Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

October 25, 2013 **BY FAX AND EMAIL**

Elaine Hardy
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Ministry of Natural Resources
880 Bay Street
Toronto, ON M7A 2B6

Dear Ms. Hardy:

RE: PROPOSED CLASSIFICATION OF INSTRUMENTS UNDER THE *FAR NORTH ACT, 2010*: EBR REGISTRY NO. 012-0087

These are the comments of the Canadian Environmental Law Association (CELA) in relation to the proposal by the Ministry of Natural Resources (MNR) to classify various instruments under the *Far North Act, 2010* (FNA) for the purposes of the *Environmental Bill of Rights, 1993* (EBR).

These comments are being provided to you in accordance with the above-noted EBR Registry Notice, and are intended to summarize CELA's concerns regarding three main issues:

(i) the adequacy of the public consultation efforts in relation to this proposal;

(ii) the appropriateness of the proposed classification of FNA instruments; and

(iii) the objectionable reliance by the MNR upon the "EA exception" in section 32 of the EBR.

1. ADEQUACY OF PUBLIC CONSULTATION

(i) Timing Considerations

At the outset, CELA commends the MNR for utilizing an information notice to solicit early public input on this important matter, well before the Ministry of the Environment (MOE) posts any proposed amendments to O.Reg.681/94. We also appreciate the fact you personally notified CELA by email to alert us about the information notice, which contains several useful links to related documentation.

However, CELA remains concerned about the relatively slow pace of this instrument classification exercise, particularly as resource development pressure continues to increase in the Ring of Fire and other areas caught by the FNA. On this point, we note that although the FNA

was enacted in 2010, this statute was not prescribed under the EBR until August 2012. We are unclear why it took an inordinate amount of time to prescribe this key legislation under the EBR. In our view, environmentally significant bills such as the FNA should be immediately (if not automatically) prescribed upon their passage or proclamation into force.

Once the FNA was prescribed under the EBR for the purposes of section 16 (regulations), sections 19 and 20 of the EBR then imposed a legal duty upon the MNR to develop an instrument classification proposal "within a reasonable time." However, it has taken over a year for the MNR to release its preliminary conclusions on how FNA instruments might be classified, and yet more time will elapse before any amendments to O.Reg.681/94 are actually passed in relation to FNA instruments.

For example, the current EBR information notice is soliciting public comment until December 2, 2013. Assuming that the MNR will require some time to consider all public comments received, it seems reasonable to anticipate that it will be the winter (or early spring) of 2014 before the actual amendments to O.Reg.681/94 will be proposed by MNR, processed by MOE, and posted again on the EBR Registry for another round of public consultation. Assuming that the MOE will then require some time to consider all public comments received, it may be well into the spring or summer of 2014 (or later) before a final regulatory decision is made and O.Reg.681/94 is amended accordingly.

In these circumstances, CELA submits that MNR has not acted "within a reasonable time" to develop and implement its FNA instrument classification scheme pursuant to the EBR. Since the FNA was first enacted, it has taken approximately three years to just reach the point where the MNR has offered some initial ideas about potential instrument classification. In addition, it may take most of another year to formally promulgate the necessary changes to O.Reg.681/94. In light of this approximate 4 year-long timeframe, it cannot be seriously contended that the MNR has moved with due dispatch in classifying FNA instruments under the EBR.

The overall effect of this unjustifiable delay is to deprive Ontarians of their Part II rights to notice/comment on the proposed issuance of FNA instruments. On this point, CELA notes that a number of these instruments (i.e. ministerial orders allowing aggregate operations and infrastructure projects to proceed) have already been issued under the FNA. As long as these FNA instruments remain unclassified, they are not subject to the mandatory public participation requirements under Part II of the EBR. We are aware of the MNR's claim that the FNA instruments may be generally exempt from Part II requirements due to the section 32 "EA exception" in the EBR, and we respond to this dubious argument in Part 3 of this submission, *infra*.

(ii) Facilitating Public Involvement in the Decision-Making Process

As noted above, the current information notice on the EBR Registry includes links to seven different documents or websites that are directly or indirectly related to the FNA and/or EBR. Of these links, however, only one deals specifically with the MNR's proposed instrument classification scheme, and it is essentially a summary chart with some cryptic columns and checkmarks regarding the various FNA instruments that the MNR proposes to classify (or

exclude) pursuant to the EBR. No explanatory text is provided in the chart to describe the MNR's analysis or position on each FNA instrument under consideration. Similarly, there is no indication whether – or to what extent – the MNR considered its Statement of Environmental Values under the EBR in developing this proposed classification scheme.

