



**BY MAIL AND EMAIL**

April 16, 2010

Joy Williams, Senior Engineer  
Ministry of the Environment, Environmental Programs Division  
Program Planning and Implementation Branch, Modernization of Approvals  
135 St. Clair avenue West  
Toronto Ontario  
M4V 1P5

CC: Gord Miller, Environmental Commissioner of Ontario

Dear Ms Williams:

**Re: Legislative Framework for Modernizing Environmental Approvals  
EBR #: 010-9143**

Please find enclosed Lake Ontario Waterkeeper's comments on the proposed changes to Ontario's environmental approvals system. 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

## **EXECUTIVE SUMMARY**

The proposed framework for legislative change is the most alarming policy proposal Lake Ontario Waterkeeper has encountered in our organization's history. If implemented, Ontario would have a two-tiered system of environmental approvals wherein the majority of proponents that currently require individual Certificates of Approval would instead register activities online and agree to abide by a check-list of rules. These registered activities would never undergo any Ministry review, would not be subject to public notice or comment, and could not be appealed to the Environmental Review Tribunal.

The Ministry has identified significant problems with its ability to evaluate proposed activities in a timely manner, while ensuring the public is notified and consulted before a decision is made. LOW accepts that the Ministry must fix these problems and avoid a backlog in the system that can compromise environmental protection. The fact that many activities that could be impacting the environment are currently being conducted without C of As, and therefore without any Ministry review, is a serious threat to the environment in Ontario. However, the proposed risk-based, two-tiered legislative system is more likely to decrease environmental protection than to increase it, while reducing public participation rights, accountability, and transparency.

There will be no true benefit to industry, government, or the economy if this proposal is implemented. The only guaranteed outcome is the loss of clean air, clean water, and healthy ecosystems in Ontario and across the Great Lakes for generations to come.

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

T 416-861-1237 [admin@waterkeeper.ca](mailto:admin@waterkeeper.ca) [www.waterkeeper.ca](http://www.waterkeeper.ca)

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## BACKGROUND

The Ministry of the Environment has initiated a process to develop legislation that would fundamentally change the system of environmental approvals in Ontario. The Ministry has outlined its proposed changes in a document entitled, “Proposed Framework for Modernizing Environmental Approvals” [hereafter “the Framework Document”]. This document was posted to the Environmental Registry for a 30 day comment period. After a request from Lake Ontario Waterkeeper [LOW] to provide a 90 day comment period, which would be more commensurate with the seriousness and complexity of the proposal, the Ministry extended the comment period to 45 days. The proposed timeline would see changes introduced by September 2012.

One of the most fundamental of the proposed changes would drastically reduce the number of activities covered by a Certificate of Approval [C of A]. Currently, anyone who wishes to carry out an activity that would contravene the province’s environmental laws or standards, and are not explicitly exempted by legislation, can apply for a C of A from the Ministry. If the activity is approved, the C of A acts as a licence to engage in an activity that would otherwise be illegal. For instance, if a company wishes to emit contaminants into the air, ground or surface water, establish a waste disposal site, or release sewage to the environment, they could be in violation of the *Environmental Protection Act*, the *Ontario Water Resources Act*, or both. In order to avoid penalties under those laws, the proponent is required to obtain a C of A from the Ministry.

The Ministry has three options when considering a C of A application: approve the application; refuse to approve the application; or approve the application with terms and conditions. The purpose of a C of A is to ensure that site- and activity-specific conditions can be imposed to ensure that the activity is conducted in such a way that minimizes or prevents negative impacts on the environment. A C of A is a legally binding document that must be complied with in order to avoid violation of the provincial law.

The Ministry’s Framework Document states that the current approvals system, “has largely been viewed as effective in protecting the environment”. However, it goes on to state that the legislation “has not adapted to keep pace with changes in economic activity and technology”.

The Framework Document describes the problems facing the current C of A system as:

- the legislation has not kept pace with changes in economic activity and technology;
- the system is inflexible, requiring all activities to undergo the same process regardless of complexity and risk;
- there is a backlog of applications at the Ministry, costing business time and money; and
- the public has trouble accessing information in the paper-based system.

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To respond to those problems, the Framework Document sets out the Ministry's three goals for the changing the approvals process:

1. Maintaining and, where possible, enhancing protection of the environment and human health;
2. Enhancing the delivery of services to businesses in Ontario; and
3. Improving public transparency and availability of information.

The Framework Document proposes a selection of potential changes to the C of A approvals process in order to meet those goals, including:

1. Introducing a categorization system for proposals based on a sliding scale of risk-level or complexity, where attention would be focused on more complex or riskier proposals;
2. Providing online information and tools for applying proponents and the public.

Under the proposed system, proponents would engage with an online system created by the Ministry. Based on a comparison of the nature of the proposed activity to a set of eligibility requirements, it would enter either the Registry stream or the C of A stream. If an activity falls into the Registry stream, the proponent would only need to registry the activity on the website and ensure that it complies with the stated rules. Registered activities would be subject to Ministry audit.

If the activity does not meet the Registry stream criteria, the proposal would enter the C of A stream and undergo a detailed, but paper-based, technical review by the Ministry. Proposals in this stream would be subject to public notice and comment requirements. If the activity is approved, the Ministry will issue either a single, site-wide approval, or system-wide approval.

