



November 8, 2016

Anda Kalvins, Project Manager

Ministry of the Environment and Climate Change
77 Wellesley Street West, Floor 11, Ferguson Block
Toronto Ontario M7A 2T5

Re: Environmental Registry No. 012-8002

Dear Anda,

On behalf of Ontario's waterfront landowners the Federation of Ontario Cottagers' Associations (FOCA) respectfully provides the following input to the Review of the Ontario Environmental Bill of Rights (EBR).

FOCA has been aware and supportive of the Application for Review filed by Canadian Environmental Law Association in 2010, requesting that the EBR should be considered for revision. In our opinion it has been a missed opportunity, that the EBR review was deferred by the Ministry of Environment and Climate Change (MOECC) for so long.

As early users of the EBR, FOCA has utilized and promoted the use of the Registry and other provisions of the EBR since its inception in 1994. It has become apparent that the tool has not evolved with the advent of newer technology and the modern expectations of transparency and utility.

We look forward to the thoughtful consideration of the following comments provided by FOCA in this current review, and look forward to further opportunities to participate in public consultations about the EBR and its future. Our comments below correspond to the questions posed in the EBR Discussion Guide.

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FOCA and the EBR

As a conduit to the community, FOCA relies on the EBR and Environmental Registry to stay abreast of and involved with important public policy decisions that affect our communities. FOCA comments regularly on proposed regulations, legislation, policy etc. on the EBR, and many of these substantive public policy decisions would otherwise go unnoticed, and would not benefit from important public discourse. Our local member associations likewise have used the EBR for informing their respective community members and voicing their concerns and comments.

The Federation of Ontario Cottagers' Associations (FOCA) is an incorporated non-profit organization that represents over 500 waterfront property owners' groups, with over 50,000 member families. For over 50 years, FOCA has spoken on behalf of, and supported, Ontario's 250,000 waterfront property owners.

Waterfront property owners represent one of the single largest rural constituencies – over 250,000 families located in nearly 200 Ontario municipalities, who collectively own and steward 15,000 kilometres of the Provinces shorelines, and over 50,000 hectares of economically and environmentally important lands.

These are challenging times for rural Ontario, and the way forward will have to come through productive and open working relationships between government of all levels, industry, and non-government organizations.

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Question 1: Should the EBR purposes and principles be expanded or modified?

FOCA recommends a reimagined and clearer purpose of the EBR which is to:

- protect the right of present and future generations of Ontarians to a healthy and ecologically balanced environment;
- establish the Ontario government's duty to comply with this Act, and to protect the environment in accordance with the public trust;
- ensure that all Ontarians have timely access to:
 - (a) adequate environmental information;
 - (b) environmental justice in the courts and before administrative decision-makers;
 - (c) fair and effective mechanisms for participating in environmental decision-making; and
 - (d) protection for the rights of employees against reprisals for taking or facilitating actions to safeguard the environment.

Further it is imperative that important terms and concepts referred to in the Act are adequately defined, such as the rights related to a "healthful environment", "integrity", "pollution prevention", "biodiversity conservation", "ecosystem protection", and "sustainability."

A number of other important environmental principles warrant inclusion (and statutory definition) in a revised EBR including "zero discharge", "polluter pays" principle, and the "precautionary principle."

Question 2: Are there additional ministries, instruments or legislation that should be covered under the EBR?

With the goal of ensuring that all ministries making environmentally significant decisions are subject to the EBR, FOCA recommends that the following Ministries should become prescribed under Part IV of the EBR: Ministry of Finance; Ministry of Education; Ministry of Economic Development, Employment and Infrastructure; Ministry of Community Safety and Correctional Services; Ministry of Aboriginal Affairs; and Treasury Board Secretariat.

In addition, and in keeping with previous Environment Commissioner of Ontario (ECO) recommendations, FOCA feels strongly that water management plans under the Lakes and Rivers Improvement Act should be prescribed under the EBR.

Question 3: Is there a need to adjust EBR requirements regarding the content, review, and updating, or application of Statements of Environmental Values? If so, how?

FOCA believes there are a number of reforms necessary to strengthen and improve SEV content, and use. By way of ensuring currency, there should be a specific duty upon Ministers to undertake a public review and revision of their SEVs, perhaps every five years. This kind of periodic review would help ensure that the SEVs remain current and effective. In addition, Ministers should develop (with public input) appropriate guidance materials, procedures and protocols which explain how EBR purposes are to be considered and applied during the Ministries' environmental decision-making (including decisions to issue or amend prescribed instruments).

The SEVs should include clearer goals, prescriptive detail, and measurable targets, which should be required through statutory amendments to the SEV provisions in the EBR. The EBR should be amended to clarify that all ministry decisions in relation to Acts, regulations, policies and prescribed instruments "shall conform with" the relevant SEV.

Question 4: Should changes be made to the EBR requirements for "Public Participation in Decision-Making" to improve the engagement of the public regarding acts, regulations, policies, instruments and other processes? If so, what changes are necessary, particularly regarding the Environmental Registry and its notice requirements?

If properly modernized, this powerful tool can perform an important role in soliciting public input and as a repository for significant decisions along with the prevailing and relevant information.

Especially for complex or controversial proposals such as wholesale changes to environmental laws/regulations, provincial plans or policies, or complicated instruments for large-scale facilities and projects, the comment periods must be of an adequate length for reasonable interpretation, reflection and comment by the public and interested parties.

Similarly, the EBR should require by law that all relevant documents be linked or available through Registry notices.

