

November 13, 2012

Ministry of Natural Resources
Policy Division
Modernizing Approvals
300 Water Street, Floor 5
Peterborough, ON K9J 8M5

Delivered via Facsimile: 705-755-1957

Dear Sir/Madame:

Re: The Canadian Environmental Law Association's Comments on EBR Registry Number 011-6751, Modernization of Approvals: A Proposed Policy Framework for Modernizing Approvals for Ontario's Natural Resources

I: INTRODUCTION

The Canadian Environmental Law Association (CELA) is a legal aid clinic, specializing in environmental law and represents individuals and citizens groups before administrative tribunals, trial and appellate courts on a broad range of environmental issues.

CELA was founded in 1970 for the purpose of using and improving laws to protect the environment and natural resources and has a lengthy history of involvement with the approvals processes by government ministries. CELA provided comments on the Ontario Ministry of Environment's (MoE) proposal for *Standardized Approvals Regulations* and *Approvals Exemption Regulations*. CELA along with Ecojustice and the Canadian Institute for Environmental Law and Policy provided comments on MoE's proposal to modernize environmental approvals and our submission to the MoE is available on CELA's website at www.cela.ca. CELA counsel also participates in the MoE's' Roundtable Stakeholder Consultation on Modernizing Environmental Approvals.

Many of the comments and concerns we expressed in relation to the MoE's proposal are equally applicable to the MNR's proposal which is discussed in the document titled "Modernization of

Approvals: A Proposed Policy Framework for Modernizing Approvals for Ontario's Natural Resources." (MNR Discussion Paper).

II: GENERAL COMMENTS

MNR's Discussion Paper states that one of the reasons for the proposed changes is to address delays in the approval process. The paper cites comments made by Minister Gravelle that the processes that were created [by MNR] take too long and cost too much to administer. The Discussion Paper, however, fails to provide any information about the underlying causes for the delay in the approvals process. When the Ontario Ministry of Environment (MoE) undertook to streamline its environmental approvals, it found that a significant portion of the delay was caused by the failure of applicants to correctly complete application forms. Consequently the MoE, in response, imposed regulatory requirements related to the quality of submissions and completeness of the application as well as sign-off requirements by appropriate or accountable persons.

In order for MNR to effectively address delays in its approvals process, MNR needs to accurately determine the underlying factors which are causing delay. It is essential this be done, as this information should inform the choice of the appropriate policy and legislative changes that may be required. CELA, therefore recommends that prior to undertaking any changes to its approval programme, MNR should provide information about the underlying causes for delay so that the public can consider and provide meaningful comments on the proposed alternative approaches to the approvals process.

CELA Recommendation # 1: Prior to undertaking any changes to its approval programme, MNR needs to obtain and provide information to the public about the underlying causes for delay in its approval programme. Information about the underlying cause for the delay should inform the selection of the appropriate policy and legislative changes that may be required to ensure the effective delivery of MNR's approvals programme.

MNR's Discussion Paper states that it will review fees charged for approvals to ensure full cost recovery associated with the delivery of its approval programme. CELA fully supports this proposal.

In his 2005 -2006 Annual Report titled “Neglecting Our Obligations” the Environmental Commissioner of Ontario stated that for too many years the MNR and MOE have not been given the human and financial resources that are realistically required to meet the broad expectations imposed by their mandates. CELA is concerned that the impetus for considering new approaches to approvals by MNR is being driven by the lack of adequate financial and staff resources as opposed to a genuine modernization exercise to improve efficiencies.

The implementation of full cost recovery for the delivery of the MNR’s approvals programme may itself provide the Ministry with sufficient resources to effectively deliver services to individuals and businesses, without requiring it to undertake changes that may compromise the protection of Ontario’s natural resources. CELA, therefore, recommends that the MNR first examine the use of full cost recovery prior to considering new approaches to the approval process. This will also ensure that decisions affecting the approval process are not influenced by lack of capacity at MNR but are instead based on genuine efforts to improve the delivery of government services.

