

Ontario Regulation 482/95 and the *Environmental Bill of Rights*

A Special Report to the Legislative Assembly of Ontario

Submitted by Eva Ligeti, Environmental Commissioner of Ontario
January 17, 1996



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Environmental
Commissioner
of Ontario



Commissaire a
l'environnement
de l'Ontario

Eva B. Ligeti
LL.B., LL.M.
Commissioner

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Commissaire

January 17, 1996

The Honourable Allan McLean
Speaker of the Legislative Assembly
Room 180, Legislative Building
Legislative Assembly
Province of Ontario
Queen's Park, Toronto, Ontario

Dear Mr. Speaker:

In accordance with section 58(4) of the *Environmental Bill of Rights, 1993*, I respectfully present this special report for your submission to the Legislative Assembly of Ontario.

Sincerely,

A handwritten signature in black ink, appearing to read "Eva Ligeti".

Eva Ligeti
Environmental Commissioner of Ontario

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Introduction

The main goal of Ontario's *Environmental Bill of Rights* is to protect, conserve and restore Ontario's natural environment for our benefit today, and for future generations. It explicitly recognizes that the government has the primary responsibility for achieving this goal.

At the same time, the *Environmental Bill of Rights* recognizes that the people of the province have a responsibility and a right to take part. That means they need tools to ensure that a healthy environment will be achieved in an effective, timely, open and fair manner. To this end, the *Environmental Bill of Rights* provides some minimum levels of public participation when government makes important decisions about the environment.

As Environmental Commissioner of Ontario, it is my responsibility to review how provincial ministries carry out the requirements of the *Environmental Bill of Rights*, and to report to the Legislative Assembly annually. I am also empowered to submit a special report to the Speaker of the Assembly at any time, on any matter related to the *Environmental Bill of Rights*.

This is my first special report. It concerns Ontario Regulation 482/95 (see Appendix) which was filed and came into effect on November 29, 1995 – the same day the Finance Minister, the Honourable Ernie Eves, announced the Fiscal and Economic Statement, and the same day as the first reading of Bill 26, the *Savings and Restructuring Act, 1995*.

1.

Regulation 482/95 makes remarkable changes to the scope of the *Environmental Bill of Rights*, and also to the scope of my duties as Environmental Commissioner. I submit this special report because I believe the elected members of the Legislative Assembly must fully understand the detrimental impacts which Regulation 482/95 will have. I make the following recommendations to avoid those impacts.

Recommendations

- 1. Since many environmentally significant decisions are made by the Ministry of Finance, the Ministry should be legally required to comply with the same provisions of the *Environmental Bill of Rights* which were in place before Regulation 482/95 was filed.**
- 2. All environmentally significant proposals of each prescribed ministry should be posted on the Environmental Registry according to the provisions of the *Environmental Bill of Rights* which were in place before Regulation 482/95 was filed.**

By revoking Regulation 482/95, these recommendations would be met and the spirit and intent of the *Environmental Bill of Rights* would be upheld.

The Issues

To provide context for my recommendations, I wish to draw your attention to three issues which arise from Regulation 482/95:

- 1. *The sudden and permanent exemption of the Ministry of Finance from the requirements of the Environmental Bill of Rights.***
- 2. *The temporary suspension, during the next ten months, of public notice requirements for any environmentally significant proposals which are linked to the government's cost-cutting initiatives.***
- 3. *The failure of the Minister of Environment and Energy to post Regulation 482/95 on the Environmental Registry.***

Each of these issues is noteworthy on its own. Combined, they form such a significant change to the *Environmental Bill of Rights* and set such significant precedents that I am compelled to comment.

3.

Issue 1.

The sudden and permanent exemption of the Ministry of Finance from the requirements of the Environmental Bill of Rights.

Why was the Ministry of Finance prescribed under the *Environmental Bill of Rights* before Regulation 482/95 was filed?

The *Environmental Bill of Rights* was expressly designed to apply to 14 provincial ministries – ministries as diverse as Health, Consumer and Commercial Relations, and Transportation.

By assigning environmental responsibility to 14 ministries, the *Environmental Bill of Rights* represented a significant departure from previous practice. Before the *Environmental Bill of Rights*, the extent to which these ministries considered environmental factors in their decision making was varied. There was no clear way to measure the environmental consequences of their decisions, nor were the ministries rewarded for pursuing green strategies. The prevailing assumption was that only the Minister of Environment and Energy and the Minister of Natural Resources made decisions on environmental issues.