For the purposes of greater accountability, traceability and public participation, CELA submits that it would have been far more preferable for the MNR to have provided an EBR Registry link to a detailed discussion document that:

- provides background information and an overview of the classification criteria and iterative process required under section 20 of the EBR;
- carefully articulates the MNR's analysis and rationale for classifying each FNA instrument as Class I or II on the basis of the factors in subsection 20(2)(5) of the EBR (i.e. potential environmental effects/risks posed by the instrument; potential mitigation measures; public/private interests affected by the instrument; or other relevant considerations); and
- soliciting public comment on the MNR's methodology, assumptions and conclusions resulting in the proposal to classify (or exclude) FNA instruments.

Since the MNR chart currently linked in the EBR Registry Notice is entitled "Summary", we presume that the MNR did, in fact, carry out a staff-led (and closed-door) analysis of the various FNA instruments. However, the MNR's apparent failure or refusal to publicly link relevant analytical documentation, containing a sufficient level of detail, in the EBR Registry Notice makes it exceedingly difficult for CELA and other stakeholders to understand or respond to the MNR's thought process regarding FNA instrument classification.

To remedy this situation, CELA recommends that the current EBR information notice should be immediately amended and/or re-posted to include links to the actual paper trail (not just a tabular chart) generated by MNR in relation to whether – or how – FNA instruments should be classified under the EBR.

Similarly, once this matter has advanced to the stage when EBR notice will be provided for the actual proposed amendments to O.Reg.681/94, then the MOE (with input from MNR) should develop and web-post a Regulatory Impact Statement pursuant to subsection 27(4) of the EBR in order to permit more informed public consultation on the proposed regulatory changes.

2. PROPOSED CLASSIFICATION OF FNA INSTRUMENTS

The EBR broadly defines "instrument" as "any document of legal effect issued under an Act", and includes statutory permits, licences, approvals, authorizations, directions or orders.[1] In light of this definition, it appears to CELA that some key FNA instruments are being incorrectly excluded from the MNR's proposed classification scheme. Moreover, CELA concludes that the small handful of FNA instruments that MNR proposes to classify are, in fact, misclassified due to the MNR's misapplication of the classification criteria in subsection 20(2) of the EBR. Both of these concerns are described below in more detail.

1. EBR, subsection 1(1).

(i) Some FNA Instruments are Erroneously Excluded by MNR

The MNR's summary chart identifies sixteen different FNA instruments that the MNR considered for EBR classification purposes. Of these candidates, the MNR is only proposing to classify about half of the identified FNA instruments for the purposes of the EBR. Eight of the candidate instruments are being excluded by the MNR from classification under the EBR, primarily on the grounds that, in the MNR's opinion, these instruments are unlikely to have a significant effect on the environment.

For example, the MNR chart acknowledges that the Minister's establishment of a "joint body" under subsection 7(5) of the FNA is an "implementation decision". However, the chart proposes to exclude this instrument from EBR coverage on the grounds that this decision is unlikely to cause any significant environmental effects. CELA agrees that while the mere administrative creation of a joint body *per se* may not be environmentally significant, the overarching purpose and function of the joint body includes creating "Far North Policy Statements" which will likely have profound environmental significance on the ground. Among other things, these statutory policy statements are intended to address wide-ranging matters such as:

- cultural and heritage values;
- ecological systems, processes and functions, including considerations for cumulative effects and for climate change adaptation and mitigation;
- the interconnectedness of protected areas;
- biological diversity;
- areas of natural resource value for potential economic development;
- electricity transmission, roads and other infrastructure; and
- tourism.[2]

By any objective standard, these matters involve key environmental considerations and pose natural resource implications in the FNA area. Moreover, these policy statements will be incorporated directly into the Far North land use strategy[3] and filter down into community-based land use plans under the FNA.[4] Indeed, given that the land use strategy "shall" contain all Far North policy statements (as issued or amended), then it is certainly arguable that these policy statements are analogous to official plans (rather than the Provincial Policy Statement) under the *Planning Act*, which have been classified as "instruments" for the purposes of the EBR.[5]

In any event, the status and treatment of the Far North policy statements under the EBR remains unclear, as the MNR has not identified or classified these as "instruments" and it is unknown whether these proposals will trigger notice/comment under the EBR as "policies" since they are not "Acts" or "regulations". Accordingly, CELA recommends that the MNR should clarify how (not whether) proposed FNA policy statements will be subject to public notice/comment under the EBR.

