



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

May 18, 2008

**BY EMAIL**

Scott Shaw  
Policy Advisor, Reviews & Investigations  
EBR Office  
Ministry of the Environment  
40 St. Clair Avenue West, Floor 12  
Toronto, Ontario  
M4V 1M2

Dear Mr. Shaw:

**RE: EBR REGISTRY NO. 010-2308  
PROPOSED MULTI-SECTION AMENDMENTS TO O.REG. 73/94 UNDER THE  
ENVIRONMENTAL BILL OF RIGHTS**

---

These are the submissions of the Canadian Environmental Law Association (“CELA”) in relation to the proposed multi-section amendments to O.Reg. 73/94 under the *Environmental Bill of Rights* (“EBR”). These submissions are being provided to you in accordance with the above-noted EBR Registry notice.

**PART I - BACKGROUND**

CELA is a non-profit, public interest group established in 1970 to use and improve laws to protect the environment, conserve natural resources, and safeguard public health. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens’ groups before trial and appellate courts and administrative tribunals on a wide variety of environmental protection and resource management matters.

Since its inception, CELA has advocated the development and implementation of laws, regulations and administrative practices which enhance access to environmental justice, facilitate public participation in environmental decision-making, and ensure governmental accountability. Among other things, CELA has a lengthy history in the development of the EBR in Ontario, and CELA served as a member of the Environment Minister’s Task Force on the EBR. In addition, CELA staff members have written about, and made frequent use of, the various tools available under the EBR.

In light of this extensive background, CELA has carefully considered the proposed amendments to O.Reg. 73/94. Our overall position is that while the MOE’s proposed amendments address some of the shortcomings in the current regulation, the MOE’s proposal fails to address a

number of serious issues where significant change or improvement is required within the regulation. The reasons for CELA's conclusion are set out below in more detail in Part II of this submission.

In addition, CELA would be remiss if we did not comment upon the fundamental inadequacy of the current public comment opportunity on the proposed amendments to O.Reg. 73/94. With little or no advance warning, and without any attempts at pre-release stakeholder consultation, the package of proposed amendments was simply posted by the MOE for a paltry 30 day notice/comment period on the EBR Registry. No detailed regulatory impact statement was contained in the Registry Notice, and no backgrounder or discussion paper was provided by MOE (or linked to the Registry notice) in order to rationalize the changes or explain why other necessary changes were not being pursued at this time. Indeed, the EBR Registry fails to provide a link to the actual text of the proposed regulation intended to amend O.Reg. 73/94.

Given the significance of, and considerable public interest in, any amendments to the general regulation under the EBR, CELA submits that the perfunctory 30 day public comment period is woefully inadequate. In our view, the proposed amendments should be immediately re-posted on the EBR Registry for another 60 day comment period. In this regard, we note that the MOE has recently re-posted the sewage and water works design guidelines for a 90 day comment, and we see no compelling reason why the proposed regulatory amendments under the EBR (which arguably have a more widespread effect than facility-specific guidelines) should be subject to a significantly smaller (and wholly unacceptable) public comment period.

On a more fundamental level, it appears to CELA that the modest regulatory amendments proposed by the MOE are relatively innocuous changes which are not responsive to the various recommendations for broader EBR reform offered in the ECO's special report released in 2005.<sup>1</sup> Because the MOE has failed or refused to initiate any public dialogue on long-overdue amendments to the EBR itself, please be advised that under separate cover, CELA will shortly be filing an Application for Review of the EBR and associated regulations.

## **PART II – COMMENTS ON THE PROPOSED AMENDMENTS**

### **(a) Annual Need to Update O.Reg. 73/94**

As a general matter, CELA submits that new governmental initiatives (i.e. laws, regulations, policies, etc.) that are environmentally significant should be prescribed under, and subject to, the relevant provisions of the EBR within one year of their effective date, as recommended in the Environmental Commissioner of Ontario's ("ECO's") 2004-2005 Annual Report. Thus, requisite amendments to Regulation 73/94 must occur at this annual rate in order to ensure that the goals and objectives of the EBR are not frustrated by the government's failure to keep the EBR and its associated regulations up to date with other legal and policy developments in the Province.

