# SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF THE ENVIRONMENT RE: DECLARATION ORDER – MNR FOREST MANAGEMENT EBR REGISTRY NO. RA03E004

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**SUBMISSIONS OF THE**
**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**
**TO THE MINISTRY OF THE ENVIRONMENT**
**RE: DECLARATION ORDER – MNR FOREST MANAGEMENT**
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## PART I – INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") regarding the proposed declaration order under the *Environmental Assessment Act* ("EA Act") in relation to the Ministry of Natural Resources ("MNR") forest management program on Crown lands in Ontario.

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect the environment and conserve natural resources. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

Over the years, CELA's casework and law reform efforts have frequently involved forest-related matters across Ontario. For example, CELA has:

- served as counsel for the Forests for Tomorrow ("FFT") coalition, which was a full-time party at the 411 day Environmental Assessment Board ("EA Board") hearing on the MNR's Class EA for Timber Management;
- participated in the Megisan Lake EA, which was the first individual EA designation request granted in relation to forestry activities;
- made submissions to the Environmental Assessment Advisory Committee on designation/bump up criteria for timber management plans;[2]
- submitted briefs to the Ontario government on various forestry and Crown land use planning issues;[3] and
- provided summary advice to members of the public who are concerned or affected by forestry activities (e.g. construction of access roads, clear cutting, pesticide application, etc.).

[1] Counsel, Canadian Environmental Law Association.
[2] CELA, "Submissions to EAAC re Environmental Assessment of Timber Management Plans" (1991).
[3] See, for example, CELA, "The Lands for Life Proposals: A Preliminary Analysis" (1999); "Submissions to the MNR re Lands for Life Planning Process" (1997); "Comments re Ontario's Approach to Wilderness: A Draft Policy" (1997); "Reply of CELA to MNR Draft Forest Compliance Strategy" (1995); and "Submissions on the *Crown Forest Sustainability Act"* (1994).

It is against this extensive background and experience that CELA has evaluated the current proposal by the Ministry of the Environment ("MOE") to replace the Class EA approval with a conditional declaration order. This order is being proposed under section 3.2 of the EA Act, which empowers the Minister to "declare" that the Act "does not apply" with respect to a proponent, undertaking or class of undertakings.

In the instant case, the proposed declaration order will effectively exempt (in perpetuity) the MNR's "forest management" program from the EA Act. This legal consequence is readily apparent on the face of the proposed declaration order:

> The undersigned declares that the terms and conditions of the Timber Class EA approval, including terms and conditions related to expiry, review or extension of the Timber Class EA Approval… do not apply to MNR or the undertaking as of the effective date of this Declaration Order….
>
> The undersigned further declares that sections 5 [application for approval] and 38 [offences] of the EA Act do not apply to any changes that result from redescribing the undertaking as "forest management planning, comprising the interrelated activities of access, harvest, renewal, maintenance and their planning…"

For the reasons described below, CELA strongly submits that this regressive approach is ill-conceived and wholly unjustified in the circumstances. In our view, the preferable approach is to renew the Class EA approval with tighter conditions and a clear expiry date, rather than providing the MNR with an open-ended exemption under the EA Act. In addition, we are concerned that many of the proposed conditions for the declaration order are clearly inadequate for the purposes of protecting the timber and non-timber values of Ontario's Crown forests.

Accordingly, CELA concludes that the proposed declaration order is not in the public interest, and is inconsistent with the protection, conservation and wise management of the environment (section 2, EA Act). We therefore submit that the proposed declaration order should be abandoned forthwith, and further submit that the MOE and MNR should refocus their efforts on developing an appropriate renewal of the Class EA approval (with full public input) before it expires in July 2003.

## PART II – CRITIQUE OF THE DECLARATION ORDER

It is beyond the scope of this brief to prescribe in detail how sustainable forestry ought to be practiced in Ontario and reflected in statutory approvals under the EA Act and other provincial legislation. Instead, this brief will focus on CELA's main objections to the declaration order itself, as well as to certain conditions proposed thereunder in relation to forest management planning, clearcutting restrictions, monitoring, scientific research, and technical/policy development.