The proposal is a mix of seemingly unconnected problems and objectives, many of which do not require legislative change to implement. Lake Ontario Waterkeeper has reviewed the proposal carefully and prepared the following comments for Ministry staff to consider.

Our main recommendations can be summarized as:

1. Public participation rights under the *EBR* must be preserved for all activities that require Ministry approval. All approval applications must continue to be posted to the Environmental Registry for notice and comment, and the public's right to appeal decisions must be preserved.

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2. The Ministry must abide by the legal requirement to consider cumulative and site-specific impacts for all approvals it issues. The registry system as proposed will not fulfill this obligation.
3. Risk and relativism are not valid bases for a system of environmental approvals. Environmental decisions should be made on the basis of the precautionary principle and scientific evidence.
4. Any changes to the current system must be based on valid assertions. The current justifications include a misquote from the Environmental Commissioner, jurisdictions selected randomly for comparison, and a false premise that old laws are necessarily in need of “modernization”.
5. The Ministry must redefine the problems with the current system *after* consulting with the public. The current problem statement is not a valid basis for legislative change. From LOW’s perspective, the problem statement would include:
  - a. There are too many loopholes exempting projects from consultation;
  - b. The Ministry fails to provide reasons for a majority of decisions;
  - c. The Ministry fails to make information accessible in a complete and timely manner;
  - d. The Ministry fails to include expiration dates on approvals;
  - e. The Ministry fails to provide enough time to comment on many proposals;
  - f. Regulatory capture decreases the effectiveness of the Ministry as a regulator.
6. The Ministry must provide a level of public consultation commensurate with the seriousness and far-reaching potential implications of this proposal. This consultation must occur *before* the proposed changes reach the Legislature. It must include assurances that all proposed drafts will be posted for comment on the *EBR* and committee hearings will be held if a Bill is developed.
7. System-wide or multi-site approvals would be inconsistent with the Ministry’s SEV and should be eliminated from the framework.
8. Electronic access to documents should be implemented, but does not require a legislative change.
9. Site-wide issues and impacts should be considered for all approval decisions, but no legislative change is required to achieve this goal.
10. Environmental legislation should be technology and industry-neutral.
11. The Ministry must resolve its staffing and resource problems without compromising environmental protection in Ontario.

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## COMMENT

### The proposed “modernization” is actually an elimination of Ontarians’ environmental rights.

The proposed changes would reduce public participation in environmental decision-making by eliminating the right to notice, comment, mandatory hearings, and appeal - a process which has already begun. The changes would also be inconsistent with the Ministry’s legal obligation to consider the cumulative and site-specific impacts of every decision that could affect the environment.

### The Framework eliminates Environmental Registry postings and appeal rights for the majority of environmentally significant decisions, thus effectively eliminating public participation opportunities currently protected under the *Environmental Bill of Rights*.

The *Environmental Bill of Rights [EBR]* was established in 1993 in order to, “protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act; to provide sustainability of the environment by the means provided in this Act; and to protect the right to a healthful environment by the means provided in this Act”.<sup>1</sup> When it passed the *EBR* into law, the Legislature explicitly recognized that in order to achieve those enumerated purposes, the government must provide, “means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario”. The Legislature clearly asserted that without public participation, environmental protection cannot be effectively achieved in Ontario.

By definition, any process or activity that currently requires a C of A is an “environmentally significant decision” as contemplated by the *EBR*. If the activity was not “environmentally significant”, it would fall within the bounds of the province’s environmental laws without requiring any special approval. Under the proposed regime, if an environmentally significant activity falls into the Registry stream, the proponent would only need to register the activity on the website and ensure that it complies with the stated rules. The Registry stream is equivalent to a “permit by rule” or “approval by rule” system, wherein proposals will not be evaluated individually by the Ministry. Instead, the criteria would be applied by proponents and only reviewed by Ministry staff if the registered activity is selected for an audit. While the flow chart on page 6 of the Framework Document shows Registry stream activities flowing into public transparency, this will presumably be limited to information notices after an activity is registered. Since Ministry staff will not be

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<sup>1</sup> Environmental Bill of Rights, 1993, S.O. 1993, c. 28, s.2 (EBR).

reviewing the information to determine if an activity can be registered, there will be no opportunity for public comments to be considered.

The proposed system would remove public participation from the majority of environmentally significant decisions in this province. In fact, the Ministry estimates that 75% of environmentally significant decisions would fall under the new registry system and thus be exempted from the public participation rights guaranteed by the EBR.<sup>2</sup> Not only would the public lose the right to comment on proposals, they would not even be notified before these decisions are made. This change would completely undermine the purposes of the *EBR* and would be the undoing of 30 years of environmental progress in Ontario.

If the changes are implemented, any public involvement before a registration is made would be a voluntary inclusion by the applicant. This amounts to “downloading” consultation on to the proponent, a change that would flip the current system on its head by turning a right into a privilege. Proponents do not generally have the expertise required to complete proper public consultation, nor do they have the independence required to consider public comments. This is not an effective system for including the public in environmental significant decision-making. The public must be able to speak directly to an independent decision-maker in order for consultation to be effective.

The implementation of consultation rights in this province is already problematic. There is a lack of public consultation on many proposals, and where consultation does occur, it is often restricted to a short window in which the public may submit comments in writing. Background documents required to provide a full understanding of proposals are often not available for the full consultation period, and the public must pay to obtain copies. Public meetings on proposals are scarce and hearings before the Environmental Review Tribunal (ERT) are even more rare. The proposed changes would eliminate mandatory hearings before the ERT, leaving only discretionary hearings. This would require the Minister to decide on a case-by-case basis to refer a matter to the Tribunal, a discretionary option that is almost never used in the current system.

