

**Canadian Environmental Law Association**  
**L'Association canadienne du droit de l'environnement**

517 College Street, Suite 401, Toronto, Ontario M6G 4A2  
Telephone (416) 960-2284  
Fax (416) 960-9392

**SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL  
LAW ASSOCIATION TO THE MINISTRY OF NATURAL  
RESOURCES REGARDING THE DRAFT WETLAND  
POLICY STATEMENT**

**Publication #204**

**ISBN# 978-1-77189-526-2**

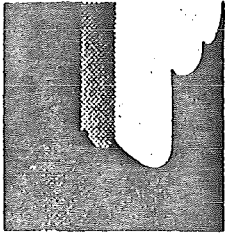
Prepared by:

Zen Makuch  
Counsel

Richard D. Lindgren  
Counsel

December 1991

CELA BRIEFS FILE NO. 204.  
CANADIAN ENVIRONMENTAL LAW  
ASSOCIATION.  
MAKUCH, ZEN.  
CELA BRIEF NO. 204; Sub...RN7937



Canadian Environmental Law Association  
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2  
Telephone (416) 960-2284  
Fax (416) 960-9392

December 18, 1991

Mr. Doug Hagan, Manager  
Wildlife Policy Branch  
6th Floor, ICI House  
90 Sheppard Ave. East  
North York, Ontario  
M2N 3A1

Dear Mr. Hagan,

RE: DRAFT WETLANDS POLICY STATEMENT

Further to our recent meetings and correspondence, we are writing to reiterate our concerns about the draft Wetlands Policy Statement. We have also enclosed a copy of our proposed policy statement, which we offer for the Ministry's consideration. We acknowledge that it may not be immediately possible to implement some of the provisions contained in our policy statement. Nevertheless, our policy statement sets out the clear policy direction that the government must head towards when revising its own policy statement and reforming the land use planning process in general.

As you know, it is our view that the latest Draft Policy Statement falls far short of its potential as a wetland protection instrument. Several of its key provisions are fundamentally flawed and it fails to provide the necessary measures for preventing any further wetland losses. It is our position that the Draft Policy Statement needs to be rewritten in order to ensure that wetlands are adequately protected throughout Ontario.

Accordingly, this letter attempts to summarize our main concerns with the Draft Policy Statement. In addition, due to our fundamental disagreement with the approach taken in this Draft Policy Statement, we have attached a copy of our own policy statement, which has attracted considerable support from a number of environmental and conservation groups throughout Ontario.

When you review our proposed policy statement, you will immediately note the similarity between it and the version which was produced by the MNR in April of this year. It is our contention that the April document had considerable merit, despite some minor difficulties which we have addressed in our version. Frankly, we

are puzzled by the government's decision to replace the April document with one that fails to sufficiently protect our wetlands. The following analysis provides a summary account of the deficiencies within the MNR's current draft Policy Statement.

## A. Critique of MNR Draft Policy Statement

### 1. Objective

The Policy Statement does not contain a section which identifies fundamental objectives. Such provisions should be inserted as a means of clarifying the tone and intent of the Policy Statement, thereby making it more coherent. If the objective of the Policy Statement is clear and unequivocal, then this will also facilitate its implementation by the relevant authorities.

It is submitted that "no loss of wetland area or function" should serve as the guiding objective of the Policy Statement.

The April version also included a valuable statement which provided that the goal of the policy "is to ensure that wetlands are identified and adequately protected through the land use process." This direction should also form part of an "Objective" section.

### 2. Interpretation

This portion should use imperative language of the kind that requires all planning authorities subject to the Planning Act to apply the Policy Statement in their decision-making processes. As it stands, the "Interpretation" section gives no encouragement to planning authorities to protect wetlands. Policy #1 addresses this concern inadequately through a half-hearted gesture which suggests that planning authorities merely "consider the implications" of their actions as they pertain to provincially significant wetlands.

In addition, to the extent that a municipality may protect provincially significant wetlands, it may be less inclined to protect other significant wetlands. For this reason the "Interpretation" section should provide the direction that the Policy Statement should be applied to other wetlands.