FOCA agrees with the ECO's recent recommendation that instrument decision notices should generally be posted within two weeks after the decision has been made, to provide clarity and accountability to the public.

Question 5: Do you have any comments on the leave to appeal process?

The third-party appeal for prescribed instruments is one of the most important EBR mechanisms for protecting the environment and ensuring governmental accountability. There remains considerable concern over the short timeframe (15 days) in which EBR leave-to-appeal applications must be served and filed. Without the supporting documentation (and even the full text of the instrument itself) it is exceedingly difficult for citizens to obtain and review such documentation within 15 days.

Intervenor funding is long overdue under the EBR, and would facilitate meaningful public usage of the review, comment and appeal provisions of the EBR in relation to instruments.

Question 6: Should the section 32 "EA exception" to public participation be modified? If so, how?

FOCA believes EBR exceptions should not be available to 'shield' important EA-related approvals from adequate public scrutiny, or public participation rights. The Section 32 "EA exceptions" for public notice, comment, and third-party appeal rights should be amended such that any exception applies only where the undertaking in question has been subject to a public hearing under the Environmental Assessment Act (EAA). Eliminating or scoping the section 32 EA exception was identified in the ECO's 2016 list of "key areas in need of reform" under the EBR.

Question 7: Should changes be made to Applications for Review part of the EBR, specifically timelines and content of government responses? If so, how?

In order to restore public confidence in the Request process, the EBR should prescribe 60 days as the deadline for the Ministry's preliminary response to a Request for Review.

It would also be helpful to allow appeals of questionable Ministry refusals of Applications for Review to an independent entity (e.g. the Environmental Review Tribunal (ERT)) to ensure that the refusal decision complied with EBR purposes and SEV principles.

It should include provisions for prescribed Ministries to grant Applications for Review, even if the subject-matter of the application is already known to, or under consideration by, the Ministries.

Ministries should be required to post an information notice on the Registry to publicly announce the receipt of an Application for Review on a particular matter, and to solicit public input from interested persons. Decisions to grant or refuse requested reviews should also be posted, with reasons, in information notices.

Where an Application for Review has been granted, the updated information notice should also solicit input from interested persons (including the successful Review applicants).

It is further recommended that there be clear provision to apply for review of the need for a new instrument.

In cases where Applications for Review have been granted, FOCA agrees with the ECO's concerns about the slow pace of the ministries' resulting review activities, without any tangible progress or notice to the successful applicants. An interim status report or other communications about the status of Reviews should be a requirement.

If the review results in a specific proposal for a new or amended Act, regulation, policy or instrument, the proposal should be duly processed in a timely manner.

Question 8: Should changes be made to Applications for Investigation part of the EBR, specifically timelines and content of government responses? If so, how?

In order to restore public confidence in the Request process, the EBR should prescribe 60 days as the deadline for the Ministry's preliminary response to a Request for Investigation.

It would also be helpful to allow appeals of questionable Ministry refusals of Applications for Investigation to an independent entity (e.g. the ERT) to ensure that the refusal decision complied with EBR purposes and SEV principles.

It should include provisions for prescribed Ministries to grant Applications for Investigation, even if the subject-matter of the application is already known to, or under consideration by, the Ministries.

Ministries should be required to post an information notice on the Registry to publicly announce the receipt of an Application for Investigation on a particular matter, and to solicit public input from interested persons. Decisions to grant or refuse requested reviews should also be posted, with reasons, in information notices.

Where an Application for Investigation has been granted, the updated information notice should also solicit input from interested persons (including the successful applicants)

Other:

- The EBR should include some further legal mechanisms related to environmental decision-making, standard-setting and permit-issuing in Ontario. This could take the form of a new cause of action for harm to a public resource, by which the public could act to hold the government to its responsibility to protect public resources. The ECO has stated that the current EBR cause of action (section 84) was burdened with too many conditions and other restrictive provisions, suggesting that there is room for statutory reforms to enhance public access to the courts under the EBR.

- There should be a streamlined and meaningful “citizens’ suit” provision which enables Ontarians: to commence a civil action in respect of breaches of environmental laws and regulations; that no longer requires plaintiffs to demonstrate that they suffered direct economic loss or direct personal injury resulting from the public nuisance, and; should remove the need for plaintiffs to demonstrate statutory contraventions or “significant” harm.
- Given the public interest aspects of such litigation, the EBR should be amended to entrench a rule limiting the cost awards, or a perhaps a “one-way” cost rule (e.g. successful plaintiffs or applicants may recover legal/expert costs from the opposing party).
- The EBR should be amended to expressly (vs. implicitly) empower the ECO to make recommendations in Annual and Special Reports, and to impose a positive legal duty upon the MOECC (or other prescribed Ministries) to provide the Ontario Legislature with a written response to the ECO’s recommendations within 90 days of their public release. This positive obligation on the Ministries should enhance political accountability related to the EBR.

In conclusion, FOCA values the leadership position the EBR and Environmental Registry advances in Ontario for the benefit of all residents. With this important opportunity to refine and update the EBR, Ontario can regain the foundation from which the Government of Ontario can meet the spirit of:

- protecting, conserving and, where reasonable, restoring the integrity of the environment;
- providing sustainability of the environment; and
- protecting the right to a healthful environment.

Respectfully,



Terry Rees, Executive Director
on behalf of Federation of Ontario Cottagers’ Associations, Inc.

#201 - 159 King St.
Peterborough, Ontario K9J 2R8

foca.on.ca