

SUBMISSION
ON THE
STATEMENTS OF ENVIRONMENTAL VALUES
UNDER THE
ENVIRONMENTAL BILL OF RIGHTS

Publication #243
ISBN# 978-1-77189-488-3

August 15, 1994

This submission has been endorsed by
the following groups and organizations:

- CANADIAN ENVIRONMENTAL LAW ASSOCIATION
- CANADIAN INSTITUTE OF ENVIRONMENTAL LAW AND POLICY
- CLEAN (County of Lanark Environmental Action Network)
- NORTHWATCH
- POLLUTION PROBE
- WETLANDS PRESERVATION GROUP OF WEST CARLETON

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CANADIAN ENVIRONMENTAL LAW
ASSOCIATION.
CELA BRIEF NO. 243; Sub...RN13980

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INTRODUCTION

On February 15, 1994, the Environmental Bill of Rights, 1993 was proclaimed into law.

The new law is intended to ensure that the public has a fair and effective means to participate in government decisions, improve government accountability and enhance the rights of workers. One of the components of the EBR is a requirement that each of the 14 ministries subject to the law must draft "Statements of Environmental Values" (SEVs) pursuant to sections 7 to 11.¹ Draft SEVs were released to the public in May of 1994.

They are to be finalized by November 15, 1994.

Many environmental groups have worked for many years to develop a strong

¹ The ministries subject to the SEV requirements of the EBR are:

1. Ministry of Agriculture, Food and Rural Affairs
2. Ministry of Consumer and Commercial Relations
3. Ministry of Culture, Tourism & Recreation
4. Ministry of Economic Development and Trade
5. Ministry of Environment and Energy
6. Ministry of Finance
7. Ministry of Health
8. Ministry of Housing
9. Ministry of Labour
10. Management Board Secretariat
11. Ministry of Municipal Affairs
12. Ministry of Natural Resources
13. Ministry of Northern Development and Mines
14. Ministry of Transportation

Environmental Bill of Rights. Hence, they are committed to ensure its effective implementation.

This submission is being forwarded to the Government of Ontario in response to the draft SEVs. The first section provides a context for the SEVs. This context outlines the origins of the SEVs, a review as to how the SEVs are to work, and some comments on the process of consultation with respect to the SEVs.

The second section of this submission provides general comments that generically apply to all 14 SEVs. Among other things, these comments: suggest an enhanced framework for SEVs; urge greater consistency among SEVs; strongly recommend more specific goals and milestone within SEVs; and propose that SEVs include mechanisms for periodic review.

The third section of the submission summarizes the recommendations contained within this document with a discussion as to the next steps in the process to finalize the SEVs.

It should be noted that this submission does not contain specific comments on each and every SEV. A number of environmental and other non-governmental groups will be submitting comments on ministry specific SEVs. It will be argued that the comments on specific SEVs may be premature until some of the more general comments discussed throughout this submission are addressed.

1. The Statement of Environmental Values in Context

The purpose of this section is to provide a context for the critical analysis provided in this submission. This section reviews the origin and intent of these provisions, the relationship of these provisions with other provisions in the EBR, and the process of consultation with respect to the EBR.

1.1 The Origin of the SEVs

When reviewing the EBR, it is important to note that many of the provisions have their origins in early proposals for a comprehensive environmental rights law or in a variety of private members' bills that preceded the EBR. One of the concepts in these previous proposals is the public trust doctrine.

The public trust doctrine is a mechanism to promote government accountability in the

management of public resources.² The doctrine mandates that the government has a fiduciary duty to manage such resources for the benefit of present and future generations. As beneficiaries of the trust, the public would be given certain rights to make government agencies accountable if they were to mismanage the trust property.

The absence of the public trust doctrine in the EBR and the inclusion of the SEV provisions makes it fairly obvious the SEV is a tool to substitute for the public trust doctrine. This conclusion may not be too surprising since both concepts attempt to promote government accountability. In other words, the SEVs, like the public trust doctrine, are intended to create a substantive framework for governmental decision-making in matters respecting environmental protection and resource conservation.

