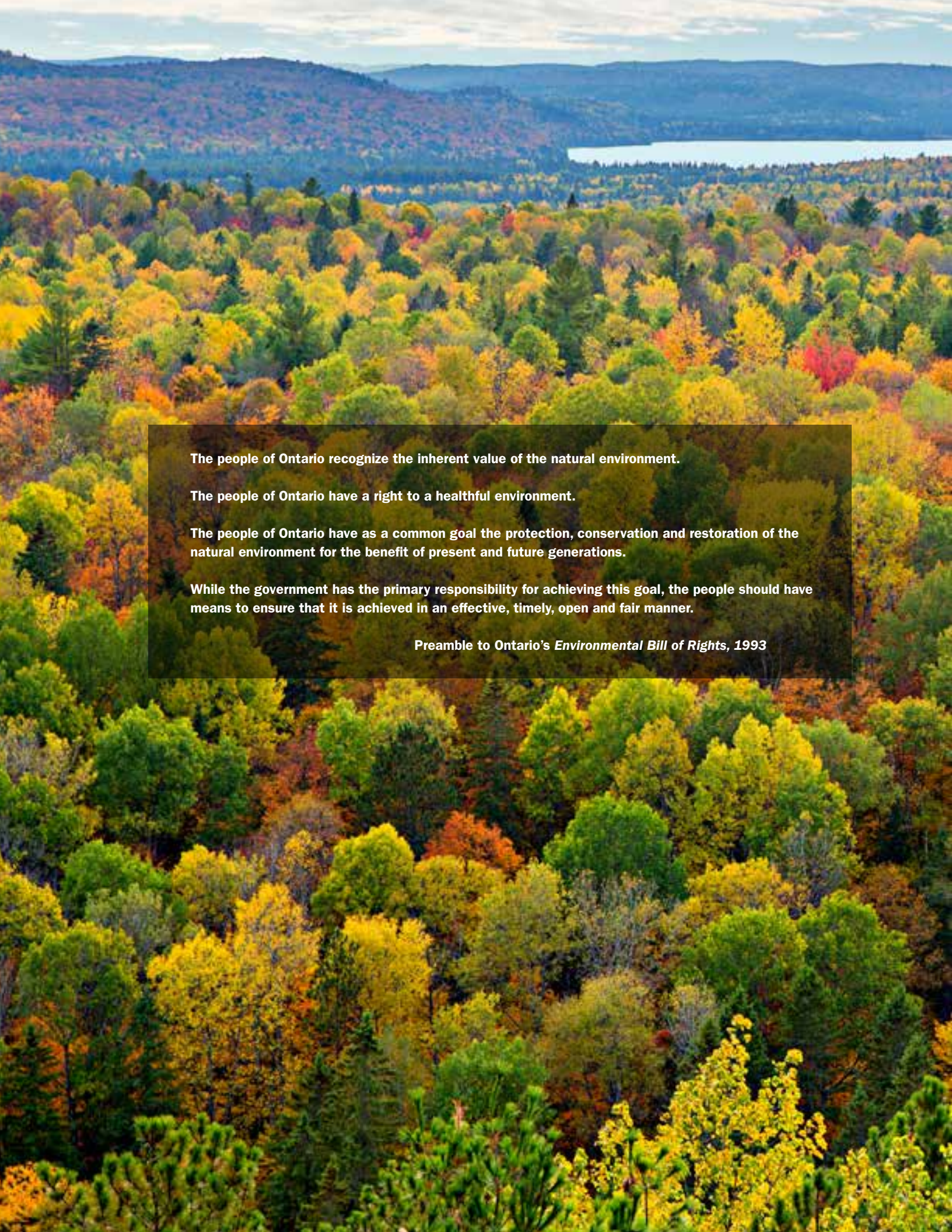
SMALL STEPS FORWARD

Environmental Protection Report 2015/2016

VOLUME ONE: ENVIRONMENTAL RIGHTS

Environmental Commissioner of Ontario



The people of Ontario recognize the inherent value of the natural environment.

The people of Ontario have a right to a healthful environment.

The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.

While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

Preamble to Ontario's *Environmental Bill of Rights, 1993*

Environmental Commissioner of Ontario

Commissaire à l'environnement de l'Ontario

Dianne Saxe, J.D., Ph.D. in Law
Commissioner

Dianne Saxe, J.D., Ph.D. en droit
Commissaire

October 2016

The Honourable Dave Levac
Speaker of the Legislative Assembly of Ontario

Room 180, Legislative Building
Legislative Assembly of Ontario
Queen's Park
Province of Ontario

Dear Speaker:

In accordance with Section 58(1) of the *Environmental Bill of Rights, 1993*, I am pleased to present the 2015/2016 Environmental Protection Report of the Environmental Commissioner of Ontario for your submission to the Legislative Assembly of Ontario. This year's report is presented in two volumes.

