Environmental Commissioner of Ontario

LOSING TOUCH

ANNUAL REPORT 2011/2012 PART 1

Environmental
Commissioner
of Ontario

Commissaire à
l'environnement
de l'Ontario

Gord Miller, B.Sc., M.Sc.
Commissioner

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Commissaire

September 2012

The Honourable Dave Levac
Speaker of the Legislative Assembly of Ontario

Room 180, Legislative Building
Legislative Assembly
Province of Ontario
Queen's Park

Dear Speaker:

In accordance with Section 58 of the *Environmental Bill of Rights, 1993*, I am pleased to present Part 1 of the 2011/2012 Annual Report of the Environmental Commissioner of Ontario for your submission to the Legislative Assembly of Ontario.

Sincerely,

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COMMISSIONER'S INTRODUCTION

Sometimes I think we have all forgotten our civics. Remember, we have a parliamentary democracy and that democracy (paraphrasing Churchill) is the worst system except when you compare it to all others. We elect a parliament (in Ontario, a Legislative Assembly) to make our laws. Those laws declare the intent of parliament and parliament is supreme! There is, of course, a considerable amount of detail that is involved in delivering parliament's intent, so the laws delegate to the Cabinet of the day the right to pass regulations to administer the laws without bothering parliament with administrivia. The "civil service" (as it used to be called) takes over the day-to-day administration of the laws and regulations in the day-to-day business of government. Or, at least, that is how it is supposed to work.

There are some variations from this model. As Environmental Commissioner, I am an Officer of the Legislative Assembly charged with administering the Environmental Bill of Rights, 1993 *(*EBR*). This is a unique piece of legislation which allows you, the people, to participate in the decision making of government as it relates to the environment. In essence, it is a law that holds the government of the day to be transparent and accountable to the people with respect to environmental decision making. And, it tasks me to see that that happens. This brings me to the significance of this report.*

Each year within my large Annual Report to the Legislature, I comment on the compliance of various ministries of government with the legal requirements of the EBR. *There is, of course, always some degree of non-compliance. Mistakes happen and there are always differences of opinion with regard to interpreting what exactly is required by the wording of the statute. But lately there has been a marked change in the behaviour of some ministries in respecting the rights of the citizens of Ontario under the* EBR. *This disregard for the rights of Ontarians has increased to a scope and degree such that I find it necessary to break out this portion of my statutory reporting requirements into its own part, so that Legislators can focus on the implications of the situation.*

CHAPTER 1.0

THE *ENVIRONMENTAL BILL OF RIGHTS, 1993*

This year, the ECO's Annual Report is divided into two parts. This first part of the Annual Report (Part I) focuses on the compliance of prescribed ministries with the procedural requirements of the *Environmental Bill of Rights, 1993* (*EBR*), such as adherence to the legislative timelines, use of the Environmental Registry, and the provision of notice and consultation on environmentally significant decisions. Part II of the Annual Report (to be released later under separate cover) will focus on reviewing how prescribed ministries have upheld the purposes of the *EBR* and their individual Statements of Environmental Values (SEVs) during the reporting year through substantive reviews of ministry decisions, ministry responses to applications for review and investigation, and other environmental issues.

1.1 | Significance of the *EBR*

The *EBR* is one of the most significant environmental laws of our time. Its purposes are to:

- protect, conserve and, where reasonable, restore the integrity of the environment;
- provide sustainability of the environment; and
- protect the right of Ontarians to a healthful environment.

The *EBR* is a unique law, unlike any other jurisdiction in Canada or the rest of the world.

In order to achieve the goals of the *EBR*, the Act imposes requirements for the Ontario government to consider the environment in its decision making. Further, the *EBR* recognizes that while the government has the primary responsibility for protecting the natural environment, the people of Ontario have the right to participate in the government's environmental decision

making, and the right to hold the government accountable for those decisions. As such, the *EBR* provides several tools to support a transparent process and enable the public to participate in government decision making that affects the environment.

It is important to note that the *EBR* does not apply to all ministries. The *EBR* only applies to select provincial ministries that are "prescribed" under the Act by Cabinet decision. Getting the right ministries prescribed to meet the purposes of the Act, and keeping them prescribed through various name changes and reorganizations, is one of the challenges identified in this report. For a detailed description of which ministries (as well as acts, regulations, policies and instruments administered by those ministries) are prescribed for the purposes of the *EBR*, see Appendix I: Prescribed Ministries and Acts.

1.2 | The Tool Kit of the *EBR*

There are five broad categories of tools in the *EBR* that establish rights and responsibilities for the provincial ministries, the Commissioner and the participating public.

Statement of Environmental Values

The *EBR* requires each prescribed ministry to develop and publish a "Statement of Environmental Values" (SEV) which they must "consider" when making decisions that might significantly affect the environment. An SEV describes how the ministry will integrate environmental values with social, economic and scientific considerations when it makes environmentally significant decisions. The ministry does not have to always conform to its stated values, but it does have to clearly inform the public how it considered its SEV in the decision-making process. This is the mechanism by which the public knows how a given ministry sees its environmental responsibilities.

Public Notice and Consultation through the Environmental Registry

One of the key tools for enabling the public to engage in environmentally significant decision making is the Environmental Registry. It is a searchable online database that provides public access to information about environmentally significant proposals and decisions made by the Ontario government. Under the *EBR*, all prescribed ministries are required to give notice of environmentally significant proposals on the Environmental Registry, and to provide a minimum of 30 days for the public to submit comments on the proposal before the ministry makes a final decision. Once the ministry has made a decision, it must post a notice on the Environmental Registry that explains the effect of public participation on the ministry's decision.

Every year, the ECO reports on a selection of decisions posted on the Environmental Registry, including reviewing ministry compliance with *EBR* public consultation requirements. For more information about the government's use of the Environmental Registry this reporting year, refer to Appendix II: Ministry Use of the Environmental Registry in 2011/2012.

Applications for Review and Investigation

The *EBR* gives Ontario residents the right to ask a prescribed ministry to review an existing environmentally significant policy, act, regulation or instrument, or to request a review of the need for a new policy, act or regulation where one is absent; this is called an "application for review." The *EBR* also gives Ontario residents the right to ask a prescribed ministry to

investigate alleged contraventions of prescribed acts, regulations or instruments; this is called an "application for investigation." Applications are a powerful tool that the public can use to participate in and influence government decision making, and to ensure environmental laws and policies are upheld. Ministries who receive applications must follow the procedures set out in the *EBR* when considering those applications. The ECO reviews and reports on ministries' handling of these applications.

Appeals, Lawsuits and Whistleblower Protection

The *EBR* also increases Ontarians' access to the courts and tribunals to protect the environment. The *EBR* provides a special right for members of the public to appeal (i.e., challenge) certain ministry decisions regarding instruments (e.g., permits, licences, etc.). It also gives Ontarians the right to take court action to prevent harm to a public resource, and the right to seek damages for environmental harm caused by a public nuisance without being required to obtain the consent of the Attorney General. Finally, the *EBR* also provides enhanced protection for employees who suffer reprisals from their employers for exercising their *EBR* rights or for complying with or seeking the enforcement of environmental rules. For more information about these rights under the *EBR*, refer to Appendix III: Appeals, Lawsuits and Whistleblowers.

The Environmental Commissioner of Ontario

The Environmental Commissioner of Ontario (ECO), as an independent Officer of the Legislative Assembly, is responsible for reviewing and reporting on the government's compliance with the *EBR*. The ECO reports annually to the Legislative Assembly — not to the governing political party or to a ministry. To ensure the *EBR* is upheld, the ECO monitors how ministers exercise their discretion and carry out their responsibilities in relation to the *EBR*. The ECO reports on whether ministries have complied with the procedural and technical requirements of the law, and whether the ministries' decisions were consistent with their SEVs and the purposes of the *EBR*. For example, each year, the ECO reviews: whether ministries properly used the Environmental Registry to provide notice and consult with the public; how ministries considered public input when making decisions about environmentally significant decisions; and how ministries handled applications for review and investigation.

CHAPTER 2.0

GAMES MINISTRIES PLAY
FAILURES TO COMPLY WITH THE *EBR*

Every year, the ECO observes instances in which ministries fail to meet their legal obligations under the *Environmental Bill of Rights, 1993* (*EBR*) to properly notify the public of environmentally significant proposals on the Environmental Registry. To be clear, this obligation involves posting a proposal notice, providing a public comment period, and posting a decision notice that acknowledges the public's input in the ministry's final decision. Subsequently, the ECO has a statutory obligation to report to the Legislature on how well the public's rights have been respected. It sounds simple enough, but frequently this requirement for notification and comment is circumvented (see Table 1).

In some cases, ministries improperly post proposals that should be posted as regular proposal notices as "information notices." Information notices look similar to normal proposal notices, but they do not include the *EBR* right to comment and are not followed by a decision notice clearly indicating what was finally decided.

Sometimes, the ministries post information notices on the Environmental Registry that do seek the public's comments, but in failing to follow the proper *EBR* process to post proposal and decision notices, these ministries still deny the public some of its *EBR* rights. Seeking comments with neither the requirement to consider them, nor the accountability of having the ECO verify compliance, is at best misleading to the public, and at worst, a mockery of the instructions of the Legislature.

Other times, ministries fail to post any notice at all on the Environmental Registry. In these cases, ministries often misunderstand or deliberately circumvent their *EBR* requirements. For example, the *EBR* is quite clear that environmentally significant policies—including guidelines, programs, plans or manuals—must be posted as proposal notices on the Environmental Registry for public comment; yet, with disturbing frequency, this is not done.