However, while the goals of the SEVs and public trust doctrine may be similar, their operation is very different (the operation of the SEVs is described below). The long standing intent to further accountability of government decision-making over the environment should be reflected in the SEVs' format, design, substance and application.

First and foremost, there is a need for SEVs to be specific enough so that the public knows when and in what context the SEVs are being complied with by government.

² For further discussion, see: C. Hunt, "The Public Trust Doctrine" in J. Swaigen (ed.) Environmental Rights in Canada (Toronto: Butterworths, 1981). Also see mechanisms to further environmental accountability, P.S. Elder and W.A. Ross, "How to Ensure that Developments are Environmentally Sustainable" in J. Owen Saunders, The Legal Challenge of Sustainable Development (Calgary: Canadian Institute of Resources Law, 1990), at 124.

Secondly, the role of the public is crucial to the SEVs' concept since Ontario residents have a stake in the future of the public resources of the province and they should have some role in ensuring that the government fulfils its obligations. Third, there is need for certainty and clarity as to what is subject to the SEVs and to extent which they will be applied.

1.2 How the SEVs are to Work

The SEVs are a very important component of the EBR. As stated above, they are to directly enhance the accountability of government action respecting the environment.

Section 7 of the EBR clearly outlines the objectives of the SEVs. The ministries are to prepare SEVs that:

- (a) explain how the purposes of the EBR are to be applied when decisions that might significantly affect the environment are made in the ministry;
- (b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of the decision-making in the ministry.

The SEVs, therefore, are to explain how the purposes of the Act are to be applied and integrated on a ministry specific basis. Section 2 provides the purposes that are to be applied and integrated.

The overall purposes are provided in section 2(1) and include:

- (a) to protect, conserve and, where reasonable restore the integrity of the environment by means provided in this Act;
- (b) to provide sustainability of the environment by the means provided in this Act; and
- (c) to protect the right to a healthful environment by means provided in this Act.

The specific purposes are equally important and provided in section 2(2);

1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
2. The protection and conservation of biological, ecological and genetic diversity.
3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.
5. The identification, protection and conservation of ecologically sensitive areas or processes.

In effect, these purposes create a framework that is to direct government action affecting the environment and natural resources.

When the SEVs are finalized, the intent of the EBR is to allow the public to understand how these general and specific purposes as described above are to be applied and integrated into ministry decision-making.

If the SEVs are to provide the gameplan as to how the purposes of the EBR are to be applied and integrated, what is the mechanism to ensure that the SEVs are complied with in the activities of the ministries?

First, section 11 states that the minister shall take every reasonable step to ensure that the ministry SEV is considered whenever decisions that might significantly affect the environment are made in the ministry.

Second, the Environmental Commissioner is to review the application of the SEVs. In its annual report to the Legislature, the Environmental Commissioner is empowered to report on compliance of each Ministry with respect to their SEVs. The methodology and criteria as to how compliance will be evaluated has not yet been developed. However, it is suspected that the review function of the Commissioner should be instructive as to the nature, scope and detail required of the SEVs.

Once the SEVs are developed and approved, the SEVs are to serve as the mechanism to further the purposes of EBR in the context of ministry actions and activities. It is expected that, over a relatively short period of time, each ministry subject to the SEVs requirements would have to review all guidelines, policies, regulations and statutes applicable to that ministry to ensure that they conform to the SEVs and ultimately to the purposes of the law.

In summary, the EBR outlines a framework to further accountability of government decision-making. The SEVs provide a mechanism to require 14 different ministries to determine how they will apply and integrate the purposes of the law. The ministry then must take every reasonable step to ensure that they are considered. The Environmental Commissioner then can use the powers bestowed to that office to enforce the SEVs through political accountability. This is the framework provided by the EBR. Any evaluation of draft SEVs must be made in the context of and work toward the successful implementation of this framework.