### *1. Class EA Approval or Declaration Order?*

CELA fundamentally objects to the proposed use of a declaration order (as opposed to a conditional, time-limited Class EA approval) as the means for addressing the MNR's forest management program under the EA Act.

On this point, it should be recalled that when the EA Act was first proclaimed in force in 1976, the MNR was granted a series of continuing exemptions for its forest management program.[4] The most recent statutory exemption imposed an obligation upon the MNR to prepare and submit a Class EA to the MOE by a prescribed date, and, upon its submission, the MOE referred the Class EA to the EA Board for public hearings in 1987. Thus, the MNR's forest management program escaped meaningful public scrutiny and the application of EA Act planning principles for over a decade prior to the EA Board hearings. Unfortunately, it appears that the proposed declaration order will herald a return to this undesirable state of affairs.

It should also be pointed out that although the Class EA had a dubious legal basis under the EA Act prior to the Bill 76 reforms (enacted in 1996), no stakeholders objected in principle to the use of the Class EA mechanism for ensuring coverage of forest management activities under the EA Act. While concerns were raised at the EA Board hearing about the appropriateness of a single, "one size fits all" Class EA at the provincial level (as opposed to 2 or 3 regional Class EAs to better reflect forest stand/site variability across the boreal and Great Lakes – St. Lawrence forests), the FFT coalition did not request rejection of the MNR Class EA. To the contrary, FFT and other parties advocated approval of the Class EA subject to effective and enforceable terms and conditions.[5]

Significantly, the EA Board, after extensive evidence and argument, decided to grant conditional approval to the Class EA in order to ensure MNR compliance with the EA Act:

> It is MOEE's responsibility, prescribed in statute and specified in this approval, to ensure compliance by the MNR and with the Act generally. Both ministries therefore play a role in ensuring that this undertaking continues to meet the requirements of good environmental planning.
>
> As a general proposition, we believe MNR does not avoid compliance with the EA Act upon approval [of the Class EA] under the Act. A Class EA approval satisfies the particular requirements of the Act to the extent we specify. An approval in no way lessens or waives the requirements of the Act. It only satisfies them. Other substantive and procedural requirements of law would continue to

[4] Interestingly, while these EA Act exemptions related to "forest management", the MNR ended up submitting a Class EA that was more narrowly focused on "timber management". Without commenting on the legal significance of this distinction, CELA notes that the proposed declaration order now purports to characterize the undertaking as "forest management" instead of "timber management".

[5] EA Board Timber Management Decision (1994), p.48.

> apply to MNR and to the implementation of the undertaking… Also, and although it might appear too obvious for discussion, when an approval of this undertaking expires, MNR is faced again with submitting the timber management planning undertaking to MOEE for review and approval (emphasis added).[6]

Thus, while it was open to the EA Board to reject the Class EA (and by default leave forest management to be addressed via an ongoing EA Act exemption), the EA Board clearly preferred to use the Class EA vehicle as the primary means of ensuring compliance with the Act. Unfortunately, the proposed declaration order is designed to circumvent or undermine the Board's decision on this very issue. CELA submits that transforming the Class EA approval into an open-ended exemption does indeed "lessen" or "waive" the requirements of the EA Act, contrary to the EA Board decision.

We are aware that the proposed declaration order, if issued, will be subject to a number of terms and conditions. However, it is CELA's view that such conditions do not mitigate the fundamental unacceptability of turning the Class EA approval into an exemption under the EA Act.

Furthermore, CELA takes little comfort in the MOE's ability to properly monitor and enforce the conditions attached to the proposed declaration order. After all, despite the regulatory presence of the MOE, there has been significant non-compliance by MNR with certain terms and conditions of the Class EA itself (as well as with the *Crown Forest Sustainability Act*).[7] In light of this fact, and given the MOE's well-documented systemic failure to follow up to ensure compliance with EA Act approvals/exemptions, we have no confidence that the declaration order conditions will be rigorously enforced by the MOE.

