



BY MAIL AND EMAIL

February 4, 2010

Mike Parkes, Cabinet Liaison & Strategic Policy Coordinator
Ministry of Energy
Regulatory Affairs and Strategic Policy
Strategic Policy and Research Branch
880 Bay Street, 6th Floor
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Email: Mike.Parkes@ontario.ca

CC: Gord Miller, Environmental Commissioner of Ontario

Dear Mr. Parkes:

**Re: Proposed Statement of Environmental Values
Ministry of Energy and Infrastructure
EBR #: 010-8644**

Please find enclosed Lake Ontario Waterkeeper's comments on proposed Statement of Environmental Values for the Ministry of Energy and Infrastructure. If you have any questions or comments, please do not hesitate to contact our counsel, Joanna Bull, at 416-861-1237.

Yours truly,

Mark Mattson
Waterkeeper & President

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BACKGROUND

The Ministry of Energy and Infrastructure (MEI) is proposing a new Statement of Environmental Values (SEV). The proposed wording has been posted to the Environmental Registry for a 45 day comment period, from December 23, 2009 to February 6, 2010.

The new SEV is being developed because of the restructuring that led to the creation of the MEI in 2008. The MEI was formed from the June 20, 2008 merger of the former Ministry of Energy and Ministry of Public Infrastructure Renewal. The former Ministry of Energy's SEV dates from 2001, when the ministry was named the Ministry of Energy, Science, and Technology. The former Ministry of Public Infrastructure Renewal was not prescribed under the *Environmental Bill of Rights (EBR)* and did not have an SEV.

The SEV's are required for all ministries prescribed under the *EBR*. The MEI became a prescribed ministry through an amendment to O.Reg. 73/94 on September 23, 2009. Section 7 of the *EBR* says that the MEI was required to create a draft SEV within three months of becoming a prescribed ministry, which made that deadline December 23, 2009. The final SEV must be in place nine months from September 23, 2009, so that the Ministry has an SEV in place by June 23, 2010 (s.9(1)). The MEI is required to undergo a public review and to consider public comments before finalizing the SEV.

Section 7 of the *EBR* requires each ministry prescribed under O.Reg. 73/94 to create an SEV that:

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

The purposes of the *EBR* are set out in s.2(1):

- (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the 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 the means provided in this Act.

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These purposes include (*EBR* s.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.

The minister is required to take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry (*EBR*, s.11).

In *Lafarge Canada v. Ontario (Environmental Review Tribunal)*, the Ontario Superior Court of Justice found that a failure to explicitly consider and apply an SEV when a prescribed Ministry makes a decision on approvals and permits is grounds for review by the Environmental Review Tribunal.¹ At paragraph 60, the court explained that, “the Directors' decision was unreasonable because of the failure to take into account SEV principles”.²

The *Lafarge* decision still applies to the SEV's despite the fact that a new version was implemented by the MOE in 2008. As the Environmental Review Tribunal found in *Protect Our Water and Environmental Resources Inc. v. Ontario (Ministry of the Environment)*:

[C]hanges to the MOE's SEV do not alter or change the findings in the *Lafarge* decision with respect to the obligations to consider the SEV for proposals for Class I and Class II instruments. In addition, **it would be reasonable to consider well-recognized principles of environmental decision-making, such as precaution, the ecosystem approach and conservation, in making environmentally significant decisions even if they were not specifically mentioned in the SEV.**

These principles are simply reflective of current best practices in environmental decision-making.³

¹ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [*Lafarge*].

² *Ibid.* at 60.

³ *Protect Our Water and Environmental Resources Inc. v. Ontario (Ministry of the Environment)* [2009] O.E.R.T.D. No. 23 at para. 59 (QL) [*P.O.W.E.R.*].

COMMENTARY

The MEI is required to apply the SEV to each individual decision made by the Ministry that could affect the environment.

Section 11 of the *EBR* requires all prescribed ministries to apply the SEV whenever decisions that might significantly affect the environment are made. The third section of the MEI draft, entitled, “Application of the SEV”, says that the Ministry will apply the principles inherent in the SEV, “as it develops Acts, regulations, and policies”. While decisions about developing Acts, regulations, and policies are required to be made with regard to the SEV, that is not the limit of the requirement. The MEI is also required to apply the SEV whenever *any* decision that might affect the environment is made within the Ministry. This includes decisions at the operational and project levels, including anything equivalent to approving a project internally or granting a licence or approval to a third party.

As the Ontario Superior Court of Justice found in *Lafarge v. Ontario (Environmental Review Tribunal)*, a failure to explicitly consider and apply an SEV when a prescribed Ministry makes a decision on approvals and permits is grounds for review by the Environmental Review Tribunal.⁴ The Court explicitly rejected the Ministry of the Environment’s argument that the SEV is only required to be considered during policy and legislative decision-making.⁵ Instead, the Court found that it was reasonable for the Tribunal to consider, “the SEV as relevant policy which should guide the decisions of Directors”.

