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

September 18, 1997 **BY FAX**

Mr. David Griffin
EBR Coordinator
Environmental Assessment Branch
Ministry of Environment and Energy
250 Davisville Avenue, 5th Floor
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Dear Mr. Griffin:

RE: DRAFT TIMELINE REGULATION - ENVIRONMENTAL ASSESSMENT ACT EBR REGISTRY NO. RA7E0010.P

We have reviewed the draft "Timeline Regulation" that has been proposed under the Environmental Assessment Act (EAA). CELA's comments are as follows:

1. It should be noted at the outset that CELA has no objection to the promulgation of timeframes and deadlines to guide the EA process. In our view, the establishment of clear and reasonable timeframes should help make the EA process more certain, timely and efficient. However, as described below, it is our opinion that several of the proposed timeframes are too abbreviated to permit a meaningful opportunity for public and agency review of key EA documentation. Accordingly, consideration should be given to modest expansions of certain timeframes, particularly those relating to:

   - public/agency review of proposed Terms of Reference;
   - public/agency review of the EA document; and
   - the final public comment period under the EAA.

2. We note that neither the EAA nor the draft Timeline Regulation prescribe any specific sanctions or penalties for missed deadlines. In our view, this lack of sanctions is appropriate in order to accomodate unforeseen or unavoidable delays in processing EA documentation. Nevertheless, because there are no hard-and-fast deadlines, we submit that it is somewhat misleading for the Regulation, the associated Chart, and other government documents to imply that the whole EA process will

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now take no longer than "approximately 12 months" to complete. This is particularly true since two of the most contentious and time-consuming stages in the EA process -- viz., preparation of Terms and Reference and preparation of the EA -- have no prescribed timeframes.

3. In a previous draft of the Timeline Regulation, the government review of proposed Terms of Reference was not to exceed 21 days, while the Minister's approval decision on the Terms of Reference was to occur within 28 days. Under the current draft, the proposed Terms of Reference are to be reviewed by both the government and the public (via the EBR Registry) within 4 weeks, while the Minister's decision is be made within 7 weeks.

In CELA's view, the prescribed 7 week timeframe for the Minister's decision on the Terms of Reference is reasonable (although in practice, this decision may take a bit longer until more experience is gained with the Terms of Reference mechanism). However, CELA remains concerned about the extremely tight timeframe for public and agency review of proposed Terms of Reference. Since Terms of Reference are, by nature, binding on all parties once approved, and since the Terms of Reference can (and will) be used to scope or "screen out" essential EA requirements (i.e. need, alternatives, etc.), the critical importance of these documents cannot be underestimated. In our view, a perfunctory 30 day posting of proposed Terms of Reference on the EBR Registry is inadequate to ensure that affected members of the public have a meaningful opportunity to review and comment upon the proposal. At least 45 to 60 days are required for the EBR posting, and the proponent should be encouraged (if not required) to use other non-Registry means to notify interested persons that draft Terms of Reference have been submitted. In addition, given the significance of approved Terms of Reference, these proposals should be prescribed and classified as Class II instruments under the EBR.

Ideally, interested or affected persons should be consulted by the proponent prior to drafting and submitting proposed Terms of Reference. However, recent experience clearly demonstrates that not all proponents are willing or able to carry out meaningful or comprehensive consultation at the critical early stages of the EA process. Accordingly, an enhanced 45 to 60 day comment period is a necessary safeguard to ensure that members of the public find out about, and comment upon, draft Terms of Reference prior to approval by the Minister.

We are also doubtful whether a meaningful government review of proposed Terms of Reference can occur within four weeks, particularly for complex, novel or largescale undertakings or Class EA's. The recent budget cuts and staff reductions within the Ministry and other relevant ministries will also undoubtedly affect the government's ability to undertake a

meaningful and timely review of proposed Terms of Reference. Again, we see no downside to extending this timeframe to at least 45 to 60 days, keeping in mind that it is always open to the government to complete its review in a shorter timeframe where possible. On the other hand, if "4 weeks" becomes the prescribed timeline for the government review, then it will likely become the de facto standard and result in rushed, incomplete or superficial government reviews in many instances.