For instance, while s.30 of the *Environmental Protection Act* appears to guarantee the right to a mandatory hearing for waste disposal sites, the regulations provide a myriad of exceptions. A hearing is not required for sites that store, handle and treat waste without technically “landfilling”

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<sup>2</sup> Environmental Commissioner of Ontario (2007) “Doing less with less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MOE and MNR” [“Doing less with less”] at 42.

it.<sup>3</sup> Sites that are subject to the *Environmental Assessment Act*, but are subsequently exempted from that *Act*, are also exempted from the hearing requirement.<sup>4</sup> Even where no exemption for the mandatory hearing provision is provided in the regulations, the Ministry has chosen to interpret s.30 in such a way that a hearing will almost never be required. In a recent decision, the Ministry stated that “non-hazardous industrial and commercial wastes” are not equivalent to domestic waste, so that even if a site will receive more than the quantity of waste specified in s. 30, a hearing will not be required.<sup>5</sup> If industrial and commercial waste is not considered “equivalent” to domestic waste, it is not clear that hearing for a waste site other than a traditional domestic waste dump will ever occur.

Instead of recognizing these problems and working to improve the delivery of public consultation rights, the Ministry’s proposal would eliminate those rights for the majority of applications. Without mandatory hearings, it is likely that the public will never get to participate before the ERT outside of an appeal, which puts a heavy risk of costs on individuals and not-for-profit groups. This would be a significant reduction in the transparency and accountability of the Ministry.

**The Framework eliminates the Ministry’s legal obligation to consider and account for the cumulative and site-specific impacts of every decision that could affect the environment.**

The Ministry of the Environment is required by O.Reg. 73/94 under the *Environmental Bill of Rights* to create a Statement of Environmental Values (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.<sup>6</sup>

The purposes of the *EBR* are to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act; to provide sustainability of the environment

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<sup>3</sup> Environmental Protection Act, General - Waste Management, R.R.O. 1990, Reg. 347, s.5.1.

<sup>4</sup> Environmental Protection Act, Waste Disposal Sites and Waste Management Systems subject to approval under or exempt from the Environmental Assessment Act, O. Reg. 206/97, s.1.

<sup>5</sup> Letter from Tesfaye Gebrezghi, Director, Ministry of the Environment, to Mark Mattson and Gord Downie (6 April 2010), re: St. Marys Cement Proposal, EBR 010-4892 and 010-4894.

<sup>6</sup> *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, s.7.

by the means provided in this Act; and to protect the right to a healthful environment by the means provided in this Act.<sup>7</sup> This includes the prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment; the protection and conservation of biological, ecological and genetic diversity; the protection and conservation of natural resources, including plant life, animal life and ecological systems; the encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems; and the identification, protection and conservation of ecologically sensitive areas or processes.<sup>8</sup>

The Minister is required to take every reasonable step to ensure that the Ministry's SEV is considered whenever decisions that might significantly affect the environment are made in the ministry.<sup>9</sup> 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.<sup>10</sup> At paragraph 60, the court explained that, "the Directors' decision was unreasonable because of the failure to take into account SEV principles".<sup>11</sup>

The *Lafarge* decision applies to the Ministry, despite changes that were made since it was decided. As the Environmental Review Tribunal found in *Protect Our Water and Environmental Resources 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.<sup>12</sup>

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<sup>7</sup> *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, s.2(1).

<sup>8</sup> *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, s.2(2).

<sup>9</sup> *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, s.11.

<sup>10</sup> *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [*Lafarge*].

<sup>11</sup> *Ibid.* at 60.

<sup>12</sup> *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.*].

Section 11 of the *EBR* requires all prescribed ministries to apply the SEV whenever decisions that might significantly affect the environment are made. This includes decisions about developing statutes, regulations, and policies, as well as operational decisions like whether to issue a C of A. In *Lafarge*, 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.<sup>5</sup> 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”. The Ministry is therefore 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.

The Ministry’s SEV requires it to adopt an “ecosystem approach” and to consider, “the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society”.<sup>13</sup>

In *Dawber*, the ERT described the meaning of “ecosystem approach” as used in the Ministry’s SEV:

Under an ecosystem approach, decisions are made by measuring effects on the system rather than on their constituent parts in isolation from each other. An ecosystem approach is inherently effects-based: what matters under an ecosystem approach is the overall consequence of human activity, rather than an assessment of particular human actions isolated from the effects of other actions affecting the same ecosystem. As the MOE SEV stipulates, one of the key features of an ecosystem approach is measurement of cumulative effects.<sup>14</sup>

The Tribunal found that the Ministry is required to consider the effects of the whole project on the environment and how those effects add to the consequences of other human activity in the ecosystem, before making a decision.

Under the proposed approvals system, proponents would engage with an online system created by the Ministry. Based on a comparison of the nature of the proposed activity to a set of eligibility requirements, it would enter either the Registry stream or the C of A stream. The Framework Document does not indicate what these eligibility requirements will be.

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<sup>13</sup> Ontario Ministry of the Environment, Statement of Environmental Values, “Application of the SEV”, available online at: <[www.ebr.gov.on.ca](http://www.ebr.gov.on.ca)>.