2. FNA, subsection 7(7).
3. FNA, subsection 8(3).
4. FNA, subsection 9(7).
5. O.Reg.681/94, subsection 10.2.

We have similar concerns in relation to the MNR chart's failure to specifically consider or classify the Far North land use strategy or community land use plans, both of which seem to closely resemble municipal official plans, which, as noted above, are classified as "instruments" under the EBR. In fact, it appears that no aspect or component of the FNA land use planning exercises are classified as EBR instruments except for the final step under section 9(14) (ministerial order approving land use plans) or subsequent amendments pursuant to subsections 10(2) and 10(3). The MNR chart concedes that the preceding planning steps (i.e. approving terms of reference, amending the planning area, etc.) are "implementation decisions" within the meaning of the EBR, but they are purportedly excluded on the basis of environmental non-significance.

The MNR's claim that these early planning steps are not environmentally significant is certainly debatable and has not been substantiated by any persuasive MNR evidence or arguments. Moreover, it is our view that expanding an initial planning area (or amending terms of reference) to include lands not previously caught by the planning process (and thereby potentially exposing these additional lands to resource development activities) is an environmentally significant proposal which warrants public notice/comment under the EBR.[6] Again, the MNR should clarify how (not whether) these northern land use planning exercises will trigger public notice/comment opportunities under the EBR.

Interestingly, subsections 7(8), 8(4) and 9(19) of the FNA expressly provides that the Far North policy statements, land use strategy and community-based land use plans are not "undertakings" within the meaning of the *Environmental Assessment Act* (EA Act). In short, these matters are not being exempted per se by way of a declaration order under the EA Act; instead, the FNA deems them to be matters that were never subject to the EA Act *ab initio* because they are not undertakings as defined by the EA Act. Since these FNA planning documents have not been specifically approved or exempted under the EA Act, it is our opinion that the MNR cannot rely upon section 32 of the EBR to justify excluding them from the public participation requirements of Part II of the EBR, as described below.

Subsection 12(1) of the FNA prohibits certain types of resource development projects from occurring in areas that lack community-based land use plans. However, subsection 12(2) goes on to confer order-making power upon the Minister to allow such projects if certain conditions are met, and the MNR chart proposes that such orders should be Class II instruments under the EBR. CELA concurs with this proposed classification.

CELA also agrees that the even broader order-making power in subsection 12(4) to exempt any person from the broad prohibitions in subsection 12(1) should be characterized as a Class II instrument, especially where Cabinet is proposing that the prohibited project should proceed because it is "in the social and economic interests of Ontario." The Minister's powers under

6. For example, there was considerable controversy on whether (or under what conditions) logging activities on Crown lands should be permitted to extend "North of 50", which was the approximate geographic limit of the "Area of the Undertaking" described in the MNR's Timber Management Class EA (now Declaration Orders): see *Re MNR Timber Management Class EA*, Environmental Assessment Board File 87-02 (April 1994), pp.360-61.

subsections 12(5), 12(5) and 12(6) to permit certain types of "incidental or complementary" or "community" development should be similarly classified as Class II instruments (see below).

The MNR chart proposes to exclude from EBR classification the Minister's orders creating areas of provisional protection pursuant to subsection 13(2) of the FNA. According to the MNR chart, this exclusion is premised on the environmental insignificance of such orders. CELA strongly disagrees with this assessment for two main reasons: (i) the threshold determination of which lands are included in – or excluded from – from the protection order could be very environmentally significant, depending upon the sensitivity or uniqueness of the natural features and ecosystem functions of the lands in question; and (ii) interested persons should be permitted to make submissions on the stringent terms and conditions that should be included in the order so as to effectively safeguard the protected area on a provisional basis. Accordingly, CELA submits that provisional protection orders should be subject to Part II of the EBR as Class II instruments. We again note that such orders are deemed not to be "undertakings" under the EA Act: see subsection 13(5) of the FNA.

We concur with the MNR that Cabinet orders under subsection 14(4) of the FNA (i.e. allocation of public lands or natural resources contrary to community-based plans) should be characterized as Class II instruments. However, we disagree with the proposal in the MNR chart that the Minister's compliance orders under subsection 15(1) should be excluded from EBR coverage on the grounds of environmental insignificance.

