

SUBMISSION BY THE

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

to the

MINISTRY OF NORTHERN DEVELOPMENT AND MINES

on the

REGULATION MADE UNDER THE ENVIRONMENTAL BILL OF RIGHTS, 1993

*WITH RESPECT TO THE CLASSIFICATION OF
PROPOSALS FOR INSTRUMENTS*

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ENVIRONMENTAL BILL OF RIGHTS, 1993 WITH RESPECT TO THE
CLASSIFICATION OF PROPOSALS FOR INSTRUMENTS**

By Paul McCulloch and Ramani Nadarajah¹

1: INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal 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 environmental litigation, CELA undertakes public education, community organization, and law reform activities.

The purpose of this brief is to respond to the draft regulation setting out the classification of instruments under the Mining Act (the Act) proposed by the Ministry of Northern Development and Mines (MNDM) as required by section 19 of the Environmental Bill of Rights, 1993 (EBR). The draft regulation was posted on the Environmental Bill of Rights Registry on May 15, 1997, EBR Registry Number RD7E0001.P, with a three month comment period.

CELA's comments and concerns may be summarized as follows:

1. MNDM has taken an unreasonable amount of time in promulgating the classification regulation, resulting in the impairment of the rights of the citizens of Ontario.
2. The proposed classification regulation assumes that all the amendments to the Mining Act that were included in Bill 26 are in force. However, there are a number of amendments which have not yet been proclaimed. The sections of the Act affected by these amendments also need to be classified as they currently stand.
3. MNDM has failed to classify all environmentally significant instruments.
4. MNDM has also failed to classify instruments correctly as class II or class III.
5. The classification regulation does not provide a specified review mechanism to re-evaluate the classification system in the future.

For these reasons, CELA submits that the proposed classification regulation is inadequate and should be amended to incorporate the changes suggested below in as timely a manner as possible.

1. Student-at-Law and Counsel at CELA respectively.

2: Delay in Releasing the Classification of Instruments and the Impairment of EBR Rights

In accordance with section 19 of the EBR and section 4 of O. Reg 73/94, MNDM has been under a statutory duty to propose a classification regulation "within a reasonable time" since April 1, 1996. This proposal is thus over one year late and more time is likely to pass before the regulation is finalized and passed into law by cabinet. In CELA's view, MNDM has taken an unreasonable amount of time to promulgate this long overdue classification regulation. Such a delay indicates that MNDM is not taking the EBR seriously and is not committed to ensuring that Ontario's environment is adequately protected, contrary to the purpose of the EBR and the Ministry's own Statement of Environmental Values [SEV].

CELA further notes that the rights of the citizens of Ontario have been significantly impaired by this ongoing delay. Until such time as this regulation is passed, Ontarians will not be able to exercise their rights and remedies as granted under the EBR. In the meantime, mining activities with significant environmental impacts may be carried out with little means for scrutiny by the public.

The potential for significant environmental impacts from mining operations has increased as a result of some of the draconian changes made to the Mining Act through Bill 26. For example, mining companies no longer have to seek MNDM approval for closure plans, instead approval is optional. Closure plans provide a key proactive mechanism to ensure mining companies take appropriate measures to ameliorate the adverse effects to the natural environment resulting from mining activities. Bill 26 also removed the requirement to file annual reports with the government. This means that MNDM will no longer be notified about a company's compliance with its closure plans. In addition, Bill 26 also changed the financial assurance requirements. Mining companies which pass a "corporate financial test" will not be required to post cash up front to rehabilitate a site. The proposed changes removes the requirement for companies to post some form of realizable financial security and has the potential to transfer future clean-up costs from mining companies unto Ontario's taxpayers. These changes to the Mining Act make it all the more critical for the classification regulation to be promulgated as expeditiously as possible.

Therefore, it is recommended that there should be no further delay in the promulgation and implementation of the Mining Act classification regulation. Moreover, MNDM must work expeditiously to incorporate the public comments it receives so as not to result in further delay. CELA expects to see the new regulation passed in the very near future.

CELA Recommendation #1: MNDM should work expeditiously to promulgate and implement the classification regulation, incorporating the amendments suggested through the public comment period.

3: Assuming that Bill 26 Amendments will be Proclaimed

The proposed classification system assumes that all the amendments to the Mining Act that were included in Bill 26 (S.O. 1996, c.1, Sched. O) are in force. However, s.26, 28, 30, 31, and ss. 32(2), (3), (4), (5) and s.39 have not yet been proclaimed², rendering the classification system unmanageable for two reasons. First, the classification system may be further delayed until such time as the amendments are proclaimed. Alternatively, if the classification regulation is passed before the amendments are proclaimed, there will be a set of sections and instruments within the Act that will not be classified. Both situations are unacceptable because they result in the rights of the citizens of Ontario being impaired.

One possible resolution would be for MNDM to develop two classification systems, one representing the Act as it stands now, and one that incorporates the future amendments. The first classification system should be passed as soon as possible. The second would remain as a draft until the amendments are brought into force, at which time the classification regulation should be amended accordingly to incorporate the second classification system.

CELA Recommendation #2: MNDM should develop two classification systems, one representing the Act as it stands now, and one that incorporates the amendments under Bill 26 to be proclaimed at a future date. The classification regulation should be amended accordingly in the future to incorporate the second classification system.

4: The Failure to Classify All Environmentally Significant Instruments

The means of classifying instruments under the Act is set out in the EBR under section 20(2). However, MNDM has failed to follow this process properly. There are numerous instances where environmentally significant instruments have been omitted from the classification regulation.