RECOMMENDATION #1: The timeline for the public and government review of proposed Terms of Reference should be extended to at least 45 to 60 days.

3. In a previous version of the Timeline Regulation, only a 45 day period was alloted for public and agency review of the EA document once submitted by the proponent. Under the current draft, "7 weeks" has been prescribed for public and agency review of the EA document. In our view, 7 weeks (49 days) is not materially different from the inadequate 45 day period proposed earlier by the Ministry. For the reasons described above, a more realistic timeframe for the public and government review of the EA document is at least 90 to 120 days.

RECOMMENDATION #2: The timeline for the public and government review of the EA document should be extended to at least 90 to 120 days.

4. In a previous version of the Timeline Regulation, only a 30 day timeline was proposed for the final public comment period. Under the current draft, "5 weeks" has been proposed for the final public comment period. In our view, the extension from 30 days to 5 weeks (35 days) is only a marginal improvement. While a 30 day comment period has traditionally been used under the EAA, it has often proven inadequate in many instances, particularly for complex, novel or largescale undertakings. Indeed, CELA has often received numerous complaints from CELA clients and members of the public about the extreme brevity and inadequacy of the final public comment period under the EAA.

In our view, a 45 to 60 day final public comment would be more appropriate, particularly in light of the sheer volume of relevant materials (i.e. Terms of Reference, EA Document, supporting technical reports, Government Review, proposed terms and conditions, applicable regulations, policies or guidelines, etc.) which would have to be obtained and reviewed by the public in order to make informed submissions to the Minister during the final comment period. Otherwise, forcing the public to quickly digest all of these materials and take a position on the undertaking, all within a highly compressed

timeline, will likely result in more, not fewer, requests for hearings before the EA Board.

RECOMMENDATION #3: The final public comment period should be extended to at least 45 to 60 days.

5. Under the current draft of the Timeline Regulation, the Minister is directed to make his or her decision on the undertaking within "13 weeks". In our view, this appears to be a reasonable timeline for this decision, although we recognize that for some undertakings, the Minister's decision may require additional time.

6. In the Chart that accompanies the draft Timeline Regulation, it is indicated that the Minister will set the timelines on a case-by-case basis for matters referred to either mediation or hearing before the EA Board. However, the draft regulation is silent on the process, criteria or factors to be considered when the Minister is establishing mediation or hearing deadlines. We are aware that the EA Branch has developed an internal policy guideline to generally assist in fixing appropriate hearing deadlines. However, for the purposes of greater certainty and for ease of reference, it may make sense to incorporate some hearing deadline directions into the Timeline Regulation, including process requirements (i.e. upfront consultation with the Board, ability to grant hearing extensions where reasonably necessary for full and fair adjudication of the issues, etc.).

RECOMMENDATION #4: The Timeline Regulation should include directions or criteria regarding deadlines for mediation or public hearings before the EA Board.

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We trust that our comments will be considered as the Timeline Regulation is finalized. Please contact the undersigned if you have any questions or comments about this submission.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

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September 17, 1997 **BY FAX**

Mr. Andy Houser
Director, Fish and Wildlife Branch
Ministry of Natural Resources
300 Water Street
Peterborough, Ontario
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Dear Mr. Houser:

RE: MINISTRY OF NATURAL RESOURCES - S.35 OF THE FISHERIES ACT EBR REGISTRY NO. PB7E4004.P

We are writing to provide CELA's comments on the recent proposal by the Ministry of Natural Resources (MNR) to withdraw from the administration and enforcement of section 35 of the Fisheries Act.

In our opinion, the MNR's proposal is completely unjustified and wholly unacceptable. Arguably, the proposal is one of the most significant regulatory rollbacks undertaken by the MNR to date, and it appears motivated solely by partisan politics rather than ecological considerations. Accordingly, CELA strongly recommends that the MNR immediately abandon this highly objectionable proposal.

