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May 12, 1997 **BY FAX**

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CANADIAN ENVIRONMENTAL LAW ASSOCIATION.
CELA Brief No. 319; Re: MNR proposal for instrument...RN22347

Dear Mr. Watton:

RE: MNR PROPOSAL FOR INSTRUMENT CLASSIFICATION REGULATION
EBR REGISTRY NUMBER RB7E60001.P

Further to our letter dated May 8, 1997, we are writing to provide the comments of the Canadian Environmental Law Association (CELA) on the instrument classification regulation proposed by the Ministry of Natural Resources (MNR) under the Environmental Bill of Rights, 1993 (EBR).

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

1. There has been unconscionable delay in the promulgation of the MNR's classification regulation, resulting in significant impairment of Ontarians' rights under the EBR.

2. The MNR has not complied with the instrument classification process prescribed by section 20 of the EBR.

3. The MNR has failed to prescribe or classify a large number of environmentally significant instruments issued under MNR statutes.

4. The MNR has improperly attempted to invoke EA-related exemptions by declining to prescribe or classify forestry instruments.

5. Of the few instruments that the MNR has proposed to prescribe, several environmentally significant instruments have been misclassified as Class I instruments.

6. The MNR's proposed regulation fails to deal with important procedural and transitional matters.

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The rationale for each of the above-noted comments is described below in more detail. CELA's list of MNR instruments that should be prescribed under the EBR is attached to this submission as Appendix A.

It should be noted that CELA's comments generally pertain to the existing MNR statutes, as amended by more recent initiatives such as Bill 52. We have not, however, included into our analysis any comments on the possible impact of Bill 119 (the MNR Red Tape Reduction Act) given the uncertain timeframe for passage and proclamation of this Bill.

1. MNR's Unconscionable Delay and Impairment of EBR Rights

The MNR has been under a statutory duty to propose a classification regulation since April 1, 1996: see section 19 of the EBR and section 4 of O.Reg. 73/94. It has thus taken approximately one year for the MNR to release a proposed regulation, and more time is likely to elapse as the MNR reviews public comments and finalizes the regulation. Moreover, even after the regulation is finalized, the MNR proposes to delay its implementation for an additional six months: see section 10 of the MNR regulation.

In CELA's view, the MNR has taken an unreasonable amount of time to promulgate the long-overdue classification regulation. This delay prompted CELA to bring a judicial review application against the MNR to compel the production of the classification regulation. After the proposed regulation was finally released by MNR, CELA discontinued the judicial review application. However, in light of the numerous deficiencies in the regulation, CELA questions whether the MNR's "proposal" actually meets the requirements of the EBR, as described below.

CELA further notes that Ontarians' rights under the EBR are being significantly impaired by the MNR's ongoing delay and by the inadequacy of the proposed regulation. Unless and until all of the MNR's environmentally significant instruments are prescribed, Ontarians will not be able to fully exercise the new rights and remedies under the EBR, such as: right to notice, comment and third-party appeal; right to apply for a review; right to apply for an investigation; and right to go to court to protect public resources. In addition, the MNR's failure to prescribe all of its significant instruments may restrict the relevance and applicability of the MNR's Statement of Environmental Values (SEV), since it is debatable whether the SEV needs to considered when the MNR is proposing to issue, amend or revoke a non-prescribed instrument.[1]

Accordingly, CELA submits that there should be no further delay in the promulgation and implementation of the MNR classification regulation. In our view, the regulation needs to

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[1] Since a non-prescribed instrument is, by definition, not environmentally significant, it is arguable that the duty under section 7(a) of the EBR to consider the SEV during environmentally significant decision-making would not apply to such instruments.

be expeditiously amended and expanded to address the concerns expressed below, and it needs to be in place and in effect as soon as possible.

2. MNR's Non-Compliance with Section 20 of the EBR

Section 20 of the EBR sets out a complete code for the identification and classification of environmentally significant instruments. Because CELA does not have access to the MNR's internal records, it is difficult to trace or understand the process used by MNR to determine that only a small handful of MNR instruments should be prescribed under the EBR.

Based on the available evidence, however, it is clear that the process used by the MNR does not comply with section 20 in several key respects.

For example, section 20(2) of the EBR requires ministries to identify all statutory provisions under which "implementation decisions" (i.e. to issue or not issue an instrument) could have "a significant effect upon the environment". In determining "environmental significance", ministries are required to consider:

- nature and extent of potential mitigation measures;
- local, regional or provincial extent of environmental impacts;
- private, public and government interests; and
- any other relevant matter.