CELA Recommendation # 2: CELA strongly supports the use of full cost recovery for the delivery of MNRs’ approvals programme.

CELA Recommendation # 3: CELA recommends that the MNR first examine the use of full cost recovery prior to considering new approaches to the Ministry’s approval programme.

III: SPECIFIC COMMENTS ON MNR’S DISCUSSION PAPER

Background of Proposal

The MNR Discussion Paper provides information of a general nature about its proposal to modernize its approval process. CELA’s comments, therefore, are of a preliminary nature and we reserve the right to provide further comments when MNR provides further details on how it plans to streamline permits, licenses and approvals.

The MNR Discussion Paper states that the Ministry is moving forward with a three year transformation plan to make it easier and faster for businesses and individuals to access services pursuant to the announcements that were made in the 2012 -2013 budget. The transformation plan includes the streamlining of the approvals process, including changes to regulations and

legislation. As well as considering full cost recovery, MNR's Discussion paper states that the Ministry is considering the following four approaches:

- 1) Removing regulatory control including eliminating the need for approvals from MNR;
- 2) Reducing the number of approvals required from MNR by establishing rules in the form of a regulation that clients can easily follow;
- 3) Moving some approvals from paper-based processes to an automated electronic registry where businesses and individuals register their activities and where rules are established in regulation ; and
- 4) Retaining the current application and review approach for certain approvals, while taking opportunities to use technology to streamline processes where possible.

CELA has reviewed each of the four approaches as outlined in MNR's Discussion Paper and our response is provided below:

1) Removing Regulatory Control

CELA does not support the proposal to remove regulatory control including eliminating the need for approvals from MNR.

MNR's approvals programme is an important means of protecting Ontario's natural resources and ensuring the sustainability of these resources. Before issuing an approval, the MNR staff is supposed to carefully review the application and determine whether the activity will result in impacts on natural resources or public safety. It is important to note, MNR is engaged in exercising an important public policy role in determining which type of activities will receive approval given the competing demands placed on finite natural resources. In the event that the MNR is satisfied that an activity will have negative impacts, the Ministry can refuse to issue an approval.

The MNR's approvals function is, thus, a key mechanism through which the Ministry undertakes a proactive up-front assessment to ensure that activities by individuals or businesses do not cause harm to Ontario's natural resources and public safety. Accordingly it constitutes a core governmental function and is an integral component of an effective regulatory framework.

CELA, therefore, would be strongly opposed to any proposal that would remove regulatory control including eliminating the need for approvals from MNR.

CELA Recommendation # 4: CELA is strongly opposed to any proposal that would remove regulatory control including eliminating the need for approvals from MNR.

2) Reducing the Number of Approvals by establishing Regulations

CELA is also concerned with the proposal to simply establish rules in the form of regulations. This approach would eliminate a site specific review that currently exists under the approvals process. This approach would not allow MNR to proactively identify unacceptable or problematic applications. It would also prevent MNR from taking proactive steps to require changes to project design or construction to avoid or minimize adverse effects to Ontario's natural resources. If problems are discovered after an activity is permitted, individuals or companies may be unwilling to take steps to address adverse impacts to natural resources or public safety.

Furthermore, an entirely reactive programme of selective monitoring to verify regulatory compliance requires MNR to have the necessary operational funding and personnel dedicated to carry out this task. Given the lack of capacity at MNR due to the significant reductions to its staff and budget, it is highly unlikely that MNR would be able achieve this. In a special report to the Legislative Assembly of Ontario, titled "Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MoE and MNR," the Environmental Commissioner of Ontario, expressed serious concerns about the lack of capacity at MNR. The reports states that the Environmental Commissioner of Ontario has "observed for a number of years that [MNR and MoE] do not have the personnel necessary to effectively carry out all the elements of their mandate If a function or task, like inspection or enforcement, does not have sufficient personnel allocated, the function or task can not be carried out effectively."