A chronic *EBR* offender in failing to post proposals on the Environmental Registry for public consultation is the Ministry of Natural Resources (MNR). In recent years, the ministry has

increasingly evaded its obligations under the *EBR*, depriving the public of its established rights. Systemic barriers within the ministry include its internal *EBR* processes and the related delegation of authority for decision making. Even in cases where the ECO has warned the ministry of non-compliance, MNR generally resists correcting its errors or finding a solution that serves the public interest and meets legal requirements.

Table 1
Ministry Non-compliance with the *EBR* in Failing to Properly Post on the Environmental Registry in the 2011-2012 Reporting Year.

Ministry of the Environment	• Climate Ready: Ontario's Adaptation Strategy and Action Plan 2011—2014
Ministry of Energy	• Two-Year Feed-in Tariff Review
Ministry of Natural Resources	• Provincial Park Boundary Adjustments: Grundy Lake Provincial Park and French River Provincial Park • Provincial Park Boundary Adjustments: DuPont, Wasaga Beach, and Charleston Lake Provincial Parks • Independent Forest Audit Process and Protocol (2011) and the Review of the Independent Forest Audit Process • Provincial Wildlife Population Monitoring Program Plan Version 2.0 • Significant Wildlife Habitat Ecoregion Criteria Schedules: Addendum to Significant Wildlife Habitat Technical Guide (Working Draft January 2009) • Our Sustainable Future—A Renewed Call to Action (2011) • Policies under the Caribou Conservation Plan, 2009
Ministry of Northern Development and Mines	• Terms of Reference for a Class Environmental Assessment for Activities of the Ministry of Northern Development, Mines and Forestry under the *Mining Act*
Ministry of Transportation	• Amendments to the Ministry of Transportation's Class Environmental Assessment

2.1 | No Chance to Comment: Ministry of Energy's Two-Year Feed-in Tariff Review

On October 31, 2011, the Ministry of Energy (ENG) launched a scheduled review of its Feed-in Tariff (FIT) Program, two years after the program's creation. The review had a wide mandate to examine a number of issues related to the program, including some that were environmentally significant. These issues included: an examination of FIT pricing; potential inclusion of new technologies and fuel sources; assessment of government policies to ensure that Ontario remains a centre of manufacturing excellence and clean energy job creation; and improving outreach techniques to complement the province's Renewable Energy Approval (REA) process.

The ministry did not post a regular proposal notice for this public review on the Environmental Registry. Instead, the ministry solicited feedback on its own website and posted an information notice on the Environmental Registry (#011-4827). The ECO wrote to the ministry, stating that its use of an information notice in no way satisfied the ministry's legal obligations under the *EBR*. The ECO further stated that neither the information notice nor the ministry website provided a clear proposal or supporting information to enable the public to provide meaningful comment on the proposed policy. Additionally, the ECO noted that there would be no assurance that the ministry would share the results of its survey or explain how the ministry actually considered public feedback in its decision.

The ministry responded to the ECO stating that the Minister had determined that there was no requirement to post a proposal notice on the Environmental Registry for this review. The ministry noted that "the focus of the review is operational in nature, including: pricing, program design and technical aspects and therefore will have no significant effect on the environment."

The ECO strongly disagrees with ENG's claim that this policy review did not need to be posted on the Environmental Registry. A number of elements in the ministry's review were clearly environmentally significant policies and, therefore, subject to *EBR* requirements for public consultation.

This issue highlights a difficulty in how some ministries interpret the *EBR* provision that states that policy proposals that are "predominantly financial or administrative in nature" do not have to be posted for public comment. Energy pricing policies often have environmental consequences; in this case, FIT pricing provides incentives that may influence how much renewable energy is produced in Ontario and from which sources, which is environmentally significant and thus must be posted on the Environmental Registry. Similarly, carbon pricing and water pricing are financial tools; however, these are intimately linked with conservation and, therefore, are predominantly environmental in nature.

2.2 | No Chance to Comment: Ministry of Natural Resources' Strategic Direction

In April 2011, MNR finalized a new overarching policy, Our Sustainable Future: A Renewed Call to Action. This environmentally significant policy is an "expression of long-term strategic directions and current priorities" for the entire ministry. For example, it establishes MNR's core activities for the years to come: biodiversity management; natural heritage and protected area management; Crown land, water and non-renewable resource management; renewable energy; and forest management.

MNR failed to comply with the *EBR* requirement to consult the public on this strategic direction for the ministry. Additionally, this important policy was not made publicly available on the MNR website. It is noteworthy that the ministry's principles outlined in this strategic direction do not include the value of public participation, unlike its own SEV.

The ECO wrote to MNR, asking why it had not posted a policy proposal notice on the Environmental Registry for this policy. The ECO further questioned how MNR had considered its SEV in the decision-making process as required by the *EBR* and how the ministry had determined that the policy did not need to be posted on the Environmental Registry. Finally, the

ECO asked when the policy was going to be made publicly available. MNR failed to resolve this non-compliance with the *EBR*.

2.3 | No Chance to Comment: Ministry of Natural Resources' Provincial Wildlife Population Monitoring Program Plan

MNR is responsible for ensuring the sustainable management of Ontario's Crown forests. This undertaking requires an understanding about how timber harvesting affects wildlife. To this end, MNR is legally required through a Declaration Order under the *Environmental Assessment Act* to maintain a Provincial Wildlife Population Monitoring Program (PWPMP). The ministry's program plan for the PWPMP is intended to outline the program's priorities, representative species to be monitored, and proposed activities and schedules.

In June 2010, the ministry published a version of the program plan on its website, without undertaking public consultation as required under the *EBR*. The ECO wrote to MNR to inquire how the ministry had considered its SEV and whether it had undertaken any public consultation during the development of the program plan. The ministry replied that it planned to post the program plan on the Environmental Registry for public comment in fall 2011 as part of a program review.

In December 2011, the ministry then inappropriately posted the proposal for the program plan review as an information notice. The information notice solicited public input with a 30-day comment period (#011-4230). The ECO wrote to MNR to remind the ministry that it is entirely inappropriate to post what is clearly an environmentally significant policy proposal as an information notice; the net effect of this non-compliance is that the public is deprived of its rights under the *EBR*.

The ministry responded in January 2012 by stating, "[t]he ministry's interpretation is that the Provincial Wildlife Population Monitoring Program Plan Version 2.0 is not a policy, act, regulation or instrument that requires posting on the Environmental Registry." Further, MNR stated that the information notice posted on the Environmental Registry provided the opportunity for public comment, as it had promised.

The ECO unequivocally disagrees with MNR's claim that the program plan is not a policy that requires posting on the Environmental Registry. The definition of "policy" in the *EBR* explicitly includes "plans." Further, the program plan and its implementation could have significant environmental effects at a provincial scale. MNR's assertion that it kept its promise to provide an opportunity for public comment, while technically accurate, is disingenuous; by using an information notice, the ministry avoided giving notice of its decision and explaining the effect of public comments. The ECO maintains that MNR's continued failure to post a proposal for this policy is an indefensible act of non-compliance with the *EBR*. Moreover, the information notice did not even provide enough information for the public to meaningfully understand this program plan or its importance.

To clarify the ministry's obligations under the *EBR*, the ECO sent MNR a legal opinion from a third party that confirms that the ministry is required to post a policy proposal for public consultation on the Environmental Registry for this program plan. MNR never responded to this legal opinion or addressed this official concern of an Officer of the Legislative Assembly.

In several of our Annual Reports, the ECO has repeatedly warned MNR about its *EBR* non-compliance for this wildlife monitoring program. The net result is that Ontarians have never had the chance, in over 18 years of the program's existence, to properly review and provide comment on this environmentally significant policy that is vital to understanding how timber harvesting affects wildlife across the province.

2.4 | No Right to Comment: Amending Environmental Laws in Budget Bills

Laws that safeguard our environment are themselves protected under the *EBR*. Normally, when the government proposes to amend legislation that is prescribed under the *EBR*, it would post a proposal notice on the Environmental Registry and solicit public comments for at least 30 days, if not longer. At about the same time, Members of Provincial Parliament would debate the specific details of the proposed changes in the Ontario Legislature; in some cases, the proposed changes would also undergo further scrutiny in a legislative committee and public testimony might be heard. The government then contemplates all this feedback and makes a decision. These steps help make for a democratic process in which there has been different opportunities to hear all perspectives; these steps also make for a defensible outcome. However, this process can be circumvented.

On March 27, 2012, the Minister of Finance tabled for first reading in the legislature Bill 55—*Strong Action for Ontario Act (Budget Measures), 2012*. Budgets bills are specifically exempt from the posting and public consultation requirements of the *EBR*. Bill 55 included proposed amendments to 69 different statutes, including nine laws that are prescribed under the *EBR*:

- the *Endangered Species Act, 2007*
- the *Provincial Parks and Conservation Reserves Act, 2006*
- the *Fish and Wildlife Conservation Act, 1997*
- the *Public Lands Act*
- the *Crown Forest Sustainability Act, 1994*
- the *Niagara Escarpment Planning and Development Act*
- the *Kawartha Highlands Signature Site Park Act*
- the *Lakes and Rivers Improvement Act*
- the *Clean Water Act, 2006*

The budget bill was passed on June 20, 2012, making changes to all of these statutes except the *Endangered Species Act, 2007* and the *Crown Forest Sustainability Act, 1994*. Changes included: allowing Crown land to be managed by third parties; making management plans for provincial parks discretionary; and allowing a third party to issue hunting licences and set conditions on those licences. These are only a few of the changes.

Almost twenty years ago, the Legislature chose to give Ontarians the right to publicly comment when amendments to environmental laws are proposed and to know how their comments were considered by the government in whatever decision was reached. These protections are enshrined in the *EBR*. The budget bill exemption included in the *EBR* was surely not intended to allow government to make significant, primarily non-fiscal changes to environmental legislation without proper public participation. Bill 55 unnecessarily undermined public confidence in government decision making relating to the environment.