### 3. Background

Our greatest concern with this section focuses on the necessity of elaborating upon the discussion of wetlands functions, values and losses. Under this heading we would also add discussion of

Ontario's regulatory and management framework and the rationale for a strong Policy Statement. Once again some reference might be made to the protection of wetlands that are not provincially significant but may be deserving of protection because of other functions or values. As it stands, the discussions raised under each of the "Background" sub-headings is simply too short to be informative or persuasive.

#### 4. Definitions

Our Policy Statement departs markedly from the Draft Policy Statement in the "Definitions" section. This is especially true with regard to the definition for adjacent lands, compatible development and land uses, development, environmental impact study, provincially significant wetland and wetland functions. We have also added definitions for buffer zones, land use and restoration as further wetland protection devices.

Among our most serious concerns with the MNR's definitions are the following: First, no definition of "land use" is offered yet "new land uses" which adversely affect wetlands may be permitted pursuant to Policies 2 and 3. In our view, land uses should be defined very broadly to include human undertakings and activities and then a list of exceptions would be applied (i.e. certain harvesting activities, scientific research, educational activities, passive recreational activities such as fishing, etc.).

Secondly, the definition of "compatible land use or development" is too inclusive. It is felt that this deficiency can be remedied by adding the requirement that compatible land uses or development should not result in any loss of wetland area or function. In this way the definition will be more consistent with overall wetland protection objectives.

Third, the definition of "development" places too much emphasis on buildings and structures. Buildings and structures do not necessarily pose the greatest threat to wetlands. There are other development activities which do not require buildings which will still result in wetlands destruction. In order to deal with this issue, we recommend the addition of other activities, such as dredging, excavation, drainage, and vegetation removal, to the definition of "development".

Fourth, a less ambiguous definition of "wetland functions" is in order. What is meant by social/economic interactions and how are they measured? Does it mean that the more a wetland is commercialized or intensively used, the greater its inherent value? This is an important definition to clarify because decisions pertaining to land use compatibility will rely on the definition of wetland function.

Fifth, the definition of "wetland complex" does not allow for the protection of the whole wetland complex. It leaves the land between "wetland areas" within a complex unprotected, which may result in a significant threat to the integrity of the wetlands within the complex and to the wider "wetland complex" itself.

Sixth, with respect to the definition of "wetlands" it is submitted that the last sentence which reads "lands being used for agricultural purposes are not considered to be wetlands" should be taken out. It is important that we review the application of this Policy Statement to drainage activities in agricultural lands.

Seventh, the definition of "environmental impact study" must be clarified and expanded. Normally, other agencies in the form of provincial ministries, federal agencies or the public may be involved in a commenting process leading up to the approval stage. These agencies are part of the decision-making process. Is it the intention of the present definition that they should be excluded? We also submit that the definition should set out the minimum requirements for an EIS (i.e. the issues of compatibility, mitigation measures, environmental impacts and the need for the proposed development). We also submit that the EIS requirement must apply to both northern and southern Ontario.

Finally, part (b) of the MNR definition for "Provincially Significant Wetland" is puzzling when it refers to a (future) evaluation system. What would such a system look like? What criteria would a wetland have to meet in order to pass the provincially significant threshold? This concludes the section on our major definitional concerns. Other subtle definition changes are proposed in our draft policy statement and for this reason we request that you review them.

## 5. Policy 1

As stated above, that the language of this policy provides a weak message to planning decision-makers as to how the Policy Statement should be applied. In addition, it is our opinion that "considering the implications of one's actions" further weakens the intent of s.3(5) of the Planning Act itself. We would suggest the language of "shall have regard to" (though still not as strong as we would like) provides for something more than a mere "consideration of implications". This rests on our view that the Ontario Legislature used the imperative word "shall" in s.3(5) rather than the non-imperative "may" as a means of giving stronger direction to planning bodies. Our message here is quite simple and direct. All planning decision-makers must identify and protect provincially significant wetlands (our definition).

## 6. Policy 2

As stated above, "new land uses" is not defined and as a result we cannot fully understand the application of this concept in Policy #2 and #3. Similarly, the definitions of "land use" and "compatibility" will inevitably lead to confusion, debate and a multiplicity of OMB hearings, creating yet another unnecessary expense for the province and public interest groups. It is submitted that as a matter of principle, no form of development and no new land use may be permitted if it threatens or destroys the area or function of any provincially significant wetland.