CELA, therefore, does not support simply replacing the current approvals process with rules established by regulations as it eliminates the MNR ability to take proactive steps to weed out problematic activities and address site specific concerns. Moreover, given the lack of capacity of

MNR, the Ministry will not be able to undertake an effective inspection and enforcement programme, to ensure regulatory compliance .

CELA Recommendation # 5: CELA does not support simply replacing the current approvals process with rules established by regulations as it eliminates MNR's ability to take proactive steps to weed out problematic activities and address site specific concerns. Given the lack of capacity of MNR, the Ministry will not be able to undertake an effective inspection and enforcement programme, to ensure regulatory compliance.

2) Moving Approvals into a Registration System

MNR's proposal to move some approvals from paper-based process to automated electronic registry where businesses or individuals register their activities and where rules are established by regulations is similar to the process that was adopted by MoE in its modernization efforts. Although, CELA supported many of the technological improvements that were achieved by MoE through the implementation of a registration process, CELA also had very serious concerns about impact that this process would have on public participation rights and its potential impact on environmental protection and public health and safety in Ontario. CELA's concerns about the registration process proposed by MNR are very similar to the concerns we raised with MoE and are provided in more detail below.

(a) EBR Notice and Comment provisions under the Environmental Bill of Rights (EBR) should apply to the registration process

Although MNR's position paper does not address the issue of the applicability of the *Environmental Bill of Rights, 1993 (EBR)* to a registration process, CELA is concerned MNR, like MoE, will exempt individual registrations from the requirement to be posted on the *EBR* Registry and from appeals by third parties. CELA expressed concerns about the MoE decision to exempt the registration process from the *EBR*. We noted that MoE's decision in this regard was fundamentally at odds with the MoE's purported goals for conducting the modernization exercise, which was to improve public transparency of approvals. The enactment of the *EBR* in 1994 greatly enhanced public participation in the environmental decision-making process. This includes requirements for public notice and a minimum 30-day comment period for all proposals

for new regulations, policies and instruments and an opportunity for third parties to seek leave to appeal instruments which are subject to the *EBR*.

An evaluation of the *EBR* almost a decade after its enactment concluded that it has improved access to information and decision-making in Ontario and has not had any measurable impact on delaying approvals. (See David McRobert & Catherine McAteer, “The Nuts, The Bolts And the Rest of the Machinery: A Guide to and Update on Ontario’s Environmental Bill of Rights,” Background Paper presented at the Environmental Law 2001: New Developments and Current Issues to Comply in Today’s Environment, Insight Conference, (August 2001) [unpublished] p. 29-30.).

Furthermore, even if posting on the EBR Registry were to cause a lengthier registration process for applicants, this factor needs to be weighed against the significant benefits of having the public participate in the approval process. For instance, even after regulations have been passed identifying the eligibility of a particular activity for the registration process, there may be a number of factors which may subsequently indicate that a particular activity should not be allowed to be registered due to special circumstances. There needs to be an opportunity for public input on the suitability of an activity for registration as this can provide decision-makers with access to important information about local conditions and circumstances about which they may not be aware. An activity which satisfies the eligibility criteria under regulation may, in fact, not be suitable for registration given unique local environmental conditions, such as its proximity to endangered species habitat and natural heritage features and systems. Furthermore, while an individual activity may not, by itself, pose a risk to the environment, numerous activities operating in relatively close proximity to each other may produce cumulative impacts which cause or are likely to cause adverse impacts to natural resources in the province. The public may also be able to provide information to the MNR regarding environmental violations due to the past behavior of an applicant which may warrant disallowing an activity to be registered. Consequently, even if a certain type of activity is deemed appropriate for registration, there may be unique features of a site or factors relating to the conduct of a particular applicant which may warrant not permitting the activity to be registered.

