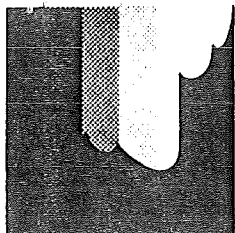


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**Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement**

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**SUBMISSION TO THE ENVIRONMENTAL COMMISSIONER
RE: EBR STATEMENT OF ENVIRONMENTAL VALUES**

Publication #268

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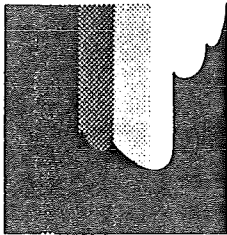
Canadian Environmental Law Association

October 13, 1995



CANADIAN ENVIRONMENTAL LAW
ASSOCIATION.

CCLA BRIEF NO. 268; Submission to
the Environmental Commi...RN1726



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October 13, 1995

BY FAX

Ms. Eva Ligeti
Environmental Commissioner of Ontario
1075 Bay Street, Suite 605
Toronto, Ontario
M5S 2B1

Dear Ms. Ligeti:

RE: SEV REVIEW: PUBLIC CONSULTATION

This is CELA's response to the request for comments on the Ministry-by-Ministry review of the Statements of Environmental Values (SEV) under the Environmental Bill of Rights (EBR). A copy of this submission has been forwarded to each of the fourteen Ministries.

We have decided against preparing fourteen individual submissions for two main reasons: first, many of our concerns and comments are common to all SEVs; and second, we have little ongoing contact with certain Ministries (i.e. Ministries of Labour, Finance and Health), and therefore we are not in a position to assess the effectiveness of their SEV implementation.

We have, however, focussed many of our comments on the performance of the Ministry of Environment and Energy (MOEE) in meeting its obligations in the EBR and SEV. As the lead EBR agency, we reasonably expected more of the MOEE in terms of leadership and direction in terms of drafting and implementing effective SEVs. Unfortunately, it is our opinion that the MOEE has not lived up to the requirements of s.7(a) of the EBR, nor to its commitments under the MOEE SEV, particularly in relation to public consultation. Accordingly, under separate cover we will be submitting a Request

for Review under Part IV of the EBR requesting that the MOEE prepare, with public input, a substantive strategic plan with clear objectives, timetables and targets -- the very things that the MOEE has steadfastly refused to incorporate into its SEV.

Our general comments on the SEV review are as follows:

1. The public consultation process during the SEV review has been questionable if not inadequate.

As the Environmental Commissioner, you placed an "open letter" on the Registry in November 1994 in which you indicated that "each Ministry has agreed to participate in a one-year review process ending November 15, 1995". The open letter further indicated that there would be public participation in the review process.

However, the next formal notice about the SEV review was not placed on the Registry until September 1995 -- approximately one month before the close of the public comment period on the SEV review. In the eight-month period between November 1994 and September 1995, only two Ministries made any direct attempt to consult CELA on the SEV review. In particular, we had a brief meeting with MOEE officials to discuss the implementation of its SEV, and the Ministry of Natural Resources (MNR) mailed us a SEV consultation package. We have since obtained further consultation materials through the offices of the Ontario Environmental Network rather than from the Ministries that profess to be interested in public input.

Given CELA's long-standing interest and involvement in EBR matters, particularly in relation to the SEVs, we are unclear why a more concerted effort was not made to solicit our views and recommendations. Of course, we acknowledge that CELA is not the fount of all environmental wisdom, and we recognize that there are other groups, individuals, and interests who may have views on SEV

implementation. However, it is our understanding that other environmental groups have generally experienced a similar lack of proactive consultation from the Ministries.

As has often occurred under Part II of the EBR over the past year, the Ministries appear to be taking a minimalist approach to public consultation. In August 1994, CELA and several other groups noted that the draft SEVs were not accompanied by public information meetings, workshops, focus groups, or other mechanisms to provide timely information and effective comment opportunities.¹ Sadly, since the SEVs have been finalized, there has been a continuing lack of any creative or flexible consultation techniques other than mail-outs and the barest of information on the Registry regarding the SEV review. If the Ministries receive little public response during the SEV review, the Ministries' own inaction may be a likely cause. As described below, it is also likely that many people have given up hope of salvaging the SEVs, and have focussed their limited time and resources on other issues.

