the planning process must be mandatory, not optional or discretionary.
5. We further note that section 2.2 of the draft ToR indicates that, among other things, the Class EA will identify the "objectives and fundamental elements of provincial park and conservation reserve planning, and related policy direction". We support the inclusion of these broad planning matters within the Class EA, subject to the following comments:
  - (a) The stated "objectives" and "essential elements" component of the Class EA must not amount to a simplistic summary of environmental platitudes, or a re-hash of existing parks policy or Crown resource/land use strategy. Instead, the Class EA must set out clear and measurable objectives, goals, and targets which drive the planning process. In addition, the Class EA must explicitly indicate how the MNR's progress (or lack

thereof) in meeting these objectives, goals, and targets will be monitored, assessed, and corrected if necessary.

- (b) The objectives, goals and targets must give primacy to ecological imperatives (i.e. biodiversity protection, resource sustainability, etc.) rather than socio-economic considerations (i.e. commercial resource use, extraction or development). In addition, the "public trust" doctrine must be explicitly entrenched in the Class EA. This doctrine provides that the Ontario government holds provincial parks and conservation reserves in trust for the benefit of all Ontarians, and therefore has a fiduciary duty to hold, manage and protect these lands with utmost good faith. To the extent that Ontario fails to live up to this duty, then the intended beneficiaries of the public trust -- namely, all Ontarians -- should be able to hold the provincial government legally accountable for its acts or omissions regarding parks and conservation reserves.
  - (c) The development of progressive, ecologically based parks objectives, goals and targets will likely require parallel changes to the clearly outdated Provincial Parks Act. A similar need for legislative reform occurred in the early 1990's in the wake of the Timber Management Class EA and related forestry initiatives, when the Crown Timber Act was replaced by the Crown Forest Sustainability Act. In our view, similar legislative reform will be required in order to properly take Ontario's parks system into the next century. Since the current Provincial Parks Act is clearly inadequate for this task, the Class EA should contain a commitment by MNR to pursue such complementary legislative reforms as may be necessary.
  - (d) The Class EA objectives, goals and targets must be consistent with aboriginal and treaty rights within the area of the undertaking, pursuant to section 35 of the Charter. At the very least, the Class EA must be developed in full consultation and/or negotiation with interested or affected First Nations, and not just the usual list of stakeholders that MNR often deals with (i.e. anglers, hunters, forestry industry, etc.). Similarly, co-management opportunities with First Nations (i.e. on a provincial, regional or community basis) should be explicitly addressed in the Class EA.
6. We have some misgivings about the types of projects and activities that the MNR is proposing to include within the Class EA. Section 2.3 of the ToR states that, among other things, the Class EA will include the "regulation" of parks and conservation reserves (i.e. land acquisition, and establishing, amending or rescinding boundaries). We are unclear as to the rationale for including initial boundary delineation or land acquisition within the Class EA. In our view, if specific lands are required within a particular site region for ecological/representation reasons (i.e. they meet the above-noted objectives, goals and targets), then such lands should be added to the parks system without undue delay (and without being subject to bump up requests). On the other hand, if the MNR wishes to withdraw established parks or conservation reserves (in whole or in part) from the system, then full EA principles (i.e. need, purpose, alternatives, environmental effects, mitigation,

etc.) should be applied to the proposed withdrawal. Accordingly, the fundamental distinction between adding lands vs. deleting lands ought to be reflected in the ToR -- and the Class EA -- in a more precise manner.

7. Similarly, we are concerned about the ambiguous indication in section 2.3 of the ToR that the Class EA will include the preparation and implementation of park management plans, resource management plans, and plans and strategies for resource development or operations. Given that certain consumptive resource/land uses (i.e. hunting) may be permitted under management plans for new parks, it is our submission that such uses should not automatically covered by the Class EA planning process. Instead, these consumptive uses -- whose environmental impacts are not necessarily minor, predictable, or mitigable -- should be defined as falling outside the Class EA, thereby requiring an individual EA to determine whether, and to what extent, such uses should be permitted on a case-by-case basis. This exclusionary principle should also apply to land withdrawals which are being made to facilitate resource development (i.e. mining) within park lands, and to significant development proposals within existing parks (i.e. the golf course complex recently proposed within Bronte Creek Provincial Park).
8. In section 2.5 of the draft ToR, the MNR states that individual EA's and declaration/exemption orders are not appropriate to address "routine" management issues. While CELA is unclear what is meant by "routine" management matters, we generally agree with this statement. However, the converse is also true -- individual EA's are highly appropriate for "non-routine" management issues (i.e. should hunting be a permitted use? should certain areas be withdrawn for mining purposes?), as described above. For such site-specific issues, concerned members of the public should not have to rely upon the highly discretionary (if not overpoliticized) bump up mechanism in order to ensure that an individual EA (i.e. full or "scoped") is carried out. Instead, the individual EA should be automatically triggered by defining such projects/activities as being outside the class of undertakings caught (and effectively "pre-approved") by the Class EA.
9. Section 3.0 of the draft ToR contains some questionable comments and unsupportable conclusions which require a response by CELA. For example, the draft ToR seems to suggest that MNR's "land use planning activities are not subject to the EA Act". In our opinion, this overstatement is not correct and warrants deletion from the draft ToR. The fact that MNR has traditionally undertaken Crown land use planning outside the EA Act does not mean that it was lawful to do so. Similarly, the draft ToR declares that the Class EA will not include land use planning:

This undertaking will not include matters involved in land use planning exercises; eg. planning and policy decisions related to the identification of new candidate provincial parks and conservation reserves. This is a function of broad, strategic initiatives which include the evaluation of alternatives and assessment of effects, and which provide multiple opportunities for public involvement (page 6).

Assuming, without deciding, that these latter statements are actually true, it does not necessarily follow that landscape-level land use planning should remain largely unaddressed in the Class EA. The ToR's attempt to distinguish park planning/management from broader land use planning/policy considerations is analogous to the MNR's ill-conceived attempt to distinguish timber planning/management from broader land use planning during the Timber Management Class EA hearing. At the hearing, it was often claimed by MNR witnesses that timber management planning simply amounted to implementing land use decisions made elsewhere under other processes, and that such land use decisions should not be revisited through the timber management planning process. This narrow focus resulted in protracted and acrimonious debate throughout the hearing about the proper scope of the Class EA, and ultimately led the EA Board to impose conditions regarding land use planning reform and broader policy development (i.e. Condition 105 (new Timber Production Policy); Condition 106 (roadless wilderness policy); and Condition 110 (revisions to District Land Use Guidelines)). The simple fact is that land use decisions for areas outside parks (i.e. allowing clearcutting, water-crossings, or access roads in close proximity to parks) can significantly affect the values, features and functions inside parks. Accordingly, the Class EA must broaden its myopic focus -- it must move beyond mere technical or operational issues within park boundaries, and must address larger land use or resource management issues which may affect the ecological integrity of parks and conservation reserves, either individually or as a system.

10. In principle, CELA has no objection to the draft ToR's proposal to set out three separate schedules for screening projects/activities on the basis of environmental significance. This tiered approach has been utilized in other approved Class EA's, and may provide a workable approach for the parks Class EA. The difficulty, of course, is that while the draft ToR proposes Schedule A, B and C, there is no express indication where specific projects/activities (i.e. waste management, sewage or water works, access roads, buildings/structures, wildlife management, vegetation management, pest management, etc.) will be located in these schedules. Until such information is available, CELA cannot comment further on the three schedule approach.
11. CELA supports the draft ToR's proposal to include both a bump up provision and a mechanism for changing projects from one schedule to another. With respect to bump up, we would submit that bump up should be available in respect of any project/activity caught within the Class EA schedules, and that a project/activity subject to a bump up request shall not proceed until the bump up request has been finally determined by the Minister of Environment (within a prescribed timeframe). We would further submit that bump up requests should be evaluated on the basis of the environmental significance of the impugned project/activity. With respect to changing the classification of a project/activity from one schedule to another, we would submit that such changes should only be one-way and "upward" in nature (i.e. projects can be bumped up to a higher level of scrutiny under the next schedule, but cannot be "bumped down" to less rigorous review under the preceding schedule).

12. We agree with the comment in section 3.8 of the draft ToR that is important that relevant federal interests (i.e. fisheries, migratory birds, etc.) are addressed, and that responsible federal agencies become involved in planning process as required. We are less clear, however, about the proposal to have the Class EA serve as a "screening" (or class screening?) under the Canadian Environmental Assessment Act (CEAA). In our view, if a particular project/activity involves one or more of the "triggers" under the CEAA (i.e. section 5, the "inclusion list", or the "comprehensive study list"), then CEAA should apply in the normal course, and the responsible federal authority should fulfill its obligations accordingly (which, in some cases, may involve a comprehensive study, mediation, or review panel rather than a simple screening).
13. We agree with the comment in section 3.9 of the draft ToR that "consultation is a cornerstone of developing an effective EA". We are not assured, however, by the MNR's indication that its existing consultation policies will be incorporated into the Class EA. In our view, public consultation carried out by the MNR on other large-scale initiatives (i.e. SLUP's/DLUG's, Timber Management Class EA, Lands for Life) has not been satisfactory for various reasons. Accordingly, we trust that for this ToR and Class EA, the MNR will be proposing a proactive consultation program which is truly open, public, accessible, iterative, and comprehensive in nature.
14. We agree with commitment in section 3.10 of the draft ToR to undertake compliance monitoring for projects/activities carried out under the Class EA. We presume that this commitment includes a reporting obligation so that the results of compliance monitoring are publicly available. Consideration should be given by the MNR to producing a specific handbook or training manual to provide guidance to MNR staff on compliance issues (i.e. investigation/enforcement of requirements imposed by the Class EA, the Provincial Parks Act, and related regulatory requirements). We also commend the MNR's commitment in the draft ToR to undertake "effects/effectiveness" monitoring to ensure that environmental protection objectives are being achieved. On this point, we submit that such monitoring/reporting needs to be designed and carried out at various scales (i.e. provincial, regional and local level) to obtain a more accurate picture of the environmental effects of Class EA projects/activities, and the effectiveness of policies, strategies, and directives intended to mitigate the environmental effects of Class EA projects/activities. Consideration should be given by the MNR to summarizing monitoring results by filing an annual (or semi-annual) "State of Ontario's Parks/Conservation Reserves Report" in the Legislature.
15. We note that section 3.11 of the draft ToR proposes that the Class EA include a process for amending the Class EA "at any time during the approval period". We would suggest that the Class EA also specify the process for renewing the Class EA (with full public notice/comment) at the end of the approval period. We further note that the draft ToR does not appear to specify the MNR's proposed approval period for the Class EA. Having regard for other approved Class EA's, we would suggest that the approval term not exceed five years. In our opinion, the nine year approval period for the Timber Management Class EA (Condition 113) is far too long, and does not provide for timely review/renewal of the Class