1.3 The Process of Consultation on the SEVs

One of the initial disappointments in the development of the SEVs has been the general exclusion of the public. While the ministries have complied with the letter of the law, they have not taken its spirit and intent into account. For example, since May of 1994 when the SEVs were released to the public, there has been:

- no information meetings with the public to inform them of the importance of the SEVs or explain their role in the context of the EBR;
- no workshops or meetings with ministries with interested groups to solicit opinion or input in a detailed manner;
- no provision of material to explain how the draft SEVs were developed and how

they will be revised. Further, there is little explanation as to how they will be used in practice. There is also some uncertainty as to how broadly the SEVs were circulated (beyond being put on the environmental registry) and comments encouraged, especially in light of the SEVs are the first real "proposal" under the EBR.

In the end, it is fair to say that the public expectations of the EBR are already going through some re-adjustment. While many thought the law would open the door to more open and cooperative government decision-making, for the most part, it remains business as usual.

2. Generic Comments on the SEVs

The purpose of this section is to provide comments which are applicable to most or all of the draft SEVs. These comments are as follows:

2.1 The Overall Structure of the SEVs

As stated above, the very purpose of the SEVs is to translate the purposes of the EBR into tangible statements which direct the operation and activities of each of the 14 ministries subject to the law. However, when reviewing the draft SEVs, it is readily apparent that few SEVs, if any, refer specifically to the purposes of the EBR. Without

such a direct correlation, it will become difficult for the Environmental Commissioner to determine whether a ministry is complying with the SEVs, and impossible for the public to understand the relationship between the purposes and the SEVs.

It would be both reasonable and fair to have the SEVs redrafted to have the SEVs conform to the format of the purposes of the EBR. In this context, it would be possible to have a more direct and clear translation of the purposes and the SEVs.

More particularly, each of the principles in s.2(2) should be reproduced as sub-headings in the SEVs, and the SEVs should outline precisely how those principles will be applied or achieved by the ministries.

One good example of the problem is found in the SEVs for the Ministry of Consumer and Commercial Relations. Part III of the SEVs is entitled "Applying the Purposes of the EBR in Ministry Decision Making." One typical statement is that "Ministry staff will address the potential environmental effects of their decision making at the legislative, regulatory or policy level." Such statements do not assist the public in understanding how the ministry will apply those purposes. It does not relate the programs, activities and operations to either the general or specific purposes of EBR.

The lack of a consistent format among the 14 ministries makes it that much more difficult for the public to understand and compare the different ministries. Some

ministries, for example, identify "environmental values" (such as the Ministry of Culture, Tourism and Recreation and Ministry of Consumer and Commercial Relations), other identify "value statements" (such as Ministry of Economic Development and Trade, still others use "guiding principles" (such as Ministry of the Environment and Energy) while still other use "goals and objectives" (such as the Ministry of Natural Resources). Even at this general level, how can anyone compare these various SEVs? Why are there differences in this terminology?

For example, there are a variety of terms open to interpretation such as "where possible and practical" and "reasonable." What do these terms mean? What is the threshold of reasonableness?

In the end, the SEVs should be clearly divided to demonstrate how the purposes should be applied with respect to a particular ministry (pursuant to section 7(a) of the EBR). In particular, how a ministry considers and integrates the purposes of the EBR should be undertaken in a manner consistent with the definition of "environment" in the EBR.

RECOMMENDATION #1

Each SEV should be redrafted to conform to the format of the purposes of the EBR with a specific and detailed explanation as to how each Ministry will achieve the specific goal statement in the purposes of the EBR. There must be greater consistency across the different SEVs in terms of their structure and terminology.

2.2 The Purposes of the EBR and the SEVs

The purposes of the EBR have already been discussed. Ironically, the opening paragraphs of the SEVs reproduce some of the text of s.2 of the EBR; however, there are no statements in the SEVs which explicitly adopt the s.2 principles. It is both curious and unfortunate that not one SEV from of the 14 ministries has expressly adopted the purposes of the EBR. How can the SEVs translate the purposes of the EBR if the SEVs do not even accept and endorse those principles?

Related to this matter is the issue of definitions. There are a number of terms which could be interpreted differently by the various ministries and the public. The most obvious term used in every SEVs is "significant environmental harm." What does that mean to a particular ministry? How is the public to understand the term? Will the term be used as an escape hatch by ministries?