<sup>14</sup> *Dawber v. Ontario (Ministry of the Environment)* [2007] O.E.R.T.D. No. 25 (QL) at para. 33.

If an activity falls into the Registry stream, the proponent would only need to register the activity on the website and ensure that it complies with the stated rules. The Registry stream is equivalent to a “permit by rule” or “approval by rule” system, wherein proposals will not be evaluated individually by the Ministry. Instead, the criteria would be applied by proponents and only reviewed by Ministry staff if the registered activity is selected for an audit. If the Ministry moves to an “approval by rule” system, staff will no longer have the opportunity to evaluate projects on a site-specific basis. It will be difficult for proponents to identify and evaluate cumulative effects as they do not have the province-wide information that the Ministry has. Further, it is not clear that self-assessment by the proponent would satisfy the Ministry’s legal obligation to consider cumulative impacts specific to each site.

The proposed “system-wide” approvals would also fail to fulfill the Ministry’s obligation to consider site-specific and cumulative impacts. By definition, a system-wide approval would apply to more than one site. The unique characteristics of each site within the system would not be evaluated, either by the proponent or by Ministry staff. This would be a flagrant flaunting of the law set out under the *EBR* and endorsed by the ERT and the courts.

### **The Framework for taking away Ontarians’ environmental rights is founded on a shocking array of logical errors and misrepresentations.**

LOW fully agrees with the three goals stated in the Framework Document and supports the Ministry’s efforts to achieve them. However, many of the specific goals and the proposed solutions could and should be achieved through policy reforms, rather than legislative change. Similarly, many of the “reasons” given to justify a need for legislative change are based on errors of fact, flawed logic, and erroneous premises.

### **The reference to the Environmental Commissioner’s report is taken out of context.**

A quote from the Environmental Commissioner’s 2007 report, “Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MOE and MNR” is included in the Framework Document as evidence that, “the legislation regarding approvals has not adapted to keep pace with changes in economic activity and technology to meet the evolving needs of business and Ontarians”. However, the quoted report does not suggest that this problem is linked to the legislation. Instead, if you read the full quote in context, it indicates that the problems spring directly from inadequate staffing at the Ministry and a failure to put appropriate conditions with expiry dates into C of As:

MOE receives approximately 8,000 applications for new or amended Cs of A each year. The process of obtaining approvals from MOE, especially for new technologies, is lengthy and, according to many

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proponents, often difficult. The difficulties experienced in obtaining approvals may have a detrimental effect on business in Ontario, pushing leading edge businesses with innovative environmental technologies to other jurisdictions where obtaining approvals is easier. It may also be impacting our environment by deterring facilities from applying for (and obtaining) approval to implement improved environmental technologies to replace older, less effective processes.

In addition, MOE has issued well over 220,000 Cs of A since 1971. Some of the oldest Cs of A contain no conditions at all. Others (issued after 1983) do contain conditions; however, they reflect the ministry's requirements in effect at the time they were issued. Changes in environmental requirements included in new ministry policies, guidelines and standards do not apply to pre-existing Cs of A. **Since most Cs of A have no expiry date and, thus, remain in effect for the life of the process or equipment (unless it is altered), they do not keep pace with MOE's changing expectations.** As such, a large number of facilities are operating with Cs of A that contain conditions that are both outdated and inconsistent with similar, but newer operations.

**By allowing facilities to operate under outdated Cs of A, MOE is not only permitting proponents to legally pollute beyond what is currently considered good practice, but it is also failing to provide proponents with any incentive to reduce discharges or implement better equipment and technologies.<sup>15</sup>**

Instead of suggesting that the C of A process is in need of replacement or revamping, the Environmental Commissioner speaks of its value:

**MOE's approvals process is one of its core functions and primary method of ensuring that new or significantly altered facilities, projects and activities in Ontario use appropriate technologies and operate within provincial environmental standards.<sup>16</sup>**

Instead of a problem with the legislative requirement for C of As, the ECO observed that the MOE appears to lack adequate staff capacity to process C of A applications at a reasonable rate, resulting in a backlog of approximately 1000 applications per year and lengthy approval times. He notes that, as technology becomes more innovative and scientific understanding of environmental problems increases, the MOE is required to become more sophisticated to respond to C of As. This does not mean that the MOE should reduce the number of C of As it considers, but instead that it must acquire the correct number of staff that can evaluate C of A applications at an appropriate rate and level of technical competence.

The ECO's report points out that the MOE tried to reduce so-called "red tape" in 1998 with the introduction of Standardized Approval Regulations (SARs) and Approval Exemption Regulations (AERs). Just like the current proposal, these changes were intended to lessen the Ministry's workload and reduce the amount of resources devoted by the Ministry and the private sector to

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<sup>15</sup> Doing less with less at 39.

<sup>16</sup> Doing less with less at 39.

issuing C of As. In a 1998 report, the ECO cautioned that, “the concept is simple, but in practice it is difficult to create categories of approvals instead of treating every polluter on a case-by-case basis”.<sup>17</sup> The report explains that, because approvals for these activities would no longer be posted to the Environmental Registry, the public would lose its right to be notified of and to comment on applications for these instruments. Additionally, the public would no longer have the right to appeal or seek review of the instruments under the *EBR*.