In our experience, environmental compliance orders typically include terms and conditions not only prohibiting the continuation of the impugned conduct, but also containing detailed provisions regarding monitoring, reporting and remediation. These are environmentally significant matters which warrant public notice and comment opportunities under the EBR. In this regard, we note that several of the administrative orders available to the MOE to ensure compliance with the *Environmental Protection Act* (i.e. control orders, stop orders, Directors' orders, etc.) are prescribed as Class II instruments under O.Reg.681/94, and we are unaware of any compelling reasons why similar compliance orders under the FNA should be excluded from EBR classification.

(ii) MNR's Proposed Instrument Classification

The MNR's summary chart suggests that of the nine FNA instruments to be classified under the EBR, six are proposed as Class I instruments and only three are proposed as Class II instruments. On this point, we note that Class I instruments generally attract the minimum public notice/comment requirements prescribed by Part II of the EBR (i.e. 30 days' notice and EBR Registry posting), while Class II instruments are supposed to trigger enhanced notice/comment opportunities under the EBR (i.e. longer comment periods, media announcements, mailings, signage, actual notice to stakeholders, public meetings, mediation, etc.).[7]

With this important procedural distinction in mind, CELA submits that given the ecological importance of FNA resources, ecosystems and lands (which comprise approximately 42% of the Ontario landbase), virtually all FNA instruments should be classified as Class II instruments.

7. See, for example, EBR, sections 23-25, 28.

This will help ensure that all Ontarians interested in, or potentially affected by, FNA instruments will have meaningful opportunities to participate in the decision-making process regarding such instruments. After all, the FNA itself includes key environmental objectives – such as ecological protection and biodiversity conservation[8] – which, in our view, are best achieved by ensuring that FNA instruments receive the highest levels of public participation available under the EBR.

We further note that subsection 4(2) of the FNA expressly provides that decision-makers (i.e. Cabinet or the Minister) are not required to hold hearings prior to issuing orders under the FNA. This is to be contrasted with section 24 of the EBR, which empowers the Minister to provide enhanced public participation – such as "opportunities for oral representations by members of the public to the minister or a person or body designated by the minister" – on the basis of the various factors set out in section 14 of the EBR. In our view, the EBR participatory rights for Class II instruments are more effective – and more appropriate – than what may be offered under the FNA, particularly in relation to project-specific instruments.

3. MISUSE OF THE "EA EXCEPTION" IN SECTION 32 OF THE EBR

The current EBR information notice claims that "many" FNA instruments are "captured" by the so-called "EA exception" created by section 32 of the EBR. Aside from a perfunctory reference to the current MNR Class EA for Crown land disposition, no substantive explanation or legal analysis has been provided in the EBR Registry Notice to substantiate the MNR's opinion on the applicability of section 32 to FNA instruments. However, the current EBR information notice goes on to indicate that the MNR may, in its discretion, undertake "voluntary postings" (i.e. more information notices) to invite public comment on FNA instruments that the MNR claims are wholly covered by the "EA exception" provisions of section 32 of the EBR.

Please be advised that CELA does not share the MNR's unsubstantiated "opinion" on the applicability or legal effect of section 32 of the EBR in the context of FNA instruments. Moreover, CELA seriously questions the adequacy of the MNR's professed commitment to post voluntary "information notices" in relation to FNA instruments which MNR claims are subject to section 32 of the EBR.

In our view, the MNR's misuse of section 32 reflects a larger systemic problem that warrants immediate legislative attention. In 2010, CELA filed an EBR Application for Review of the EBR[9] that contained, among other things, a request that section 32 of the EBR be revised or repealed forthwith. The evidence relied upon CELA included the MNR's questionable reliance upon section 32 to justify the exclusion of instruments under the *Endangered Species Act, 2007* and *Provincial Parks and Conservation Reserves Act, 2006* from Part II of the EBR.

Similar calls for reform of section 32 have been made by the Environment Minister's EA Advisory Panel (of which CELA was a member), and by the Environmental Commissioner in various annual and special reports. Indeed, in his 2012-13 Annual Report released a few weeks ago, the Environmental Commissioner again correctly focused on the MNR's excessive reliance on section 32 in order to shield significant instruments from public scrutiny under the EBR:

8. FNA, section 5.
9. This Application for Review of the EBR is available at: wwww.cela.ca.

> The excessively broad application of section 32 of the EBR is actually depriving the public of the very rights that the EBR is intended to safeguard. Consequently, many environmentally significant decisions are being made without public notification, and indeed, no public scrutiny at all. To its credit, although not required to do so, MNR has often posted information notices on the Environmental Registry to alert the public to decisions about non-prescribed ESA instruments; however, this work-around solution does not provide the same public rights.
>
> Public scrutiny is a key driver for improving environmental decision making. Shrouding these decisions from public scrutiny based on section 32 of the EBR is inconsistent with the goals of this legislation. The ECO is disappointed that MNR continues to use section 32 of the EBR as a way to avoid being held accountable for decisions regarding the protection and recovery of species at risk in Ontario (page 22).

