Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

April 15, 2024 **BY EMAIL & FILED ONLINE**

Joanna Samson
MNRF-PD-RPDPB-Water Resources Section
300 Water Street
6th Floor, South Tower
Peterborough, ON K9J 3C7

Dear Ms. Samson:

RE: ERO 019-4300 – PROPOSED EXEMPTION OF *LAKES AND RIVERS IMPROVEMENT ACT* ORDERS FROM PART II OF THE *ENVIRONMENTAL BILL OF RIGHTS*

These are the comments of Canadian Environmental Law Association (CELA) in relation to the above-noted notice[1] on the Environmental Registry of Ontario (ERO).

In this posting, the Ministry of Natural Resources and Forestry (MNRF) is proposing to exempt five types of compliance orders under the *Lakes and Rivers Improvement Act* (LRIA) from the public consultation requirements established under Part II of the *Environmental Bill of Rights* (EBR).

For the reasons set out below, CELA concludes that this proposal is highly problematic, unsupported by evidence-based reasons, contrary to the MNRF's Statement of Environmental Values (SEV) under the EBR, and inconsistent with the public interest purposes of the EBR.

Accordingly, CELA recommends that this flawed proposal should be withdrawn and re-considered by the MNRF.

1. CELA's Background and Experience

CELA is a public interest law clinic dedicated to environmental equity, justice, and health. Founded in 1970, CELA is one of the oldest environmental advocates for environmental protection in the country. With funding from Legal Aid Ontario, CELA provides free legal services relating to environmental justice in Ontario, including representing qualifying low-income and vulnerable or disadvantaged communities in litigation. CELA also works on environmental legal education and reform initiatives.

For example, CELA has been actively involved in the development and implementation of the EBR. In the early 1990s, CELA served as a member of the Environment Minister's Task Force

[1] Exempting five Lakes and Rivers Improvement Act orders from certain requirements of Part II of the Environmental Bill of Rights, 1993 through proposed amendments to Ontario Regulation 73/94 | Environmental Registry of Ontario.

that assisted in drafting and consulting on the *EBR*. After the enactment of the *EBR*, CELA lawyers have provided summary advice, public education, and client representation in relation to various *EBR* tools, including applications for review, applications for investigation, third-party appeals of instrument decisions, and judicial review proceedings arising under the *EBR*. CELA was also extensively involved in the MNRF instrument classification exercise under the EBR years ago.

Similarly, CELA's casework, law reform, and summary advice activities have addressed water-related projects, facilities, or activities regulated under the LRIA and/or other provincial statutes (e.g. *Environmental Assessment Act*, *Ontario Water Resources Act*, *Planning Act*, *Conservation Authorities Act*, *Drainage Act*, *Public Lands Act*, *Crown Forest Sustainability Act*, etc.), including dams, causeways, culverts, water diversions, water crossings, and similar structures in northern and southern Ontario.

Accordingly, CELA has carefully considered the MNRF proposal from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice. Our detailed comments on various aspects of the current ERO posting are set out below.

We hasten to add that CELA appreciates the opportunity to meet with you and other MNRF staff on April 9, 2024 to obtain further clarification about the proposal and to discuss CELA's concerns about the proposed exemption of the five LRIA orders from the EBR.

2. Overview of the Proposal in ERO 019-4300

(i) The Legislative and Regulatory Context

The LRIA[2] is used to regulate the location, construction, operation, and maintenance of dams[3] and other structures that forward, hold back, or divert water on lakes and rivers throughout Ontario. The LRIA also prohibits people from throwing, discharging, or depositing substances into lakes, rivers, shores, or banks in circumstances that conflict with the Act's purposes. The LRIA purposes include: (a) protecting, preserving, and using lakes and rivers; (b) protecting the equitable exercise of public rights in or over of lakes and rivers; (c) safeguarding riparian rights of landowners; (d) managing fish, wildlife, and other natural resources dependent on lakes and rivers; (e) protecting natural amenities of lakes, rivers, shores, and banks; and (f) ensuring protection of property and public safety.

The EBR[4] was enacted in 1993 and proclaimed in force in 1994 to create various legal tools which Ontarians can use to protect the environment, participate in environmental decision-making, and ensure governmental accountability for its environmental decisions. The establishment and operation of the ERO is mandated by the EBR, and the ERO is used as the primary means for providing notice and soliciting comments on environmentally significant decisions under consideration by prescribed Ministries, including the MNRF.