CHAPTER 3.0

WON'T BE HELD ACCOUNTABLE TO THE PUBLIC

MINISTRIES NOT PRESCRIBED UNDER THE *EBR*

The *Environmental Bill of Rights, 1993* (*EBR*) establishes important rights to ensure government accountability, transparency, and public participation in environmental decision making. However, these responsibilities only apply to the provincial ministries that are "prescribed" (i.e., designated in a regulation) under the *EBR*. Therefore, for the *EBR* to function, it is essential that those ministries (and agencies) that make decisions that have, or may have, an impact on the environment are prescribed under the *EBR*.

Currently, there are 14 ministries prescribed under the *EBR* (see Appendix I). However, there are a few ministries and agencies that make decisions that affect the environment that are not prescribed. The ECO has been flagging these omissions for years. In this section, the ECO highlights three ministries that have presented barriers and long delays to becoming prescribed (for a full discussion of ministries, agencies, acts and instruments that should be prescribed, see Appendix V).

The failure to prescribe appropriate ministries and agencies undermines the intent of the *EBR* and deprives the public of its rights: the right to participate in environmentally significant decisions made by these ministries, to ensure that Statements of Environmental Values (SEVs) are prepared and considered, and to request *EBR* investigations and reviews from these ministries. Moreover, the ECO is unable to scrutinize decisions of non-prescribed ministries in the same manner as decisions made by prescribed ministries and, therefore, is hampered in our ability to report to the Members of Provincial Parliament.

Formal responsibility for prescribing ministries in O. Reg. 73/94 under the *EBR* falls to the provincial Cabinet; however, it is the responsibility of the Ministry of the Environment (which administers the *EBR* and its supporting regulations) to work with the subject ministry to agree to become prescribed, and then to bring forward the proposed regulatory amendment to prescribe the new ministry. Sometimes, however, the subject ministry refuses to become prescribed, or alternately, takes years to internally review and discuss the parameters for which it may be prescribed. Even when the ministry has notionally agreed to become prescribed, there is often another unreasonably long delay before the *EBR* regulation is actually amended to prescribe the ministry. The ECO has repeatedly raised concerns about this protracted process for prescribing new ministries under the *EBR*. There is simply no reasonable justification for these excessive delays.

3.1 | No Public Rights: Ministry of Infrastructure

In August 2010, the Ministry of Energy and Infrastructure (MEI)—a prescribed ministry—was split into two separate ministries: the Ministry of Energy (ENG) and the Ministry of Infrastructure (MOI). In November 2010, the ECO met with the Deputy Minister of the new MOI and urged the ministry to become prescribed under the *EBR* for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment, and for *EBR* applications for review. At that time, MOI indicated to the ECO that the ministry was working on becoming prescribed. However, in March 2011, MOE posted a notice on the Environmental Registry proposing to remove MEI under the *EBR* regulation and instead prescribe the new Ministry of Energy, but the notice made no mention of MOI.

MOI administers or oversees a number of acts (such as the *Places to Grow Act, 2005*), regulations, policies and agencies (e.g., Infrastructure Ontario) that have clear environmental significance. It is important that the public be given the opportunity to participate in MOI's environmentally significant decision making relating to public infrastructure, growth, and development. For example, in 2010/2011, MOI developed a ten-year plan for public infrastructure, which sets priorities for public infrastructure spending (including water, wastewater and transportation infrastructure). Although this major, environmentally significant plan was subject to extensive consultation, it should have been subject to the full rights provided by the *EBR*.

As of July 2012, nearly two years after MOI was formed, the ECO has not seen any real progress in prescribing MOI. The ECO strongly urges MOE and MOI to move forward, without delay, in prescribing MOI.

3.2 | No Public Rights: Ministry of Aboriginal Affairs

The Ministry of Aboriginal Affairs (MAA) was established by the Ontario government in November 2007 with a mandate to protect the rights of Aboriginal peoples, and promote the health and economic well-being of Aboriginal Ontarians. In November 2007, the ECO wrote to MAA requesting that it be prescribed for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment, and for applications for review under the *EBR*. In early 2009, MOE advised the ECO that MOE and MAA had discussed some potential MAA

activities that might be subject to the *EBR*. MOE also offered its ongoing assistance to MAA as MAA considered the parameters for becoming prescribed. In November 2010, MOE indicated that discussions with MAA were still ongoing, but as of July 2012, no further action was evident. The ECO continues to urge MOE and MAA to move forward on this matter.

3.3 | Public Rights Delayed: Ministry of Education

In September 2005, MOE recommended prescribing the Ministry of Education (EDU) under the *EBR* for the purposes of developing and considering an SEV for environmentally significant proposals. In November 2005, MOE posted a proposal notice on the Environmental Registry (#RA05E0016) to amend O. Reg. 73/94 to prescribe EDU for the purposes of SEV consideration. The notice stated, however, that EDU would not be required to post proposal notices for changes to policy and curriculum on the Environmental Registry. This proposal was never finalized.

Instead, in March 2011, MOE posted a new proposal on the Environmental Registry (# 011-2697) proposing to amend O. Reg. 73/94 to prescribe EDU for the purposes of SEV and public consultation provisions under Part II of the *EBR*. In yet another example of the interminable delays in prescribing ministries, this regulatory amendment to prescribe EDU was not made until August 2012. As a result, for seven years—from the time MOE first recommended prescribing EDU—the public lost out on opportunities to participate in EDU's environmentally significant decisions.

3.4 | The Name Game: Keeping the *EBR* in Sync with Ministry Name Changes

Sometimes, ministries that are prescribed cease to become technically prescribed because of governmental organizational changes, presenting yet another problem for keeping the *EBR* functioning effectively. Government is constantly evolving: new ministries are created; existing ministries are joined together or split apart; ministry names are changed; and portfolios are moved from one ministry to another. With each organizational change that involves a ministry with the potential to affect the environment, O. Reg. 73/94 under the *EBR* must be amended to reflect the new, renamed or restructured ministry name; otherwise existing rights under the *EBR* may be lost.

Despite the routine nature of government organizational changes, the *EBR* has no mechanism to address these ministry reorganizations. Instead, it typically takes months or even years before the *EBR* regulation is amended just to reflect a simple name change.

Such delays in updating the *EBR* regulation to properly identify the prescribed ministries create uncertainty and confusion for the public, the ECO, and ministry staff with respect to the ministry's responsibilities under the *EBR*. The ECO strongly urges the province—MOE and Cabinet Office, working together with the subject ministries—to develop an efficient and expedient process for keeping the *EBR* regulation in sync with ministry changes.

CHAPTER 4.0

PUBLIC'S RIGHTS DENIED

EBR APPLICATIONS FOR REVIEW AND INVESTIGATION

If two Ontario residents believe that the environment is not being sufficiently protected, the *Environmental Bill of Rights, 1993* (*EBR*) gives them the right to ask prescribed government ministries to review: an existing policy, act, regulation or instrument (e.g., an environmental compliance approval, permit, licence, etc.); or the need for a new act, regulation or policy. Such requests are called applications for review. Ontario residents can also ask ministries to investigate if they believe that specific environmental laws, regulations or instruments have been contravened. These particular public rights are exercised through applications for investigation.

Members of the public often raise important environmental issues through applications, sometimes focusing on site-specific issues, sometimes critiquing province-wide laws or policies, and sometimes drawing attention to policy vacuums. Applicants frequently support their arguments with an impressive level of knowledge and insight, and can show admirable passion, tenacity and patience in the face of frustrating situations. An *EBR* application can serve as an important ground-truthing mechanism for both the ECO and the government, highlighting issues that really matter to the public, and often spurring further research and action.

In the 2011/2012 reporting year, the ECO received 12 applications for review, and the ministries decided on 15 applications (some were submitted in previous years). The ministries denied undertaking all of these reviews but one. These applications for review submitted by the public dealt with diverse topics such as the Oak Ridges Moraine Conservation Plan and forest management in Algonquin Provincial Park.

The ECO also received four applications for investigation in this reporting year, and the ministries decided on five applications (some were submitted in previous years); three of these

applications were undertaken. These applications dealt with topics such as the legality of bounties for hunting wildlife, the alleged discharge of contaminants from an auto body shop, and the alleged improper operation of an asphalt plant.

As a general trend over time, the ECO agrees in the majority of cases with the decisions made by ministries to either undertake or deny applications for investigation. For applications for review, whether or not the ECO agrees with the ministry's decision correlates highly with which ministry is involved; for example, the ECO generally agrees with the Ministry of the Environment's (MOE's) decisions in the majority of cases, but disagrees with the Ministry of Natural Resources' (MNR's) decisions the majority of the time.

4.1 | Playing Politics with the Public's Rights: Ministry of Natural Resources' Failure to Meet Legal Timelines

MNR demonstrated several serious acts of non-compliance in failing to meet the legislated 60-day timeline to respond to *EBR* applications in this reporting year. MNR took 133 days (i.e., 73 additional days) to respond to a request to review forest management in Algonquin Provincial Park that was filed in June 2011. The ministry was also took 252 days (i.e., 192 additional days) to respond to a request to investigate the legality of bounties in hunting coyotes and eastern wolves that was filed in March 2011. MNR did not respond to the applicants in either case until November 2011.

The ministry's failure to comply with non-discretionary *EBR* deadlines is an affront to the statutory instructions of the Legislature. MNR's failure to provide any explanation for its gross non-compliance could give the public the impression that the ministry's response was delayed for political purposes given that the Ontario provincial election occurred in October 2011. In both cases, these *EBR* applications were denied by the ministry.