Recommendation #2

Each SEV should specifically adopt and endorse the stated purposes of the EBR. In adopting the purposes of the EBR, each ministry should clearly define its interpretation and understanding of the various terms and phrases so that there is a clear understanding of these terms with the objective of maintaining some consistency among various ministries.

2.3 The Lack of Measurable Benchmarks

When reviewing the draft SEVs, one of the most conspicuous omissions is the lack of

specific targets, goals, or benchmarks. There are no quantifiable or measurable milestones that the Environmental Commissioner or the public can use to determine whether the SEVs are being complied with or ignored.

This comment should be discussed in conjunction with the comment 2.1 above. For each stated purpose of the EBR, each ministry should attempt to set targets, goals or benchmarks to assist the people of Ontario to determine whether the province is moving closer to or further from the stated purposes of the EBR.

There are many, many examples of this problem in the various draft SEVs. For example, in the draft statement for the Ministry of Economic Development and Trade, there are a number of "value statements" in Part IV. Statements such as "promoting a productive and efficient economy that is environmentally sustainable" and "considering the environment in its decision-making" may sound impressive. Yet how does one assess whether the Ministry is really adopting these guidelines in its daily functions?

A similar comment can be made concerning the draft SEVs for the Ministry of Finance.

In Part III of that statement, the ministry

...will apply the principle of integrating economic, environmental, social and other considerations when it administers the provincial Act for which it has been assigned responsibility and when it develops new Acts.

The Ministry of Finance administers some 55 provincial statutes. As such, the ministry

could be an effective vehicle to integrate environmental principles into the administration of these and future statutes. However, no details are provided as to how such an integration is to be achieved. There are no measurable benchmarks and no criteria to determine when and how this value statement is being met.

In the SEV for the Ministry of Transportation, a number of measures are identified. For example, the first measure reads: "The ministry will seek to reduce transportation-related air emissions." What level of reduction is the ministry striving to achieve? Is a 50% reduction or a 1% reduction appropriate? How should reductions be achieved? For greater clarity, the ministry must set itself specific and defined goals.

These are just three examples. Virtually every other SEV, and in particular, the Ministry of the Environment and Energy and the Ministry of Natural Resources, is subject to this criticism.

Recommendation #3

Each SEV should include quantifiable and measurable goals corresponding to the stated purposes of the EBR.

2.4 The Need for Built-in Review Mechanism

One of the attributes of environmental law and policy that most agree upon is that the evolution of the field is a dynamic one. However, with respect to the SEVs, there is no

review or updating mechanism available. Hence, once the SEVs are finalized in November of 1994, those SEVs may still be in place ten years from now, despite the likelihood that new information or environmental priorities will render certain SEVs out-of-date.

What is needed in the context of the SEVs is a review mechanism that will serve to update the SEVs. Because of the novelty of the SEVs, the first review should be within a three year period with a review occurring every three to five years thereafter.

The EBR gives each ministry the power to review its SEVs "from time to time." What is being recommended is a specific and identified time frame for review.

As part of this review mechanism, there should also be some internal monitoring regime that would allow the ministry to assess the level of compliance between its SEVs and its programs and activities. This regime would be of considerable assistance to the Environmental Commissioner and would assist the public in their assessment of ministry performance.

The Ministry of Culture, Tourism and Recreation, in Part E of their SEVs, propose the objective to monitor the application of its SEV. However, there is no specifics given as to how the SEVs will in fact be monitored. The Ministry of Health does outline some internal review procedures by, for example, identifying ministry managers as those vested

with the responsibility for ensuring compliance with the requirements outlined in its SEVs.

Recommendation #4

Each SEV should include a review mechanism whereby the SEV is reviewed again immediately after the report of the Environmental Commissioner with a periodic review every three years thereafter.

2.5 Skills Development and SEVs

The EBR and its processes will be new to many ministries. Despite this fact, few of the SEVs include any program, procedure or process to assist ministry staff to become acquainted with EBR issues and its implications, including application of the SEVs. Skills development and training should be a common attribute to the SEVs.