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[2] Lakes and Rivers Improvement Act, R.S.O. 1990, c. L.3 (ontario.ca).
[3] "Dam" is defined under the Act as "a structure or work forwarding, holding back or diverting water and includes a dam, tailings dam, dike, diversion, channel alteration, artificial channel, culvert or causeway": see LRIA, section 1.
[4] Environmental Bill of Rights, 1993, S.O. 1993, c. 28 (ontario.ca).

Pursuant to section 10.10 of O.Reg.681/94[5] under the EBR, the five LRIA compliance orders are currently prescribed as Class II instruments. CELA notes that since the ERO posting does not attach or contain a link to its proposed draft amendment, it is unclear whether the MNRF is seeking changes to the general EBR regulation (O.Reg.73/94[6]), the instrument classification regulation (O.Reg.681/94), or both regulations. However, for the purposes of this submission, CELA presumes that the MNRF is just seeking an exemption from the application of Part II of the EBR, rather than changing or removing the designation of the LRIA orders as Class II instruments under the EBR.

(ii) Summary of the Proposal in ERO 019-4300

The ERO posting summarizes the regulatory proposal as follows:

> We are seeking comments on a proposal to amend O.Reg.73/94 to exempt five *Lakes and Rivers Improvement Act* (LRIA) orders that are prescribed proposals for instruments from the requirements of Part II of the *Environmental Bill of Rights* (EBR) except the requirement to post a decision notice.

In particular, the ERO posting proposes to exempt the following LRIA compliance orders from the application of Part II of the EBR:

> The proposal is that the exception would apply to the following five LRIA orders that are Class II proposed instruments:
>
> - Subsection 17(1) - order to repair or remove a dam
> - Subsections 17(2) - orders to rectify problems with a dam based on an engineer's report
> - Subsection 17(3) – order to do what is necessary in respect of a dam to further the purposes of the LRIA based on an examination and report of an engineer
> - Subsection 17(4) - order to construct a fishway at a dam
> - Subsection 36(2) - order to take steps to remove a substance or matter from a lake or river.

The rationale for the proposed exemption of such orders is stated in the ERO posting as follows:

> The main purpose of LRIA compliance orders is to prevent harm to people, property, and the environment. Expedient action to avoid injury or further damage to the environment is often required…

[5] O. Reg. 681/94: CLASSIFICATION OF PROPOSALS FOR INSTRUMENTS (ontario.ca).
[6] O. Reg. 73/94: GENERAL (ontario.ca).

> A quick response time is often critical to achieve the intended purpose of these orders in the public interest. In this context, posting proposed orders for public consultation in advance of issuing them may cause a delay that undermines the effectiveness of this compliance tool.

In support of this statement, the ERO posting offers some hypothetical examples of where "expedient action" may be needed in relation to matters under the LRIA:

- When an order is issued to repair or remove a dam that was constructed without approval, timing would be critical for obtaining plans and specifications of the dam and performing any necessary work. Requiring posting of an ERO proposal notice may cause delay that may pose additional risk to persons, property, or the environment.

- Delaying the examination of a dam by an engineer, receipt of engineer reports, or an owner making dam improvements, including the installation of a fishway, by requiring ERO proposal notice for minimum 30-day public review and comment period, could pose a risk to persons and the environment.

- Delaying the removal of a substance or matter that was thrown, deposited, or discharged in a lake or river or on its banks by requiring an ERO posting of a proposal notice could pose risk to persons and the environment.

At our April 9th meeting, MNRF staff offered the further hypothetical example of taking "expedient action" under the LRIA to require dam alteration, repair, or maintenance ahead of the spring freshet.

If the proposed regulatory exemption is implemented, the ERO posting indicates that the provincial Crown's duty to consult with Indigenous communities about LRIA orders will continue to exist:

> The posting and public consultation requirements under the EBR Act are separate and distinct from the Crown's duty to consult with Indigenous peoples. The ministry will continue to assess whether LRIA orders have the potential to adversely impact Aboriginal or treaty rights and will consult Indigenous communities where required.