For example, in the Constance Creek Wetland case, the proposed "land use" policy would have allowed the developer to substantially gut the wetland, removing any trees and vegetation. According to the MNR Policy Statement, if a new land use does not include a building or filling activities then virtually any use may be allowed. It is submitted that the only uses which should be permitted are those which already exist, which for the most part includes conservation or recreation uses.

#### 7. Policy 3

The phrase "generally prohibited" leaves much to be desired since it provides a considerable loophole to any prohibition on development or new land uses as they pertain to Provincially Significant Wetlands in the Boreal Region. When added to the MNR assertion that northern wetlands are at less risk, it is clear that the potential approval of development applications will result in further destruction of Provincially Significant Wetlands in the north. This position is simply untenable for those who support effective wetlands protection programs throughout the province. This loophole must be eliminated, and provincially significant Boreal wetlands must be given the same level of protection as southern Ontario wetlands.

In addition, much of the Boreal Region is Crown Land. There must be some clarification as to whether this Policy Statement is intended to apply to such lands. It is our position that the Policy Statement should bind the Crown and should apply to wetlands on Crown Lands.

#### 8. Policy 4

Policy 4 represents another significant gap in wetlands protection objectives, one which was not evident in the MNR's 1989 draft policy statement. As discussed above in the critique of the definition "Wetland Complex", if lands within a "Wetland Complex" which separate "Wetland Areas" are not protected, the overall integrity of the complex and the constituent wetlands may be threatened by development. Accordingly, we cannot help but expect that, as development of unprotected areas within a Wetland Complex

occurs, the tendency to leave other parts of the complex unprotected (or to downgrade the classification) will increase.

#### 9. Policy 5

Here, the primary concern is over the lack of any meaningful buffer zone requirement. It is also noteworthy that the MNR's proposed test of "loss of wetland area" does not preclude the destruction of critical wetland values or functions through the incursion of development and other uses immediately adjacent to wetlands. In these situations the wetland area may remain relatively intact but the wetland itself could be functionally degraded.

Many American jurisdictions have recognized the necessity of providing vegetative buffer zones as an important component of wetlands protection. This has also been recognized by the Niagara Escarpment Commission which has proposed vegetative setbacks for all wetlands within the Niagara Escarpment Plan. It is significant that the MNR has apparently accepted this proposal by the NEC.

It is submitted that significant portions of lands adjoining wetlands must be preserved in their natural state to protect against off-site migration of development and other land use impacts on Provincially Significant Wetlands. As you will note, we have suggested a 120 m buffer zone in our policy statement. This buffer zone requirement must be specified in the Policy Statement and cannot be left to the Implementation Guidelines, which carry no weight in law.

#### 10. Policy 6

This section is unclear and provides little assurance in achieving wetlands protection objectives in the face of public sector development activities. Paragraph 2 of Policy #6 could be interpreted to mean that destruction of Provincially Significant Wetlands at the hands of the public sector is inevitable and that mitigation of damage is the best that can be done. The range of alternatives to locating such utilities and facilities in Provincially Significant Wetlands is sufficient to warrant an outright prohibition of these types of development in Provincially Significant Wetlands.

There is the further problem that private proponents often play a significant role in building such utilities and facilities. For example, at Lagoon City the sewer and water infrastructure is being built by the developer. In the Leitrim case the developer is building a road through a Provincially Significant Wetland. Thus, Policy 6 must be crafted in a way which regulates such infrastructural activities even when they are undertaken by the private sector.

## 11. Implementation

To date, a copy of the "Wetlands Implementation Guidelines" referred to in this section has not been made available to the public. Therefore, we are left with an important gap concerning exactly how the Policy Statement will work. As we have discussed, we would request that the Implementation Guidelines be available for public review and comment before finalization.

In our view, the Wetlands Implementation Guidelines should, inter alia, require municipalities to identify and protect wetlands through available land use tools such as official plans, zoning by-laws, plans of subdivisions, consents, minor variances and other planning documents. Where a municipality fails to comply with this requirement, the MNR could, inter alia, be empowered to apply for an order of mandamus forcing the municipality to do so, or alternatively, for an order of prohibition which would quash any decision by the municipality taken in defiance of the Policy Statement.