The full context of the ECO’s Report with respect to changing the C of A program can be summed up in this paragraph:

MOE’s enormous C of A processing workload and the resulting pressure on the approvals staff is such that MOE must consider new approaches to its approvals program. The use of alternative strategies is necessary and, hopefully, will result in improved efficiencies. However, **the ECO cautions that when MOE is required to offload or deregulate sectors from the C of A process, the consequent decrease in regulatory-oversight may present risks to the environment and human health. “Low-risk” facilities still produce impacts on the environment. Indeed, the cumulative impact of several low-risk facilities located closely together (as they commonly are) can be significant.**<sup>18</sup>

At no point in his report does the ECO suggest that the problems at the Ministry are rooted in a failure of the legislation to “keep pace with... the evolving needs of business and Ontarians”, as suggested by the citation in the Framework Document. In fact, the ECO warned explicitly that changing the C of A system by classifying projects on the basis of risk could present risks to the environment and human health.

**The description of selected jurisdictions as “leading” is unsubstantiated and arbitrary, designed to prove a pre-determined point.**

The Framework Document states that the Ministry looked to, “comparable, leading jurisdictions to identify best practices most relevant to Ontario relating to the structure and delivery of approvals processes”. The selected jurisdictions include: three Canadian provinces (Alberta, Nova Scotia, and British Columbia); four American states (Michigan, Massachusetts, California, and Florida), and two nation states (the United States and the United Kingdom).

The Document does not elaborate on the methodology used to identify comparable jurisdictions or to determine that they are “leading”. Nor does the document explain what the compared

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<sup>17</sup> Environmental Commissioner of Ontario, Annual Report (1998), “Open Doors: Ontario’s Environmental Bill of Rights” at 158.

<sup>18</sup> “Doing Less with Less”, supra at 41.

jurisdictions are “leading” in. Presumably, the jurisdictions were chosen because they are “leading” in terms of the three stated goals of the Ministry (namely, protecting human and environmental health; enhancing service delivery; and improving transparency). However, the jurisdictions used for comparison are not, on the face of the matter, obviously leading in these three categories, and no evidence is provided to suggest otherwise.

The reference to Alberta as a “leading jurisdiction” is particularly inexplicable. Alberta is the location of the Oil Sands, widely recognized to be one of the largest pollution sources and worst ecological sites in Canada. Sacrificing environmental protections for short term profit, the Alberta oil sands burn more carbon than conventional oil, destroy forests and displace woodland caribou, poison the water supply and communities downstream, drain the Athabasca, the river that feeds Canada’s largest watershed, and contribute to climate change.<sup>19</sup> Alberta’s system of approvals has allowed this ecological crisis to develop and cannot be held up as a “leading jurisdiction”.

The Framework Document cites four US states as leading jurisdictions. This is not an appropriate comparison because states have a completely different federal environmental protection system than provinces. When US states reduce the stringency of their environmental protection systems, citizens and the environment can still find protection in the federal *Clean Water Act*. Not only does Canada have no equivalent statute, but Canada’s federal environmental protection laws are also being stripped and rendered ineffectual. Even the *Navigable Waters Protection Act*, one of Canada’s oldest laws and one of the major gateways to the federal environmental assessment process, has been gutted.

It appears as though the jurisdictions referred to in the Framework Document were selected to support a pre-determined conclusion, rather than chosen for their environmental protection and studied, as implied by the Framework Document. If the Ministry wants to reform the approvals process to match actual leading jurisdictions, objective criteria must be applied on the basis of a) proven environmental protection, and b) a comparable legal context.

### **You don’t need to change the law to create electronic access to documents.**

The Framework Document states that the Ministry could save proponents time and money, and increase public access to documents, by transitioning from a paper-based to an electronic system. This is an important goal and one that LOW fully supports. LOW has experienced repeated problems accessing documents related to C of A applications at the Ministry in a timely

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<sup>19</sup> Andrew Nikiforuk, *Tar Sands: Dirty Oil and the Future of a Continent* (Greystone Books, Vancouver: 2008).

manner. Ministry staff have told LOW on a number of occasions that they do not have the resources to prepare all files that are posted on the Environmental Registry for public viewing. Instead, MOE staff only prepare files for the public when someone specifically requests access. This results in delays of up to a week, which cuts into the mandatory 30 days of public consultation.

If all C of A files were electronic, they could be posted to the Registry immediately, ensuring that the public could take advantage of the full consultation period. It would also save the public from paying for photocopies of documents, making the process more cost efficient and environmentally sound. Further, citizens who are not located within close proximity to the office where the documents are stored could better access the information if it were online. For these reasons, LOW fully supports this proposition and encourages the Ministry to implement it.

However, switching from a paper-based to an electronic system does not require a legislative change. This is purely a matter of changing the Ministry's internal policy. The supporting documents for proposals are already public and the *EBR* already provides a legislative basis for making information about proposals available to the public. While LOW fully supports the proposal to make all information digital and available to the public online, we do not accept that a legislative change is required.

Further, making documents available electronically is not logically connected to the other half of the Ministry's proposal. There is no logical connection between electronic access and splitting applications into two streams based on risk, and the two should be considered separately by the Ministry.

### **You don't need to change the law to consider site-wide issues and impacts.**

As stated above, LOW supports the consideration of facility-wide issues during the licencing process because this could allow for better consideration of site-specific and cumulative impacts. By considering all emissions from a facility, Ministry staff can more effectively consider site specific and cumulative impacts, as required by the Ministry's SEV. As stated in the Framework Document, the Ministry is already issuing site-wide approvals for air and select waste activities.