**Recommendation 1: All new environmentally significant laws and programs should be prescribed under the EBR within one year of coming into force.**

---

<sup>1</sup> ECO Special Report, *Looking Forward: The Environmental Bill of Rights* (March 1, 2005).

### **(b) Key Ministries Remain Excluded from EBR Coverage**

CELA welcomes the MOE's proposed addition of the Ministry of Transportation and the Ministry of Health and Long Term Care to the list of Ministries subject to the Application for Review provisions under Part IV of the EBR. However, it is also important that these Ministries be subject to Part II of the EBR to ensure that there are meaningful opportunities for public participation in environmentally significant decision-making by these Ministries. Accordingly, CELA recommends that these two Ministries should also be prescribed under sections 1, 2, and 4 of O.Reg. 73/94.

However, merely prescribing the Ministry of Transportation and the Ministry of Health and Long Term Care to the provisions of Parts II and IV of the EBR still ignores the need to prescribe a number of other Ministries to these Parts as well. In CELA's view, the MOE's proposed regulatory amendments are wholly inadequate to ensure that all provincial Ministries which make environmentally significant decisions are subject to the transparency and accountability mechanisms under the EBR. The proposed amendments also fundamentally overlook the need to ensure that environmentally significant decisions made in these Ministries are based upon consideration of appropriate Statements of Environmental Values ("SEVs") in accordance with sections 7 and 11 of the EBR.

In CELA's submission, the following Ministries should also be subject to the terms of the EBR, and should be added to the lists of Ministries under sections 1, 2, and 5 of the regulation:

1. **Ministry of Education:** As the Environmental Commissioner has recommended (e.g. 2000-2001 Annual Report), it is essential that the Ministry of Education be made subject to the provisions of the EBR, given that it makes decisions which may have an effect on the environment. Moreover, this Ministry should be prescribed given the desirability of increased transparency and public participation in Ministry decision-making processes, as well as the need for environmentally significant decisions made in the Ministry (e.g. future decisions on curriculum requirements) to be guided by a consideration of a properly drafted SEV.
2. **Ministry of Aboriginal Affairs:** Given the interrelationship between environmental considerations and issues pertaining to Aboriginal community health, and the meaningful exercise of constitutionally guaranteed Aboriginal rights and title, it is essential that this Ministry be prescribed under the EBR.
3. **Ministry of Public Infrastructure Renewal:** This Ministry's mandate includes modernizing public infrastructure, planning for growth, and managing development in a manner which enhances Ontarians' quality of life and contributes to economic success. Embedded within in this Ministry's mandate are considerations of environmental protection and resource management. Central to government planning for our future is a need for transparency and accountability, as well as public participation in environmentally significant decision-making. It is therefore necessary and appropriate for the Ministry of Public Infrastructure and Renewal to be prescribed under the EBR.

**4. Ministry of Health Promotion:** Environmental health is a key component of community and individual health. It is for this reason that the Ministry of Health Promotion should be subject to the terms of the EBR in order that its environmentally significant decisions be guided by consideration of a SEV and subject to the public participation and government accountability mechanisms established under the EBR.

**5. Ministry of Research and Innovation:** It is essential that environmentally significant decisions, policies and strategies developed in this Ministry be subject to the provisions of Part II of the EBR. Innovation in this Province will ultimately be successful only if it is environmentally sustainable.

It is important that environmentally significant decisions proposed in all of the above-noted Ministries be posted as regular notices on the EBR Registry to enable interested members of the public to provide comments for consideration prior to the finalization of such decisions. It runs contrary to the environmental protection, public participation, and governmental accountability principles of the EBR to knowingly permit the above-noted Ministries to make final decisions on matters of environmental significance without first soliciting and considering public comments on them as required by section 35 of the EBR. Moreover, this unjustifiable exclusion significantly limits the ECO's ability to review impugned environmental decisions made by these unprescribed Ministries. The purposes and principles of the EBR are further undermined by the ongoing failure to require these Ministries to develop appropriate SEVs to guide their environmentally significant decision-making.

In summary, it is CELA's submission that all environmentally significant decisions (including development of "green" fiscal, health, educational or planning policies) should be caught by Part II of the EBR. This view has been echoed repeatedly by the Environmental Commissioner in recent years.