Sincerely,

Dianne Saxe

Environmental Commissioner of Ontario

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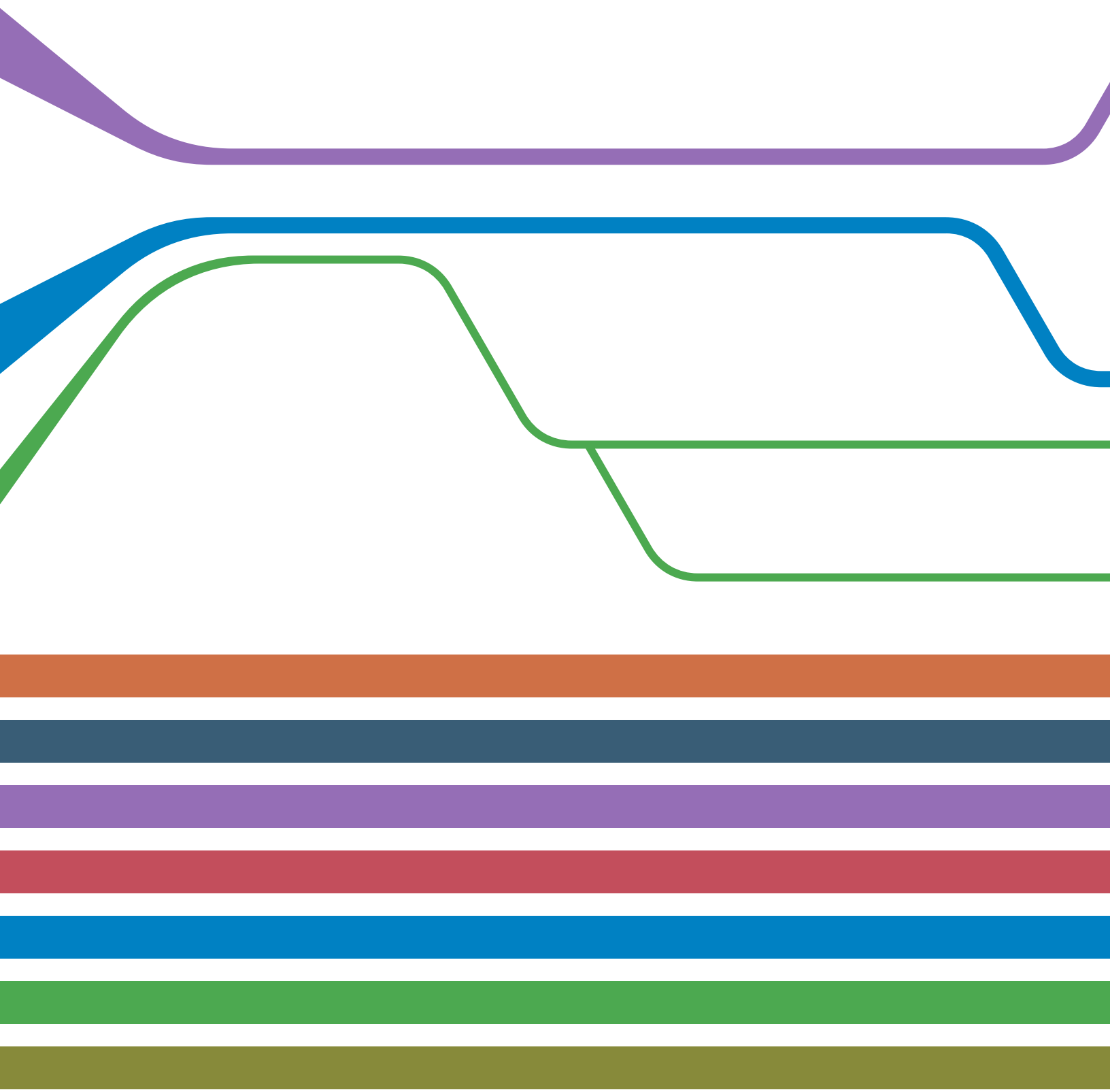