While LOW supports the concurrent consideration of linked approvals, especially because of the potential to better address cumulative and site-specific impacts, this is not currently the operating model at the Ministry. To switch to a comprehensive or site-wide permit system would require an apparently massive restructuring in the Ministry, and may actually decrease efficiency.

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Currently, Directors are appointed based on their areas of expertise. Approvals are split into multiple parts so that each aspect can be reviewed by a staff person with expertise in that area. The proposed change would require the Ministry to stop categorizing applications by medium (i.e. air or water). Even officials with the Ministry of the Environment argue that the current system of approvals should not be replaced with facility, site, or system-wide approvals. As Tesfaye Gebrezghi, a Director at the MOE, stated in a recent letter to LOW:

A proposal with potential emissions or release points in more than one medium requires several areas of technical expertise for Ministry review and therefore requires more than one technical reviewer. Procedurally, this is most effectively handled by categorizing applications by medium and associated processes (air, water, waste).

While LOW supports the consideration of site-wide impacts in the approvals system, the change cannot be implemented under the guise of increasing efficiency, since Ministry staff have already stated that it would not be a procedurally efficient system.

**It is a dangerous fallacy to assert that laws must be changed because they have been in place for a long time.**

The proposed changes are couched in terms of “modernization”. The discussion paper is titled, “Proposed Framework for Modernizing Environmental Approvals”, and the report is saturated with references to modernizing. The word “modernize” implies a teleological belief that everything old is inherently in need of updating, without reference to actual problems or issues. If this logic were based in truth, there would be no value in the *Constitution Act* or the *Criminal Code*.

**Changing legislation to solve a staffing problem would be a disservice to Ontarians.**

The Report cites staffing problems as one of the major reasons for reducing the approvals process. This is an example of the worst kind of bureaucratic problem-solving. Instead of hiring new staff or increasing the efficiency of existing staff, the Ministry proposed to reduce their workload by cutting the required approvals.

First, the proposed changes could actually increase the workload at the Ministry and reduce the efficiency in the approvals process. With specific reference to the current proposal, the ECO warned in 2007 that the plan could actually increase the Ministry’s workload by bringing, “tens of

600 Bay Street, Suite 410. Toronto, ON M5G 1M6

T 416-861-1237 admin@waterkeeper.ca www.waterkeeper.ca

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thousands of regulated entities that currently do not have a C of A into the approvals system”.<sup>20</sup> The ECO further noted that adding expiry dates into approvals would be a very positive development in terms of environmental protection, but that it will add to the Ministry’s workload. As noted above, a Director at the Ministry indicated that switching to site-wide or facility-wide approvals would not be procedurally efficient.

Second, reducing workload is not a valid justification for changing a program that was put in place to protect the environment and human health. In order to meet its obligations under the *EBR* and fulfill its duty to the people of Ontario, the Ministry should not compromise the C of A program to solve a staffing shortage.

### **The Framework for taking away of Ontarians’ environmental rights is based on an unfounded problem statement.**

The Framework Document describes the problems facing the current C of A system as:

- the legislation has not kept pace with changes in economic activity and technology;
- the system is inflexible, requiring all activities to undergo the same process regardless of complexity and risk;
- there is a backlog of applications at the Ministry, costing business time and money; and
- the public has trouble accessing information in the paper-based system.

However, no consultation was conducted to determine whether these are the actual problems with the system from the perspective of those outside the Ministry. When introducing changes of this magnitude, how the problem is stated will determine how it is understood and what solutions are possible. The Ministry has an obligation to consult the public on *all* aspects of the change, especially the identification of the problem. LOW submits that, if the public had had the opportunity to identify and contribute to the delineation of the problem, it would have included the following issues:

- **Too many loopholes that exempt projects from consultation:** The system was established to ensure that all activities that could affect the environment are subject to public notice, comment, and appeal rights. The current system includes too many loopholes whereby projects are exempted, either from a hearing before the ERT or from the public comment process entirely. In order to fulfill its mandate to protect the environment and human health, the Ministry should improve the C of A system by ensuring that projects are not exempted from consultation.

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<sup>20</sup> "Doing Less with Less", supra, at 42.

- **Failure to provide reasons:** The provision of reasons is one of the most basic procedural fairness rights accorded by the Canadian common law, yet detailed reasons are rarely provided to the public when a decision that could significantly affect the environment is made. LOW is a charity funded by the public to help protect and restore Lake Ontario for swimming, drinking, and fishing. We devote a significant amount of resources to participating, in good faith, in public decision-making processes provided under the *EBR*. Despite the amount of work devoted by LOW to providing quality, well-researched comments to the Ministry, we rarely receive reasons that reflect how our comments were considered by the Ministry when a decision is posted. The failure to provide detailed reasons is one of the flaws with the current C of A process that was not captured in the Framework Document.
- **Failure to make information accessible in a complete and timely manner:** The Framework Document did successfully identify one of the major flaws with the C of A system from LOW's perspective by highlighting the need for better transparency and access to information. As stated above, LOW has routinely encountered delay and administrative road blocks in attempting to access background documents on proposals. If LOW, as a sophisticated group with significant experience working within the available public processes, has trouble accessing information, it is likely much more difficult for members of the public to participate. Identifying the need to update technology to ensure the complete files are available to the public at the beginning of, or prior to the start of, a comment period, is an important part of stating the problem.
- **Failure to include expiration dates on approvals:** C of As with no expiry or renewal date are essentially "termless" approvals. These termless approvals allow proponents to continue activities indefinitely without regard for changes in scientific understanding or economic or social policy. Further, the activities remain approved despite changes to contaminant loads in the environment, without regard for cumulative impacts. As stated in the Framework document, termless approvals are unlikely to reflect contemporary best practices and provide industry with incentive to avoid updating their facilities to meet new standards. They fail to ensure government accountability, an ecosystem approach, environmental protection, and resource conservation. Termless approvals are also inconsistent with normal licencing practices, which are accompanied by a series of conditions, standards, expiration or renewal dates, and conditions. In 2007, the ECO noted that the Ministry was beginning to include expiry dates in C of As.<sup>21</sup> Up to that point, C of As were issued for indefinite periods of time. This termless approvals practice resulted in thousands of facilities with C of As that either had no terms and conditions attached or had outdated terms and conditions that did not reflect modern