EA to ensure that it remains up to date with new information, technological developments, or material changes in circumstances. In addition, we remain wary of the MNR's vague proposal to use the amendment process for "extending the Class EA to other undertakings". In our view, this provides another reason for limiting the approval period to a five year term. If the MNR subsequently opines that Class EA coverage should be extended to undertakings not set out in Schedules A, B or C, then such a significant change should await the normal review/renewal process, rather than trigger a mid-term amendment.

16. Section 13.1 of the EA Act imposes a general duty upon proponents to undertake public consultation when preparing a proposed ToR or a proposed Class EA. At this time, we express no opinion on whether the MNR's consultation efforts to date on the draft ToR satisfy this legal obligation to consult. This is because we are not privy to the nature and extent of MNR's consultation efforts to date on the draft ToR. Nevertheless, we are aware of some well-known conservation groups (i.e. Northwatch) which did not receive the MNR's formal invitation to comment on the ToR. In addition, given the importance of the ToR under the EA Act, and given the clear public interest in parks management and planning, we submit that a mere 31 day comment period on the draft ToR (i.e. from September 17, 1999 to October 18, 1999) is likely too short for many concerned groups and individuals. As described above, however, continuing consultation by the MNR on the proposed ToR, and a proper EBR Registry posting of the proposed ToR prior to the Minister's approval, may help remedy this situation.
17. We note that section 4.0 of the draft ToR indicates that, among other things, the MNR has mailed formal requests for input on the ToR to "aboriginal organizations". In addition, the draft ToR states that "representatives of Ontario's principal Aboriginal groups will be contacted early in the project, and asked how they would like to structure their participation in the Class EA consultation". Assuming that these first steps actually occurred or will occur, they seem to fall short of the meaningful "government-to-government" discussions that are undoubtedly desirable if not necessary in this case. First Nations are not mere "stakeholders"; instead, they have constitutionally protected rights that may be affected by matters addressed in the Class EA. In addition, we would submit that the MNR should consider including within the Class EA provisions which are analogous to Condition 77 of the Timber Management Class EA so as to require negotiations at the local level with First Nations interested in, or potentially affected by, matters dealt in the parks/conservation reserve planning process.
18. We note that section 6.0 of the draft ToR correctly indicates that once the ToR is approved, it will serve as both a framework and review benchmark for the Class EA. The ToR then goes on to commit to "modifying" the ToR if new issues arise or if certain issues can be dropped from further analysis. The draft ToR also indicates that the Director of the Environmental Assessment and Approvals Branch may be consulted by the MNR on such "modifications". First, there should be public involvement in such "modifications" -- this should not a closed-door exercise between the MNR and the Director. Second, and more fundamentally, we are unaware of any legal authority that the Director (or even the Minister)

has under Part II.1 of the EA Act to "modify" a ToR after it has been approved. While there is undoubtedly a need for flexibility, there seems to be no legally enforceable mechanism for modifying the ToR once it has been approved. In our view, the final and binding nature of the approved ToR underscores the need to ensure the ToR is sufficiently broad and comprehensive at the outset. This can be accomplished by continued -- and meaningful -- consultation on the ToR prior to its submission to the Minister, and by an appropriate EBR notice/comment period prior to the Minister's approval decision on the ToR, as described above.

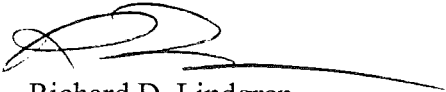
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We trust that our comments will be taken into account as the MNR finalizes the ToR and submits it to the MOE for approval.

Please be advised that CELA wishes to remain involved to the fullest possible extent in the further development of the ToR and Class EA. Please direct any future notices or correspondence regarding this matter to the undersigned.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



Richard D. Lindgren  
Counsel

cc. Director, EA and Approvals Branch  
Ms. Ivy Wile, Environmental Commissioner