4.2 | Ministry of Natural Resources: Denied All *EBR* Applications by the Public in the Last 5 Years

In this reporting year, MNR denied all three applications for review that it received. The ministry's handling of these public concerns reflects a disturbing trend by the ministry to deny each and every *EBR* application for review and investigation that it receives, regardless of the validity of concerns raised by the public. MNR has denied every *EBR* application that it has received in the last five years. The ECO believes that this trend reflects a systemic disregard by MNR of the public's rights under the *EBR* and it is indicative of poor internal decision making.

4.3 | Ministry of Municipal Affairs and Housing: Denied All *EBR* Applications by the Public in the Last 18 Years

The Ministry of Municipal Affairs and Housing (MMAH) received two applications for review in this reporting year, and denied both. As part of a long-standing trend, the ministry has

now denied all 25 applications that it has received since the inception of the *EBR*. The ECO believes that MMAH's actions over this time represent a deliberate disregard to the will of the Ontario legislature in giving the public the right to file *EBR* applications for review related to the ministry's legislation and policies.

The overwhelming majority of the *EBR* applications that the public has submitted to MMAH have related to the Provincial Policy Statement (PPS) made under the *Planning Act* (see Table 2). Many of the issues raised by the public were valid and, often, pressing concerns. In almost every case, MMAH rationalized the denial of these requests, either because the PPS had already been reviewed within the last five years or it was in the process of being reviewed. This sounds like an acceptable legal rationale for denying an individual application under the *EBR*. However, the PPS review process is primarily focused on stakeholders and municipalities; it does not provide the kind of substantive response to public concerns and specific issues that the *EBR* application process is intended to ensure. The systemic refusal by MMAH to even contemplate the public's concerns voiced in these *EBR* applications represents an utter lack of respect for Ontarians, as well as a total lack of respect for the *EBR* process set out by the Legislature.

Other ministries often deny these very same *EBR* applications as well, but on different grounds. These ministries typically argue that they are not directly responsible for the PPS and, therefore, they defer to MMAH's decision on how to handle the issues raised by the public. However, the end result is the same: the public's concerns are ignored and the problems often go unaddressed. This entrenched disregard of public concerns does not constitute good public policy.

Table 2
Handling of All *EBR* Applications for Review Since 1994 Filed by the Public that Requested Changes Related to the Provincial Policy Statement under the *Planning Act.*

	Applications Submitted	Denied	Undertaken
MMAH	17	17	0
MNR	8	8	0
MOE	6	3	3

4.4 | Ministry of Northern Development and Mines: Denied All *EBR* Applications by the Public in the Last 18 Years

The Ministry of Northern Development and Mines (MNDM) has denied all 12 *EBR* applications filed by the public since the inception of the Act. MNDM's actions over this time show a total disregard for the will of the Ontario Legislature in giving the public the right to file *EBR* applications for review related to the ministry's legislation and policies. The ministry's actions—or lack thereof—constitute a flagrant disservice to the public and its rights. This trend also could give the public the impression that the ministry insufficiently weighs environmental concerns in its decision making.

CHAPTER 5.0

INSTRUMENTS AND STATEMENTS OF ENVIRONMENTAL VALUES

CONSIDERATION IS OVERDUE

Section 11 of the *Environmental Bill of Rights, 1993* (*EBR*) requires prescribed ministries to consider their Statements of Environmental Values (SEVs) when making decisions that might significantly affect the environment. SEVs embody the core environmental principles of each ministry. Requiring ministry staff to consider their ministy's SEV when making environmentally significant decisions obliges staff to turn their minds to these core principles, which should ultimately lead to better environmental decision making, and a cleaner more sustainable natural environment.

There is no ambiguity about the nature of this requirement. The interpretation has been challenged and adjudicated in our courts. In June 2008, the Ontario Divisional Court ruled that prescribed ministries must consider their SEVs when making decisions not only on environmentally significant policies, acts and regulations, but also on instruments prescribed under the *EBR* (see pages 143-145 of the ECO's 2008/2009 Annual Report). These instruments include, for example, Permits to Take Water (PTTWs), permits under the *Endangered Species Act, 2007* (*ESA*), and approvals for waste disposal sites. While prescribed ministries have discretion to decide whether a given policy, act or regulation is environmentally significant—and therefore subject to SEV consideration—instruments that are classified under the *EBR* are, by definition, environmentally significant and require SEV consideration.

In July 2008, the ECO wrote to ministries affected by this court decision, outlining the implications and explaining that, in order for the ECO to assess ministries' consideration of SEVs and compliance with the *EBR*, the ECO must be provided with a ministry SEV consideration document for instrument decisions. It is the ECO's understanding that, prior to the June 2008 court ruling, ministries that issue prescribed instruments generally did not prepare SEV consideration documents when making these decisions.

Satisfied that enough time had passed for the ministries to put in place processes for documenting SEV consideration for instrument decisions, in August 2011, the ECO informed the affected ministries—the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), the Ministry of Municipal Affairs and Housing (MMAH), the Ministry of Northern Development and Mines (MNDM) and the Ministry of Consumer Services (MCS)—that the ECO intended to periodically request SEV consideration documentation for select instrument decisions. The ECO clarified that SEV consideration should include, at a minimum: reflecting on how a ministry's SEV principles apply to a proposal; and documenting this analysis in a transparent and accountable manner. The ECO notes that "consideration" of a SEV, however, does not necessitate conforming to or complying with the principles of the SEV.

In October 2011, the ECO began requesting proof of SEV consideration for several select instrument decisions. As detailed in Appendix IV, the ECO was satisfied with the SEV consideration documentation of several of the ministries, but was deeply troubled with some of MOE and MNR's responses.

When MOE and MNR finally responded to the ECO after several months delay, both ministries asserted that formal SEV consideration documentation is unnecessary for certain instruments. For example, MOE asserted that formal SEV consideration documentation is unnecessary for low risk PTTW applications because "no permit allows water taking that causes impact," and SEV consideration is built into MOE's PTTW program. Moreover, MOE indicated that it uses an internal screening procedure to determine environmental significance and the need to document SEV consideration for specific Environmental Compliance Approvals (formerly called Certificates of Approval). Likewise, MNR did not document its SEV consideration for two permits issued under the *ESA* because the ministry had determined that the environmental impact of the permitted activities would not be significant. The ECO takes issue with these positions and notes that documenting an SEV consideration is necessary, not only for demonstrating to the ECO and the public that such a consideration has occurred, but also ensuring that the consideration is deliberate and thorough.

In addition to arguing that SEV documentation is unnecessary for "environmentally insignificant" instrument decisions, MOE and MNR both indicated that for some instrument decisions, SEV consideration is embedded in other reports and documents, such as engineering assessment reports and aggregate licence reports (prepared under section 12 of the *Aggregate Resources Act*), rather than a stand-alone SEV consideration document. The ECO theoretically supports the notion of embedding SEV consideration in other processes and documenting this consideration in other reports. However, while MOE's engineering assessment reports and MNR's aggregate licence reports may effectively describe a project and its potential environmental impacts, upon reviewing the provided reports, the ECO found no reference to how specific SEV principles (e.g., cumulative effects, the ecosystem approach,

the precautionary approach) had been considered. To adequately demonstrate that SEV consideration has occurred, SEV consideration documentation requires an explicit explanation of which specific SEV principles were considered, and why and how they were considered, applied and/or dismissed during the decision-making process.

The ECO is extremely disappointed that four years after the court decision, some ministries still try to avoid documenting their SEV consideration for prescribed instruments, screening out some "non-environmentally significant" instruments and inadequately "embedding" SEV consideration in other reports. This saga has gone on long enough. In order for the ECO to determine whether SEV consideration has occurred, the ECO must be provided with documentation that fully demonstrates how the SEV was considered during the decision-making process. To improve transparency and accountability, the ECO recommends that ministries provide links to their SEV consideration documents in decision notices for instruments posted on the Environmental Registry. Openly explaining to the public how specific SEV principles were considered and accounted for during the decision-making process would provide clarity about the ministry's rationale for the decision, and would improve assurance that SEV principles were taken into account even if the decision does not fully conform to them.

COMMISSIONER'S CONCLUSION

The public service that I joined in 1980 was very much in touch with the requirements and intent of the statutory framework that the Legislature of Ontario had put in place. As a young pollution abatement officer in an age when environmental protection laws were still being innovated and crafted, there were many frustrations with the legal requirements that were in place or absent. We were told that our job was to follow the requirements of the law and that our senior management would pursue adjustments, if necessary, with the Legislators. Mistakes and unforeseen delays would happen, but, certainly, we were never to deliberately thwart or frustrate the will of the Legislature.

So it astounds me to report on the degree of disregard and contempt that is shown to statutory requirements of the EBR *each year. Especially because the* EBR *is about the rights of citizens to participate in decision making as it relates to our environment. The simple, yet fundamental requirement to consider a Statement of Environmental Values in their decision making has been opposed and frustrated by ministries for years, even after I had to have my lawyers successfully argue the point against MOE lawyers in Divisional Court.*

And, various ministries persist in hiding environmentally significant decisions from public scrutiny and comment in open defiance of the clear intent of the statute. The most egregious example is MNR's attempt to shield the Provincial Wildlife Population Monitoring Program Plan from public review. The ministry's behaviour is all the more offensive because the plan itself is inadequate in meeting the requirements of the Environmental Assessment Act *and the* Crown Forest Sustainability Act, 1994.

Perhaps it is understandable that the ministries are no longer referred to as the "civil service," because there is nothing civil about the way citizens are often treated when they exercise their legislated right to file a request for investigation or review. Completing the application process is a difficult and regrettably cumbersome task for regular people who are not skilled at bureaucratic or

legal procedures. They endure because they are motivated by a sincere concern which may or may not hold true, but they deserve to be treated in a "civil" manner and to be provided appropriate "service." Denying all comers as some ministries do does not reflect service; making citizen applicants wait 252 days for an answer that the Legislature has indicated must be provided in 60 days is not civil behaviour.