We note that when the government undertook to streamline and expedite the approval process under the *Green Energy Act (GEA)*, for renewable energy approvals, it maintained the requirement for notice and comment period under the *EBR* to ensure transparency and accountability. CELA, therefore, recommends that MNR ensure that the EBR notice and comment provisions apply to any registration process.

CELA Recommendation # 6: CELA recommends that MNR ensure that the *EBR* notice and comment provisions apply to any registration process.

(b) Third party appeal rights under *EBR* should apply to the registration process

The MoE removed the right of third party appeal rights when it established its registration process and CELA is concerned that MNR will do the same. We strongly recommend that MNR retain the third party appeal rights, if it decides to proceed with a registration process.

The prospect of being faced with a leave to appeal by third parties can ensure that applicants do not provide false or misleading information as they know the public can challenge this information and bring any critical errors in their application to the attention of the ERT. This is particularly important given that the MNR will be relying on the applicant's own assessment about the proposed activity at a particular site to determine whether it should be subject to registration. The public, therefore, has a vital role to play in the approval process and while the leave to appeal provisions may on occasion be expensive and time consuming, it has proven to be an extremely important way to ensure that a government ministry is aware of all the facts before it authorizes individuals or businesses to commence an activity in Ontario.

CELA recommends that the *EBR* leave to appeal rights should apply in the event MNR decides to proceed with a registration system, to ensure that the public continues to be able to participate in the environmental decision-making process. In the alternative, there needs to a legislative provision which provides an automatic right of appeal of approved instruments as was provided under the *GEA*.

CELA Recommendation # 7: CELA recommends that the *EBR* leave to appeal rights should apply in the event MNR decides to proceed with a registration system, to ensure that the public continues to be able to participate in the environmental decision-making process. In the alternative, there needs to a legislative provision which provides an automatic right of appeal of approved instruments as was provided under the *GEA*.

(c) Registration Process should allow for consideration of Cumulative impacts of activities

A fundamental weakness with the approvals system in Ontario has been the failure of the government ministries to address the issue of cumulative effects when decision-makers issue approvals.

CELA has previously noted, for example, that in regards to the MoE approval processes for air contaminants, individual facilities are approved without consideration of background air quality or other nearby sources of pollution in the vicinity, potentially resulting in air pollution that is disproportionately higher in parts of the province such as Sarnia, Sudbury, Hamilton and Windsor.

In the event MNR decides to proceed with a registration process for some approvals, it should incorporate a consideration of cumulative impacts into the decision whether to issue an approval. In addition, MNR should enact a legislative provision which authorizes MNR to require an applicant seeking to register an activity to be required to obtain an approval if there are any concerns about the potential adverse cumulative effects from that activity. The Minister of Natural Resources should also be given legislative authority to impose a moratorium on approvals or registrations in areas of the province if cumulative effects from activities will have adverse impacts on the natural resources in that area.

CELA Recommendation # 8: CELA recommends that in the event the MNR proceeds with a registration system for certain approvals, it should incorporate a consideration of cumulative impacts into the decision whether to issue an approval.

CELA Recommendation # 9: CELA recommends that MNR enact a legislative provision which authorizes MNR to require an applicant seeking to register an activity to be required to obtain an approval if there are any concerns about the potential adverse cumulative effects from that activity.

CELA Recommendation # 10: CELA recommends that the MNR should enact a legislative provision which provides the Minister of Natural Resources with authority to impose a moratorium on approvals or registrations if cumulative effects from activities will have adverse impacts on the natural resources in that area.

(d) Registration process will require effective audit and enforcement strategy

The MNR should develop a compliance and enforcement strategy for activities subject to the registration process. This should include an indication of how it will deal with complaints from the public in the event that an activity subject to the registration process causes adverse impacts to natural resources.

The MNR also needs to provide details about how staff and resources will be re-allocated to address inspections for activities subject to the registration process. The MNR should not proceed with the establishment of the registration process until it provides a detailed strategy on how it would assess compliance for activities subject to the registration system.