Finally, the ERO posting's sparse Regulatory Impact Analysis expects the following outcomes from the proposal if implemented:

> We anticipate the environmental consequence of this proposal would be positive as action to stop and/or prevent environmental harm could be pursued more quickly.
>
> We anticipate that the social and economic consequences of the proposal would be neutral.
>
> This proposal would not create new administrative costs to businesses in Ontario.

3. Implications of Exempting the LRIA Instruments under Part II of the EBR

If the MNRF's regulatory proposal is implemented, then this would effectively exempt the five instruments from several key provisions under Part II of the EBR:

- Public notice of MNRF proposals to issue the LRIA orders will not be posted on the Registry
- There will be no public comment periods under the EBR on MNRF proposals to issue the LRIA orders
- The MNRF will not need to consider providing additional types of public notice or enhanced public participation opportunities for the LRIA orders
- The MNRF will not have to consider any public comments received or explain how they factored into the decision whether to issue the LRIA orders
- The MNRF will not be legally required to consider the environmental principles and commitments in its SEV when making decisions about the LRIA orders.

By any objective standard, these adverse consequences under Part II of the EBR constitute a significant rollback of important legislative safeguards and represent an unjustified exclusion of long-standing public participation rights that currently apply to these LRIA instruments.

We recognize that the MNRF is proposing to post notice of final decisions on LRIA orders, but CELA submits that the commitment to only provide *ex post facto* notice of such decisions is virtually meaningless and clearly unacceptable, particularly given the public and private interests that may be affected by LRIA compliance orders or the adequacy of terms/conditions contained in such orders. CELA's additional concerns about the MNRF proposal are outlined below.

If the proposed regulatory amendment also attempts to make a consequential amendment to O.Reg.681/94 to de-list the LRIA orders as prescribed Class II instruments, then this change will effectively exclude other key provisions of the EBR:

- The LRIA orders cannot used by Ontario residents as the basis for Applications for Review under Part IV of the EBR
- The LRIA orders cannot be used by Ontarians as the basis for Applications for Investigation under Part V of the EBR
- Non-compliance with the LRIA orders cannot serve as the basis for the statutory cause of action to protect public resources under section 84 of the EBR.

As discussed above, however, CELA assumes that the MNRF will not undertake a "bait and switch" approach by seeking amendments to O.Reg.681/94 since this change is not expressly mentioned in the ERO posting.

4. CELA's Comments on the Proposed Regulatory Exemption

(i) More Erosion of Participatory Rights under the EBR

CELA views the MNRF's regulatory proposal as another ill-advised example of the Ontario government's incremental erosion of public participation rights under the EBR that has occurred in recent years. As noted in the 2024 report by the Law Commission of Ontario on environmental accountability:[7]

> Since the EBR's enactment, public participation rights and accountability for environmental decision-making has been weakened by alternative compliance mechanisms.[8]

Similarly, in the annual EBR reports filed by the Auditor General of Ontario, identical concerns have been expressed about this unfortunate trend. In the 2023 report,[9] for example, the Auditor General correctly notes that "public participation in environmental decision-making is at the heart of Ontario's *Environmental Bill of Rights*," but goes on to state that "we have continued to find significant problems each year, particularly with lack of consultation – or meaningful consultation – on important environmental decisions." As noted by the Auditor General's 2023 report:

> The actions taken by the government demonstrate its intent not to respect and use public consultation as a source of input into its decision-making. Full and open consultation can give the government a better understanding of the costs, benefits and impacts of the proposals from commenters with different knowledge, experience, and perspectives, as well as ideas for other—potentially more effective—approaches to achieve the government's policy aims. It can also lead to greater public acceptance of the government's decisions.[10]

Accordingly, CELA submits that the MNRF's current attempt to sidestep Part II of the EBR fails to recognize the well-recognized benefits of ensuring public input in environmental decision-making. In our view, meaningful public engagement is the *sine qua non* of sound, credible, and equitable decision-making in the environmental context. This is particularly true in relation to LRIA orders which may affect the public interest, water quality and quantity, landowner or riparian rights, and public health and safety.