2. The SEVs remain deficient and they fail to satisfactorily meet the requirements of the EBR.

It is our understanding that the overall purpose of the review is to assess the implementation of the SEVs to ensure that EBR principles are incorporated into the Ministries' decision-making. This purpose, of course, begs a key question: are the SEVs themselves satisfactory and do they meet the requirements of the EBR? As we have indicated to you on several occasions, it is CELA's view that the SEVs are generally deficient and that they fail to satisfy the requirements of the EBR.

¹ CELA et al., "Submission on the Statements of Environmental Values under the Environmental Bill of Rights" (August 15, 1994), pp.8-9.

Your "open letter" implicitly recognized the deficiencies when you indicated that "there is still more work to do" and that "some [SEV] elements need further attention". The open letter further indicated that the SEVs should be "refined" in a number of areas, such as enhancing public participation, enhancing SEV clarity, and monitoring SEV compliance. To date, no work appears to have been done to amend the SEVs to address these concerns.

In CELA's submission on the draft SEVs, a number of problems and deficiencies were identified within the SEVs. For the most part, these problems were not addressed when the SEVs were finalized, and many of CELA's original comments remain valid for most SEVs. These comments may be summarized as follows:

- the SEVs still fail to adequately explain how the purposes of the EBR will be applied during Ministry decision-making;
- the SEVs still lack measurable benchmarks to assess progress, or lack thereof, in meeting the purposes of the EBR;
- the SEVs still lack appropriate review mechanisms or skill development components;
- the SEVs still fail to require appropriate monitoring and ministry-specific "state-of-the-environment" reporting;
- the SEVs still fail to recognize that the primary or overriding objective is to ensure environmental sustainability;
- the SEVs still fail to ensure that meaningful public participation occurs when environmentally significant decisions are being proposed; and
- the SEVs still lack sufficient information about the

relationship between the SEVs and other governmental or Ministry-specific policies.

Until these fundamental flaws are rectified, the SEVs will continue to be regarded as "eco-fluff" lacking any substance or public credibility, and they will continue to undermine the EBR principle of governmental accountability for environmental decision-making. In addition, because the SEVs largely amount to pious platitudes about the environment, attempts by your office and the public to assess "compliance" with the SEVs will remain an exceedingly difficult task.

3. The implementation of the SEVs has been inconsistent, sporadic, and problematic.

It is difficult to take the SEVs seriously when it still appears to be "business as usual" for most Ministries. We are unaware of any reliable empirical data that reveals demonstrable gains in environmental quality, or qualitative improvements in environmental decision-making, as a result of the SEVs. It may be possible for the Ministries to record how many times the terms "SEV" or "EBR" are referenced in Ministry decision-making documentation; however, this is a far cry from ensuring that the EBR purposes and principles have actually influenced environmental decision-making.

A good example involves the MOEE SEV and the imminent repeal of the regulatory ban against incineration of municipal solid waste. The SEV professes a commitment to "public participation" and an "open and consultative process". However, the repeal of the incineration ban, which appears to have conceived during the recent provincial election, is being foisted upon the public with little prior consultation. In short, after the Harris government announced its intention to proceed with the ban, a perfunctory notice was placed ex post facto on the Registry. However, few people seriously believe that the comments submitted will deter, alter or influence

the government's much-hyped plans to proceed with the repeal. In our opinion, this regrettable initiative makes a mockery of the public participation commitments within the MOEE SEV and the EBR at large.

We understand that other retrogressive policy and legislative decisions are being considered and made by the Harris government,² again without the benefit of prior public notice and comment under the EBR. It may well be that some of these initiatives will eventually show up on the Registry for the typical 30 day comment period; however, people are becoming increasingly weary of going through the effort of responding to initiatives that are clearly going to proceed irrespective of public input. This trend can only be resisted by strong intervention by the Environmental Commissioner and firm insistence by the public that there be compliance with the requirements of Part II of the EBR.