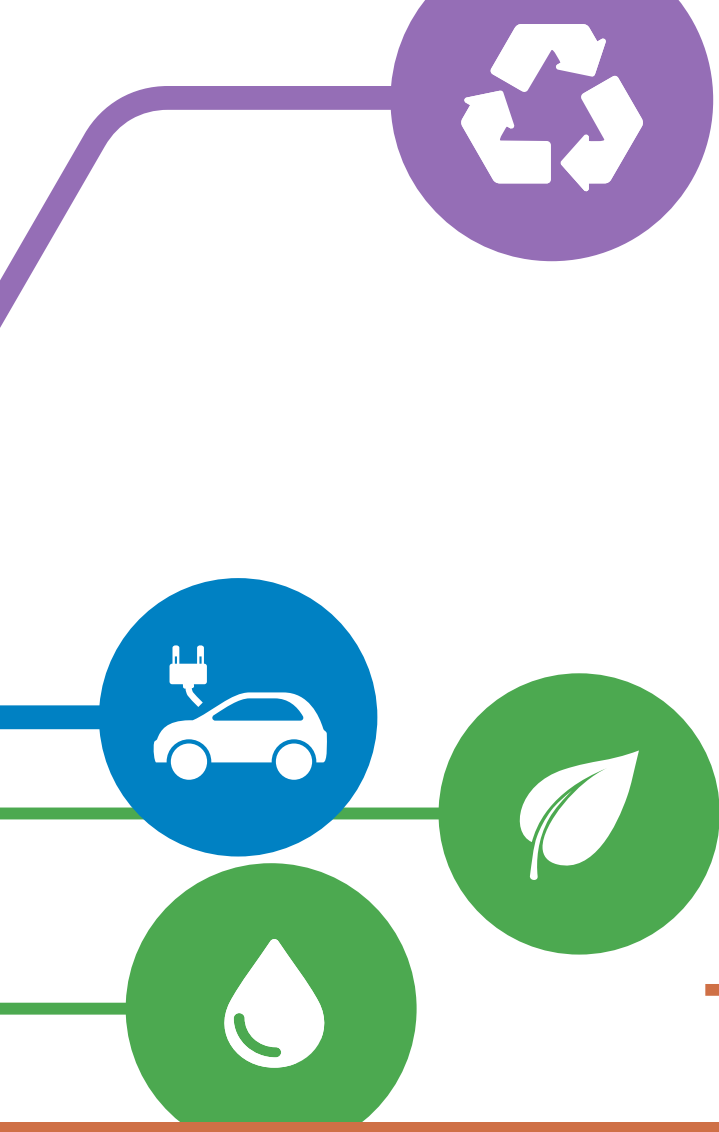

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Commissioner's Message

As your Environmental Commissioner, I am the guardian of the *Environmental Bill of Rights* (*EBR*), and I report to the Ontario Legislature, and to the public, on energy conservation, climate change and environmental protection. This report focuses on two questions:

1. Do the environmental rights of Ontarians get enough respect? (Volume 1) and
2. How well is the Ministry of Natural Resources and Forestry (MNRF) conserving biodiversity in its most recent initiatives? (Volume 2)

Environmental Rights

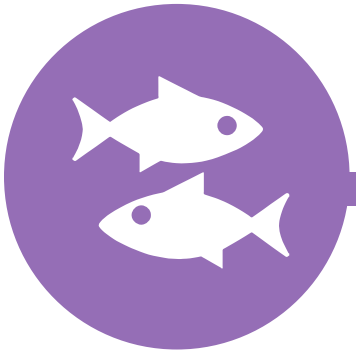
The environmental rights of Ontarians need more respect.

There has been meaningful progress since I was appointed Commissioner in December 2015. As we showed in our Special Report *EBR Performance Checkup: Respect for Ontario Environmental Rights 2015/2016*, Ontario government ministries worked hard this year to improve their compliance with the *EBR*.

This was welcome and overdue. In 2015, ministries had 1,800 outdated proposal notices on the Environmental Registry reaching as far back as 1996. By the summer of 2016, more than 1,000 of these outdated notices had been brought up to date. New notices from some ministries became of better quality and more helpful to the public. We welcomed the Treasury Board Secretariat as our 15th prescribed ministry.

The Ministry of the Environment and Climate Change (MOECC) makes the largest number of environmentally significant decisions and should set a good example in respecting environmental rights. The ECO is glad to see that the MOECC has, at last, begun posting public progress updates on its outstanding applications for review. The MOECC has also begun a long-overdue review of the *Environmental Bill of Rights* itself. These initiatives are important and appreciated. However, much remains to be done:

1. The Environmental Registry, Ontarians' window on significant government environmental decisions, is hobbled by obsolete software and often frustrates public participation. A fix to the software seems to be at least a year away.
2. The MOECC is still responsible for more than 400 outdated Environmental Registry proposals, depriving Ontarians of their legal right to seek leave to appeal on many controversial and important environmental decisions.
3. The MOECC has not completed *EBR* reviews from as far back as 2009, leaving Ontario residents hanging and important policy issues unresolved. One relates to the shameful impact of Sarnia air pollution on the health of the First Nations community of Aamjiwnaang and other similar air pollution hotspots.
4. When the MOECC "completes" a review, it does not always deliver what it promised. For example, the MOECC agreed in July 2015 that the public deserves to know when raw sewage is dumped into Toronto's harbour. It happened again in August 2016, but the public still didn't receive notice.