The MNR's stakeholder package claims that the section 20(2) provisions were followed when the MNR identified and reviewed potential candidates for inclusion in the proposed regulation. CELA questions the accuracy of this self-serving claim when it is abundantly clear that the MNR has either: disregarded these provisions; misinterpreted these provisions in an extremely narrow fashion; or erroneously applied factors or criteria that do not exist within section 20(2).

For example, there are many environmentally significant instruments issued by the MNR which have been inexplicably omitted from the proposed regulation, as described below. Had the MNR properly interpreted and applied the section 20(2) indicia of environmental significance, the resulting list of prescribed instruments would have been considerably longer than the abridged list found within the proposed regulation.

In failing to prescribe numerous significant instruments under the EBR, it appears that the MNR has applied exclusionary factors that are not found within section 20(2) of the EBR. For example, with respect to the Conservation Authorities Act and Public Lands Act, the MNR purports to prescribe only those instruments that relate to lands or wetlands that are "provincially significant": see section 3(1) and section 6 of the proposed MNR regulation.

There is no legal authority in section 20(2) for this inappropriate restriction. Indeed, paragraph 5 of section 20(2) indicates that even if an instrument had only a significant local environmental effect, then the instrument should be prescribed. Thus, the MNR's attempt to restrict "environmental significance" to provincially significant lands, wetlands or ANSI's is ultra vires and amounts to a serious error in statutory interpretation.

Similarly, there is no legal authority for the MNR's attempt to exclude instruments on the basis of the EA exception in section 32 of the EBR. In its stakeholder package, the MNR states that during "Phase 5" of the classification exercise, candidate instruments "were reviewed to determine where a notice exception should be applied on the basis of the environmental assessment exception in section 32". Since section 20(2) of the EBR makes no provision for EA exceptions, MNR's "Phase 5" is ultra vires and amounts to a serious error in statutory interpretation.

It must be noted that section 32 only provides an exception to the public notice requirements which would otherwise be applicable to MNR instruments under section 22 of the EBR. Section 32 cannot be used as an excuse for failing to prescribe instruments for the purposes of other sections of the EBR, such as: Application for Review; Application for Investigation; or Right to Sue. Regardless of whether certain instruments are to be posted on the Registry, the full suite of the MNR's environmentally significant instruments must be prescribed to ensure that all EBR tools are fully operative in the MNR context. CELA's further comments on the MNR's attempt to improperly invoke EA-related exemptions are outlined below.

3. MNR's Failure to Prescribe or Classify Significant Instruments

Under its various statutes, the MNR has authority to issue a large number of instruments (i.e. licences, approvals or orders) on a wide variety of matters, including: aggregate operations; forestry operations; watercrossings; mines; oil, gas and salt extraction; flood control; and public lands. While most of these instruments are clearly environmentally significant, the MNR's draft regulation only proposes to prescribe approximately 22 instruments.

The MNR's proposed list of instruments is excessively narrow and is undoubtedly attributable, at least in part, to the MNR's misinterpretation of section 20(2). It also appears that the MNR applied other unstated criteria to screen out candidate instruments, such as the self-evident attempt by the MNR to not prescribe any instruments subject to appeal provisions. In CELA's view, this represents a colourable attempt to circumvent or frustrate the exercise of third-party appeal rights under the EBR.

CELA has reviewed the MNR's prescribed statutes and has found numerous examples of environmentally significant instruments that must be included within the MNR's classification regulation. This list is reproduced below as Appendix A to this submission. This list (and CELA's proposed classifications) should be regarded as preliminary in nature, and CELA reserves the right to identify and recommend additional candidates for inclusion in the MNR's regulation.

4. MNR's Improper Invocation of EA-Related Exemptions

Under the draft regulation, the MNR has proposed to prescribe only one type of instrument under the Crown Forest Sustainability Act, viz. the issuance or amendment of a forest resource processing facility licence: see section 4 of the MNR regulation. Other significant instruments under this legislation -- such as the approval or amendment of forest management plans; the issuance or extension of sustainable forest licences; and the issuance of various Ministerial orders -- are conspicuously absent from the proposed regulation.

Given the clear environmental significance of forestry activities on Crown lands (i.e. access road construction, tree harvesting, forest renewal operations, and forest maintenance activities), CELA strongly submits that virtually all of the numerous instruments under the Crown Forest Sustainability Act should be prescribed under the EBR. CELA's proposed list of forestry instruments that should be prescribed under the EBR is reproduced below in Appendix A.