CELA further submits that the public has been seriously misled about this matter. In particular, the public consultation that has occurred to date was premised on a renewal of the Class EA itself – NOT a permanent exemption from the EA Act. In particular, we can find no mention of the proposed declaration order in the MNR discussion documents made available to the public during the comment period on the Class EA renewal.[8] Indeed, these documents specifically spoke to the "extension" and "amendment" of the Class EA approval, rather its revocation through a declaration order.

In our view, it is fundamentally unfair and highly unconscionable to suddenly depart from the proposed renewal to the proposed exemption. CELA submits that this profound, last-minute shift in direction is contrary to the principles of meaningful public consultation. If, at all material times, the true intention of the MOE and MNR was to again effectively exempt forest management from the EA Act, then both Ministries should have been more candid and upfront with the public about this matter. After all,

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[6] *Ibid.*, pp.48-49.

[7] See, for example, *Algonquin Wildlands League v. Ontario (MNR)*, (1998), 26 CELR (NS) 163 (Ont. Div. Ct.); varied in part, (1999), 29 CELR (NS) 29 (Ont. C.A.).

[8] See, for example, MNR, *A Paper for Public Review Concerning the Extension and Amendment of the EA Act Approval for Forest Management on Crown Lands in Ontario* (2002); *A Review by the MNR Regarding the Class EA for Timber Management on Crown Lands in Ontario* (July 2002), hereinafter referred to as "*MNR's Timber Class EA Review*".

the renewal process for the Class EA has been underway since 1999,[9] and yet it is only during the final stages of public consultation that we learn, for the first time, that the Class EA approval will be replaced by the declaration order.[10] In our opinion, this is an offensive "bait-and-switch" tactic that should not be countenanced nor approved.

For these reasons, CELA submits that the declaration order should be rejected in favour of a time-limited (e.g. 10 year) renewal of the Class EA approval and appropriate revisions of its conditions (including those relating to in-term amendments, reviews and renewal). If CELA's recommendation is adopted, then it is unnecessary for us to comment on Condition 53 of the declaration order, which purports to give the MNR authority to propose (and the MOE power to approve) sweeping changes to the conditions at any time in the future (including, presumably, the scope or geographic extent of the undertaking). In short, this virtually unfettered discretion undermines the need for clarity, certainty and predictability in the EA Act conditions and their implementation across the area of the undertaking.

## *2. The Forest Management Planning Process*

CELA submits that one of the most questionable conditions in the declaration order is the proposal to extend the term of forest management plans from 5 to 10 years (see Condition 1). In our view, the current 5 year term is appropriate for planning purposes, and therefore should remain intact.

The MNR's apparent rationale for the proposed 10 year period is that Article 15 of the Forestry Accord committed the MNR to "use its best efforts" to lengthen the term of forest management plans.[11] Aside from this promise to the regulated industry, MNR has not provided any persuasive evidence or compelling operational arguments in support of the proposed doubling of the planning period.

Moreover, it should be recalled that the EA Board specifically considered this very issue, and decided that the appropriate term for detailed planning was 5 years. Indeed, it is our recollection that the MNR and most parties agreed upon this 5 year term. Accordingly, we are unaware of any material change in circumstances that has occurred since the EA Board decision that would make this 5 year term suddenly unworkable or impractical. To the contrary, we have seen ample evidence to suggest that there has been no impediment to the preparation and approval of plans on 5 year terms in management units across Ontario.

In addition, it stretches public credibility to suggest that a forest management plan can accurately predict forest conditions and prescribe appropriate operations for up to a

[9] The MNR's Forest Management Planning Improvement Project was established in 1999 to assist in the preparation of the Timber Class EA Review.
[10] To our knowledge, the public was informed about the proposed declaration order just weeks before the current EBR notice was posted on the Registry in March 2003.
[11] *MNR's Timber Class EA Review*, p.27.

decade in advance. Since forest conditions may change dramatically over relatively short periods of time, it is necessary for the planning process to remain flexible and adaptive, rather than remain largely cast in stone for prolonged periods of time. We are aware the declaration order envisions mid-term reviews of 10 year plans, but it is our view that this untried proposal is not as conducive as 5 year plans for ensuring the accuracy of forestry predictions and the appropriateness of planned operations.