Despite these well-founded concerns and repeated requests for changes to section 32, the MOE has granted CELA's Application for Review of the EBR, but has not yet announced any proposals to reform the troublesome "EA exception." The MNR's attempt to once again to invoke the "EA exception" in the context of FNA instruments amply demonstrates the urgent need for immediate statutory reform of section 32 of the EBR.

(i) Nature and Purpose of the Section 32 "EA Exception"

The threshold question in this case is whether section 32 of the EBR wholly (or automatically) applies to instruments under the FNA, as claimed by the MNR.

As you may know, CELA was a member of the EBR Task Force that assisted the Ontario government in drafting the EBR in the early 1990s. As CELA's representative on the EBR Task Force, I can assure you that the EBR Task Force definitely did not intend section 32 of the EBR to be misused (or abused) in the manner that the MNR has now adopted in relation to FNA instruments.

For example, the MNR's information notice invokes an MNR Class EA to buttress its position that FNA instruments will implement projects, undertakings or activities that have been approved (or exempted) under the EA Act.

However, our review of this Class EA (and other MNR exemption orders under the EA Act) suggests that none of them specifically contemplate the issuance of FNA instruments regarding the lands, resources and ecosystems covered by the FNA. Accordingly, it cannot be seriously contended that the issuance of FNA instruments "implement" undertakings that have been specifically approved (or exempted) by a decision (or regulation) made under the EA Act.

CELA further submits that it is highly debatable whether the public participation provisions of the MNR Class EA (and exemption orders under the EA Act) are substantially equivalent to the public participation rights entrenched within Part II of the EBR, particularly in relation to Class II instruments.

In any event, it is our conclusion that the MNR's information notice fails to adequately explain how, in fact or in law, section 32 actually extends to or includes FNA instruments in most or all cases.

(*ii) Voluntary Postings do not Cure EBR Non-Compliance*

CELA takes no comfort in the MNR's proposal to provide "voluntary postings" on the EBR Registry in relation to the "many" FNA instruments which MNR claims are covered by section 32 of the EBR.

As described above, it is our view that MNR has not sufficiently demonstrated that the section 32 "EA exception" generally applies across the board to FNA instruments. Accordingly, the threshold question of whether or not section 32 may actually be applicable to a particular FNA instrument will have to be determined on a case-by-case basis, if and when the instrument has been applied for by a proponent.

Where it has been correctly determined that section 32 does not apply to the particular instrument, then the instrument proposal is fully subject to the public participation regime under Part II of the EBR. In other words, such postings are mandatory rather than optional, and the MNR's vague promise to voluntarily post certain FNA instruments does not comply with the requirements of the EBR.

More generally, it is CELA's view that merely providing voluntary postings – but refusing to provide any real means of ensuring governmental accountability – undermines the overall purposes and intent of the EBR.

If, for example, Ontario residents respond to a "voluntary posting" by submitting sound factual, technical or scientific concerns about the issuance of an FNA instrument, then there is no legal recourse under the EBR if the MNR decision-maker ignores this public input and issues an instrument that is unreasonable or could cause significant environmental harm.

Accordingly, voluntary postings cannot be viewed as an adequate substitute for proper EBR postings which are fully subject to the public participation requirements under Part II of the EBR.

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We trust that the foregoing comments will be taken into account by both the MNR and MOE as this classification exercise continues and when O.Reg.681/94 under the EBR is amended accordingly.

CELA further calls upon the MOE to expedite its slow-moving review of the EBR in order to revise (or repeal) section 32 of the EBR to ensure that the important – and mandatory – participatory rights under Part II of the EBR are fully available to individuals, groups and

communities who are interested in, or potentially affected by, the issuance of instruments under the FNA.

Please feel free to contact the undersigned if you have any questions or comments about this submission.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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Cc. The Hon. James Bradley, Minister of the Environment
Gord Miller, Environmental Commissioner of Ontario