Recommendation 1: To ensure that the SEV reflects current jurisprudence, the MEI should change section 3 of the SEV to read, “As it makes any decision that might affect the environment, including the development of acts, regulations and policies, the ministry will apply the following principles...”

⁴ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [*Lafarge*].

⁵ *Lafarge, ibid.* at para. 54. “The Ministry argued that the SEV was not intended to guide decisions by Directors, but rather was to be applied by the Ministry as it developed legislation.”

The SEV should state how the MEI will consider the precautionary principle, the ecosystem approach, and conservation when making any decision that could affect the environment.

As noted above, the Environmental Review Tribunal recently stated that,

it would be reasonable to consider well-recognized principles of environmental decision-making, such as precaution, the ecosystem approach and conservation, in making environmentally significant decisions even if they were not specifically mentioned in the SEV. These principles are simply reflective of current best practices in environmental decision-making.⁶

In order to be consistent with current best practices in environmental decision-making, the SEV should explicitly include an explanation of how the Ministry will consider precaution, the ecosystem approach, and conservation when making environmentally-significant decisions. Including these factors explicitly in the SEV would give Ministry staff the guidance they need to make the best possible decisions with respect to the environment and meet the Tribunal's expectations with regards to best practices.

Recommendation 2: Section Three of the SEV (“Application of the SEV”) should be expanded to include the following bullet points:

- The Ministry will apply the precautionary principle to every decision that could affect the environment;
- The Ministry will apply an ecosystem approach to every decision-making process;
- The Ministry will consider conservation when making decisions that could affect the environment, including conservation and protection of the natural environment.

The MEI SEV must address all the purposes of the EBR.

To comply with the *EBR*, the SEV must explain how the purposes of that *Act* will be considered when decisions that could significantly affect the environment are made, and how the purposes of the *EBR* will be integrated with other decision-making considerations. The document should specifically address how the Ministry will achieve each of these purposes when making decisions about energy and infrastructure projects, policy, and law.

While the draft SEV is consistent with the purposes of the *EBR*, it does not go far enough to fully explain how all the purposes of the *Act* will be considered. Consideration of certain purposes is not as evident as others. Specifically, the draft SEV addresses the purpose in the *EBR* of encouraging the wise management of our natural resources” through its emphasis on energy

⁶ *P.O.W.E.R., supra.*

conservation. However, it does not go beyond energy conservation to indicate how the Ministry will consider the broader purposes of the *EBR*, including:

- To protect and conserve biological, ecological and genetic diversity.
- To protect and conserve, and encourage the wise management of, natural resources, including plant life, animal life, and ecological systems.
- To identify, protect and conserve ecologically sensitive areas or processes.

In order to have an effective SEV that meets the requirements of the *EBR*, the MEI must go beyond energy conservation. While reducing energy consumption and increasing efficiency is important, the Ministry is also responsible for ensuring its energy and infrastructure developments themselves do not have negative effects on the environment. The SEV must help the Ministry make decisions that protect and conserve plant life, animal life, and ecological systems. It must ensure that ecologically sensitive areas or processes are protected and conserved, and that biological, ecological, and genetic diversity are protected.

This is particularly important because the recently promulgated *Green Energy Act* reduces the checks and balances that used to exist with respect to energy project development. The *Act* may result in less transparency and faster approval for projects that could have significant impacts on the environment, including industrial-scale wind plants and hydroelectric dams. It is essential that the MEI recognize its obligations under the *EBR* to ensure that all decisions made by the Ministry are consistent with *all* of the purposes of the *Act*.

Recommendation 3: The following bullet points should be added to Section 3 of the SEV:

- The Ministry will consider the effects of its decisions on biological, ecological, and genetic diversity in the environment;
- The Ministry will consider the protection and conservation of natural resources, including plant life, animal life, and ecological systems or processes, when making decisions.

SUMMARY OF RECOMMENDATIONS

In summary, Lake Ontario Waterkeeper recommends the following text be added to the Section 3 of the draft SEV, to ensure it meets the requirements of the *Environmental Bill of Rights* and current jurisprudence:

As it makes any decision that might affect the environment, including the development of acts, regulations and policies, the ministry will apply the following principles:

- **The Ministry will apply the precautionary principle to every decision that could affect the environment;**
- **The Ministry will apply an ecosystem approach to every decision-making process;**
- **The Ministry will consider conservation when making decisions that could affect the environment, including conservation and protection of the natural environment;**
- **The Ministry will consider the effects of its decisions on biological, ecological, and genetic diversity in the environment;**
- **The Ministry will consider the protection and conservation of natural resources, including plant life, animal life, and ecological systems or processes, when making decisions.**

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