Section 20(2) requires ministries to identify all statutory provisions under which "implementation decisions" could have "a significant effect upon the environment". The factors to be considered include:

- Nature and extent of potential mitigation measures
- Local, regional, or provincial extent of environmental impacts
- private, public and governmental interests
- any other relevant matter

Given these criteria, and without further information as to the process MNDM used to develop its classification regulation, it is difficult to understand how certain instruments were omitted

2. As of July 3, 1997.

from the classification. For example, section 40(3) of the Act was not included, yet it enables the Minister to waive the Crown's right to the surface rights 400' from any body of water within a mining claim, as granted under section 40(1). One of the purposes of this right is to protect water quality. The decision to waive this right will often involve "a significant effect upon the environment".

In appendix A to this submission, CELA has produced a list of sections under the Act that MNDM failed to identify as environmentally significant and thus did not include in its classification system. This list should be regarded as preliminary in nature and CELA reserves the right to identify and recommend additional candidates for inclusion in the regulation.

CELA Recommendation #3: MNDM must review all the instruments under the Mining Act and determine which are environmentally significant in accordance with the criteria set out in section 20(2), steps 3-5 of the EBR.

5: Failure to Classify All Instruments Correctly

MNDM has also failed to classify all of the instruments correctly. The proposed regulation classifies all instruments as Class I. In doing so, the Ministry has failed to acknowledge the criteria set out in steps 7 and 8 of section 20(2) of the EBR.

Step 8 specifically requires an instrument to be classified as Class II if there is discretion to hold a hearing on the matter in question. Yet, section 175(1) was classified as a Class I instrument even though it specifically states that "by order of the Commissioner, made after *hearing* such parties interested as appear or on appeal from the Commissioner..." [emphasis added]. Other sections, such as 112 and 114 of the Act, provide for hearings to resolve disputes over decisions made under the Act. Yet, sections 112 and 114 are not even identified as environmentally significant instruments, much less as Class II or III.

This failure to classify instruments correctly suggests that the Ministry wants to avoid the enhanced public participation and notice requirements for Class II proposals set out in sections 24 and 28 of the EBR respectively. As such, the Ministry is not complying with its statutory duty to implement the EBR properly. Moreover, it is worth noting that MNDM's own Statement of Environmental Values states that "We promote environmentally sustainable development activity which...is preceded by adequate public input" (part IV-4). In failing to identify some instruments correctly as Class II or III, the Ministry is denying the public their right to participate fully and thus violating the Ministry's own principles.

CELA Recommendation #4: MNDM must review its classification of instruments and reclassify, in accordance with section 20(2), steps 7-9 of the EBR, those instruments which are inappropriately classified as Class I, and correctly classify those instruments that were not originally identified as environmentally significant.

6: The Need to Provide for a Review Mechanism

MNDM should include in the classification regulation a specified means of reviewing this classification system in the future. It should be noted that the Ministry is under a statutory duty to review the regulation under section 21 of the EBR. A specified procedure, including definite dates and timelines, provides for greater accountability to the public. In this regard, the MNDM might consider the MOEE classification regulation which includes such a periodic review mechanism: see O. Reg. 691/94, section 10.

CELA Recommendation #5: MNDM should include a specified means of reviewing its classification system in the future.

7: Conclusions

For the foregoing reasons, CELA submits that the MNDM's proposed classification regulation is unsatisfactory. The regulation should be amended to include all environmentally significant instruments and to ensure that all the instruments have been classified correctly. Furthermore, the regulation must be amended and promulgated as soon as possible in order to ensure that the citizens of Ontario are able to exercise their rights accordingly. Finally, a formal review mechanism should be included as part of the classification regulation. CELA's specific recommendations are summarized below.

CELA Recommendation #1: MNDM should work expeditiously to promulgate and implement the classification regulation, incorporating the amendments suggested through the public comment period.

CELA Recommendation #2: MNDM should develop two classification systems, one representing the Act as it stands now, and one that incorporates the amendments under Bill 26 to be proclaimed at a future date. The classification regulation should be amended accordingly in the future to incorporate the second classification system.

CELA Recommendation #3: MNDM must review all the instruments under the Mining Act and determine which are environmentally significant in accordance with the criteria set out in section 20(2), steps 3-5 of the EBR.

CELA Recommendation #4: MNDM must review its classification of instruments and reclassify, in accordance with section 20(2), steps 7-9 of the EBR, those instruments which are inappropriately classified as Class I, and correctly classify those instruments that were not originally identified as environmentally significant.

CELA Recommendation #5: MNDM should include a specified means of reviewing its classification system in the future.

APPENDIX A:
CELA's PRELIMINARY LIST OF INSTRUMENTS UNDER THE MINING ACT
THAT SHOULD BE PRESCRIBED UNDER THE EBR
(In addition to those already identified in the MNDM proposal)

<u>Instrument</u>	<u>Description</u>
s.35(1)	withdraw/reopen designated lands for prospecting
s.39(2)	award surface rights to claim holder
s.40(3)	waiving of crown right to reserve 400' border from body of water
s.52(1)	give permission to mine, mill, or refine for testing mineral content
s.54((1)	land is being used other than as mine, may require hearing
s.100(2)	conditions with respect to issuance of natural gas license
s.112/114	hearing to commissioner appealing decision by recorder
s.144(2)	notice of change in closure plan
s.145(7)b	application for reduction in financial assurance
s.150(1)	surrender lease to crown if hazard created by previous owner
s.152(3)	hearing for appeal of any order under 147(1),143(3), 145(2)
s.152(11)	appeal to minister
s.159(2)	hearing with respect to approval of a smelter
s.159(5)	decision to issue license to smelter
s.160(1)	exemption for smelter used only for educational purposes
s.175(13)	alteration of rights

NOTE: This list must be read in conjunction with the MNDM proposed classification regulation. The instruments listed here are **in addition** to those identified in the proposed classification.