And, finally, the failure to prescribe ministries that clearly make environmentally important decisions or to restore that status to ministries that have had a name change is an omission of the duty of the public service, at the highest order, to respect the will of the Legislative Assembly. This sort of housekeeping item is simply a requirement of good government.

So, hence, comes the name of this report, from the perspective of a multi-decade veteran of the public service of Ontario. It appears that elements of the bureaucratic institution called the Ontario Public Service, which was created to support and implement the will of the people's Legislative Assembly, are somehow losing touch with their role and responsibilities, at least with regard to the Environmental Bill of Rights.

APPENDIX I

Prescribed Ministries and Acts

The *Environmental Bill of Rights, 1993 (EBR)* only applies to ministries, acts and instruments that are "prescribed" (i.e., specifically designated) by regulation as being subject to *EBR* requirements.

Ministries Prescribed for the Purposes of SEV Consideration and Registry Notice

As of August 2012, 14 ministries are prescribed under Part II of the *EBR* (i.e., listed in O. Reg. 73/94, the general regulation under the *EBR*):

- Ministry of Agriculture, Food and Rural Affairs (OMAFRA)
- Ministry of Consumer Services (MCS)
- Ministry of Economic Development and Innovation (MEDI)
- Ministry of Education (EDU)
- Ministry of Energy (ENG)
- Ministry of the Environment (MOE)
- Ministry of Government Services (MGS)
- Ministry of Health and Long-Term Care (MOHLTC)
- Ministry of Labour (MOL)
- Ministry of Municipal Affairs and Housing (MMAH)
- Ministry of Natural Resources (MNR)
- Ministry of Northern Development and Mines (MNDM)
- Ministry of Tourism, Culture and Sport (MTCS)
- Ministry of Transportation (MTO)

The ministries listed above must prepare and consider a Statement of Environmental Values (SEV) and must give notice on the Environmental Registry and consult with the public on any environmentally significant policies or acts that they propose.

Regulations

As of August 2012, there are 35 acts that are prescribed (in whole or in part) in O. Reg. 73/94 under the *EBR*; ministries must give notice of proposals for environmentally significant regulations made under those prescribed acts.

Instruments

Five ministries (MCS, MOE, MMAH, MNR and MNDM) are prescribed for purposes of classifying instruments (e.g., permits, licences and approvals) issued under acts administered by those ministries. Only instruments that are classified in O. Reg. 681/94—Classification of Proposals for Instruments, made under the *EBR*, are subject to the *EBR*. Currently, select instruments issued under 18 different acts are classified. The responsible ministries must give notice on the Environmental Registry of any proposals and decisions related to those classes of instruments.

Ministries Prescribed for the Purposes of Applications for Review

There are currently nine ministries prescribed for purposes of applications for review under the *EBR*:

- Ministry of Agriculture, Food and Rural Affairs (OMAFRA)
- Ministry of Consumer Services (MCS)
- Ministry of Energy (ENG)
- Ministry of the Environment (MOE)
- Ministry of Health and Long-Term Care (MOHLTC)
- Ministry of Municipal Affairs and Housing (MMAH)
- Ministry of Natural Resources (MNR)
- Ministry of Northern Development and Mines (MNDM)
- Ministry of Transportation (MTO)

Environmentally significant policies administered by those ministries are subject to *EBR* applications for review. Applicants may also request a review of the need for new policies, acts or regulations administered by those ministries. Specific acts must be prescribed in order for those acts and the regulations made under them to be subject to the *EBR* application for review requirements. Instruments prescribed under O. Reg. 681/94 are also subject to *EBR* applications for review.

Ministries Prescribed for the Purposes of Applications for Investigation

Applications for investigation may be filed for alleged contraventions under 19 different laws prescribed under the *EBR*, and for contraventions of any regulations under those laws. Applications for investigation may also be filed for alleged contraventions of prescribed instruments issued under 17 laws, administered by four ministries (MOE, MMAH, MNR, MNDM) and one agency (the Technical Standards and Safety Authority of the Ministry of Consumer Services).

Please see the ECO's website (www.eco.on.ca) for an up-to-date list of ministries, laws and instruments prescribed under the *EBR*.

APPENDIX II

Ministry Use of the Environmental Registry in 2011/2012

The Environmental Registry is a searchable online database established under the *Environmental Bill of Rights, 1993* (*EBR*) that provides public access to timely information about environmentally significant proposals and decisions made by the Ontario government. The Environmental Registry can be accessed at www.ebr.gov.on.ca.

The Environmental Registry is a key mechanism for the public to exercise their *EBR* rights to participate in government environmental decision making. Prescribed ministries are required to post notices of proposals for environmentally significant policies, acts, regulations and instruments on the Environmental Registry, and to provide the public with a minimum of 30 days to comment on such proposals. The public has the option of submitting their comments electronically, directly through the Environmental Registry. Ministries must consider all public comments received; once a ministry has made a final decision, it must post a decision notice explaining its decision and explaining the effect, if any, of the public's comments on the ministry's decision.

When a decision regarding an instrument is challenged in an appeal or an application for leave to appeal, the ECO posts appeal notices on the Environmental Registry to keep the public apprised of the status of the appeal and its outcome.

The Environmental Registry also provides other information that may assist the public in using their *EBR* rights, such as commenting on an environmentally significant proposal, including:

- background information about the *EBR*;
- links to the full text of the *EBR* and its regulations;
- links to prescribed ministries' Statements of Environmental Values;
- links, in some cases, to the full text of proposed and final policies, acts, regulations and instruments; and
- links, in some cases, to other information relevant to a proposal.

The Environmental Registry is maintained by the Ministry of the Environment (MOE). The ECO monitors ministries' use of the Environmental Registry to ensure that prescribed ministries are satisfying their obligations under the *EBR*, and that the public's participation rights are being respected.

EBR Requirements to Post on the Environmental Registry

Part II of the *EBR* sets out minimum levels of public participation that must be met before the prescribed ministries make decisions on certain kinds of environmentally significant proposals for policies, acts, regulations and instruments.

A proposal for a new policy, act, regulation or instrument (or amendments to them) must be posted if the minister of a prescribed ministry considers that: the policy, act, regulation or

instrument could have a significant effect on the environment if implemented; and the public should have an opportunity to comment on the proposal before implementation.

There are few exceptions to the requirement to post a proposal notice on the Environmental Registry. A ministry does not need to post a proposal notice if: the policy, act or regulation is predominantly financial or administrative in nature; the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property; or the policy, act, regulation or instrument has already been, or will be, considered in a public participation process substantially equivalent to the *EBR* process. In the latter two cases, the ministry must post an "exception notice" on the Environmental Registry (see below).

Ministry Use of the Environmental Registry in 2011/2012

In this reporting year, 64 proposal notices were posted on the Environmental Registry for policies, acts and regulations. Of those 64 proposal notices, 41 were for policies, 22 were for regulations, and only one was for a proposed act.

Comment Periods

The *EBR* requires ministries to provide a minimum of 30 days for the public to submit comments on proposals posted on the Environmental Registry. To examine whether ministries are exceeding this minimum consultation requirement, the ECO tracks the number of proposal notices that have public comment periods of 45 days or longer. In this reporting year, the ministries that posted proposals provided 45 days or longer for the public to comment (i.e., well beyond the minimum 30 days required) 81 per cent of the time (see Table 3). While ministries are to be praised for going above and beyond minimum requirements most of the time—and, in fact, four of the eight ministries that posted proposal notices provided 45-day or longer comment periods 100 per cent of the time—this number is down from a 90 per cent rate in 2010/2011.

Quality of Registry Notices

Proposal notices must clearly explain the nature of the proposal and the potential impacts of the proposal on the environment. It is also helpful for notices to include links to supporting documentation, such as the draft text of a proposed regulation. Likewise, decision notices should explain the ministry's final decision and the effect of public consultation on that decision.

The proposal notices posted on the Environmental Registry during this reporting year generally included clear explanations of the actions ministries were proposing, and often included links to additional information. For example, MOE and MNR regularly posted proposal notices with detailed explanations of the actions proposed and included links to related information on the ministries' websites and elsewhere. However, the ECO noted this year that some ministries, including MNR, often completed the "purpose" portion of policy and regulation proposal notices incorrectly, by describing the purpose of the proposal (i.e., to notify the public and seek public input) rather than explaining to the public the underlying purpose or rationale of the proposed policy or regulation itself.

Decision notices posted this year were also generally well explained, including descriptions of how a ministry considered public comments in making the final decision. However, some decision notices should have included more details. For example, several instrument decision notices posted this year under the *Technical Standards and Safety Act, 2000*, failed to describe

Table 3
Number of Proposal Notices for Policies, Acts and Regulations Posted on the Environmental Registry During the 2011/2012 Reporting Period (April 1, 2011 – March 31, 2012).

Ministry	Number of Proposals	Proposals with a 45-day or Longer Comment Period	
		Number	Percentage
Agriculture, Food and Rural Affairs	3	3	100%
Consumer Services	1	0	0%
Economic Development and Innovation	0	n/a	n/a
Energy	1	1	100%
Environment	11	5	45%
Government Services	0	n/a	n/a
Health and Long-Term Care	0	n/a	n/a
Labour	0	n/a	n/a
Municipal Affairs and Housing	0	n/a	n/a
Natural Resources	39	35	90%
Northern Development and Mines	5	5	100%
Tourism, Culture and Sport	1	0	0%
Transportation	3	3	100%
TOTAL	**64**	**52**	**81%**

the decision altogether or in sufficient detail, falling well below the ECO's expectations. Inadequate descriptions of ministry decisions on instruments not only result in less government transparency and accountability for its decisions, but they can impede the public's ability to exercise their *EBR* appeal rights.