In its stakeholder package, the MNR has claimed that "proposals to approve forest management plans and amendments under the Crown Forest Sustainability Act are excepted since they are steps towards implementing an undertaking approved under the EAA." However, the MNR proposes to post "voluntary" notice of such instruments at various stages of the "Forest Management Planning consultation process".

For the reasons stated above, CELA submits that the MNR's approach amounts to a misinterpretation of section 32 of the EBR because that section only relieves against public notice requirements for certain instruments. Accordingly, section 32 cannot be used by the MNR as a pretext for not prescribing forestry instruments for the purposes of other EBR tools.

More importantly, CELA strongly objects to the proposed invocation of the section 32 exception in the context of forest management decisions. Contrary to the claims made by the MNR, forest management has not been approved under the EAA. Instead, the Environmental Assessment Board made it very clear that the Class EA approval applied only to timber management planning, not forest management planning: see pages 55-57, 67-69 and 379-81 of the Board's decision dated April 20, 1994.

The distinction between "timber management" and "forest management" is not merely semantic; instead, there are profound practical, substantive and legal differences between simply planning timber activities, versus more holistic, ecosystem-based forest planning for a wide range of non-timber values. The MNR may now claim to be undertaking forest management by issuing "sustainable forest licences", but the fact is that the Board did not approve forest management planning or licencing.

As counsel for an environmental coalition that participated throughout the lengthy Class EA hearing, CELA is offended at the MNR's revisionist attempt to re-define the nature of the

undertaking that was before the Board for approval. In short, forest management planning and licencing has not been approved under the EAA. Accordingly, CELA submits that not only should forestry instruments be prescribed under the EBR, but that the section 32 exception does not even apply so as to preclude EBR notice and comment requirements.

It is also appears that the MNR may attempt to invoke section 32 of the EBR by relying upon the EA exemption (MNR 26-7) which permits the MNR to dispose of certain Crown resources, subject to conditions. In CELA's view, this EA exemption does not protect or "shield" grants of specific forestry licences against EBR coverage, largely because the activity of granting individual licences (as opposed to disposing of resources) is not caught by the EA Act: see section 9 of Regulation 334. However, as the EA Board held at the Class EA hearing, an overall licencing scheme may be considered as part of an undertaking: see 4 C.E.L.R. (N.S.) 294, at pp.303-04.

The net result is that the new forestry licencing regime now utilized by the MNR did not form part of the timber management undertaking that was approved by the EA Board. Moreover, it can be argued that granting individual forestry licences per se may not trigger EA obligations. Accordingly, the EA exception in section 32 of the EBR is not applicable in the context of forestry licences and, in any event, does not prevent prescribing forestry licences under the EBR. This argument applies, with necessary modification, to any attempt by the MNR to not prescribe instruments under the Public Lands Act or the Lakes and Rivers Improvement Act on the basis of section 32 of the EBR.

5. MNR's Misclassification of Prescribed Instruments

CELA disagrees with the MNR's proposed classification of some of the few instruments that are caught by the draft regulation. For example, in the context of Aggregate Resources Act licences, the MNR has attempted to distinguish between Class I and II instruments on the basis of whether the Minister makes a discretionary decision to provide notice to municipalities. In CELA's view, the environmental significance of an instrument does not stand or fall on the exercise of discretionary Ministerial powers regarding municipal notice. If these instruments satisfy the section 20(2) test for environmental significance, then they should be prescribed regardless of whether a Minister might elect to provide municipal notice.

Indeed, there is a strong argument to be made that most aggregate instruments should be generally classified as Class II (or perhaps Class III where an Ontario Municipal Board hearing is held). This classification should apply to aggregate licences, site plans, and waiver of rehabilitation requirements.

CELA also notes that the draft regulation attempts to utilize a definition of "provincially significant land" in order to restrict the number of prescribed instruments: see section 1 of the MNR regulation. As noted above, there is no legal basis for restricting prescribed instruments to those which are adjudged to be "provincially significant". Moreover, even the

definition of "provincially significant" is far too restrictive. For example, the section 1 definition includes the "Niagara Escarpment Natural Area". While such areas are important, the Escarpment Protection (i.e. slopes) and Escarpment Rural zones are also essential to the long-term integrity and continuity of the Niagara Escarpment Plan Area. Accordingly, if the MNR persists in using a definition of "environmentally significant land", it should amend the definition to catch all types of provincially significant land (i.e. Escarpment Protection and Rural; lands containing old-growth forests; significant fish and wildlife habitat or corridors; habitat for endangered, threatened or vulnerable species; etc.).

