



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

April 17, 2009

**BY FAX**

The Hon. Donna Cansfield  
Minister of Natural Resources  
Minister's Office, Whitney Block  
6<sup>th</sup> Floor, Room 6630  
99 Wellesley St. West  
Toronto, Ontario  
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Dear Minister:

**RE: MNR INSTRUMENT CLASSIFICATION UNDER THE *ENDANGERED SPECIES ACT, 2007* AND *PROVINCIAL PARKS AND CONSERVATION RESERVES ACT, 2006*  
EBR REGISTRY NO. 010-6162**

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On behalf of the Canadian Environmental Law Association (CELA), I am writing to express our strong objection to the instrument classification proposal that has been recently announced by your Ministry.

For the reasons outlined below, CELA hereby requests that your Ministry immediately withdraw its current "information notice" (010-6162), and replace it with a proper and timely notice that appropriately classifies instruments in full compliance with the policies and provisions of the *Environmental Bill of Rights, 1993* (EBR).

**BACKGROUND**

On March 26, 2009, the Ministry of Natural Resources (MNR) posted an "information notice" on the EBR Registry in relation to the classification of instruments under the *Endangered Species Act, 2007* (ESA) and *Provincial Parks and Conservation Reserves Act, 2006* (PPCRA).

Among other things, this information notice claims that "all instruments under the PPCRA are covered by an EA exception, in MNR's opinion". Similarly, the information notice claims that "some instruments under the ESA are covered by an EA exception, in MNR's opinion."

In particular, the information notice opines that the above-noted instruments are exempt from mandatory public notice/comment provisions under Part II of the EBR because of the existence of section 32 of the EBR. Nevertheless, the information notice indicates that the MNR may, in its discretion, undertake "voluntary postings" (i.e. more information notices) to invite public

comment on some – but not all – of the ESA and PPCRA 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 ESA and PPCRA instruments. Moreover, CELA seriously questions the MNR’s professed commitment to post voluntary “information notices” in relation to certain instruments, and CELA has serious concerns about the adequacy of the current classification proposal, as described below.

### **MNR’S MISUSE OF SECTION 32 OF THE EBR**

The threshold question in this case is whether section 32 of the EBR wholly (or automatically) applies to instruments under the ESA and PPCRA, 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 ESA and PPCRA instruments.

For example, the MNR’s information notice invokes certain MNR Class EA’s to buttress its position that ESA and PPCRA instruments will implement projects, undertakings or activities that have been approved (or exempted) under the *Environmental Assessment Act* (EA Act).

However, our review of these Class EAs (and other MNR exemption orders under the EA Act) suggests that none of them specifically contemplate the issuance of instruments which may affect species at risk, regardless of whether such species (or their habitat) are located in provincial parks, conservation reserves, or other public or private lands across Ontario.

Accordingly, it cannot be seriously contended that the issuance of such 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’s (and exemption orders under the EA Act) are substantially equivalent to the public participation rights entrenched within the EBR.

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 ESA and PPCRA instruments in most or all cases.

### **VOLUNTARY POSTINGS DO NOT CURE EBR NON-COMPLIANCE**

We take no comfort in the MNR’s proposal to provide “voluntary postings” of certain instruments under the ESA and PPCRA.

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 all such instruments under these statutes. Accordingly, whether or not section 32 may be applicable to a particular 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 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 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 ESA or PPCRA 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.

### **KEY INSTRUMENTS HAVE BEEN EXCLUDED**

While our primary concern is the MNR’s erroneous interpretation of section 32 of the EBR, CELA would be remiss if we did not also comment on the substantive inadequacy of the MNR’s proposed classification of instruments under the ESA and PPCRA.

In particular, upon reviewing the ESA and PPCRA, it appears to us that a number of environmentally significant instruments have been overlooked or omitted by MNR in deciding which instruments should be categorized as Class I, II or III for the purposes of the EBR.

Under the ESA, for example, the various instruments that can be issued under section 16, section 19, and section 58 have not been classified under the current MNR proposal. Similarly, the various instruments that can be issued under section 20 and section 22 of the PPCRA have not been classified under the current MNR proposal. In addition, the instrument that can be issued under section 2 of O.Reg.319/07 under the PPCRA has not been classified under the current MNR proposal.