In contrast, the *Environmental Bill of Rights* recognizes that environmental impacts and responsibilities cross ministry boundaries. If Ontarians want a healthy environment, then all provincial ministries must work together toward that goal. The *Environmental Bill of Rights* provides the means to do this.

The Ministry of Finance was included among the 14 prescribed ministries for good reason. It has a key role to play in Ontario's continued movement towards a healthy, sustainable environment.

The principal functions of the Ministry of Finance are to recommend taxation, fiscal, economic and regional policies; to implement expenditure management policies; to ensure consistency among these policies and other government programs; to develop the Provincial Budget and manage the province's finances; and to administer the province's major tax statutes. Most – if not all – of these activities have the potential to produce environmentally significant effects.

For example, environmental considerations must be integrated into the development of new tax laws and policies to avoid unintended environmental impacts. Increasingly, governments around the world are using "green" taxes and other economic instruments to advance environmental goals. Similarly, the development of the Provincial Budget can have significant environmental impacts. In fact, the budget is one of the most significant statements of environmental policy that any government makes.

Governments in most industrialized nations now recognize the need to integrate economic and environmental considerations in their policy making, and they are taking action. For example, new federal legislation has established a Commissioner of Environment and Sustainable Development in the office of the Auditor General of Canada. The federal Commissioner will review the planning and decision making of scheduled departments and agencies to ensure they pursue the integration of the environment and economy, and an integrated approach to planning that considers environmental impacts and natural resource costs.

By separating environment from economic considerations through Regulation 482/95, Ontario falls behind other forward-looking jurisdictions.

What was the Ministry of Finance required to do under the *Environmental Bill of Rights*?

The requirements for the Ministry of Finance were not onerous, but they were important. Like other prescribed ministries, the Ministry of Finance drafted, received public comment on and finalized its own Statement of Environmental Values.

The Ministry's Statement of Environmental Values committed the ministry to integrating environmental considerations with economic, social, scientific and other considerations in the course of the ministry's work. Among other things, the Ministry of Finance committed to holding broadly-based pre-budget consultations, including discussions on sustainable development. In fact, this had already become the ministry's practice through several recent budget cycles.

The Ministry of Finance's key responsibility under the *Environmental Bill of Rights* was to make every effort to consider its Statement of Environmental Values when making environmentally significant decisions. The ministry was also responsible for posting proposals for environmentally significant policies and Acts on the Environmental Registry. (The Environmental Registry, an electronic bulletin board, can be accessed free of charge by computer users who have a modem, from anywhere in Ontario. The Registry is also available in more than 300 libraries across the province and in many government offices. Posting on the Environmental Registry provides the public with a minimum of 30 days to comment on a proposal, thereby improving public access to government decision making. Ministries must consider public comments as part of their decision making.)

The *Environmental Bill of Rights* does not require that the Provincial Budget or Economic Statements be posted on the Environmental Registry.

Recognizing the Provincial Budget's special status, and that its details cannot be prematurely disclosed, the *Environmental Bill of Rights* specifically exempts proposals that form part of, or would give effect to, budgets or economic statements presented to the Assembly from the requirements of public notice on the Registry. To provide additional flexibility to ministries, the *Environmental Bill of Rights* also exempts proposals for policies or Acts which are "predominantly financial or administrative in nature" from public notice requirements.

However, the Ministry of Finance as a government body was not exempted from the *Environmental Bill of Rights*, and it should not be exempted now. The *Environmental Bill of Rights* is still new, ministries are still learning how to apply it, and I have yet to submit my first Annual Report to the Assembly. The *Environmental Bill of Rights* should not be weakened so soon after its inception, and without substantially evaluating its effectiveness.

Exempting the Ministry of Finance will weaken the *Environmental Bill of Rights*. (See page 12 for the Ministry of Environment and Energy's explanation of this exemption). Even more importantly, it will impede Ontario's progress toward a healthy, sustainable environment.

Without any requirement to consider environmental factors, decision makers at the Ministry of Finance will by necessity tend to focus on other priorities which may seem more urgent. The resulting decisions will potentially ignore or undervalue important environmental factors. In the long run, the people of Ontario and the environment will suffer.

Issue 2.

The temporary suspension, during the next ten months, of public notice requirements for any environmentally significant proposals which are linked to the government's cost-cutting initiatives.