Our detailed comments are as follows:

1. **The "consultation" on the MNR's proposal has been virtually non-existent, contrary to the Environmental Bill of Rights (EBR).**

There can be little doubt that the MNR's proposal is a significant policy decision with broad environmental implications if implemented. We note that the MNR's EBR Registry Notice claims that the proposal is merely "administrative in nature and will not significantly affect the environment if the federal Department of Fisheries and Oceans (DFO) moves to fulfill its constitutional responsibilities for fish habitat protection" (emphasis added). However, given the small number of field staff at DFO's Burlington office, it is abundantly clear that DFO is simply not equipped, on short notice, to adequately administer or enforce section 35 of the Fisheries Act across the length and breadth of Ontario. Thus, the MNR's abrupt departure from the long-standing arrangement with DFO regarding section 35 will inevitably have profound consequences upon the aquatic environment in Ontario.

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Moreover, it appears clear that the MNR's initiative has moved well beyond the "proposal" stage despite the EBR Registry Notice's description of this matter as a "policy" still in "proposal" status. Indeed, the EBR Registry Notice expressly states that the MNR has already advised DFO that it will no longer administer or enforce section 35 as of September 18, 1997 -- one day after the close of the public comment period prescribed by the EBR Registry Notice. Accordingly, the MNR has already made up its mind to implement the proposal, regardless of any public comments received during the comment period. In our view, this approach is contrary to the spirit and letter of Part II of the EBR. Simply announcing this significant policy shift as a fait accompli through the EBR Registry is both offensive and unacceptable.

Indeed, the EBR Registry Notice itself is unclear and riddled with inconsistencies and contradictions. For example, the introductory paragraph indicates that the Notice is being provided simply for "information purposes only", although section 15 of the EBR clearly requires notice-and-comment on this significant policy change. Similarly, the Notice correctly advises that no public consultation has occurred in relation to this proposal, and further states that "no comment period has been provided for this proposal because it is an Information Notice only". In the very next sentence, however, the Notice goes on to invite written submissions between August 18th and September 17th, and it provides the address and fax number of the MNR's contact person. We can only conclude that the MNR either does not understand the public notice-and-comment requirements of Part II of the EBR, or that the MNR is not willing to comply with such requirements, at least with respect to this proposal.

It should be noted, however, that CELA's concerns about the MNR's proposal are not premised solely on the MNR's procedural failings. Instead, CELA has a number of fundamental objections and substantive concerns about this proposal, as described below.

2. There is no ecological justification for the MNR's withdrawal from the administration and enforcement of section 35 of the Fisheries Act.

The text of the EBR Registry Notice makes it abundantly clear that the MNR's action is a political response to the perceived lack of progress made by the federal government on Bill C-62. If passed, this Bill would amend the Fisheries Act to permit a greater provincial role in fish habitat protection. Thus, the MNR's proposed withdrawal can only be regarded as a "power play" designed to force the federal government to acquiesce to Ontario's demands and timetable. Nowhere in the EBR Registry Notice is it suggested that Ontario's withdrawal will result in better fish habitat protection across the province. Indeed, it can only be concluded that fish habitat protection will suffer greatly under the MNR proposal, particularly since MNR staff will now confine themselves

to matters under provincial statutes, which are not specifically geared to protect fish habitat:

> ...for those projects involving work in and around the water, MNR will not be reviewing and/or providing site specific mitigation advice for fish habitat beyond requirements of the applicable provincial legislation.... Additionally, MNR will no longer be providing enforcement of the habitat provisions of the federal Fisheries Act (sec. 35).[1]

The lack of ecological justification for the MNR's proposed withdrawal is underscored by an internal memorandum circulated to MNR staff by Deputy Minister Ron Vrancart. This memorandum dated August 14, 1997 (i.e. days before the "proposal" was posted on the EBR Registry) rationalizes the MNR withdrawal on the basis of DFO's "lack of progress" and the lack of federal funds for Ontario's section 35 activities. Incredibly, the memorandum goes on to chide the federal government for terminating funds for lamprey control programs. This fiscal decision, according to the memorandum, "compromises one of the most successful fisheries management programs in the world and poses a threat... to the Great Lakes fishery". Apparently, the detrimental effect of the MNR's withdrawal from section 35 activities upon the Great Lakes fishery does not appear to have been considered or acknowledged by the memorandum.