As a matter of law, the legal consequence of omitting these instruments is that the public notice/comment rights under Part II of the EBR will not be applicable to such instruments. Moreover, the public rights established under other Parts of the EBR (i.e. Application for Investigation, Application for Review, etc.) will be inapplicable to these non-classified instruments. In addition, the MNR will not be legally obliged under section 11 of the EBR to

consider and apply its Statement of Environmental Values (SEV) when deciding whether to issue these non-classified instruments.

In light of these omitted instruments, CELA can only conclude that the MNR's classification exercise was not carried out in full compliance with sections 20 to 21 of the EBR. Indeed, a careful perusal of these EBR sections indicates that instruments are to be reviewed and classified according to their environmental significance, and not on the basis of whether there are any EBR exceptions that may allow for non-posting of these instruments (i.e. emergencies, other substantially equivalent processes, etc.).

On this point, we have reviewed the MNR's one-page explanation of its five-step "section 20 process". Assuming that these five steps were followed, CELA submits that there is no logical or persuasive explanation from the MNR as to why certain ESA and PPCRA instruments were wholly excluded from the classification proposal. In the absence of any other information contained in, or linked to, the information notice, the MNR's "section 20 process" appears to have been a closed-door exercise that is not traceable, replicable, or accountable.

In any event, the questionable outcome of the MNR's classification exercise under the ESA and PPCRA provides another reason for the MNR to withdraw the current information notice in order to properly revisit and fundamentally revise its classification proposal.

## **CONCLUSION**

CELA observes that the MNR's track record in classifying instruments under the EBR has been fraught with considerable delay, difficulty and controversy since the EBR first came into force.

For example, the Environmental Commissioner of Ontario (ECO) has repeatedly commented upon the MNR's intransigence regarding instrument classification, and he found it necessary to file a special report with the Ontario Legislature to draw public attention to the MNR's systematic disregard of its EBR obligations:

I am reporting that the MNR is thwarting public participation and public scrutiny of environmental decision-making by effectively blocking the final steps in a legal process set out in the EBR. I see the need to issue this special report to respond to the long string of broken promises that MNR has made to my office since 1995, each time asserting that the ministry would very shortly be complying with the EBR by "classifying its instruments" – in other words, by opening up its instruments to public comment and review... MNR's persistent failure... is not only a breach of the letter and spirit of the EBR, it also frustrates the rights of the public.

The practical effect of MNR's failure to classify its instruments is that the public cannot use the EBR as it was intended.<sup>1</sup>

In CELA's view, these ECO criticisms in 2001 remain equally applicable in 2009 to the MNR's proposed exclusion of ESA and PPCRA instruments from full coverage under the EBR.

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<sup>1</sup> ECO, *Broken Promises: MNR's Failure to Safeguard Environmental Rights* (June 21, 2001), page 1.

It is also unclear to CELA why the MNR is even proposing such sweeping exclusions when its own SEV contains commitments to public participation, government accountability, environmental sustainability, and resource stewardship. For example, the MNR's SEV states that:

MNR believes that public consultation and participation is vital to sound environmental decision-making. The Ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.

If the MNR is truly committed to public participation in its environmental decision-making, then why is the MNR attempting to "shield" ESA and PPCRA instruments from mandatory public scrutiny under the EBR?

In closing, I would note that when your Ministry undertook its first instrument classification exercise under the EBR over a decade ago, it became necessary for CELA to commence a judicial review application against the MNR to ensure compliance with its EBR obligations. Fortunately, MNR then took certain steps to at least technically comply with the EBR's procedural requirements, and CELA withdrew the judicial review application.

While we hope that it does not become necessary to launch a second judicial review application against the MNR in relation to ESA and PPCRA instruments, please be advised that CELA has not ruled out this option under section 118(2) of the EBR.

It would, of course, be highly preferable for the MNR to voluntarily bring itself into compliance with the EBR in this matter, but CELA is fully prepared to consider legal action to ensure MNR compliance with EBR obligations respecting ESA and PPCRA instruments.

Therefore, at your earliest convenience, can you kindly advise us whether your Ministry intends to withdraw the current "information notice", and replace it with a proper notice that appropriately classifies ESA and PPCRA instruments in compliance with the applicable EBR provisions?

We look forward to your earliest reply to this urgent request. Please feel free to contact the undersigned if you have any questions or comments about this matter.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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cc. The Hon. John Gerretsen, Minister of the Environment  
Gordon Miller, Environmental Commissioner of Ontario  
James Fitzpatrick, MNR  
Pat Walsh, MNR