(ii) Lack of Evidence-Based Justification for the Proposed Amendment

As noted above, the ERO notice asserts that the amendment is necessary to "prevent harm to people, property, and the environment" because "expedient action to avoid injury or further damage to the environment is <u>often</u> required (emphasis added)." However, no statistical information or data has been presented in the ERO notice (or the Regulatory Impact Analysis) to describe the number, nature, or frequency of LRIA orders that have been issued on an expedited

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[7] A New Environmental Bill of Rights for Ontario: Final Paper (lco-cdo.org).
[8] *Ibid.*, page 25.
[9] Operation of the Environmental Bill of Rights, 1993 (auditor.on.ca).
[10] *Ibid.*, page 4.

basis (while presumably still complying with currently applicable *EBR* notice/comment requirements).

However, during our April 9th meeting, MNRF staff acknowledged that the LRIA orders have been rarely issued over the years. CELA has confirmed the relative infrequency of such orders by searching the current Registry (using the LRIA as the search filter), and only one notice was found for a proposed LRIA order pertaining to a private dam that was apparently non-compliant with current standards.[11] Interestingly, this LRIA order was first proposed by the MNRF in 2011 and received public comments, but it took until 2023 for the ERO notice to be updated to indicate that this proposal did not proceed.

Using the same filter for the LRIA and all instrument types under the Act, we also searched the archived notices on the former Registry and failed to find a single notice of a proposed LRIA order. However, it is possible that some of the older ERO notices of proposed LRIA orders may have been administratively removed from the Registry if they were outdated, withdrawn, or already fully implemented.

In any event, CELA's Registry search results suggest that LRIA compliance orders are uncommon, which contradicts the claim in the ERO posting that such orders are "often" required. It further appears that if LRIA orders have been issued in the past by the MNRF, then either they have either been framed as "immediate orders" (which are not EBR-prescribed instruments), relied upon the "emergency exception" under the EBR (see below), or were issued without complying with the public notice/comment requirements under Part II of the EBR.

During our April 9th meeting, MNRF staff suggested that the explanation for the small number of LRIA orders is that the time required to comply with Part II of the EBR serves as a "deterrent" to issuing these prescribed instruments. In reply, CELA submits that this anecdotal and unpersuasive argument lacks any supporting evidence or documentation. In addition, the MNRF has not identified any actual instances where the EBR prevented or delayed the issuance of LRIA orders. Moreover, CELA submits that posting notice of proposed LRIA orders for the minimum 30-day comment period under the EBR is not unduly onerous or unreasonable in the circumstances.

This is particularly true given the amount of time that may elapse before, during, and after compliance orders are issued under the LRIA. Based on information provided by MNRF staff at the April 9th meeting, it is CELA's understanding that the LRIA compliance program is largely reactionary (not proactive) insofar as members of the public may contact the MNRF with concerns about dams or other structures.

We further understand that upon receipt of such public complaints, MNRF staff will: (a) investigate in due course; (b) conduct a site visit if necessary; (c) enter into discussions or negotiations with the owner/controller of the dam or structure as may be appropriate; (d) determine if an order should be issued if there are unresolved engineering, safety, or environmental issues; and (e) draft, issue, and serve the order after internal MNRF review.

[11] 957293 Ontario Inc. - Order to remove, open, repair or improve a dam | Environmental Registry of Ontario.

Moreover, unless an "immediate order" is being utilized (see below), the LRIA requires the MNRF to provide at least 15 days' notice of any order that may cause the orderee to incur costs, and the orderee, in turn, can request the Minister to appoint an inquiry officer.[12] Production and disclosure among the inquiry parties must occur at least 20 days before commencement of the inquiry.[13] The officer shall conduct the requested inquiry and report back to the Minister on whether the proposed order "is fair, sound and reasonably necessary to achieve the purposes of this Act."[14] After considering the report, the Minister may, with reasons, issue, modify, or withdraw the order.[15] Under the LRIA, there are no prescribed deadlines for completion of the inquiry, filing the report with the Minister, or making the Minister's decision.

Given the foregoing steps and timelines under the LRIA itself, CELA is unaware of any compelling reason why the EBR public comment period cannot be triggered once the MNRF is actively considering the option of issuing a compliance order.

(iii) Availability of "Immediate Orders" and Other LRIA Tools

The LRIA already empowers the Minister to issue an "immediate order" if it is "necessary to protect any person from injury or property from damage."[16] These orders remain available for use by the Minister and are expressly excluded as a prescribed instrument under the EBR.[17] Given that the Minister continues to possess this wide-ranging discretion, there is no justification for the MNRF proposal to exclude most other LRIA orders from the public consultation requirements of Part II of the EBR in order to address threats posed by dams in a timely manner.