In the circumstances, we can only conclude that the MNR's proposal has been entirely motivated by purely political objectives, such as:

- forcing the federal government to commit federal funds to Ontario to ensure that the province carries out section 35 activities;

- forcing the federal government to relinquish some or all of its jurisdiction over fisheries management and protection; or

- making it easier (or less risky) for Ontario developers to undertake projects which may adversely affect fish habitat.

While the public is left to speculate as to the MNR's actual motivation (or hidden agenda), the fact remains that this initiative has not been advanced on the grounds that it will somehow enhance fish habitat protection in Ontario. Indeed, as described below, the MNR's proposal will leave fish habitat at considerable risk in Ontario, particularly in light of recent regulatory rollbacks undertaken by the current provincial government.

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[1] EBR Registry Notice.

3. The MNR's proposal leaves fish habitat at considerable risk, particularly in light of recent regulatory changes in Ontario.

Both the EBR Registry Notice and the MNR memorandum indicate that despite the withdrawal, MNR staff will continue to administer and enforce existing provincial laws insofar as they may apply to fisheries and work activities in and around water. In CELA's view, this bland assurance provides very little comfort and does not guarantee the continued protection of fish habitat in Ontario. The principal reason for this concern is simple: none of the Ontario laws administered by MNR contain any provisions which are identical to section 35 of the Fisheries Act. Statutes such as the Public Lands Act or Lakes and Rivers Improvement Act are **not** specifically directed at protecting fish habitat, nor do they contain the strong investigation, enforcement and penalty provisions found within the Fisheries Act. Similarly, to CELA's knowledge, the MNR has not developed policy under its statutes to incorporate the important "no net loss of fish habitat" and "net gain of fish habitat" principles entrenched in DFO's Policy for the Management of Fish Policy. Therefore, it is misleading for the MNR to suggest or imply that the same level of fish habitat protection can be achieved under provincial legislation or policy.

Indeed, the sweeping amendments to MNR statutes contained in Bill 26 and MNR's "Red Tape Reduction" legislation make the province's role even more tenuous and uncertain in relation to reviewing and approving activities that may affect fish habitat. Moreover, in light of the massive staff reductions and budget cutbacks experienced by MNR since 1995, CELA has little confidence that MNR statutes will be diligently administered and stringently enforced in order to indirectly protect fish habitat. The simple fact is that section 35 is arguably the most important and effective mechanism for protecting fish habitat in Ontario. The MNR's arbitrary decision to abandon section 35 therefore deprives the remaining MNR staff of the most potent tool for safeguarding fish habitat and the future of Ontario's fisheries.

It should be noted that other environmental laws in Ontario, such as the Ontario Water Resources Act or Environmental Protection Act, are not administered by the MNR, nor do they directly protect fish habitat against physical alteration or destruction. Accordingly, these other provincial statutes cannot be regarded as an adequate substitute for section 35 of the Fisheries Act.

Similarly, it should be noted that Section 2.3 of the new Provincial Policy Statement under the Planning Act permits development and site alteration within fish habitat (and lands adjacent to fish habitat), provided that it is demonstrated (by the proponent) that there will be no negative impacts on natural features or ecological functions. However, it is questionable whether municipalities have the requisite fisheries expertise to properly scrutinize developers' reports on fish habitat alteration,

particularly since provincial agencies have significantly reduced their traditional review-and-comment functions in relation to site-specific planning applications. Moreover, in light of the Bill 26 changes to the Planning Act, municipalities are not even bound by Section 2.3 -- they are merely required to "have regard" for Section 2.3. For these and other reasons, the present Planning Act regime cannot be relied upon as a comprehensive tool for protecting fish habitat, particularly since the vast majority of Ontario is Crown land and is not subject to municipal land use planning in any event.

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For the foregoing reasons, CELA strongly objects to the MNR's proposal to withdraw from the administration and enforcement of section 35 of the Fisheries Act. Accordingly, we urge the MNR to abandon this ill-conceived and highly partisan proposal, and we further urge the MNR to resume its important role as the lead agency for fish habitat protection in Ontario.

Please contact the undersigned if you have any comments or questions about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. The Hon. Chris Hodgson, Minister of Natural Resources
Ms. Eva Ligeti, Environmental Commissioner
Mr. John Lounds, Federation of Ontario Naturalists
Mr. Tim Gray, Wildlands League