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CANADIAN ENVIRONMENTAL LAW  
ASSOCIATION.  
CELA Brief No. 319A; Re: MNR proposal for an  
instrument classification regulation  
...RN23058

CANADIAN ENVIRONMEN  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

January 16, 1998

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**BY FAX**

Dear Mr. Freistatter:

**Re: MNR Proposal for an Instrument Classification Regulation  
EBR Registry Number RB7E6001.P**

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We are writing to provide the comments of the Canadian Environmental Law Association (CELA) on the revised instrument classification regulation proposed by the Ministry of Natural Resources (MNR) as required under the *Environmental Bill of Rights, (1993)* (EBR). These comments rely and draw upon our submission dated May 12, 1997, which addressed the MNR's original proposal for an instrument classification system. We continue to stand by the comments made in that submission as many of the concerns we raised have not been addressed appropriately by the revised proposal. Therefore, we strongly urge the Ministry to reconsider that submission. It is not our intention in this letter to repeat everything that was thoroughly canvassed in our original submission. The following simply highlights our concerns and addresses revisions contained in the new proposal.

In addition to the comments of our submission dated May 12, 1997, CELA's concerns may be summarized as follows:

1. MNR continues to unduly delay the promulgation of the classification regulation;
2. The proposed classification continues to rely heavily upon the exemption granted under section 32 of the EBR, contrary to the spirit of the EBR and the Ministry's own Statement of Environmental Values; and
3. The MNR's classification system still fails to prescribe environmentally significant instruments and fails to provide a rationale as to how the system was developed.

## **1. MNR's Delay in Promulgating the Classification Regulation**

In our earlier submission, CELA raised the concern that MNR was not moving quickly enough in promulgating the classification regulation. The events that have transpired since then have only served to reinforce this position. The revised proposal was released November 10, 1997, a full six months after comments were due in on the original proposal. Moreover, MNR has been under a statutory duty to promulgate this regulation "within a reasonable time" since April 1, 1996. In all likelihood, it will be over two years after this date that this regulation is passed and the citizens of Ontario are able to exercise their rights accordingly. This simply cannot be characterized as "within a reasonable time".

The MNR's indifference to the EBR is further evidenced by the lack of forward thinking demonstrated by the Ministry. For instance, the proposal classifies instruments under the *Fish and Game Act*. Yet, the *Fish and Game Act* has since been replaced by the *Fish and Wildlife Conservation Act, 1997*, which received third reading on December 18, 1997. Once proclaimed, the classification system will already be out of date. This being so, the MNR failed to propose a new classification system for the *Fish and Wildlife Conservation Act, 1997*, either in this proposal or in the proposal for a new regulation under the *Fish and Wildlife Conservation Act, 1997* (see EBR registry posting RB8E6002.P, posted January 12, 1998).

One can only conclude that MNR considers the EBR to be a low priority. Therefore, CELA strongly urges the MNR to move expeditiously in promulgating the classification regulation and in keeping the regulation constantly updated. CELA also requests the Ministry to devote the necessary time, staff, and resources to comply with the legal requirements of the EBR.

## **2. MNR's Continued Reliance on Section 32 (the "EA Exemption")**

In the revised proposal, the Ministry continues to rely upon section 32 of the EBR to exempt numerous instruments from the public participation requirements. CELA submits that this approach runs contrary to the spirit of the EBR. The intention of section 32 was to avoid subjecting a decision to public participation twice. However, we note that many of MNR's Class EA's and exemptions under the *Environmental Assessment Act* have not been subject to recent public scrutiny.

For instance, the MNR Class EA for Small Scale Projects was given an approval in 1992 for a period of four years. That approval has since been extended for a period of 18 months, now set to expire in April, 1998 and, in all likelihood, will require yet another extension. The MNR is thus relying upon an approval granted in 1992 to justify a current exemption from the public participation requirements of the EBR. In our opinion, this frequency of public scrutiny of MNR activities is wholly inadequate .

Similarly, the MNR operates under a large number of EA exemptions. These exemptions were passed by cabinet and have never received any public comment. Many are also outdated. MNR

exemption order 26/7 was originally passed in 1980 and has received continuous extensions since that time. Again, the MNR is relying upon an outdated exemption to escape public scrutiny of its activities. It is our opinion that the public interest would be better served if the MNR was held publically accountable for decisions made under these exemptions.

Finally, relying upon the section 32 exemption runs contrary to the intentions of a Class EA and the original EA exemptions themselves. We note that Class EA's usually contain bump-up provisions to enable the public to participate in environmentally significant decisions. It would seem that the public participation requirements of the EBR could be used creatively to inform the public of this opportunity, even if the MNR is not strictly required to comply with Part II of the EBR. Similarly, an exemption order will often contain provisions stating that the exemption is granted upon the condition that necessary public consultation is carried out.<sup>1</sup>

It is CELA's opinion that MNR is making use of every occasion to avoid public participation in the Ministry's decision-making process. This is disappointing and contrary to the Ministry's own Statement of Environmental Values, where it is stated on page 6 that "the Ministry also recognizes the need for openness and consultation in decision-making which may significantly affect the environment". CELA seriously questions the Ministry's commitment to this objective.

### **3. Classification of Instruments**

CELA still has concerns regarding the classification of instruments proposed by MNR. We do recognize that the revised proposal is far more comprehensive than the original and includes many more decisions. This progress will enable the public to participate in many more decisions which have the potential to significantly affect the environment.

Nevertheless, it is troubling that no explanation was provided as to why certain instruments were classified and others were not. We note that while many instruments were added, some were deleted from the original proposal. Others were reclassified, either from Class I to Class II, or vice versa. Finally, some of the instruments that CELA recommended to be classified remain unclassified. It would be helpful if the rationale as to why each instrument was classified the way it was, or was not, was provided. As it stands now, the public is left uncertain as to how the MNR developed its classification system. As for those instruments that were not classified, or those that were classified as Class I when CELA recommended that they be classified as Class II, we still stand by our original submission.

The MNR classification system also exempts a number of instruments from the public participation requirements of the EBR. There are numerous exceptions provided for under the *Niagara Escarpment Planning and Development Act*. Under the *Oil, Gas, and Salt Resources Act*, a number of the instruments apply only to activities that occur in close proximity to "a

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1. See, for example, Ontario Regulation 83/94 - Exemption MNR-59/2, condition 4.

natural heritage feature". Yet, Section 20 of the EBR requires the Ministry to classify those instruments which "could" have a significant impact on the natural environment. It is CELA's opinion that these instruments could potentially have a significant impact upon the natural environment regardless of whether they are carried out in proximity to a natural heritage feature or not. It would be better to post all of these decisions and let the public comment on whether the proposed activity poses a threat or not to the environment.

Therefore, CELA would request that MNR revisit its classification system one more time, and provide a rationale as to how each instrument was classified, and why others were not.

#### **4. Conclusions**

In conclusion, CELA is still unsatisfied with the proposed classification regulation. As currently construed, the regulation denies the citizens of Ontario their rights under the EBR to become involved with all environmentally significant decisions. We would therefore ask that the concerns outlined above and in our submission of May 12, 1997 be addressed. Moreover, this action must be taken as expeditiously as possible. Kindly advise us how the MNR proposes to deal with these issues.

We look forward to your reply.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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