In CELA's view, either an urgent situation exists in relation to dams, or it does not. If it does, then section 11(5) of the LRIA provides sufficient authority to the MNRF to address or remedy the situation. If there is no urgent threat, then the Part II of the EBR should continue to fully apply to MNRF proposals to issue any of the five LRIA orders. In this regard, CELA submits that the overbroad exemption proposed by the MNRF inexplicably captures <u>all</u> LRIA compliance orders, including those which are not required for "expedient action." In essence, the MNRF proposal, if implemented, would enable the issuance of LRIA compliance orders without any public consultation under the EBR, even such orders are not needed for time-sensitive or emergency reasons.

At the April 9th meeting, it was suggested by MNRF staff that the scope of section 11(5) of the LRIA is too limited since it can only be used if there is an actual adverse impact arising from a dam or other structure or activity regulated under the Act. CELA respectfully disagrees with this unduly restrictive interpretation of section 11(5). On its face, section 11(5) enables the issuance of an immediate order if it is "necessary to protect any person from injury or property from damage." In our view, actual or ongoing damage is not the condition precedent for issuing an immediate order under section 11(5). Accordingly, section 11(5) of the LRIA is tailor-made for

[12] LRIA, section 11.
[13] LRIA, section 11(9).
[14] LRIA, section 11(10).
[15] LRIA, section 11 (14).
[16] LRIA, section 11(5).
[17] O.Reg.681/94, section 10.10.

exactly the types of hypothetical scenarios mentioned in the ERO posting where "expedient action" may be necessary to protect persons or property.

CELA further submits that aside from immediate orders under section 11(5), there are other LRIA tools that can be used to address actual impacts of, or potential risks posed by, facilities or activities which are regulated under the LRIA. For example, section 14 of the LRIA provides that "no person shall construct a dam in any lake or river in circumstances set out in the regulations without the written approval of the Minister for the location of the dam and its plans and specifications." The Minister has authority to refuse or conditionally approve the dam and its plans and specifications.[18]

Where an "emergency dam" is required to "prevent injury to persons, loss of life or loss of property," the approval requirements do not apply but the Minister can issue directions regarding the construction and removal of such dams.[19] These directions are not prescribed instruments under the EBR.

Section 16 of the LRIA prohibits the alteration, improvement, or repair of dams unless the plans and specifications have been approved by the Minister, who is again empowered to refuse the approval[20] or to impose binding and enforceable conditions in the approval. The types of dam-related activities that require approvals under section 14 and 16 are prescribed by O.Reg.454/96 (Construction).[21]

Taken together, CELA submits that these approval provisions provide the MNRF with wide-ranging regulatory oversight and control of the location, construction, operation, maintenance, alteration, or decommissioning of dams throughout Ontario. Despite the clear environmental significance of such approvals, they are not prescribed instruments under O.Reg.681/94. This means that if the MNRF proceeds with its proposed exemption of the five LRIA compliance orders from Part II of the EBR, then only Ministerial orders under section 22(2) (regulating the use of lakes/rivers or use/operation of dams) and section 23(1) (maintaining, raising, or lowering water levels) will remain as prescribed instruments which are subject to Part II of the EBR.

If dam construction has been started without the requisite approval under the LRIA, the Minister may issue an order that requires the dam owner to: (a) stop the activity; (b) furnish, within the time specified in the order, the diagrams, statements, plans and specifications, reports or other information that the Minister would be entitled to have before issuing an approval; and (c) change or remove, within the time specified in the order and at the owner's expense, whatever may have been done.[22] Such orders are not prescribed instruments under the EBR. If the required work is not completed by the dam owner, the Minister may undertake the work and recover the costs from the orderee.[23]

In addition, the LRIA enables the Minister to approve the location, plans, and specifications for dams that have not been previously approved under the Act, provided that the Minister opines that

[18] LRIA, sections 14(5) and (7).
[19] LRIA, section 14(11).
[20] LRIA, section 11(1).
[21] O. Reg. 454/96: CONSTRUCTION (ontario.ca).
[22] LRIA, section 17.1.
[23] LRIA, section 17.1(2) and (3).

issuance of such retroactive approvals is "compatible" with the purposes of the Act.[24] This approval is not a prescribed instrument under the EBR, and the Minister may impose binding and enforceable conditions in such approvals and may rescind or modify any previous orders issued in relation to the dam.[25]