What are the public notice requirements under the *Environmental Bill of Rights*?

The *Environmental Bill of Rights* requires prescribed ministries to give public notice of proposed policies or Acts which are considered environmentally significant if the minister considers that the public should have an opportunity to comment. Certain ministries are also required to give public notice of proposed regulations and instruments which are environmentally significant.

Although ministers must consider any relevant public comments which are submitted within the comment period, they are not required by law to act on the comments. The *Environmental Bill of Rights* also gives ministers the flexibility to exempt specific proposals from public notice requirements in emergency situations. As noted earlier, the *Environmental Bill of Rights* also contains an exemption for proposals which are "predominantly financial or administrative in nature" and which are thus judged not environmentally significant.

Why are the public notice requirements important?

The public wants a role in decision making in all areas of public policy, including environmental matters. The drafters of the *Environmental Bill of Rights* recognized this, and saw the need for a uniform, predictable process for public involvement.

By including the public early in the decision-making process, the government can benefit from more complete information and avoid costly environmental mistakes.

Business managers have long recognized the importance of "getting it right the first time around", and this maxim is particularly appropriate when the decision affects the environment.

Ontarians depend on a healthy environment. Industries like forestry, mining, tourism and agriculture depend directly or indirectly on a healthy environment and a sustainable resource base.

Natural resources require forward-thinking stewardship. Managers of natural resources – both in the public and the private sectors – often have to make long-term investments. To do that, they need to know that the policies and laws they operate under are well-considered and widely supported. They need assurances that policies and laws will not be abruptly reversed and that their efforts will be rewarded in the future.

When policies and laws are unpredictable managers will be reluctant to make the necessary investments. They will be less likely to build the needed treatment systems, to plant or tend new forests, or to invest in environmental technology. Ontario cannot afford to neglect its environmental capital in this way.

The best way – perhaps the only way – to provide far-sighted and predictable environmental policies is to encourage broad public participation before decisions are finalized, to ensure that all important factors are considered, and "to do it right the first time". The public notice requirements of the *Environmental Bill of Rights* encourage public input into environmental decision making. They are essential to sound policy development, particularly when difficult decisions must be made.

What are the consequences of Regulation 482/95?

Regulation 482/95 gives all ministries a ten-month exemption from the public notice requirements under the *Environmental Bill of Rights* for any environmentally significant proposals which are linked to the government's cost-cutting initiatives. The Regulation exempts all environmentally significant new Acts, regulations and policies of each prescribed ministry, as long as implementation of the proposal, or of another provision that would implement the proposal, "would result in the elimination, reduction or realignment of an expenditure of the Government of Ontario." This broad exemption is effective until September 30, 1996.

Many government initiatives can be characterized as a realignment or reduction of expenditures. Therefore, this exemption means the public notice and comment opportunities through the *Environmental Bill of Rights* will be weakened at precisely the time when numerous changes are occurring in Ontario's environmental policy and regulatory framework.

Because the filing of Regulation 482/95 coincided with the first reading of Bill 26, the *Savings and Restructuring Act, 1995*, significant changes to environmental legislation introduced through Bill 26 will not be open to public comment through the *Environmental Bill of Rights*.

I have carried out a preliminary analysis of the parts of Bill 26 which have the potential for significant environmental impacts. Some aspects of the legislation such as the creation of a dedicated fund for habitat preservation have potential for environmental improvement. Others, such as the changes to the *Mining Act*, the *Public Lands Act*, the *Lakes and Rivers Improvement Act* and the *Conservation Authorities Act*, could have both environmentally beneficial and detrimental effects, depending greatly on how the Bill 26 amendments are implemented.

While I do not wish to review the environmental implications of Bill 26 in this report, I would emphasize that significant environmental implications do exist, and that public notice and comment through the public participation methods provided by the *Environmental Bill of Rights* regarding the proposed changes has been unnecessarily curtailed.

Full and open public discussion would benefit both the government's financial reorganization goals and Ontario's natural environment at this time. Granted, the *Environmental Bill of Rights* is not the only means to solicit public advice and expertise on environmental matters. It is, however, a cost-effective and inclusive way to obtain public feedback. As venues for discussion of these issues decrease, the opportunities for public participation provided by the *Environmental Bill of Rights* become even more important.

Issue 3.