Furthermore, we strongly suggest that this Policy Statement should take precedence over other Policy Statements. For example, in the future developers and others may seek to justify wetlands destruction on affordable housing grounds pursuant to the Affordable Housing Policy Statement. In this case the Wetlands Policy Statement should prevail due to the multiple alternatives to siting an affordable housing project in the middle of a Provincially Significant Wetland. In short, resource protection imperatives must predominate over resource production or development imperatives in cases of conflict.

### B. General Remarks about Wetlands Protection

The draft Policy Statement does not apply to Class 4 to 7 wetlands and ignores the existence of small wetlands. It is likely that, taken collectively, these small wetlands are more important to flora and fauna than are many class 1, 2, and 3 wetlands yet they have not been part of any inventory, let alone being deemed worthy of attention under the Policy Statement. These small wetlands are often of heightened significance in urban areas where they represent the only remaining natural habitats in an otherwise overdeveloped landscape.

The Policy Statement also needs to encourage ecosystem-based enhancement and restoration projects in wetland areas. Restoration should be mandatory when wetlands are destroyed or damaged through the contravention of the Policy Statement. The person(s) responsible for the loss or destruction should be liable to



undertake and pay for restoration.

More generally, it is unfortunate that the draft Policy Statement addresses an important but relatively small cause of wetlands loss and degradation in Ontario, viz. activities requiring approval under the Planning Act. A 1987 Environment Canada study of wetland losses in southern Ontario (Working Paper #48: Wetlands Distribution and Conversion in Southern Ontario) documented that of the recent wetland conversions to other land uses, 81 per cent were converted to agriculture. Accordingly, it is clear that the draft Policy Statement does not attempt to address the most important threat to wetlands protection, namely grading, draining and filling for agricultural purposes.

In this regard, the Ministry of Agriculture and Food must become an active participant in the drafting and implementation of wetland protection policies, and the Policy Statement's applicability to the drainage of agricultural land must be confirmed. Activities and approvals under the Drainage Act must also be re-examined and reformed in light of wetland protection imperatives.

However, the goal of wetlands protection cannot be achieved by a policy statement alone. Hence, the MNR must play a lead role in enforcing existing statutes and regulations in a timely and effective manner to secure wetland protection. In so doing, the MNR should also encourage other ministries and agencies (i.e. MMA, MOE, and Conservation Authorities) to use their respective jurisdictions to the maximum extent possible in order to achieve wetlands protection objectives. The Province should also extend the Conservation Land Tax Program to all classes of wetlands, and should enhance public education and stewardship programs.

At the same time, the Province must immediately develop and implement comprehensive wetlands protection legislation. Over the past two decades, the United States has set the standard for wetlands protection through the introduction of wetlands legislation in several states and at the federal level. Ontario must also develop appropriate wetlands legislation that applies to all wetlands within the province; that prohibits the further destruction or degradation of significant wetlands; and that provides for the restoration of wetlands that have already been lost or degraded. The statute should also establish a permit-issuing process to regulate land uses and activities which require buildings, structures or alterations of the natural environment within or beside wetlands. CELA's research regarding American wetlands legislation will be provided to you shortly.

In conclusion, over the past ten years the Ontario Government has been attempting to implement wetland protection policies in Ontario. The current draft Policy Statement is one of its weakest efforts to date. It has been shown to lack commitment, coherence, and credibility. The loopholes are considerable, leaving CELA at a

loss as to why the superior April draft was abandoned in favour of an utterly deficient document.

Wetlands can no longer be treated as casualties of the planning process, particularly in light of the historic loss of these valuable natural resources and their continued loss and degradation. We cannot help but see the latest Draft Policy Statement as an affront to widespread public support for wetlands protection and, more generally, for stronger environmental regulation. The time has come for the present government to ask itself whether it is committed to protecting wetlands in this province. If it is, then it must immediately improve and implement the Draft Policy Statement. In addition, the MNR must also start the development of wetlands protection legislation.

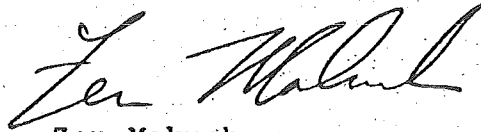
We would be pleased to meet you to discuss this letter or our attached policy statement.

Yours sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Richard D. Lindgren  
Counsel



Zen Makuch  
Counsel