Under section 23.1 of the LRIA, the Minister may order dam owners or approval applicants to: (a) prepare or amend a plan for the operation and maintenance of the existing or proposed dam, other structure, or work; or (b) participate in the preparation or amendment of a plan referred to in clause (a). These orders are not prescribed instruments under the EBR. If the required work is not completed by the dam owner, the Minister may undertake the work and recover the costs from the orderee.[26]

In summary, CELA submits that in the proposal to exempt the five LRIA orders from Part II of the EBR, the MNRF has given inadequate consideration to the availability of other orders, directions, and approvals under the LRIA that: (a) are not prescribed instruments under the EBR; (b) do not trigger public notice/comment opportunities under Part II of the EBR; and (c) provide ample authority to address the types of hypothetical scenarios conjured up by the MNRF as the underlying rationale for the exemption proposal.

(iv) The EBR "Emergency Exception" to Public Participation

The rationale for the MNRF's proposed regulatory exemption becomes even more questionable because the *EBR* already has a built-in exception to public consultation for instruments (such as LRIA orders) that may be needed on an urgent basis to address:

- danger to the health or safety of any person
- harm or serious risk of harm to the environment
- injury or damage or serious risk of injury or damage to any property (emphasis added).[27]

CELA submits that the existence of the EBR's "emergency exception" undermines the MNRF position that LRIA orders should be wholly excluded from Part II of the EBR in order to address urgent situations that threaten public safety, property, or the environment.

Based on information conveyed by MNRF staff at our April 9th meeting, it appears that the Ministry believes section 29 of the EBR is limited to situations where damage has already occurred, and an instrument is warranted in response to the situation. CELA disagrees with this narrow interpretation of the EBR's "emergency exception," primarily because section 29 is not restricted to instruments needed to address actual or ongoing harm. To the contrary, the section 29 exception extends to instruments that are directed at "risks" that may result in harm to the environment, people, or property. Accordingly, LRIA compliance orders used in a preventative manner to anticipate and mitigate imminent harm clearly fall within the scope of the "emergency

[24] LRIA, section 17.2(1).
[25] LRIA, section 17.2(2) and 17.3.
[26] LRIA, section 23(2).
[27] EBR, section 29.

exception" under the EBR. Conversely, LRIA compliance orders that are being proposed for non-emergency situations should continue to be subject to Part II of the EBR.

(v) The LRIA Orders are Environmentally Significant and Warrant Public Participation

Under O.Reg.681/94, the five types of LRIA orders listed in the ERO notice are classified as Class II proposals under the EBR. This designation has remained intact since the MNRF carried out its instrument classification exercise over two decades ago.

Pursuant to the steps prescribed by sections 19 and 20 of the EBR, the MNRF's classification process considered the environmental significance of its instruments, including:

- the extent and nature of the measures that might be required to mitigate or prevent any harm to the environment that could result from the decision
- the geographic extent, whether local, regional or provincial, of any harm to the environment that could result from the decision[28]
- the nature of the private and public interests, including governmental interests, involved in the decision
- any other matter that the minister considers relevant.

Moreover, the *EBR* expressly required the MNRF to "classify a type of proposal as a Class II type of proposal <u>if the minister considers that the public notice and public participation requirements of sections 23 to 25 ought to apply to it because of the level of risk and extent of potential harm to the environment involved</u> (emphasis added)"[29] Since the LRIA orders have been properly classified as Class II instruments due to their environmental significance, they should not now be wholly excluded from Part II of the *EBR*, as proposed in the ERO posting.

CELA further notes that there is nothing in the ERO posting that suggests these LRIA orders were wrongfully designated as Class II instruments under O.Reg.681/94. Similarly, the ERO posting does not appear to be arguing that this existing classification should be changed or eliminated at this time. In CELA's view, there is no new information, or any material change in circumstances, that calls into question the MNRF's original (and correct) determination that these instruments are environmentally significant <u>and</u> warrant public participation.

(vi) Other Statutory Compliance Orders are Subject to Part II of the EBR

In CELA's view, there is nothing unique or exceptional about the LRIA orders that warrant an exemption from Part II of the EBR. Other site-specific environmental orders that are available under other provincial statutes remain fully subject to Part II of the *EBR* despite the occasional need to issue an order on an expedited basis where warranted.