Public participation in forest management planning may also be seriously eroded by "locking up" Crown lands for up to a decade in advance. In essence, local stakeholders may have only meaningful opportunities to influence forestry operations once every 10 years, instead of the current 5 year planning cycle. Aside from these public participation/accountability issues, CELA is also concerned that forest management planning on 10 year cycles means that planning may become more generalized in nature, and less responsive to new science, emerging technologies, or changing public policy about Crown forest management.

CELA is also concerned that the declaration order generally leaves it to the proponent to translate the forest management planning requirements in Conditions 1 to 26 into amendments to the Forest Management Policy Manual (see Conditions 1(a) and 51). Once the declaration order has been issued, the MNR has considerable discretion to interpret the conditions and make whatever changes it wants to the Manual (albeit subject to public comment and MOE review). This proposal is highly significant because the MNR intends to confine the declaration order to general "planning direction", while the technical details regarding forest management planning will be set out in the Manual, as amended.

In effect, the MOE is asking stakeholders to trust that the proponent will make appropriate amendments to the Manual. However, even if serious objections or concerns are identified by the public, there is nothing to prevent the MNR from ramming through its desired amendments to the Manual. Indeed, once the MOE has "signed off" on the declaration order within the coming weeks, we are unclear how the MOE can subsequently force the MNR to back down on controversial or inappropriate amendments to the Manual. Even if the MOE had legal leverage to wield, the public is being asked to believe that the MOE will intervene and force suitable changes upon the MNR. In our view, this murky situation is highly unacceptable, to say the least.

Indeed, given the long timeline leading up to the Class EA renewal, there was ample time for the MNR to propose its draft amendments to the Manual so that all stakeholders could clearly understand the amendments and respond accordingly. Unfortunately, the declaration order defers these critically important details to an unspecified future date. Given that the "devil is in the details", CELA strongly objects to this ill-conceived attempt to defer the Manual amendments to a later date, outside the scope of the current EA process.

### *3. Clear Cuts and "Natural Disturbance"*

CELA remains astounded that as we enter the 21st century, the MNR is still perpetuating the myth that large area clearcuts essentially duplicate the effects of natural disturbances, such as wildfire in the boreal forest. The ecological evidence is clear that large clearcuts do not equal wildfire, and yet the MNR's current guidelines allow huge clearcuts (eg. 10,000 ha) on the basis that such cutovers emulate natural disturbance patterns.

It is for this reason that CELA objects to Condition 39 of the proposed declaration order, which will effectively allow this status quo to continue unabated. In our view, merely requiring the MNR to study the impacts of these huge clearcuts *ex post facto* (Condition 39(c)) has the effect of turning large portions of Crown lands into experimental forests. On this point, it should also be recalled that the 260 ha "limit" suggested by the moose habitat guidelines was adopted and relied upon the EA Board. In other words, the EA Board did not endorse 10,000 ha clearcuts (even on an exceptional basis) that are now approvable under the guidelines that the MNR developed after the EA Board decision.

Regardless of whether the Class EA is renewed or the declaration order is issued, CELA submits that the MOE must impose an appropriate condition that requires the MNR to immediately review and revise (with full public input) its current "natural disturbance" guideline so that effective and enforceable limits are placed on clearcut size, distribution and spatial complexity. These limits should be based on proper ecological and silvicultural evidence (especially at the landscape level), rather than the MNR's wishful thinking that large area clearcuts equal wildfire.