For example, the Environmental Commissioner has previously recommended that Ministries and prescribed agencies should consult the public regarding environmentally significant goals and targets for the province's energy sector (ECO 2004-2005 Annual Report). Similarly, the Environmental Commissioner has urged that the Ministry of Municipal Affairs and Housing should consult the public regarding population growth modelling and projections in order to provide transparency and accountability in land use planning decisions (ECO 2004-2005 Annual Report). In addition, the Environmental Commissioner has recommended that the Ministry of Energy, Management Board Secretariat and other ministries should consult the public and use the EBR Registry in developing environmental aspects of energy conservation initiatives such as the Green Power Standard program and government-wide energy conservation targets (ECO 2002-2003 Annual Report).

Unless and until O.Reg. 73/94 is comprehensively amended to address such concerns, the regulation must be regarded as fundamentally inadequate for the purposes of achieving the public interest objectives of the EBR.

**Recommendation 2: The following Ministries should be subject to the terms of the EBR: Ministry of Education, Ministry of Aboriginal Affairs, Ministry of Public**

**Infrastructure Renewal, Ministry of Health Promotion, and Ministry of Research and Innovation.**

**(c) The Need to Repeal Current Regulatory Exemptions**

CELA submits that the current exemption under subsection 4(2) of the regulation, whereby an instrument made under subsections 29(1)(a) or (c) of the *Building Code Act, 1992* is exempt from the requirements of sections 19 to 26 of the EBR, should be repealed. CELA takes this position because Ministerial rulings regarding the approval of new and innovative materials, systems, and building designs will often be of an environmentally significant nature and, when this condition precedent is satisfied, it is important that such decisions be subject to the provisions of the EBR.

Section 4 of the regulation should be further amended such that the Ministry of Agriculture, Food, and Rural Affairs, and the Ministry of Energy become subject to the requirements of the EBR for proposals for instruments. Furthermore, in accordance with the Environmental Commissioner's recommendations in its 2005-2006 Annual Report, CELA submits that the Ontario Heritage Trust should become an EBR-prescribed agency.

**Recommendation 3: The exemption under subsection 4(2) of the regulation should be repealed.**

**Recommendation 4: The Ministry of Agriculture, Food, and Rural Affairs, and the Ministry of Energy should be subject to the requirements of the EBR for the purposes of proposals for instruments.**

**(d) Key Statutes Remain Excluded from EBR Coverage**

CELA welcomes the MOE's proposed prescription of the *Endangered Species Act, 2007*, and certain provisions of the *Health Protection and Promotion Act* under sections 3, 6, and 12 of the Regulation. CELA also supports the addition of the *Kawartha Highlands Signature Site Park Act, 2003*, the *Provincial Parks and Conservation Reserves Act, 2006*, and the *Energy Conservation Leadership Act, 2006* to sections 3 and 9 of the regulation. CELA also supports the prescription of the *Clean Water Act, 2006* under section 3 of the Regulation.

Nevertheless, it appears to CELA that the MOE's proposed regulatory amendments fail to make a number of other environmentally statutes (or parts thereof) fully subject to relevant EBR requirements. Indeed, the MOE's proposal does little or nothing to remedy the curious and ill-conceived patchwork of regulatory exemptions that wholly or partially exclude key statutes from EBR coverage.

For example, CELA submits that all of Part III of the *Health Protection and Promotion Act* should be prescribed under sections 3, 6, and 12 of the regulation. CELA further submits that both the *Endangered Species Act, 2007* and Part III of the *Health Protection and Promotion Act* should also be prescribed under section 9 of the Regulation. Similarly, the *Kawartha Highlands Signature Site Park Act, 2003*, the *Provincial Parks and Conservation Reserves Act, 2006*, and the *Energy Conservation Leadership Act, 2006* must be prescribed under sections 6 and 12 of the

regulation. The *Clean Water Act, 2006* should likewise be prescribed under sections 3, 6, 9, and 12 of the regulation.

Moreover, CELA recommends that the entire *Building Code Act, 1992* and its associated regulations should be prescribed under the EBR. Specifically, as the Environmental Commissioner recommended in the 2005-2006 Annual Report, this statute must, at a minimum, be subject to the EBR requirements regarding commenting on proposals and applying for reviews. This particularly true in light of the considerable potential for the *Building Code Act, 1992* to serve as a key tool in climate change mitigation and adaptation in Ontario.