Late Decision Notices: Unknown Status of Policies, Acts and Regulations

The Environmental Registry should provide a reliable, up-to-date window on environmental decision making in Ontario. While much of the information on the Environmental Registry is up to date, sometimes old proposal notices are left hanging. Once ministries have considered public comments on a proposal and made a decision, they must follow up with a "decision notice." Unfortunately, ministries do not always follow up, and thus some proposals are left on the Environmental Registry for years without updates or explanation.

Looking at an 18-year time frame from 1994 to 2012, ministries have followed the process as intended for 90 per cent of all notices relating to policies, acts and regulations: they have posted a decision notice to follow up on the proposal notice. But the other 10 per cent of the proposal notices have been languishing on the Environmental Registry at the proposal stage for at least two years and, in some cases, many years. Looked at another way, 60 per cent of all proposals (for policies, acts and regulations) currently on the Environmental Registry are at least two years old and may no longer be relevant. These orphaned proposals reduce the credibility of the Environmental Registry as a reliable source of information; neither the public nor the ECO is able to tell whether the ministry is still considering the proposal, or has decided to drop the proposal, or is late in posting a decision notice.

Almost 50 proposals on the Environmental Registry (not counting instrument proposals) pre-date October 2003, when Ontario last experienced a change in government after a provincial election; it is fair to assume that some of these proposals have become irrelevant, but the Environmental Registry gives no such indication.

The public would be better served if MOE (which administers the Environmental Registry) could resolve the problem of orphaned proposal notices; one option might be to clearly label outdated proposals as such, and where possible, offer Registry users electronic links to more recent proposals.

Information Notices

In cases where ministries are not required to post a proposal notice on the Environmental Registry for public comment, they may still provide a public service by posting an "information notice" under section 6 of the *EBR*. These notices keep Ontarians informed of important environmental developments.

Significant differences exist between regular "proposal notices" posted on the Environmental Registry and "information notices." With regular proposal notices, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision. The ECO then reviews the extent to which the ministry considered those comments and its Statement of Environmental Values when it made the final decision. Information notices should only be used by ministries in cases when a regular proposal notice is not required under the *EBR*.

In the 2011/2012 reporting year, there were 165 information notices posted on the Environmental Registry by seven ministries (see Table 4). Some examples of information notices in this reporting year included: Minister's Zoning Orders under the *Planning Act*; amendments to mine closure plans under the *Mining Act*; approvals of assessment reports for Source Protection Areas under the *Clean Water Act, 2006*; and unclassified permits under the *Endangered Species Act, 2007*.

An example of a good use of an information notice posted on the Environmental Registry is MNR's provision of information regarding prescribed burns scheduled for 2012 (#011-5659). Although MNR is not required under the *EBR* to provide this information on the Environmental Registry, the information notice is helpful for interested or affected members of the public wishing to learn what areas are scheduled for burns and for what purpose (e.g., tallgrass prairie restoration, etc.).

Table 4
Number of Information Notices Posted by Ministry, 2011/2012 Reporting Year.

Ministry	Number of Information Notices
Energy	2
Food, Agriculture and Rural Affairs	1
Municipal Affairs and Housing	21
Natural Resources	75
Northern Development and Mines	16
Environment	49
Transportation	1
TOTAL	**165**

Exception Notices

In certain situations, the *EBR* relieves prescribed ministries of their obligation to post environmentally significant proposals on the Environmental Registry for public comment.

There are two main instances in which ministries can post an "exception notice" to inform the public of a decision and explain why it was not posted for public comment. First, there is the "emergency" exception. Ministries are permitted to post an exception notice under section 29 of the *EBR* when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property. Second, there is the "equivalent public participation" exception. Ministries can post an environmentally significant proposal as an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR*.

During the 2011/2012 reporting year, MOE posted five instrument exception notices on the Environmental Registry, all using the emergency exception. The ECO believes that all exception notices posted on the Environmental Registry in 2011/2012 were acceptable uses of the *EBR*'s exception provisions. For example, MOE issued an order under the *Environmental Protection Act* and the *Ontario Water Resources Act* to avoid the catastrophic failure of a tailings dam in Timmins that would have resulted in a serious risk of harm to the environment.

Renewable Energy Approvals and the Environmental Registry

Renewable energy approvals (REAs) issued under the Environmental Protection Act (e.g., approvals for solar, wind power or bioenergy projects) are prescribed instruments under the *EBR*. To apply for a REA, applicants must prepare a number of reports and other documents outlining various aspects of the proposed projects and its potential impacts. Just one component of a REA application is the natural heritage assessment, for which up to six separate reports may be required.

Proposal notices for REAs have not, to date, included links to any of the supporting materials for the application, such as the various natural heritage assessment reports. And while the REA regulation requires an applicant to post all application materials on the applicant's own website (but only if they have one), proposal notices on the Environmental Registry do not inform the public of this requirement. Thus, a member of the public who wishes to view the supporting application materials before commenting on a proposal for a REA must either contact the ministry staff named in the proposal notice for additional information, or know that they might find the application materials on the applicant's website.

Forcing interested Ontarians to track down information they may need to make an informed comment on specific aspects of a proposal for a REA is unnecessary and contrary to the intent of the *EBR*. This challenge in obtaining supporting information for instrument proposals is not unique to REAs; however, given that supporting information for REAs is typically otherwise readily available, it would make infinitely more sense for MOE to include a link to the REA application and all supporting documents (such as the natural heritage assessment reports) in the proposal notice on the Environmental Registry or, at a minimum, provide a link to the materials on the applicant's website.

The process for a third party to challenge a REA decision is different than the usual "leave to appeal" process for other instrument decisions under the *EBR*. However, when MOE posts decision notices for REAs on the Environmental Registry, it uses the same template used for all other instrument decision notices even though the instructions for seeking leave to appeal do not apply to REA decisions. MOE addresses this problem by including large, bold lettering at the top of REA decision notices instructing the reader to ignore the section entitled "Leave to Appeal Provisions" and to instead follow the instructions contained in a note added to the "Decision on Instrument" section.

The Environmental Registry is, in many ways, the face of the *EBR*. It is the primary venue for the public to receive notice of and participate in government environmental decision making. When a REA decision notice is posted on the Environmental Registry, it triggers the public's right to challenge the government's decision to issue the approval. It is therefore critical that REA decision notices clearly explain to Ontario residents their appeal rights and the process for exercising these rights. While MOE can be credited for attempting to communicate the proper information in REA decisions notices, the result is a messy and complicated notice that is likely to confuse some Registry users.

In some REA decision notices posted in 2010, MOE stated that it "is currently working to amend the template for decision notices to reflect the third party hearing process for renewable energy projects." However, these amendments still have not been made and MOE no longer includes this statement in REA decision notices. In April 2012, MOE advised the ECO that it is still working on updates to the template.

APPENDIX III

Appeals, Lawsuits and Whistleblowers

The *Environmental Bill of Rights, 1993* (*EBR*) provides Ontarians with several legal tools that enable them to enforce and protect their environmental rights, including:

- appeal rights;
- public nuisance claims;
- "harm to a public resource" claims; and
- whistleblower protection.

Appeals

Many Ontario statutes provide individuals and companies with a right to appeal (i.e., challenge) government decisions that directly affect them, such as a decision to deny, amend or revoke a permit, licence or approval for which they applied or that was issued to them. These are called "instrument holder appeals." If an instrument holder appeal relates to an instrument that is prescribed as a Class I or Class II instrument under O. Reg. 681/94 made under the *EBR*, the public has a right under the *EBR* to receive notice of that appeal. The ECO is required to post notice of instrument holder appeals on the Environmental Registry; the ECO also posts notice on the Registry of the final disposition of these appeals (i.e., whether the appeal was allowed, denied or withdrawn) for the public's information.

During the 2011/2012 reporting year, the ECO posted 13 new instrument holder notices of appeal on the Registry. Seven of these appeals related to Ministry of the Environment (MOE) Director's orders issued under the *Environmental Protection Act* (*EPA*), four related to renewable energy approvals for wind power projects issued under the *EPA*, and the remaining two were appeals of municipal official plan amendments made under the *Planning Act*.

Leave to Appeal

The *EBR* expands the basic appeal rights granted to instrument holders by enabling any member of the public (i.e., a "third party") to apply for "leave" (i.e., permission) to appeal certain ministry decisions that relate to instruments prescribed under the *EBR*. These are called "third party appeals." Ontario residents who wish to seek leave to appeal a decision must apply to the proper appeal body—usually the Environmental Review Tribunal (ERT)—within 15 days of the decision being posted on the Environmental Registry.

However, to be granted leave to appeal, applicants must first establish that they have an interest in the decision in question. They must then satisfy the two-part test for leave to appeal set out in section 41 of the *EBR* by successfully demonstrating that:

- there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
- the decision could result in significant harm to the environment.