As an aside, CELA points out that this ongoing debate over clearcuts illustrates the danger of relying upon the proponent's self-serving statements about this matter (and other issues in dispute). At the EA Board hearing, the proponent's witnesses were extensively cross-examined under oath about this matter, and contradictory expert evidence was adduced by other parties. This hearing process placed the EA Board in the best position to assess, accept or reject the MNR's evidence regarding clearcuts.

In contrast, as the proposed declaration order is being negotiated, the MNR's current assertions about "natural disturbance" cannot be tested through cross-examination or contrary expert testimony. This leaves the MOE in a difficult position in terms of assessing the veracity of the MNR's claims about such matters (or, indeed, claims by the MNR about how it has "satisfied" EA Board conditions that the MNR now proposes to delete). For this reason, CELA submits that rather than accept the MNR's current "natural disturbance" guidelines *holus bolus*, the MOE should specifically require further review and revision to ensure that they are, in fact, ecologically sound and scientifically defensible before they are implemented any further across Ontario. Allowing the MNR to continue to implement these highly questionable guidelines – and simply requiring some vague *ex post facto* studies – is not sound public policy, and is inconsistent with the precautionary principle.

### *4. Monitoring, Scientific Research, and Technical/Policy Development*

As an overview comment, CELA notes that many of the key conditions relating to monitoring, scientific research, technical development, and policy development fail to specify any clear deadlines or deliverables.

In particular, we note that such conditions merely require the MNR to continue to "monitor" or "study" important matters such as: silvicultural effectiveness (Condition 29); wildlife populations (Condition 30); effectiveness of forest management guidelines (Condition 31); growth and yield (Condition 42); full tree harvesting/chipping (Condition 43); tending/protection improvement (Condition 44); and data systems/analytical methodologies (Condition 45). In general, these conditions do not impose firm targets for the completion of such work, nor do the conditions even require the MNR to implement or incorporate the results of such work into the forest management planning process.

For example, while Condition 49 requires the MNR to develop an old growth policy by May 18, 2003, the condition leaves it completely to the MNR's discretion as to when (or if) the policy is to be translated into forest management guidelines and implemented in the planning process. Similarly, we note that the MNR is now proposing to delete EA Board Condition 98 on the grounds that it has prepared the Northern Ontario Wetlands Evaluation System required by the condition. This may be true, but it is our understanding that few evaluations are actually being carried out under the new system, and that the results of such evaluations are not being adequately integrated into the forest management planning process.

In addition, CELA notes that the MNR proposes to delete EA Board Condition 106 on the grounds that it has already developed the roadless wilderness policy required by this condition. Again, it is true that a provincial policy has been developed, but it should be pointed out that this policy is largely confined to parks/protected areas established through the Living Legacy Land Use Strategy. In other words, there is little evidence that roadless wilderness values are being adequately identified and protected by forest management planners in relation to Crown lands <u>outside</u> of the parks/protected areas system.

Accordingly, CELA submits that the above-noted conditions must be revised in order to impose clear and enforceable targets, timetables and deadlines, and must require the MNR to ensure that the results of such monitoring, scientific research, and technical/policy development are incorporated forthwith into the forest management planning process. Otherwise, we remain concerned that the MNR will continue to drag its feet and delay (or underfund) these important initiatives.

## PART III – CONCLUSIONS

For the foregoing reasons, CELA submits that the proposed declaration order is a 1970s solution in search of a non-existent problem. In our view, the stated rationale for the declaration order is unpersuasive, and the above-noted changes in the EA Board conditions are unacceptable and unjustified.

Accordingly, CELA strongly recommends that the declaration order should be immediately jettisoned, and further recommends that the MOE, MNR and other stakeholders immediately work together on an appropriate, time-limited (eg. 10 year) renewal of the Class EA approval.

In closing, we note that Part II.1 of the EA Act now provides a clear statutory basis for approving and extending Class EA's. Thus, it is unclear to us why the MOE would forsake this new regime in favour of an old-style exemption order in relation to the environmentally significant activities of access, harvest, renewal and maintenance on Crown lands in Ontario.

April 11, 2003