By next year's report, the MOECC should earn Ontarians' trust by respecting and protecting Ontarians' environmental rights.

The MNRF and Biodiversity

The MNRF is responsible for almost all of Ontario's biodiversity, including the plants, animals and natural landscapes for which we are famous around the world. This biodiversity will come under increasing threat as climate change accelerates. The MNRF has important new tools this year to conserve our biodiversity: a new *Invasive Species Act, 2015*, a new *Wildland Fire Management Strategy*, and new moose management measures for this iconic but declining species. These are good steps in the right direction.

But will MNRF "walk the talk"?

Unfortunately, we see evidence of the government failing to use its tools to provide effective conservation for Ontario's species. We have seen instances where the MNRF:

1. Did what was easiest and cheapest, instead of what works;
2. Hoped for the best instead of collecting the data that are essential for effective species protection; and
3. Relied on others to do the work it should, or used to do, without providing leadership, coordination, funding or accountability.

The impact was substantial:

1. Invasive species continued to be a serious threat while some practical and inexpensive precautions were ignored;
2. Years of fire suppression impaired the ecological health of our forests and increased the risk of catastrophic fires; and
3. Important wildlife populations, like moose, bats and amphibians, declined.

The MNRF, like other ministries, struggles to fulfil its many mandates within the constraints of limited resources, and amid the demands of many stakeholders. But the MNRF can, and must, take its biodiversity duties more seriously. It has new tools. Will it use them well?

Staff Who Go Above and Beyond

The ECO is impressed by the passion, commitment and expertise of many government staff who devote themselves to Ontario's environmental well-being, despite obstacles and constraints. With our annual ECO Recognition Award, we are delighted to recognize the initiative of two groups of civil servants who set outstanding examples of environmental commitment and achievement last year. Congratulations to them and to all the nominees.

Executive Summary

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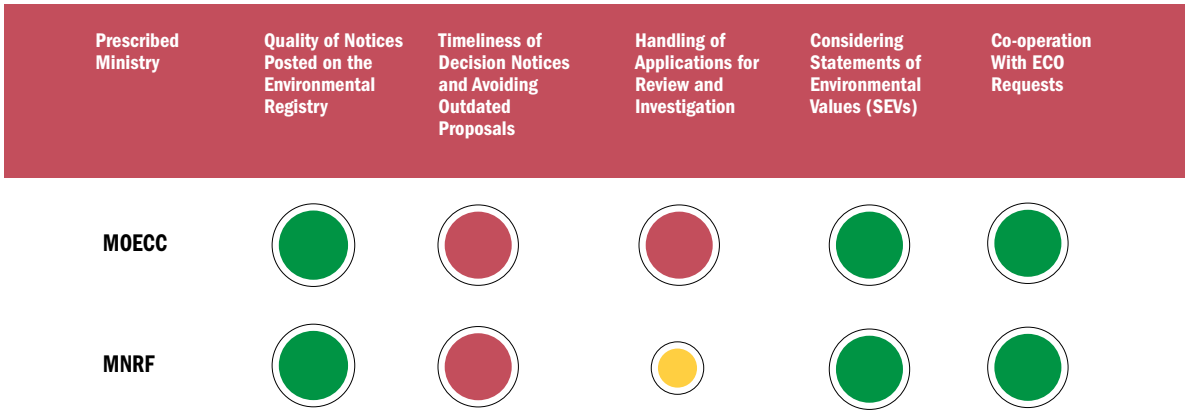
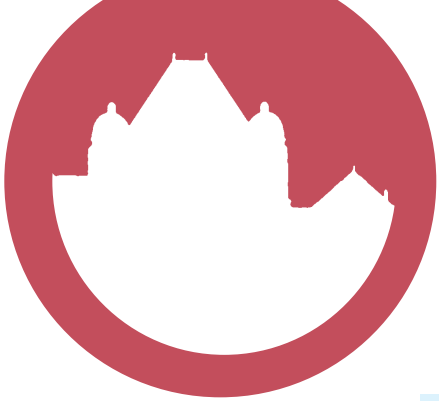


Excerpt from ECO Special Report, *EBR Performance Checkup: Respect for Ontario Environmental Rights 2015/2016*