In addition, as the Environmental Commissioner recommended in the 2001-2002 Annual Report, both the *Ontario Heritage Act* and the regulation-making powers under the *Municipal Act* should be prescribed under the EBR such that proposals for environmentally significant regulations under these statutes are posted on the EBR Registry for public comment and review.

Furthermore, as recommended in the Environmental Commissioner's 1998-1999 and 1999-2000 Annual Reports, the *Ontario Energy Board Act* in its entirety should be prescribed under the provisions of the EBR such that environmentally significant regulations passed under the Act are posted on the EBR Registry for public review/comment. This Act should also be subject to the provisions of Part IV of the EBR. The Environmental Commissioner also recommended in these same Annual Reports that the *Electricity Act* be prescribed under the EBR so that environmentally significant regulations passed under it are posted on the EBR Registry for public comment. In CELA's view, it is also important that regulations under these statutes be subject to the Application for Review and Application for Investigation provisions under Parts IV and V of the EBR.

The *Nutrient Management Act* is not currently listed under section 9 of the regulation as being subject to the investigatory provisions of Part V of the EBR. Given the serious potential for adverse environmental effects arising out of the mismanagement of fertilizers, biosolids, and other substances subject to the statute's provisions, it is fundamentally important that this Act become subject to the provisions of the EBR dealing with applications for investigation. CELA's additional EBR recommendations regarding nutrient management are set out below.

The exemption currently set out in subsection 6(2) of the regulation regarding the *Waste Diversion Act, 2002* should be repealed, as should the existing exemption set out under subsection 7(2) regarding regulations under section 34 of the *Building Code Act, 1992*. Similarly, CELA recommends the repeal of subsection 8(2) of the regulation in relation to certain approvals of undertakings under the *Environmental Assessment Act*. Finally, the exemption set out in subsection 11(2) of the regulation regarding subsections 29(1)(a) and (c) of the *Building Code Act, 1992* should be repealed.

**Recommendation 5: Section 3 of the regulation should be amended to include Part III of the *Health Protection Act*, the *Clean Water Act, 2006*, the *Building Code Act, 1992*, the *Municipal Act*, the *Ontario Heritage Act*, the *Ontario Energy Board Act*, and the *Electricity Act*.**

**Recommendation 6:** Section 6 of the regulation should be amended to include Part III of the *Health Protection and Promotion Act*, the *Kawartha Highlands Signature Site Park Act, 2003*, the *Provincial Parks and Conservation Reserves Act, 2006*, the *Energy Conservation Leadership Act, 2006*, the *Clean Water Act, 2006*, the *Building Code Act, 1992*, the *Ontario Energy Board Act*, and the *Electricity Act*.

**Recommendation 7:** Section 9 of the regulation should be amended to include the *Endangered Species Act, 2007*, Part III of the *Health Protection and Promotion Act*, the *Clean Water Act, 2006*, the *Building Code Act, 1992*, the *Ontario Energy Board Act*, the *Electricity Act*, and the *Nutrient Management Act*.

**Recommendation 8:** Section 12 of the regulation should be amended to include Part III of the *Health Protection and Promotion Act*, the *Kawartha Highlands Signature Site Park Act, 2003*, the *Provincial Parks and Conservation Reserves Act, 2006*, the *Energy Conservation Leadership Act, 2006*, the *Clean Water Act, 2006*, and the *Building Code Act, 1992*.

**Recommendation 9:** The exemption under subsection 6(2) of the regulation should be repealed.

**Recommendation 10:** The exemption under subsection 7(2) of the regulation should be repealed.

**Recommendation 11:** The exemption under subsection 8(2) of the regulation should be repealed.

**Recommendation 12:** The exemption under subsection 11(2) of the regulation should be repealed.

#### **(e) Nutrient Management Plans and Strategies Should be Prescribed under the EBR**

CELA supports the recommendation contained in the Environmental Commissioner's 2003-2004 Annual Report that nutrient management plans and nutrient management strategies for large farms and biosolids should be classified as 'instruments'. Pursuant to subsection 121(1)(c) of the EBR, the Lieutenant Governor in Council may make regulations deeming a class of documents to be an instrument. Thus, O.Reg. 73/94 can and should be amended in accordance with the Environmental Commissioner's recommendations regarding nutrient management.