The failure of the Minister of Environment and Energy to post Regulation 482/95 on the Environmental Registry.

The Ministry of Environment and Energy administers the *Environmental Bill of Rights* and is responsible for developing and recommending to the Ontario government regulations made under the legislation. In failing to post Regulation 482/95 on the Environmental Registry, the Minister of Environment and Energy did not comply with the public notice requirements of the *Environmental Bill of Rights*. To comply, notice of a proposal for a regulation made under the *Environmental Bill of Rights* should be placed on the Environmental Registry for public comment. No such notice of a proposal for this regulation was placed on the Registry by the Minister of Environment and Energy. A first step toward evaluating the importance of the removal of the Ministry of Finance would be consultation with stakeholders by posting a proposal for Regulation 482/95 on the Environmental Registry.

Regrettably, the previous Minister of Environment and Energy failed on two earlier occasions to post regulations made under the *Environmental Bill of Rights* on the Registry (Regulation 719/94, filed November 18, 1994, and Regulation 108/95, filed on March 7, 1995). Both regulations dealt with the timing of the application of the *Environmental Bill of Rights* to a limited number of instrument holders. I contacted the Ministry of Environment and Energy regarding each of these incidents and asked for an explanation of the Minister's actions. I received an admission that indeed these regulations had been made improperly, and an assurance that this would not happen in the future.

What is the Ministry of Environment and Energy's explanation for not posting Regulation 482/95 on the Environmental Registry?

Senior officials in the Ministry of Environment and Energy have indicated to me that Regulation 482/95 falls under the s. 16 (2) financial and administrative proposal exemption of the *Environmental Bill of Rights*. In response to my December 11, 1995 letter to the Ministry requesting information about Ontario Regulation 482/95, the Ministry replied in a letter dated January 12, 1996 as follows:

"In your letter you raise three matters:

- a) a request for background information,
- b) the consideration of the Ministry's SEV in removing the Ministry of Finance from the application of the *Environmental Bill of Rights* and in limiting the application of sections 15 and 16, and
- c) the placement of the proposal for the amending regulation on the Registry.

The proposal for making the amending regulation came from questions asked by the Ministry of Finance (MOF), Management Board of Cabinet

(MBC) and Management Board Secretariat (MBS) about how the Act was applying to them. Cabinet Office took the lead in coordinating the initiative.

MOF had noticed that its activities, for the most part, were not subject to the notice of proposal provisions of the Act due to the exclusions relating to matters of financial and administrative nature and s. 33. When MOF considers matters of environmental significance they rely on input from other ministries; MOF then considers activities from a financial point of view. It appeared to MOF that the original decision to include MOF in the list of *Environmental Bill of Rights* subject ministries was inappropriate as the *Environmental Bill of Rights* in practice had little application to them since they operate in a similar manner to Cabinet Office.

MOF and MBS were also of the view that, where matters were being dealt with in connection with the implementation of government restructuring, the matters would be excluded from being placed on the Registry as proposals because they would be principally administrative or financial in nature or be provided for in a budget or economic statement presented to the Assembly. As an administrative matter it was desirable to avoid confusion over how individual matters would fit under the exclusionary rules in the *Environmental Bill of Rights* during the initial period when it would be necessary to proceed rapidly with implementing the government restructuring.

In considering its Statement of Environmental Values (SEV) in developing O. Reg. 482/95, MOEE paid particular attention to section V of the SEV which addresses the integration of social, economic and other considerations. Given the nature, scope and timing of the Economic Statement, and actions resulting from it, the regulatory amendment was considered necessary to reflect MOF's role in government and to facilitate implementation of the required budgetary constraints in a timely manner.

A notice of proposal could not have been placed on the Registry at the time of your letter, as the regulation had been implemented under clause 1 (6) (c) of the *Environmental Bill of Rights* when it was filed on November 29, 1995. The Ministry had decided not to place notice of the proposed regulatory amendments on the Registry because subsection 16 (2) of the *Environmental Bill of Rights* specifically states that notification requirements of the *Environmental Bill of Rights* do not apply to a regulation that is predominantly financial or administrative in nature. O. Reg. 482/95 falls into this category."

I am not convinced that the Ministry's argument is sound. Regulation 482/95 significantly affects the *Environmental Bill of Rights*, the powers of the Environmental Commissioner and the scope of public participation in environmental decision making. Failing to provide public notice of this regulation undermines the integrity of the *Environmental Bill of Rights*.