Table 5
Applications for Leave to Appeal (LTA) Initiated in the ECO's 2011/2012 Reporting Year

Instrument Holder	Instrument	Environmental Registry #	LTA Applicant(s)	Date of LTA Application	Leave Decision
Timco Foods Ltd.	Air approval	011-2928	Jim and Laurie Muche; John and Jo-anne Bisaillon	June 17, 2011	LTA denied (August 2011)
Miller Paving Ltd.	Air approval	010-8228	James McBride	September 9, 2011	LTA withdrawn (December 2011)
Waste Management of Canada Corporation	Waste approval	011-3302	Kimberly Mantas	October 17, 2011	LTA denied (February 2012)
Panolam Industries Ltd.	Air approval	011-1771	Andrew Tkachenko	December 30, 2011	LTA withdrawn (January 2012)
Waste Management of Canada Corporation	Waste approval	011-0671	Concerned Citizens Committee of Tyendinaga and Environs	January 30, 2012	LTA granted (March 2012)

Table 6
Leave to Appeal Application Concluded in the ECO's 2011/2012 Reporting Year (filed in earlier years)

Instrument Holder	Instrument	Environmental Registry #	LTA Applicant(s)	Date of LTA Application	Leave Decision
Orgaworld Canada Ltd.	Waste approval; and air approval	010-4040 (waste); 010-4049 (air)	Mark Scharfe, registered Chair of the Ramsayville Community Association	September 2009	Waste: LTA dismissed because applicant did not file notice of leave to appeal in time; Air: LTA denied (November 2011)

During the 2011/2012 reporting period, concerned members of the public sought leave to appeal five instrument decisions. Three of the applications this year involved air approvals issued by MOE under section 9 of the *EPA*. The remaining two applications involved waste approvals issued by MOE under section 27 of the *EPA*. Table 5 provides a brief summary of the leave to appeal applications filed during the ECO's 2011/2012 reporting year; Table 6 provides a summary of the leave to appeal applications concluded in 2011/2012, but filed in earlier years. Additional information can be found in the notices posted on the Environmental Registry at www.ebr.gov.on.ca. The full text of the decision for each appeal can be found on the ERT's website at www.ert.gov.on.ca.

Claims for Public Nuisance

Before the *EBR* came into force, claims for public nuisances in Ontario had to be brought by, or with leave of, the Attorney General. Since 1994, under section 103 of the *EBR* someone who has suffered direct economic loss or personal injury as a result of a public nuisance that has harmed the environment can bring forward a claim without the approval of the Attorney General. No new lawsuits claiming public nuisance as a cause of action came to the ECO's attention during this reporting year.

The Right to Sue for Harm to a Public Resource

The *EBR* gives Ontarians the right to sue any person that is breaking, or is about to break, an environmental law, regulation or instrument that has caused, or will cause, harm to a public resource. To date, the only court action brought under the "harm to a public resource" provisions of the *EBR* for which notice has been provided to the ECO is a proceeding started in 1998 by the Braeker family against MOE and Max Karge, an owner of an illegal tire dump.

Whistleblower Rights

The *EBR* protects employees against reprisals by employers (e.g., dismissal, discipline, etc.) for reporting environmental violations in the workplace or otherwise exercising their rights under the *EBR*. The ECO is not aware of any employer reprisal cases in this reporting year.

APPENDIX IV

SEV Consideration for Instruments

Five ministries and one agency have responsibility for administering instruments prescribed under the *Environmental Bill of Rights, 1993 (EBR)*:

- The Ministry of the Environment (MOE);
- The Ministry of Natural Resources (MNR);
- The Ministry of Northern Development and Mines (MNDM);
- The Ministry of Municipal Affairs and Housing (MMAH); and
- The Technical Standards and Safety Authority (TSSA) of the Ministry of Consumer Services (MCS).

Ministries' Responses to the ECO's Requests

This year, to assess ministries' compliance with section 11 of the *EBR* with respect to prescribed instruments, the ECO requested proof of the ministries' consideration of their Statement of Environmental Values (SEV) for select instrument decisions. As detailed below, the ECO was troubled by some ministries' responses, given the Divisional Court's clear ruling on SEV consideration for prescribed instruments.

Ministry of the Environment

Between October 2011 and March 2012, the ECO requested from MOE proof of SEV consideration for 61 instruments. The ministry did not begin responding to these requests until March 13, 2012, when it sent the ECO a letter apologizing for the delay and explaining the ministry's processes for documenting SEV considerations.

MOE stated that due to the complexity and high volume of applications received for Environmental Compliance Approvals (ECAs)—formerly called Certificates of Approval—the ministry "does not formally document the consideration of our SEV for each application. Instead MOE has developed an internal procedure to screen for environmentally significant applications against a set of criteria …. When a proposal triggers these criteria and the reviewer determines that the application is environmentally significant, consideration of our SEV is documented in a SEV Consideration Form, or in an [environmental assessment report] or other document."

For Permits to Take Water (PTTWs), MOE reasoned that because its PTTW manual and program apply principles that echo those found in the ministry's SEV, consideration of MOE's SEV is built into the current delivery of the PTTW program. Moreover, "as no permit allows water taking that causes impact because of the general and specific terms and conditions imposed by every permit, [MOE is] especially confident that decisions related to low risk Category 1 applications do not require the ministry to make decisions that might significantly affect the environment. On this basis, the ministry does not believe that formal SEV consideration documentation is required for Category 1 applications." MOE assured the ECO that it will continue to provide SEV consideration documentation upon request for PTTW instrument decisions that receive public comments and that involve higher category proposals.

Of the 61 MOE instrument decisions for which the ECO requested proof of SEV consideration, as of May 2012, MOE had provided environmental assessment reports for 34 of them, separate SEV consideration documentation for 20, and nothing for 7 of them.

Upon reviewing engineering assessment reports provided by MOE, the ECO determined that these reports do not adequately document SEV consideration. MOE's engineering assessment reports provide: a technical overview of the proposal; a description of the project's potential implications; references to relevant standards and emission limits; and information on public consultation via the Environmental Registry. These reports, however, lack any reference to how specific SEV principles were considered during the decision-making process.

The stand-alone SEV consideration documents MOE provided demonstrate variable detail. For several PTTWs, the SEV consideration document describes how broad SEV principles (e.g., environmental management, pollution reduction, environmental restoration, and strategic management) were considered, why certain principles were not applicable, and cases where it was not possible to take specific SEV guiding principles into account. Within each of these broad categories, the documentation appropriately includes reference and consideration of specific SEV principles (e.g., cumulative effects, the ecosystem approach, the precautionary approach). By contrast, other SEV consideration documents (including approvals for renewable energy projects and the alteration to an air standard) refer to the same general categories, but lack discussion of how specific SEV principles were considered. Still other documents list the guiding questions, but fail to answer them.

Ministry of Natural Resources

Between December 2011 and March 2012, the ECO requested from MNR proof of SEV consideration for seven instruments. MNR took over two months to provide an SEV consideration document for the first request, but later responded to ECO requests in just over two weeks.

For a permit to engage in an activity (road construction) that would otherwise be prohibited by section 9 of the *Endangered Species Act, 2007*, the ministry used a checklist template to document its consideration, explaining whether and how it considered several SEV principles when making its decision, including: recognition of the finite capacity of natural systems; use of adaptive management; rehabilitation of degraded environments; the value of natural resources; and public participation.

For two instrument decisions, which concern aggregate licences, MNR explained that the consideration of environmental values is contained within reports prepared to fulfill section 12 of the *Aggregate Resources Act* (*ARA*). (Section 12 of the *ARA* requires the Minister of Natural Resources or the Ontario Municipal Board to consider several factors when deciding whether a licence should be issued or refused, including: the effects of the operation on the environment and nearby communities, ground and surface water resources, and agricultural resources.) While the two reports MNR provided consider the impacts of aggregate operations, they do not explain whether or how the ministry considered its SEV's principles, such as the ecosystem approach and adaptive management, when making these decisions.

For the other four instrument decisions, MNR did not provide any documentation of SEV consideration. For two of these decisions, the ministry explained that it did not document

its SEV consideration because MNR had determined that the environmental impact of the permitted activity would not be significant.

Ministry of Municipal Affairs and Housing

Between December 2011 and March 2012, the ECO requested from MMAH proof of SEV consideration for four instrument decisions. For the first request, MMAH took a month and a half to provide an SEV consideration document. For the three later requests, the ministry provided proof of SEV consideration within less than a month.

MMAH staff document their SEV consideration by following a guideline that asks a decision-maker to: summarize the instrument decision; confirm which SEV environmental principle(s) were considered in the decision-making process (as determined by completing a checklist assessing the environmental impact); explain how the decision is consistent with the environmental principles(s) considered; indicate whether there are specific *EBR* purposes that benefit from the decision; and indicate whether there are aspects of the decision that conflict with provisions or commitments set out in MMAH's SEV. The guideline also provides a list of factors to help MMAH staff assess the significance of an environmental impact. For all four of the instrument decisions that the ECO requested proof of SEV consideration, MMAH determined that the environmental principle of "ensuring well-planned and healthy communities while protecting greenspace" applied.

Ministry of Northern Development and Mines

Between December 2011 and March 2012, the ECO requested from MNDM proof of SEV consideration for four instruments. For three of these requests, the ministry promptly provided documentation of SEV consideration the same day. For the other request, MNDM's proof of SEV consideration arrived within the week.

MNDM staff document their SEV consideration by completing brief answers to a series of relevant questions, including: how the proposal/project complements or furthers the achievement of the ministry's SEV; whether there are any aspects of the proposal/project that conflict with provisions or commitments in MNDM's SEV; and whether special measures have been instituted to monitor and assess the proposal or project's achievement of the SEV's provisions and commitments.

Technical Standards and Safety Authority

In December 2011, the ECO requested proof of SEV consideration from the Technical Standards and Safety Authority (TSSA), which is an authority under the Ministry of Consumer Services (MCS) for one instrument: permission to deviate from requirements of the Liquid Fuels Handling Code. In February 2012, the TSSA wrote to the ECO to explain that it only became standard practice at the TSSA to complete an SEV consideration form for instruments as of January 1, 2012—after the decision on the instrument had been made. The TSSA explained that in mid-2011, it developed an SEV consideration form and guide to aid staff in considering MCS's SEV when making instrument decisions and documenting that consideration process. Staff were given until January 1, 2012 to become familiar with the new process. The TSSA provided the ECO with copies of its new SEV consideration form and guide.