CELA Recommendation # 11: CELA recommends that MNR should not proceed with the establishment of the registration process until it provides a detailed strategy on how it would assess compliance for activities subject to the registration system.

(e) MNR should consider compliance record of individual/ business or sector in assessing suitability for registration.

The MNR's Discussion Paper states that the Ministry is considering activities which have a low to moderate impact to the natural resources or public safety as activities which may be eligible for the registration process.

CELA is of the view that only activities which have low impact should be subject to a registration process. An activity which has moderate impacts should remain under the current approval system, given the risk it poses Ontario's natural resources.

MNR's Discussion Paper states that it will undertake an evaluation of risk to consider the suitability of an activity for a new approvals approach. MNR's risk evaluation criteria will include an assessment of impacts on public health and safety, natural resources, social and cultural uses of natural resources, government, public and private finances and the economy and public expectations of government.

CELA recommends that in assessing whether an activity is suitable for registration, MNR's risk evaluation criteria should also consider an industry's compliance record. MNR should not allow individuals, businesses or sectors with a poor compliance record with provincial laws to be eligible for the more expeditious registration process.

CELA Recommendation # 12: CELA recommends that in assessing whether an activity is suitable for registration, MNR's risk evaluation criteria should also consider an industry's compliance record. MNR should not allow individuals, businesses or sectors with a poor compliance record with provincial laws to be eligible for the more expeditious registration process.

(f) MNR should have legislative authority for "bump up" provision so that it can require an applicant to apply for an approval

The MNR should also be given legislative authority to require an individual, business or sector with a poor compliance record to submit an application for an approval as opposed to proceeding by way of registration or if MNR deems a "bump up" is necessary in the public interest.

CELA Recommendation # 13: CELA recommends that in the event MNR adopts a registration system for some approvals, it should ensure that it has legislative authority to require an individual, business or sector with poor compliance record to submit an application for approval as opposed to proceeding by way of registration or if MNR's deems a "bump up" is necessary in the public interest.

4) Retaining the current application and review approach for certain approvals, while taking opportunities to use technology to streamline processes where possible.

CELA is of the view activities which have moderate to significant impacts should be subject to the current approval process, given the risk they pose to Ontario's natural resources, and public safety. Therefore, for these activities MNR should continue to be involved in reviewing applications for approval and continue to monitor and ensure compliance.

CELA supports the use of technology to streamline and expedite the approval process, provided this does not compromise the level of scrutiny and review of applications by MNR staff.

CELA Recommendation # 14: CELA strongly recommends that activities which have moderate to significant impacts remain subject to the current approval process, given the risk they pose to Ontario natural resources, and public safety.

CELA Recommendation # 15: CELA supports the use of technology to streamline and expedite the approval process provided this does not compromise the level of scrutiny and review of applications by MNR staff.

IV: CONCLUSION

The MNR's Discussion Paper makes a number of policy recommendations to streamline its permits, licenses and approvals. The Discussion Paper states that the current processes for obtaining approvals take too long and cost too much to administer. However, the paper does not indicate whether the delay is caused by applicants' failure to submit complete applications, the lack of capacity at MNR or a combination of both these factors or whether there are other reasons which are contributing to the delay in the approvals process.

CELA recommends that the MNR first accurately determine the factors causing delay as this should inform the choice of the appropriate policy and legislative measures that may be required to address any problem of delay within the current approvals programme.

CELA supports full cost recovery for the delivery of MNR's approvals programme and we strongly urge the Ministry to examine this option before considering any significant change to its approvals programme. The implementation of full cost recovery itself may generate sufficient revenues so that MNR has the necessary financial and human resources to administer an effective approvals programme. CELA also supports the MNR use of technological measures to streamline processes where possible, provided they do not reduce the level of review and scrutiny of applications by MNR staff,

In the event that MNR considers it necessary to pursue other alternative approaches to approvals, CELA recommends that the public notice and comment provisions under the *EBR* should continue to apply. In addition MNR should ensure that cumulative effects are considered and integrated into decisions regarding whether to issue approvals.