Similarly, there is increasingly widespread concern over the growing list of MOEE instruments that are being issued without any comment opportunities. In some instances, public comment is negated because the instruments were considered during consultation processes that are alleged to be "substantially similar" to EBR requirements. In other instances, there has been an attempt to invoke the "emergency" exceptions to rationalize the exclusion of public comment opportunities. Upon closer examination of these exceptions, however, the reasons for negating public comment are not always compelling or appropriate. For example, an approval for applying a molluscicide to treat a zebra mussel infestation was recently granted without public comment on "emergency" grounds.³ Public comments would likely have been supportive of the proposal,

² Such as the much-rumoured exemption of the entire waste management sector from the application of the Environmental Assessment Act.

³ See EBR Registry No. IA5E1603.D.

SEV.

The MOEE is not the only Ministry that has experienced a significant gap between SEV rhetoric and practical reality, particularly in relation to public participation. The MOEE and Ministry of Transportation of Ontario (MTO), for example, have both been labouring on a "Sectoral Environmental Assessment Proposal" (SEAP) regarding largescale provincial highway projects. We have written to you on previous occasions to record our concern that this significant initiative was proceeding after the finalization of the MOEE and MTO SEVs without the required public participation. Indeed, it took a formal FOI request for CELA to obtain a copy of the document, and aside from its other deficiencies, the SEAP did not even refer to the MTO SEV, which, ironically, emphasizes the MTO's commitment to public participation.

Another increasing problem regarding public participation has been the use of the 30 day comment period as the de facto standard rather than the minimum required under the EBR. With very few exceptions, the MOEE has provided only 30 days for public comment, despite the SEV commitment to public participation and the EBR provisions which clearly contemplate enhanced notice and comment opportunities where appropriate. The inadequacy of the standard 30 day comment period in many circumstances has already been noted by the Environmental Appeal Board in the first third-party appeal under the EBR.⁴ This problem becomes particularly acute when persons living in remote areas are trying to obtain the relevant documentation in time to exercise public comment or appeal rights. In our view, this is an important aspect of SEV implementation that warrants critical review and comment by your office.

Similarly, CELA notes that the recent decision to abolish three

⁴ See Re Hunter (Reasons for Decision, September 20, 1995), EAB File No. EBR 00001.A1 (unreported), at pp.17-20.

important expert advisory committees -- the MISA Advisory Committee, the Environmental Assessment Advisory Committee, and the Advisory Committee on Environmental Standards -- does not appear to have been influenced by SEVs, nor, to our knowledge did this initiative show up on the Registry as a proposal. More alarmingly, the apparent rationale for the abolition of these committees was that the EBR already prescribes mandatory public notice and comment opportunities, thereby making the committees redundant. Again, this argument overlooks the actual role and mandate of the committees, and it ignores the fact that Part II is intended to provide minimum rules for public participation, giving rise to a widespread expectation that the Ministries can and will do more where appropriate. It is indeed unfortunate that the EBR is now being used as the pretext for rolling back valuable environmental initiatives in this province.

The final aspect of SEV implementation that we wish to draw to your attention is the apparent failure of the fourteen ministries to use the SEVs as "green templates" to review and revise existing Ministry-specific laws, regulations, policies, procedures, and programs to ensure consistency with EBR purposes and principles.⁵ The EBR Task Force contemplated that the SEVs would be particularly useful in structuring and undertaking such a comprehensive and long overdue review. However, there has been little evidence that the fourteen ministries have, in fact, systematically reviewed and revised existing laws and policies to ensure EBR compliance.

In conclusion, CELA remains extremely disappointed about the SEVs and their implementation, and CELA is not optimistic that the SEVs will be substantially overhauled to address the concerns outlined in this brief. Unfortunately, the SEVs will remain as the least

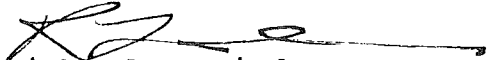
⁵ EBR Task Force Report (July 1992), p.81. See also Muldoon and Lindgren, The Environmental Bill of Rights: A Practical Guide (1995), p.125.

effective tool under the EBR unless your office and concerned residents press the Ministries to make the necessary amendments forthwith.

Please call me if we can be of further assistance in this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Richard D. Lindgren
Counsel

cc. Ms. Cathy Taylor, OEN
All Ministry EBR Coordinators