The TSSA stated:

> Although the SEV consideration form was not yet in use at the time of this particular variance application, TSSA was nevertheless already considering potential environmental impacts as part of our integrated variance application assessment process. This is in keeping with the MCS SEV, which provides that "analysis of environmental effects and the purposes of the *EBR* will be integrated into a proposal's other analysis, whether of a social, economic, scientific or other nature. This will permit joint consideration of all relevant factors in a balanced, reasonable and responsible manner."

APPENDIX V

Ministries, Acts and Instruments Not Prescribed

The *Environmental Bill of Rights, 1993 (EBR)* establishes important rights to ensure government accountability, transparency, and public participation in environmental decision making. However, these responsibilities only apply to the provincial ministries that are "prescribed" (i.e., designated in Ontario Regulation 73/94 made under the *EBR*). Furthermore, many of the *EBR* rights only apply to acts and instruments administered by these ministries that are also prescribed. Therefore, for the *EBR* to function, it is essential that those ministries and agencies that make decisions that may have an impact on the environment, and the environmentally significant acts and instruments that they administer, are all prescribed under the *EBR*.

To ensure that the *EBR* remains up to date, the ECO regularly tracks developments in the Ontario government (such as the creation of new ministries, reorganizations of government portfolios, and the enactment of new laws), and continually encourages the government to update the two *EBR* regulations (O. Reg. 73/94 and O. Reg. 681/94) to ensure that all ministries, laws and instruments that are environmentally significant are prescribed. Keeping the *EBR* up to date helps to ensure that Ontario residents can participate in all environmentally significant decision making.

While most key ministries, acts and instruments are prescribed, there continue to be both outright refusals as well as inordinate delays from government to prescribe certain ministries, laws and instruments under the *EBR*. For example, there are typically exceedingly long delays before new environmentally significant acts are prescribed; in the interim, new regulations are often filed, depriving the public of its rights to proper notice and comment under the *EBR*.

The government's continued failures and/or delays to prescribe all appropriate ministries, acts and instruments deprives the public of its *EBR* rights to: participate in environmentally significant decisions, ensure that Statements of Environmental Values (SEV) are considered, request *EBR* investigations and reviews, and seek leave to appeal prescribed instruments. Moreover, the ECO is unable to scrutinize non-prescribed decisions in the same manner as decisions made by prescribed ministries under prescribed acts and instruments.

The ECO's outstanding concerns are summarized below.

Ministries and Agencies Not Prescribed Under the *EBR*

Ministry of Aboriginal Affairs (MAA): MAA was established by the Ontario government in November 2007 with a mandate to protect the rights of Aboriginal peoples and promote the health and economic well-being of Aboriginal Ontarians. In November 2007, the ECO wrote to MAA requesting that the ministry be prescribed under the *EBR*. In early 2009, MOE advised the ECO that it had been working with MAA to identify some potential activities and parameters for MAA to become prescribed. In November 2010, MOE indicated that discussions with MAA were still ongoing, but as of July 2012, no further action was evident. The ECO continues to urge MOE and MAA to move forward on this matter.

Ministry of Finance (MOF): When the *EBR* was first proclaimed in February 1994, MOF was listed as a prescribed ministry. In November 1995, however, the ministry was removed from the list of prescribed ministries, and therefore was no longer required to consider an SEV or post notices on the Environmental Registry for environmentally significant decisions. In a 1996 Special Report (Ontario Regulation 482/95 and the *EBR*), and in several annual reports since (see pages 200-202 of the Supplement to the ECO's 2003/2004 Annual Report, and page 29 of the ECO's 2009/2010 Annual Report), the ECO has recommended that MOF be prescribed.

Prescribing MOF and requiring it to consider its SEV for environmentally significant decisions—including those that are predominantly financial in nature—would further the purposes of the *EBR*. Furthermore, prescribing MOF for applications for review would enable the public to ask the ministry to develop or amend laws and policies that would advance environmental goals, such as green taxes and economic incentives to conserve energy and resources. Unfortunately the ECO's repeated requests that MOF be prescribed under the *EBR* have been ignored.

Ministry of Infrastructure (MOI): In August 2010, the Ministry of Energy and Infrastructure (MEI)—a prescribed ministry—was split into two separate ministries: the Ministry of Energy (ENG) and the Ministry of Infrastructure (MOI). In November 2010, the ECO met with the Deputy Minister of the new MOI and urged the ministry to become prescribed under the *EBR*. At that time, the Deputy Minister indicated to the ECO that MOI was working on becoming prescribed.

MOI administers or oversees a number of acts (e.g., the *Places to Grow Act, 2005*), regulations, policies (e.g., MOI's ten-year plan for public infrastructure spending including water, wastewater and transportation infrastructure), and agencies (e.g., Infrastructure Ontario) that have clear environmental significance. It is important that the public be given the full *EBR* rights to participate in MOI's environmentally significant decision making relating to public infrastructure, growth, and urban and rural development. However, as of July 2012—two years after MOI was created—there appears to be no real progress in prescribing MOI. The ECO strongly urges MOE and MOI to prescribe MOI without delay.

Ontario Heritage Trust (OHT): The OHT, an agency of the Ministry of Tourism, Culture and Sport (MTCS), is dedicated to identifying, preserving and promoting Ontario's heritage. In 2005, the amended *Ontario Heritage Act, 2005* (*OHA*) formally recognized the role of OHT in conserving the "natural" environment. OHT holds in trust a portfolio of more than 130 natural heritage properties, which include rare Carolinian forests, wetlands, the habitats of endangered species, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield, and numerous properties on the Bruce Trail and Niagara Escarpment.

In 2006, the ECO urged MTCS's predecessor, the Ministry of Culture (MCL), to prescribe OHT under the *EBR* (see pages 76-79 of the ECO's 2005/2006 Annual Report). In August 2007, MCL advised the ECO that it would not be prescribing OHT because OHT is not a policy-making agency, all policies and programs related to the work of OHT are developed by MCL and MNR, and OHT merely implements those programs. In September 2009, MCL and MOE did however prescribe the *OHA* under the *EBR*.

The ECO continues to be disappointed by this decision. The current funding, policy-making and reporting functions related to natural heritage protection are confused and fragmented between MNR, MTCS and OHT. As a result, responsibility for posting environmentally significant

decisions related to natural heritage protection is not always clear and proposals can slip through the cracks. The ECO continues to urge MTCS to prescribe OHT; alternatively, MTCS must take responsibility for ensuring that all environmentally significant proposals relating to OHT's work are posted on the Environmental Registry for public comment.

Acts Not Prescribed Under the *EBR*

***Animal Health Act, 2009*:** In September 2010, the ECO wrote to the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) asking the ministry to review the need to prescribe the *Animal Health Act, 2009* under the *EBR*. In November 2010, OMAFRA advised the ECO that, while it was not contemplating developing any environmentally significant regulations for the foreseeable future, the ministry would give the option of prescribing the Act under the *EBR* "due consideration." The ECO encourages OMAFRA to undertake a review of the need to prescribe this Act.

Entire *Building Code Act, 1992:* The *Building Code Act, 1992* (*BCA*) is prescribed under the *EBR* for limited purposes relating to septic systems. In the ECO's 2005/2006 Annual Report, the ECO recommended that the Ministry of Municipal Affairs and Housing (MMAH) fully prescribe the *BCA* under the *EBR*. In March 2007, MMAH advised the ECO that it had no plan to further prescribe the *BCA*. In 2009 and 2010, the government passed amendments to the *BCA* to include new provisions relating to energy and water efficiency, respectively. Given these environmentally significant amendments, the ECO again urges MMAH to reconsider prescribing the entire *BCA*. Prescribing the entire *BCA* would ensure transparency and accountability for MMAH policies and laws relating to green building materials and energy and water technologies.

Instruments Not Prescribed Under the *EBR*

Water Management Plans under the *Lakes and Rivers Improvement Act*: In June 2002, a new section 23.1 of the *Lakes and Rivers Improvement Act* was created. This provision enables the Minister of Natural Resources to order owners of dams to develop water management plans (WMPs). In our 2002/2003 Annual Report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under section 23.1 as prescribed instruments. In March 2006, MNR advised the ECO that it would not be prescribing WMPs under the *EBR* because MNR's Water Management Planning Guidelines for Waterpower already "establishes a comprehensive approach to public engagement." MNR also noted that the majority of WMPs were completed or close to completion.

The ECO continues to disagree with MNR's decision. During the 2011/2012 reporting period, MNR posted yet another information notice for a WMP. The fact that MNR continues to post these notices every year exemplifies why WMPs should be prescribed, ensuring the public's right to notice and comment under the *EBR*.

Nutrient Management Instruments under the *Nutrient Management Act, 2002*: In 2006, after years of ECO requests, the *Nutrient Management Act, 2002* (*NMA*) was prescribed under the *EBR* for most purposes, except for applications for investigation. None of the instruments issued under the *NMA* were prescribed, and therefore, these are not subject to *EBR* notice and comment processes, SEV consideration, or applications for review or investigation.

In 2008, OMAFRA stated that the purposes of *EBR* investigations and prescribing instruments is to achieve transparency, and that this is already achieved by clearly articulating the requirements for the nutrient management instruments in O. Reg. 267/03, the general regulation made under the *NMA*. OMAFRA also noted that there is sensitivity in the farm community to posting these instruments on the Environmental Registry because they contain proprietary information, and that public access to this information could cause business problems for these farmers.

The ECO strenuously disagrees with OMAFRA's approach. Unless nutrient management instruments are prescribed, the public and municipalities will not be notified on the Environmental Registry of local nutrient management activities (such as land application of sewage sludges), and residents will be unable to request an investigation under the *EBR* into possible non-compliance, or to request reviews of specific instruments.

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