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[28] EBR, section 20(2), clause 5.
[29] EBR, section 20(2), clause 7.

For example, Directors in the Ministry of the Environment, Conservation and Parks (MECP) have authority to issue binding orders to require the control, remediation, or prevention of harm to the environment or people caused by actual or potential discharges of contaminants (e.g., sections 7, 10, 17 and 18 of the *Environmental Protection Act* (EPA). All these orders are classified as Class II instruments,[30] and therefore remain subject to Part II of the EBR (unless the above-noted "emergency exception" is invoked by the MECP on a case-by-case basis via an ERO posting).

During our April 9th meeting, MNRF staff suggested that the closest analogue to LRIA compliance orders are waste removal orders issued by MECP Directors under section 43 of the *Environmental Protection Act* (EPA). While CELA generally agrees that this EPA order superficially resembles the section 36(2) order under the LRIA to remove materials deposited into waterways or shorelines, we note that section 43 orders are, in fact, prescribed Class II instruments but are exempted from Part II of the EBR.[31]

Nevertheless, there are significant legal differences between these types of LRIA and EPA orders. For example, unlike LRIA orders under section 36(2), an EPA waste removal order can be issued to a broader class of persons (i.e. current or former owners/occupants). Similarly, this EPA order is subject to a statutory appeal to the independent Ontario Land Tribunal, which holds a *de novo* public hearing and decides whether the order should be upheld, varied or quashed.[32] At the same time, given their nature, scope, and effect, the various compliance orders available under section 17 of the LRIA are not substantially equivalent to waste removal orders under section 43 of the EPA, and therefore should not be wholly exempted from Part II of the EBR.

CELA further notes that there are numerous examples of compliance orders under Ontario's environmental laws that can be used to address serious time-sensitive matters but are currently subject to Part II of the EBR. These prescribed instruments include:

- Orders to suspend registration in the MECP's Environmental Activity and Sector Registry due to contraventions of the EPA[33]
- Orders under various sections of the *Safe Drinking Water Act* in relation to imminent drinking water health hazards[34]
- Orders under section 97 of the EPA in relation to the cleanup of spilled pollutants[35]
- Orders under the *Ontario Water Resources Act* in relation to discharges of sewage or other materials into water[36]

[30] O.Reg.681/94, section 5.
[31] O.Reg.73/94, section 15.2.
[32] EPA, sections 140 and 145.2.
[33] O.Reg.681/94, section 2(2).
[34] O.Reg.681/94, section 4.1.
[35] O.Reg.681/94, section 5(2).
[36] O.Reg.681/94, section 6.

- Stop orders, control orders, and cleanup/decontamination orders under the *Pesticides Act*[37]

- Orders under various sections of the *Mining Act* in relation to mines, closure plans and mine hazards.[38]

Accordingly, CELA submits that little or no weight should be given to the MNRF's claim that it cannot undertake "expedient action" to address dam-related impacts or risks unless its compliance orders are fully exempted from Part II of the EBR. In our view, if other Ministries' compliance orders are subject to Part II of the EBR, then so should the five LRIA orders. If a truly urgent matter is encountered by the MNRF, then either an "immediate order" can be issued under section 11(5) of the LRIA or the MNRF can invoke the "emergency exception" under the EBR where appropriate factual grounds exist.

(vii) The Exemption Proposal Contravenes the MNRF SEV

Section 11 of the EBR imposes a duty on the Minister to "take every reasonable step to ensure that the ministry statement of environmental values is considered" when environmentally significant decisions are made within the MNRF.

Among other things, the MNRF's SEV[39] contains several commitments to public and Indigenous engagement whenever the Ministry is making environmentally significant decisions. For example, the SEV states that "MNRF believes that public consultation and participation is vital to sound environmental decision-making," and that "the ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment." Accordingly, CELA submits that the proposal to wholly exclude the five environmentally significant LRIA orders from public notice/comment requirements under the *EBR* is clearly inconsistent with the MNRF's SEV.

More generally, the MNRF's SEV contains important environmental principles and approaches that are relevant to LRIA instrument decisions:

> The Ministry of Natural Resources and Forestry (MNRF) is committed to applying the purposes of the EBR when making decisions that might significantly affect the environment.
>
> As it develops Acts, regulations, policies and instruments, the ministry applies the following principles:
>
> a. The ministry strives to identify and manage healthy, resilient, and diverse ecosystems to provide for sustainable natural resource use.