CELA's proposed re-classification of the foregoing instruments is reproduced below in Appendix A.

6. MNR's Failure to Address Procedural and Transitional Matters

The MNR's draft regulation fails to address some key procedural and transitional matters. Indeed, the only transitional issue dealt with by the regulation is the MNR's attempt to delay implementation of the regulation for another six months: see section 10 of the MNR regulation. As described above, CELA submits that the MNR has had enough time to get its act together under the EBR, and we are unaware of any compelling reason why the MNR should be permitted to stall any longer under the EBR. In our view, section 10 should be deleted, and the regulation should take force immediately upon filing under the Regulations Act.

The draft regulation also fails to provide any direction on any "in-the-mill" instruments that may be pending when the regulation is finalized. In CELA's view, the regulation (and consequential EBR requirements) should apply immediately to all prescribed instruments, including those that are "in-the-mill".

We also note that the draft regulation fails to include a built-in mechanism for periodic review. On this point, it is noteworthy that the MOEE classification regulation includes a periodic review mechanism: see O.Reg.681/94, section 10. In CELA's view, the MNR regulation also requires periodic review to ensure that it is up to date and catches all relevant MNR instruments.

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For the foregoing reasons, CELA submits that the MNR's proposed classification regulation is fundamentally flawed and completely unacceptable. In our view, the MNR's classification regulation must be promulgated as soon as possible and, more importantly, must be substantially expanded to include the numerous environmentally significant instruments that have been omitted from the proposed regulation.

Kindly advise us how the MNR proposes to address the substantive and procedural concerns raised throughout this submission. Please contact the undersigned if you have any comments or questions about this submission.

We look forward to your reply.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
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Paul Muldoon
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cc. Pat Freistatter, MNR EBR Coordinator
Eva Ligeti, Environmental Commissioner

APPENDIX A - CELA'S PRELIMINARY LIST OF MNR INSTRUMENTS THAT SHOULD BE PRESCRIBED UNDER THE EBR

Instrument	Classification
Aggregate Resources Act	
ss.13(2)	II
ss.16(1)	II
ss.16(2)	II
s.18	I
s.20	I
s.22	I
ss.30(1)	II
ss.30(2)	II
ss.32(1)	I
ss.34(1)(a)	II
ss.34(1)(b)	II
ss.34(1)(c)	II
s.42	I
s.45	I
ss.48(2)	II
s.49	II
ss.68(1)	II
ss.72(3)	II
Conservation Authorities Act	
ss. 21(c)	II
ss. 21(d)	II
ss.23(1)(a)	I
ss.23(1)(b)	I
ss.23(1)(c)	I
ss.23(2)(a)	I
ss.23(2)(b)	I
ss.23(1)(c)	I
ss.24(1)	II
ss.28(1)(b)	II
ss.28(1)(e)	II
ss.28(1)(f)	II

Crown Forest Sustainability Act

ss.9	II
ss.10(2)	II
ss.11	II
ss.17(3)	II
ss.17(4)	II
ss.25	II
ss.26(1)	II
ss.26(4)	II
ss.27(1)	II
ss.27(4)	II
ss.29(2)	II
ss.34(1)	II
ss.42(2)	II
ss.44(1)	II
s.47	I
ss.55(1)	II
ss.56(1)	II
ss.57(1)	I
s.59	I

Ont. Reg. 167/95 - General Regulation under the CFSA

s.24	I
ss.29(1)	II

Game and Fish Act

ss.6(3)	I
s.32	I
ss.39(2)	I
ss.40(1)	I
ss.40(2)	I
s.44	I

Lakes and Rivers Improvement Act

s.14	II
s.15	I
s.16	I
ss.17	II
ss.18(1)	I
s.19	I

ss.22(1)	II
s. 23	II
ss.38(3)	I

Mining Act

s.99	II
s.100	II

Oil, Gas and Salt Resources Act

s.7	I
s.7.01	I
s.13	II
ss.14(1)	I

Public Lands Act

s.2	I
s.12	II
s.13	II
s.14	II
s.15	I
s.16	I
s.17	I
s.18	I
s.19	I
s.20	I
ss.27(1)	II
s.44	I
s.45	I
s.74	II

Provincial Parks Act

s. 7(2)	II
s. 7(3)	II
s. 8	II
s. 9	I