Recommendation #5

Each SEV should include a skills development component for each ministry.

2.6 State of the Environment Reporting

One of the underlying assumptions in the SEVs is that there is sufficient monitoring and reporting data to fulfil the purposes of the EBR. However, few would disagree with the statement that there is a need for better, more comprehensive and more integrated

monitoring and reporting regimes. Hence, the SEVs should include some notion of state of the environment or annual progress reporting in the context of the SEVs.

One example where this criticism is particularly appropriate is the SEVs for the Ministry of Agriculture, Food and Rural Affairs. There is no provision to monitor losses of agricultural land in the province. It could monitor trends in foodland preservation, such as increase in non-farm ownership of farmland. Remedial and protective measures, such as the use of vegetation buffers along municipal drains and natural watercourses, could be tracked.

Recommendation #6

Each SEV should include state of the environment reporting as a component of each SEV.

2.7 Environmental Paramountcy

Many of the SEVs contain statements about the ministries' socio-economic mandates and objectives. Similarly, some SEVs speak of the need to "balance" environmental concerns with economic growth and developments. It should be noted that s.7 of the EBR states that the SEVs should explain how the ecological principles of the EBR are to be "integrated", not balanced, with other socio-economic factors. This is not merely a semantic difference, for most SEVs, as currently drafted, fail to properly recognize that the primary or overriding objective is to ensure environmental sustainability, as reflected

in s.2 of the EBR. Socio-economic factors are important considerations, but they are ultimately subordinate to the overall goal of ensuring environmental sustainability.

One of the most obvious example of these comments is with respect to the SEV of the Ministry of Economic Development and Trade. The SEV lists environmental sustainability last in the list of goals and objectives.

Recommendation #7

Each SEV should acknowledge that environmental sustainability is the paramount objective, and that only those socio-economic objectives or activities which are consistent with environmental sustainability will be undertaken or approved. In cases of conflict between environmental and socio-economic objectives, environmental objectives shall prevail.

2.8 Public Participation

Some of the SEVs fail to acknowledge the need for, or value of, meaningful public participation when significant decisions respecting the environment are being made by the ministries. Given s.2(3) of the EBR and the requirements of Part II respecting notice-and-comment, it is important for the SEVs to affirm the necessity of public participation.

Recommendation #8

Each SEV should expressly acknowledge the need for, and value of, meaningful public participation when the ministries are making significant decisions

respecting the environment.

2.9 Relationship to Other Provincial Policies

While some SEVs refer to other ministerial policy documents for example, Direction 90s, Common Ground, there is little discussion in the SEVs on the relationship to other ministerial or Cabinet policies respecting the environment. To ensure comprehensive application of these other policies, the SEVs should contain provisions which expressly commit the ministries to only undertaking or approving activities or programs which are consistent with relevant ministerial or Cabinet policies respecting the environment.

Recommendation #9

Each SEV should contain provisions stating that the ministries environmental decisions shall be consistent with all relevant government policies respecting the environment.

3. Summary and Conclusions

The draft SEVs should be regarded as a "first attempt" to comply with the provisions of the EBR. It is respectfully submitted, however, that there is considerable additional work that needs to be undertaken by the ministries to satisfy the minimum requirements of the EBR. Many of the comments and recommendations noted above could have been dealt with before this time if the ministries had: (1) conducted public discussions on the generic framework and components for developing SEVs; and (2) sponsored more

focussed consultations on a ministry specific basis that would have provided more direct and particular comment on each ministry SEVs.

As noted above, this submission has not undertaken a detailed review of each ministry SEV. It is respectfully submitted that such a detailed analysis is premature. Until the concerns raised above are addressed, it is difficult to evaluate in detail each ministry SEV. It is anticipated that each ministry:

- (a) respond to the above comments in an expedited fashion;
- (b) sponsor focussed meetings or consultations on a ministry - specific basis; and
- (c) commit to review each SEV immediately after the first report of the Environmental Commissioner with appropriate public notice and consultation.