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[37] O.Reg.681/94, section 7.
[38] O.Reg.681/94, section 12.
[39] Statement of Environmental Values: Ministry of Natural Resources and Forestry | Environmental Registry of Ontario.

b. The ministry recognizes the finite capacity of ecosystems and takes into account environmental, social and economic values, impacts and risks.

c. The ministry relies on the best available knowledge, including science, Traditional Ecological Knowledge, and other information to improve natural resource management and responsible use.

d. The ministry exercises caution in the face of uncertainty and seeks to avoid, minimize or mitigate harm to the environment.

e. The ministry provides for open and accessible engagement opportunities that promote awareness and understanding of natural resource management and use.

f. The ministry seeks to make natural resource management and use decisions through consideration of input from the public, Indigenous peoples, stakeholders, and partners.

During our April 9th meeting, MNRF staff indicated that the SEV is taken seriously by the Ministry, but they indicated that the LRIA purposes are considered when making decisions whether to issue instruments under the Act. The LRIA purposes are framed as follows:

> The purposes of this Act are to provide for,
>
> (a) the management, protection, preservation and use of the waters of the lakes and rivers of Ontario and the land under them;
>
> (b) the protection and equitable exercise of public rights in or over the waters of the lakes and rivers of Ontario;
>
> (c) the protection of the interests of riparian owners;
>
> (d) the management, perpetuation and use of the fish, wildlife and other natural resources dependent on the lakes and rivers;
>
> (e) the protection of the natural amenities of the lakes and rivers and their shores and banks; and
>
> (f) the protection of persons and of property by ensuring that dams are suitably located, constructed, operated, and maintained and are of an appropriate nature with regard to the purposes of clauses (a) to (e).[40]

In CELA's view, the LRIA purposes reflect public interest considerations, but they are not as comprehensive or substantive as the MNRF's SEV and do not include the precautionary principle. Moreover, as a matter of law, the purposes of the LRIA are merely aids to interpretation, and do not impose any enforceable duties or obligations upon the MNRF. In contrast, the EBR expressly requires the MNRF to consider the SEV during its decision-making, including decisions on the five LRIA compliance orders. In our view, this is precisely why the five LRIA orders should remain subject to Part II of the EBR for transparency, credibility, and accountability purposes.

[40] LRIA, section 2.

5. Conclusion and CELA's Recommendation

In conclusion, it is unclear to CELA why it is now suddenly necessary, at least according to the MNRF, to exempt the five LRIA orders after they have been prescribed instruments subject to Part II of the EBR for decades.

As discussed above, most LRIA orders, directions, and approvals are already exempt from Part II of the EBR because they are not prescribed instruments under O.Reg.681/94. In our view, it is therefore contrary to the public interest purposes of the EBR[41] to grant the MNRF additional exemptions from EBR notice/comment requirements, which, if implemented, would only leave two types of LRIA orders subject to Part II of the EBR. In our above-noted Registry searches, we did not find any ERO notices for any of these two orders (section 22(2) and 23(1) orders under the LRIA).

Accordingly, CELA calls upon the MNRF to withdraw and re-consider the fundamentally flawed proposal outlined in ERO 019-4300. In our view, if the MNRF is serious about complying with its SEV commitment to meaningful public participation in environmental decision-making, then this new regulatory exemption cannot proceed in its current form.

Moreover, since the MNRF's SEV recognizes the need for, and benefits of, public consultation, the MNRF should undertake an open and accessible review of its current instrument classification under O.Reg.681/94 to determine whether and how other LRIA tools (e.g., approvals under section 14, 16, and 17.2) should be prescribed under the EBR and subject to Part II notice/comment requirements. This periodic review of instrument classification is mandated by section 21 of the EBR and should be undertaken forthwith by the MNRF with meaningful public input.

We trust that CELA's findings, conclusions, and recommendations will be duly considered as the MNRF contemplates its next steps in relation to the five LRIA compliance orders. If you have any questions about CELA's comments, please contact the undersigned at your earliest convenience.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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cc. Tyler Schulz, Assistant Auditor General/Commissioner of the Environment

[41] EBR, sections 2 and 3.