**Recommendation 13:** Nutrient management plans and strategies for large farms and biosolids should be classified as 'instruments' under the EBR.

#### **PART III – CONCLUSIONS AND RECOMMENDATIONS**

For the foregoing reasons, CELA submits that the MOE's proposed multi-section amendments address some – but not all – of the deficiencies that currently exist within O.Reg. 73/94.

However, by providing a clearly inadequate public comment period on the proposed amendments, the MOE is on the verge of squandering an important opportunity to strengthen and improve O.Reg.73/94.

Fortunately, the MOE's misstep can be easily rectified by immediately re-posting the proposed amendments for a further 60 days. In addition, the MOE should take proactive measures to directly solicit the views of interested stakeholders, the public at large, and the Office of the Environmental Commissioner. These measures could include one-on-one meetings, public workshops and similar consultation efforts with persons who may be interested in, or are potentially affected by, changes to the general regulation under the EBR.

In this way, all reasonable amendments to the regulation (not just those initiated by the MOE) can be considered and developed in an open, timely and consultative manner. Otherwise, the many other necessary amendments to the regulation might only be considered in a piecemeal or fragmented manner in the future, if at all.

To guide the next stage of the regulatory review, CELA hereby makes the following recommendations:

**Recommendation 1: All new environmentally significant laws and programs should be prescribed under the EBR within one year of coming into force.**

**Recommendation 2: The following Ministries should be subject to the terms of the EBR: Ministry of Education, Ministry of Aboriginal Affairs, Ministry of Public Infrastructure Renewal, Ministry of Health Promotion, and Ministry of Research and Innovation.**

**Recommendation 3: The exemption under subsection 4(2) of the regulation should be repealed.**

**Recommendation 4: The Ministry of Agriculture, Food, and Rural Affairs, and the Ministry of Energy should be subject to the requirements of the EBR for the purposes of proposals for instruments.**

**Recommendation 5: Section 3 of the regulation should be amended to include Part III of the *Health Protection Act*, the *Clean Water Act, 2006*, the *Building Code Act, 1992*, the *Municipal Act*, the *Ontario Heritage Act*, the *Ontario Energy Board Act*, and the *Electricity Act*.**

**Recommendation 6: Section 6 of the regulation should be amended to include Part III of the *Health Protection and Promotion Act*, the *Kawartha Highlands Signature Site Park Act, 2003*, the *Provincial Parks and Conservation Reserves Act, 2006*, the *Energy Conservation Leadership Act, 2006*, the *Clean Water Act, 2006*, the *Building Code Act, 1992*, the *Ontario Energy Board Act*, and the *Electricity Act*.**

**Recommendation 7: Section 9 of the regulation should be amended to include the *Endangered Species Act, 2007*, Part III of the *Health Protection and Promotion Act*,**



*the Clean Water Act, 2006, the Building Code Act, 1992, the Ontario Energy Board Act, the Electricity Act, and the Nutrient Management Act.*

**Recommendation 8:** Section 12 of the regulation should be amended to include Part III of the *Health Protection and Promotion Act*, the *Kawartha Highlands Signature Site Park Act, 2003*, the *Provincial Parks and Conservation Reserves Act, 2006*, the *Energy Conservation Leadership Act, 2006*, the *Clean Water Act, 2006*, and the *Building Code Act, 1992*.

**Recommendation 9:** The exemption under subsection 6(2) of the regulation should be repealed.

**Recommendation 10:** The exemption under subsection 7(2) of the regulation should be repealed.

**Recommendation 11:** The exemption under subsection 8(2) of the regulation should be repealed.

**Recommendation 12:** The exemption under subsection 11(2) of the regulation should be repealed.

**Recommendation 13:** Nutrient management plans and strategies for large farms and biosolids should be classified as ‘instruments’ under the EBR.

We trust that the foregoing recommendations will be taken into account by the MOE as it determines its next steps regarding the proposed amendments to O.Reg. 73/94. If requested, we would be pleased to meet with you or your MOE colleagues to discuss further and other amendments to the regulation.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



Richard D. Lindgren  
Counsel



per

Kaitlyn Mitchell  
Student-at-Law

CELA Publication #616  
ISBN # 978-1-897043-89-9

cc. Gord Miller, Environmental Commissioner