Finally, CELA is pleased to see that MNR will be providing further opportunities for consultation as future regulatory or policy changes are considered in the effort to streamline the approvals process. Given the significant implications that these proposed changes could have Ministry's mandate as the primary steward of Ontario's forests, wetlands, plant, wildlife, aquatic life, and aggregate resources, it is critical that the MNR provide ample public consultation opportunities prior to undertaking any changes to its approvals programme.

V: SUMMARY OF RECOMMENDATIONS

1) CELA Recommendation # 1: Prior to undertaking any changes to its approval programme, MNR needs to obtain and provide information to the public about the underlying causes for delay in its approval programme. Information about the underlying cause for the delay should inform the selection of the appropriate policy and legislative changes that may be required to ensure the effective delivery of MNR's approvals programme.

2) CELA Recommendation # 2: CELA strongly supports the use of full cost recovery for the delivery of MNRs' approvals programme.

3) CELA Recommendation # 3: CELA recommends that the MNR first examine the use of full cost recovery prior to considering new approaches to the Ministry's approval programme.

4) CELA Recommendation # 4: CELA is strongly opposed to any proposal that would remove regulatory control including eliminating the need for approvals from MNR.

5) CELA Recommendation # 5: CELA does not support simply replacing the current approvals process with rules established by regulations as it eliminates MNR's ability to take proactive steps to weed out problematic activities and address site specific concerns. Given the lack of capacity of MNR, the Ministry will not be able to undertake an effective inspection and enforcement programme, to ensure regulatory compliance.

6) CELA Recommendation # 6: CELA recommends that MNR ensure that the *EBR* notice and comment provisions apply to any registration process.

7) CELA Recommendation # 7: CELA recommends that the *EBR* leave to appeal rights should apply in the event MNR decides to proceed with a registration system, to ensure that the public continues to be able to participate in the environmental decision-making process. In the alternative, there needs to a legislative provision which provides an automatic right of appeal of approved instruments as was provided under the *GEA*.

8) CELA Recommendation # 8: CELA recommends that in the event the MNR proceeds with a registration system for certain approvals, it should incorporate a consideration of cumulative impacts into the decision whether to issue an approval.

9) CELA Recommendation # 9: CELA recommends that MNR enact a legislative provision which authorizes MNR to require an applicant seeking to register an activity to be required to obtain an approval if there are any concerns about the potential adverse cumulative effects from that activity.

10) CELA Recommendation # 10: CELA recommends that the MNR should enact a legislative provision which provides the Minister of Natural Resources with authority to impose a moratorium on approvals or registrations if cumulative effects from activities will have adverse impacts on the natural resources in that area.

11) CELA Recommendation # 11: CELA recommends that MNR should not proceed with the establishment of the registration process until it provides a detailed strategy on how it would assess compliance for activities subject to the registration system.

12) CELA Recommendation # 12: CELA recommends that in assessing whether an activity is suitable for registration or a new approval approach, MNR's risk evaluation criteria should also consider an industry's compliance record. MNR should not allow individuals, businesses or sectors with a poor compliance record with provincial laws to be eligible for the more expeditious registration process.

13) CELA Recommendation # 13: CELA recommends that in the event MNR adopts a registration system for some approvals, it should ensure that it has legislative authority to require an individual, business or sector with poor compliance record to submit an application for approval as opposed to proceeding by way of registration or if MNR's deems a "bump up" is necessary in the public interest.

14) CELA Recommendation # 14: CELA strongly recommends that activities which have moderate to significant impacts remain subject to the current approval process, given the risk they pose to Ontario natural resources, and public safety.

15) CELA Recommendation # 15: CELA supports the use of technology to streamline and expedite the approval process, provided this does not compromise the level of scrutiny and review of applications by MNR staff.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Ramani Nadarajah

Counsel