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<sup>21</sup> "Doing Less with Less", supra, at 43.

environmental knowledge or standards. LOW supports and advocates a move to incorporating expiration dates in every approval issued by the Ministry.

- **Failure to provide enough time commensurate with the seriousness of the proposal:** LOW routinely finds that proposals with complex, far-reaching potential effects are posted to the Environmental Registry for the minimum required 30-day time period. The Framework Document exemplifies this problem, as it is one of the most complex and far-reaching proposals LOW has encountered, but was only posted for 45 days. The failure to provide adequate time for the public to review, understand, research, and comment on proposals is one of the major problems with the current C of A system.
- **Regulatory capture decreases the effectiveness of approvals:** Regulatory capture occurs when a regulator meant to act on behalf of the public instead acts in the interest of the industry it is meant to regulate. This is a common phenomenon in the current C of A system because Ministry staff work more closely with proponents than with the public. Much of the communication that occurs during the approvals process is not provided to the public, and the public does not have the same access to Ministry staff. Instead of evaluating proposals on the basis of environmental protection, staff act to facilitate approval, informing industry how best to get through the system. Instead of denying approval requests that are not tenable, the Ministry informs proponents that they should withdraw their application and reapply with different information. Regulatory capture is one of the fundamental problems with the C of A process.

If LOW had been consulted prior to the development of the problem statement, these would have been identified as necessary inclusions. It is likely that other members of the public would identify other challenges with the process. It would be prudent for the Ministry to restate the problem, rather than work from a starting point that does not reflect consultation.

## **The proposed changes will harm the environment.**

If implemented, the new approvals system would be less protective of the environment and human health.

### **Environmental decisions should not be made on the basis of risk.**

The proposed approvals system would be based on classifying proposed activities on the basis of risk. The Framework Document states that the Ministry believes that, “risk reflects both the

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

T 416-861-1237 admin@waterkeeper.ca www.waterkeeper.ca

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environmental and human health impact of an activity and the probability that the impact would occur”. The new process would involve an evaluation of risk based on factors like:

- the complexity of the activity;
- the types of emissions involved; and
- the proximity to receptors like daycares, residences, and wetlands.

The evaluation and classification of proposals on the basis of risk is one of the most significant problems with the proposed changes. Four serious problems with the proposal are apparent on the face of the Framework Document:

1. The Framework Document provides a simplified example of the Registry stream selection process which presents the comparison of two hypothetical activities as straightforward. In reality, proposals are likely to involve a complex mix of these factors. This evaluation will be complex and likely involve subjective judgements. It would be left to proponents to complete on their own before filling out an online form. No Ministry staff will participate in this decision-making process. The public will not be given the opportunity to comment or to make the stream decision better.
2. The example in the Framework Document that compares a hypothetical low and high-risk activity is based on relativism. Because Activity A is “less risky” than Activity B, it would be subject to less review by the Ministry. The use of relativism is not a valid basis for environmental decision-making. It does not justify Activity A to say that it is less harmful than Activity B. Instead, the Ministry’s decision-making must be based on environmental impacts, environmental protection, and preserving democratic rights. These are objective factors that cannot be satisfied through subjective relativist comparisons.
3. Using risk as the determining factor for sorting proposals into streams does not account for cumulative impacts. Specifically, it is not clear how historical contamination will be accounted for. Under this proposed system, proponents will be self-evaluating their activities. It is not clear how they will have the sophistication or access to information required to account for historic contamination. Only the Ministry can evaluate proposals in terms of the specific community they would be situated in with a view to existing contamination and cumulative impacts from other installations. The proposal appears to leave communities with existing pollution vulnerable to compounding impacts, without the opportunity to inform the Ministry about those impacts and how they might affect life in that area.

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

T 416-861-1237 admin@waterkeeper.ca www.waterkeeper.ca

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4. A risk-based approach is antithetical to precautionary principle which has been adopted in actual leading jurisdictions and the decisions of the Supreme Court of Canada. In *Davidson*<sup>22</sup>, cited in *Dawber*, the Environmental Review Tribunal defined the precautionary approach:

A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be.

A risk-based approach cannot co-exist with a precautionary approach, since it is based on the probability of something occurring rather than prudence wherever harm is possible. For instance, if an activity may result in environmental harm, the precautionary principle would demand scientific certainty of no adverse effect. The risk approach would approve an activity (or subject it to less scrutiny) if it is “less risky” than another activity. The risk approach is not based in science or precaution. If applied, it would result in less environmental protection in Ontario, and violate the requirements of the Ministry’s SEV.