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Walking the Fire Line: Managing and Using Fire in Ontario's Northern Forests

Ontario's forests need regular renewal by fire. But Ontario doesn't allow enough managed fire in our Crown forests to provide ecological benefits and prevent future catastrophic fires. The MNRF took a step in the right direction with a new *Wildland Fire Management Strategy* that could allow more fires to be left to burn in northern Ontario. Now the MNRF needs to let such fires burn when and where they are needed and appropriate, even if this means the loss of some potentially harvestable timber:

- Forest fires are necessary for the ecological health of Ontario's forests, particularly to enable a diversity of species types and age classes.
- Long-term fire suppression can result in older forests that are burdened with excess fuel loads, and more susceptible to catastrophic and uncontrollable fires such as the one in Fort McMurray.

Jack Pine regeneration in Woodland Caribou Provincial Park after the spring 2016 forest fire. Source: Ontario Parks.

A strong focus on protecting standing timber for possible future use by the forestry industry has traditionally been a substantial obstacle to restoring natural fire cycles. The MNRF has not yet faced up to the trade-offs between these two objectives.

Regular fire cycles have particular importance in protected areas.

Regular fire cycles have particular importance in protected areas such as provincial parks, which must conserve Ontario's biodiversity. Unfortunately, these areas are starved of fire because Ontario Parks lacks the resources to manage prescribed burns, and the MNRF as a whole will not assist them without payment. This is penny wise and pound foolish.

With climate change gathering speed, northern Ontario communities should increase their resistance and resilience to forest fire. The Ontario government should ensure all communities near flammable forest become "FireSmart."

Phragmites with full seed heads Sources: Leslie J. Mehrhoff, University of Connecticut. Bugwood.org

The MNRF is mostly leaving the hard front-line work to municipalities, conservation authorities and private landowners, without provincial guidance, co-ordination, expertise or predictable funding.

Invasive Species Management in Ontario: New Act, Little Action

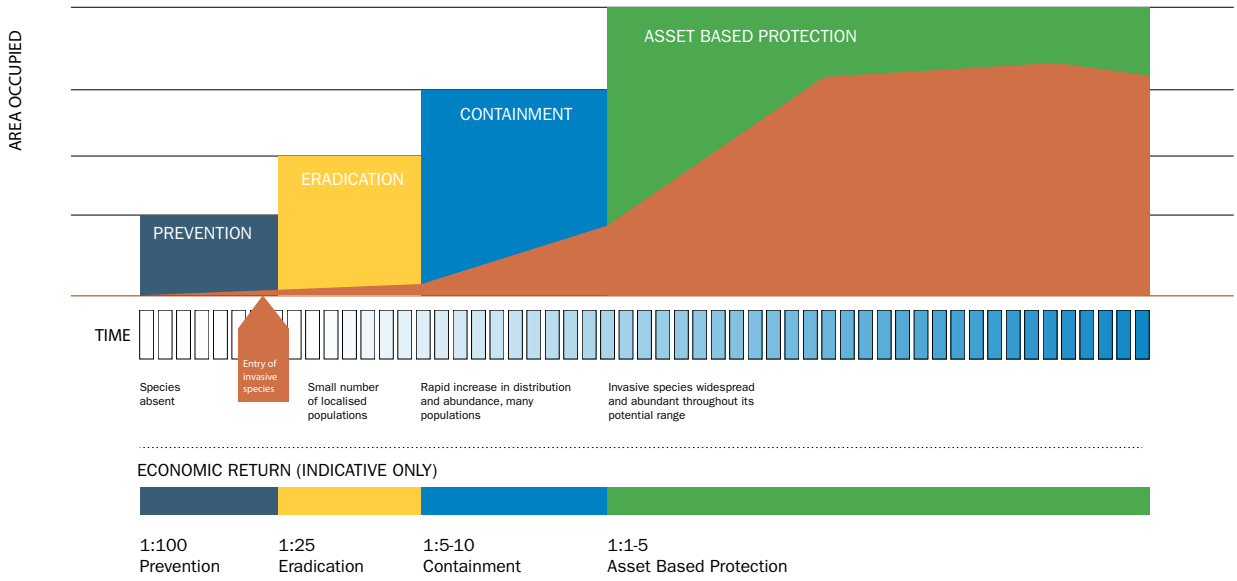
Invasive species have huge economic and social effects, and are among the biggest threats to biodiversity. Ontario has Canada's highest risk of invasions by non-native species (e.g., emerald ash borer, Phragmites, zebra and quagga mussels, and Asian carp). Up to 66 per cent of Ontario's species at risk are already threatened by established invaders such as garlic mustard (a forest herb), Phragmites (a grass), and round goby (a fish).