The Ministry of Finance's Statement of Environmental Values was a positive step toward integrating environmental and economic considerations in the ministry's decision-making process and the province's movement along the road to achieving a healthy environment. By posting Regulation 482/95 on the Environmental Registry, the people of Ontario would have the opportunity to comment on whether they are willing to delay, even stop altogether, that progress.

Recommendations

1. **Since many environmentally significant decisions are made by the Ministry of Finance, the Ministry should be legally required to comply with the same provisions of the *Environmental Bill of Rights* which were in place before Regulation 482/95 was filed.**
2. **All environmentally significant proposals of each prescribed ministry should be posted on the Environmental Registry according to the provisions of the *Environmental Bill of Rights* which were in place before Regulation 482/95.**

By revoking Regulation 482/95, these recommendations would be met and the spirit and intent of the *Environmental Bill of Rights* would be upheld.

Closing

I trust that my submission provides the members of the Legislative Assembly with some new insights into the implications of Regulation 482/95 for Ontario's environment, and that my comments will be considered in light of the importance people across the province place on a healthy environment.

I respectfully submit this special report to the Speaker of the Legislative Assembly of Ontario.

Appendix

Publications under the Regulations Act Publications en vertu de la Loi sur les règlements

1995—12—16

ONTARIO REGULATION 480/95 made under the LAND TITLES ACT

Made: November 23, 1995
Filed: November 27, 1995

Amending Reg. 691 of R.R.O. 1990
(Land Titles Divisions)

Note: Regulation 691 has not been amended in 1995. For prior amendments, see the Table of Regulations in the Statutes of Ontario, 1994

1. The Schedule to Regulation 691 of the Revised Regulations of Ontario, 1990 is amended by adding the following item:

31.1 Waterloo (No. 58) Kitchener All of The Regional
Municipality of Waterloo

50/95

ONTARIO REGULATION 481/95 made under the PLANNING ACT

Made: November 24, 1995
Filed: November 27, 1995

DEEMING ORDER (HEARST PLANNING BOARD)

1. (1) Ontario Regulation 173/93 as it read immediately before its revocation under section 2 shall be deemed to be and to have always been a by-law of the Hearst Planning Board under section 34 of the Act.

(2) The deemed by-law shall be referred to as by-law number 3 of the Hearst Planning Board until changed by the Board.

2. Ontario Regulations 173/93, 266/95, 312/95, 340/95, 341/95, 395/95 and 471/95 are revoked on December 1, 1995.

BRIAN D RIDDELL
Assistant Deputy Minister
Municipal Operations
Ministry of Municipal Affairs and Housing

Dated at Toronto on November 24, 1995.

50/95

ONTARIO REGULATION 482/95 made under the ENVIRONMENTAL BILL OF RIGHTS, 1993

Made: November 29, 1995
Filed: November 29, 1995

Amending O Reg. 73/94
(General)

Note: Since January 1, 1995, Ontario Regulation 73/94 has been amended by Ontario Regulation 108/95. For prior amendments, see the Table of Regulations in the Statutes of Ontario, 1994

1. (1) Paragraph 6 of section 1 of Ontario Regulation 73/94 is revoked.

(2) Paragraph 10 of section 1 of the Regulation is revoked and the following substituted:

10. Management Board Secretariat.

2. (1) Item 6 of the Table to section 2 of the Regulation is revoked.

(2) Item 10 of the Table to section 2 of the Regulation is revoked and the following substituted:

10 Management Board Secretariat April 1, 1995

3. The Regulation is amended by adding the following section:

15.4 (1) Section 15 of the *Environmental Bill of Rights, 1993* does not apply to a proposal for a policy if implementation of the proposal would result in the elimination, reduction or realignment of an expenditure of the Government of Ontario

(2) Section 15 of the *Environmental Bill of Rights, 1993* does not apply to a proposal for an Act if implementation of the proposal, or of another provision in the bill that would implement the proposal, would result in the elimination, reduction or realignment of an expenditure of the Government of Ontario

(3) Section 16 of the *Environmental Bill of Rights, 1993* does not apply to a proposal for a regulation if implementation of the proposal, or of another provision in the regulation that would implement the proposal, would result in the elimination, reduction or realignment of an expenditure of the Government of Ontario

(4) This section does not apply to a proposal that is implemented after September 30, 1996.

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