### **Environmental legislation should be technology and industry-neutral.**

The proposed Framework indicates that proposals will be classified into an approval stream in part on the basis of the technology or industry involved. If the Ministry approves many of the same type of application, those proposals are more likely to enter the Registry stream and undergo only proponent self-evaluation. This could have the effect of favouring certain technology choices over others, especially where there is a familiar and an unfamiliar option. Further, the Framework states that system-wide or multi-site approvals could be granted to cover similar installations in multiple locations. As this practice lends itself more to certain industries (i.e. sewage systems or energy utilities), the legislation would make approvals easier for certain industries over others. LOW submits that environmental legislation should focus on the actual effects and be designed to protect the public and the environment. Rather than determine the approval required on the basis of technology or industry, environmental standards must be set to ensure that pollution does not degrade the environment for any use that can be made of it.

### **System-wide or multi-site approvals are inconsistent with the Ministry’s SEV.**

LOW does not support the implementation of multi-site or system-wide approvals. System-wide approvals do not allow for a site-specific review accounting for cumulative impacts. In fact, the

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<sup>22</sup> *Davidson v. Ontario (Ministry of the Environment)* [2006] O.E.R.T.D. No. 33.

apparent purpose of this category of approvals would be to avoid conducting site-specific reviews. This would be in direct contravention of the EBR and SEV requirements.

### **The Ministry of the Environment appears unwilling to engage in meaningful public consultation as it moves to curtail public consultation rights.**

The Ministry of the Environment appears unwilling to engage in true public consultation on this proposal, which enhances concerns about the threat to citizens' environmental rights in the Framework Document. The proposal was initially posted to the Environmental Registry for the minimum 30 required days. When LOW requested a 60 day extension to reflect the complexity and serious implications of the proposal, the comment period was lengthened by 15 days. No open houses, public meetings, or conferences have been held to help identify the problem or to shape this framework.

The proposed legislation should be posted to the Environmental Registry at each stage of its development for comments and those comments must be received, considered, and reflected in changes before the legislation is introduced to the Legislature. If a Bill is developed, it must go to Committee for consideration and public hearings should be held to allow the public to make oral representations. The Ministry has not guaranteed that the legislation will be posted the Environmental Registry before it is introduced to the Legislature, nor have they guaranteed committee hearings.

The Framework Document says that, if the enabling legislation for these changes is passed by the Legislature, "there will be future opportunities for the public and stakeholders to comment on the development of regulatory proposals required to implement a new approvals system". These changes are so fundamental and wide reaching that, while it is important to continue to provide public participation options during the development of regulations, the key time for public involvement will be during the development of the statute. As lawmakers well know, the purposes of a statute cannot be changed after First Reading. Any failure to consult the public on draft legislation prior to that stage of the process could and will be recognized as a cynical effort to exclude the public from determining the nature of their own rights.

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

T 416-861-1237 admin@waterkeeper.ca www.waterkeeper.ca

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## RECOMMENDATIONS

Lake Ontario Waterkeeper believes that the proposed framework is fundamentally flawed and cannot be implemented without compromising environmental protection and integrity in Ontario. The following recommendations address our basic concerns with the proposal. Further consultation is required to review any detailed plans, once these fundamental flaws are corrected.

1. Public participation rights under the *EBR* must be preserved for all activities that require Ministry approval. All approval applications must continue to be posted to the Environmental Registry for notice and comment, and the public's right to appeal decisions must be preserved.
2. The Ministry must abide by the legal requirement to consider cumulative and site-specific impacts for all approvals it issues. The registry system as proposed will not fulfill this obligation.
3. Risk and relativism are not valid bases for a system of environmental approvals. Environmental decisions should be made on the basis of the precautionary principle and scientific evidence.
4. Any changes to the current system must be based on valid assertions. The current justifications include a misquote from the Environmental Commissioner, jurisdictions selected randomly for comparison, and a false premise that old laws are necessarily in need of "modernization".
5. The Ministry must redefine the problems with the current system *after* consulting with the public. The current problem statement is not a valid basis for legislative change. From LOW's perspective, the problem statement would include:
  - a. There are too many loopholes exempting projects from consultation;
  - b. The Ministry fails to provide reasons for a majority of decisions;
  - c. The Ministry fails to make information accessible in a complete and timely manner;
  - d. The Ministry fails to include expiration dates on approvals;
  - e. The Ministry fails to provide enough time to comment on many proposals;
  - f. Regulatory capture decreases the effectiveness of the Ministry as a regulator.

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

T 416-861-1237 admin@waterkeeper.ca www.waterkeeper.ca

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6. The Ministry must provide a level of public consultation commensurate with the seriousness and far-reaching potential implications of this proposal. This consultation must occur *before* the proposed changes reach the Legislature. It must include assurances that all proposed drafts will be posted for comment on the *EBR* and committee hearings will be held if a Bill is developed.
7. System-wide or multi-site approvals would be inconsistent with the Ministry's SEV and should be eliminated from the framework.
8. Electronic access to documents should be implemented, but does not require a legislative change.
9. Site-wide issues and impacts should be considered for all approval decisions, but no legislative change is required to achieve this goal.
10. Environmental legislation should be technology and industry-neutral.
11. The Ministry must resolve its staffing and resource problems without compromising environmental protection in Ontario.

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T 416-861-1237 admin@waterkeeper.ca www.waterkeeper.ca

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