Ontario's new *Invasive Species Act, 2015*, and the 2012 *Ontario Invasive Species Strategic Plan* are useful tools for managing invasive species. But the MNRF is taking few concrete actions to prevent the introduction of invaders, detect them early, or manage and monitor species that are already doing damage. Worse, the MNRF is failing to take basic precautionary steps to block known pathways by which some invasive species spread.

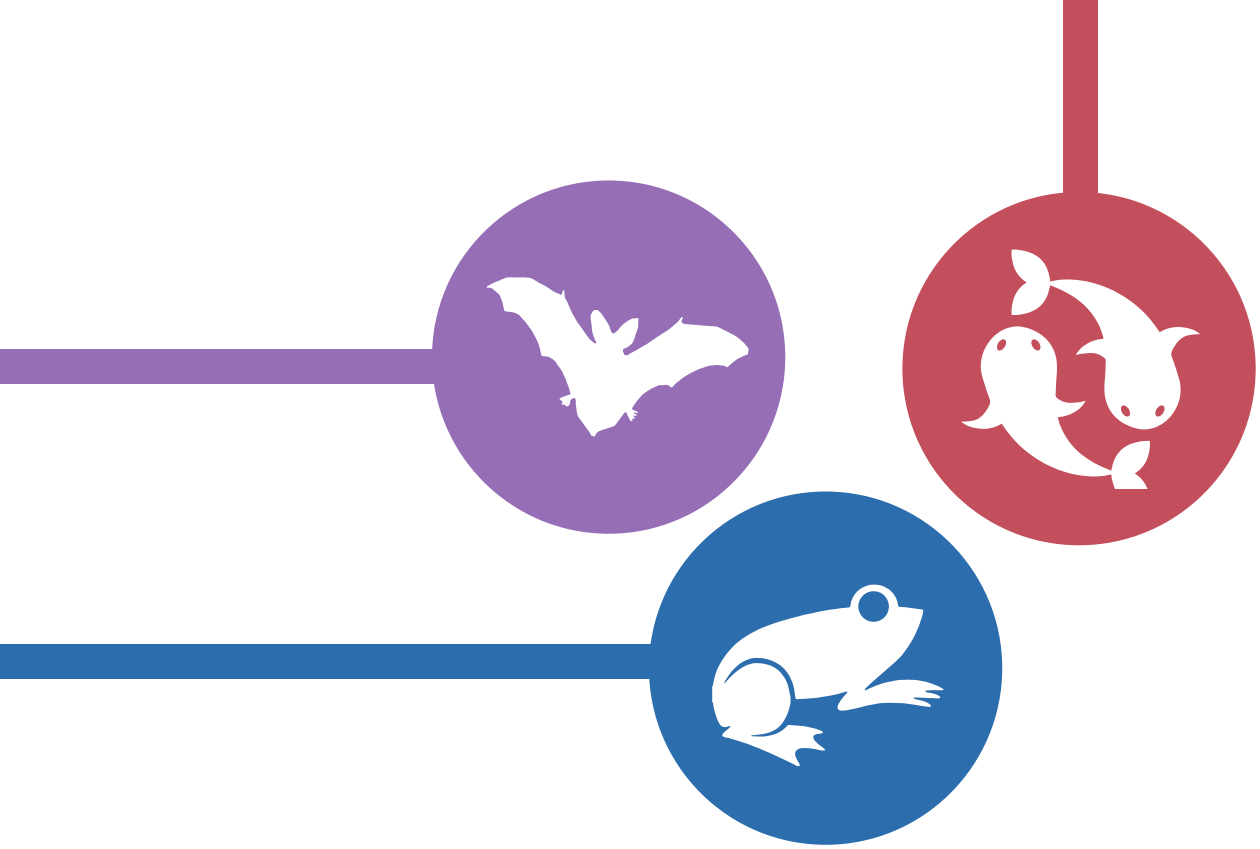
Instead, the MNRF is mostly leaving the hard front-line work to municipalities, conservation authorities and private landowners, without provincial guidance, co-ordination, expertise or predictable funding. The MNRF is not collecting enough data to know which threats are the most urgent, and which control measures work best.

The MNRF should:

- restrict known pathways of invasive species spread;
- tackle invasive species in provincial parks;
- establish advisory panels with scientific expertise and local and Aboriginal knowledge; and
- report publicly on progress in managing invasive species.

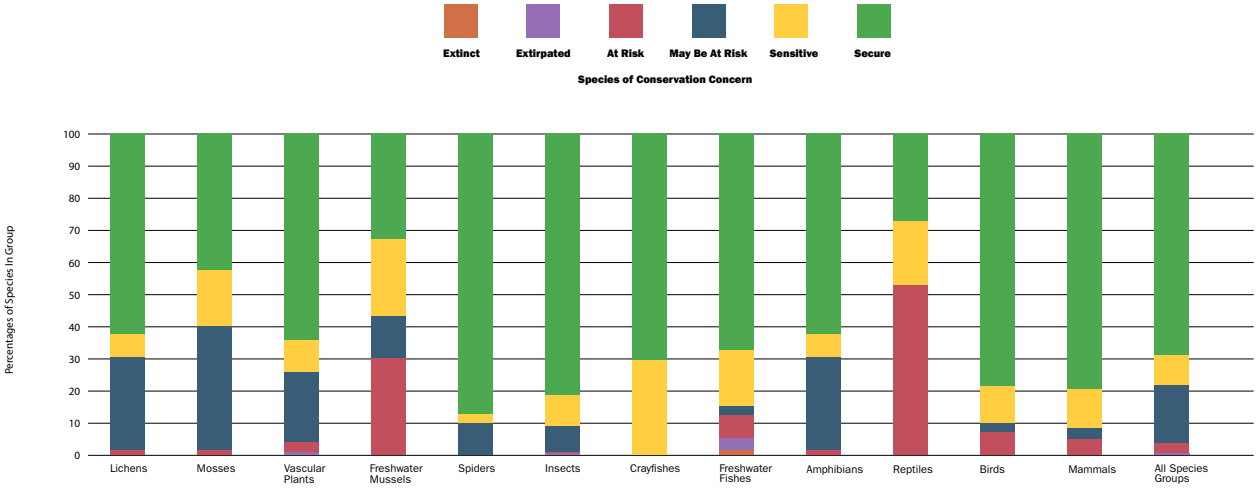


Generalized invasion curve showing actions appropriate to each stage © State of Victoria, Department of Economic Development, Jobs, Transport and Resources. Reproduced with permission.



Biodiversity Under Pressure: Wildlife Declines in Ontario

The large-scale loss of biodiversity is a crisis in Ontario and around the world. As well as invasive species, the biggest threats are human-caused habitat loss and degradation and disease, with climate change playing a growing role. The declines of moose, bats and amphibians in Ontario demonstrate that the Ministry of Natural Resources and Forestry needs to act urgently on habitat protection and biodiversity monitoring.



Proportion of Ontario native wild species in secure and conservation concern categories. Source: Ontario Biodiversity Council (2015). *State of Ontario's Biodiversity*. Available at: http://ontariobiodiversitycouncil.ca/sobr.

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Source: Ryan Hagerty, U.S. Fish and Wildlife Service

Ontario's Declining Moose Populations

Moose are an iconic Ontario species with particular cultural and economic significance. However, Ontario's moose are in trouble. There are now about 92,300 moose – down about 20 per cent in the last decade. In nearly half of Ontario moose management units, too few calves are reaching adult breeding age to keep the population stable.

There are many pressures on moose, including habitat degradation, disease and parasites (e.g., winter ticks, liver fluke, brainworm), hunting, predation and weather. Climate change is an increasingly serious threat.

Climate change is an increasingly serious threat.

The MNRF's Moose Project included changes to moose harvesting rules, and an ill-advised proposal (since abandoned) to increase the hunting of wolves and coyotes. However, the new restrictions on harvesting moose may not prevent further population declines. Ontario has approximately 98,000 licensed moose hunters – more than one licensed hunter for every moose in Ontario – plus Aboriginal peoples with a constitutional or treaty right to take moose without a licence. Based on the MNRF's estimates:

Moose Population Decline	Adult Moose Harvest (2014)	Calf Moose Harvest (2014)
-22,700 since early 2000s	Legal limit: 13,499 tags	Legal limit: one for each of the 98,000 licensed hunters
	Estimated resident harvest: 3,020	Estimated resident harvest: 1,403
	Aboriginal harvest: Unknown	Aboriginal harvest: Unknown
	Tourism industry harvest: 601	Tourism industry harvest: 26

A little brown bat infected with white-nose syndrome Source: Ryan von Linden/ New York Department of Environmental Conservation used under CC BY 2.0.

White-nose Syndrome: Tragedy of the Bats

Ontario's bats are important predators of mosquitoes and other insects. Since 2010, millions of them have died from an invasive fungal disease called white-nose syndrome. As a result, four of Ontario's eight native bat species have become endangered. Bat populations across eastern North America are collapsing. There is no known treatment.

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Ontario's White-nose Syndrome Response Plan concentrates on increasing awareness about white-nose syndrome, so as to limit the inadvertent spread of the disease by humans. The MNRF is also co-operating with other ministries and governments to share information, and to co-ordinate surveillance and research.

Bat White-Nose Syndrome Occurrence as of August 2016. Source: Lindsey Heffernan, Pennsylvania Game Commission.

While white-nose syndrome is by far the major threat to Ontario's bats, bats can suffer additional losses from human persecution and from wind turbines. The collapse of Ontario's bat populations could lead to an increase in insect pests, just as public health authorities are calling on Ontarians to protect themselves from mosquito bites because of the spread of insect-borne diseases.

Update: Amphibian Declines Continue in Ontario

Amphibians are the most threatened group of vertebrate animals in the world.

Both globally and in Ontario, the most significant threat to amphibians is habitat loss. Habitat degradation (e.g., from pollutants such as agrochemicals, pharmaceuticals and road salt), habitat fragmentation, road mortality, overharvesting, invasive species, infectious diseases, climate change, and ozone depletion also put immense pressure on amphibian populations. In 2009, the ECO recommended that the MNRF co-ordinate an inter-ministerial plan to protect and conserve amphibian populations.

Blanchard's Cricket Frog (*Acris blanchardi*) Source: Jessica Piispanen/U.S. Fish and Wildlife Service Midwest used under CC BY 2.0.

Seven years later, there has been no action, and amphibian habitat (especially wetlands) continues to decline. Provincial land-use planning policies have not effectively protected amphibian habitat. In fact, the Ontario government continues to subsidize the destruction of irreplaceable wetlands under the *Drainage Act*.

Meanwhile, the MNRF does not effectively monitor amphibian populations. Most of Ontario's information about our amphibians comes from unpaid citizen science monitoring programs. These programs are immensely valuable, but would be far more effective with MNRF leadership, co-ordination and support. Ontario cannot effectively conserve biodiversity with uncoordinated piecemeal monitoring.

Mid-Canada Radar Site Clean-up in Polar Bear Provincial Park. Source: Ontario Parks/MNRF

ECO Recognition Award

The ECO is impressed by the passion, commitment and expertise of many government staff who devote themselves to Ontario's environmental well-being, despite obstacles and constraints.

With our annual ECO Recognition Award, we are delighted to recognize the initiative of two groups of civil servants who set outstanding examples of environmental commitment and achievement last year. This award recognizes their hard work on projects that are innovative, go above and beyond legal mandates, better Ontario's environment and that meet the requirements and purposes of the *EBR*.

The 2016 ECO Recognition Award goes to MNRF staff for the Mid-Canada Radar Site Clean-up in Polar Bear Provincial Park. An honourable mention goes to Ministry of Transportation staff for their project to restore fish passage in a tributary to the Saugeen River, near Southampton, Ontario. The ECO congratulates all the ministry staff who implemented these exceptional environmental projects.

The *Environmental Bill of Rights*

Ontario's *Environmental Bill of Rights, 1993* (*EBR*) is an environmental law unlike any other in the world. The purposes of the *EBR* are to:

- protect, conserve and, where reasonable, restore the integrity of the environment;
- provide sustainability of the environment; and
- protect the right of Ontarians to a healthful environment.

To achieve these goals, the *EBR* requires the Ontario government to consider the environment in its decision making. Certain ministries, known as "prescribed ministries," are given varying responsibilities under the *EBR*. During the ECO's 2015/2016 reporting year (April 1, 2015 – March 31, 2016), there were 14 prescribed ministries.

In July 2016 (outside of the ECO's 2015/2016 reporting year), a 15th ministry was prescribed under the *EBR*: the Treasury Board Secretariat (TBS).

While the government has the primary responsibility for protecting the natural environment, the *EBR* recognizes that the people of Ontario have the right to participate in environmentally significant decision making, as well as the right to hold the government accountable for those decisions. The *EBR* empowers Ontarians to participate in environmental decision making in a number of different ways.

The *EBR*'s "toolkit" is a collection of government obligations and public participatory rights that work together to help ensure that the purposes of the *EBR* are met.

Statement of Environmental Values

The *EBR* requires each prescribed ministry to develop and publish a Statement of Environmental Values (SEV). An SEV describes how the ministry will integrate environmental values with social, economic and scientific considerations when it makes environmentally significant decisions; ministries must consider their SEVs when making decisions that might significantly affect the environment. Essentially, an SEV reveals how a given ministry views its environmental responsibilities. The ministry does not always have to conform to its stated values, but it must explain how it considered them when making a decision. For information about prescribed ministries' consideration of their SEVs during this reporting year, see **Chapter 1.5** of this report.

Aboriginal Affairs (MAA)*	Health and Long-Term Care (MOHLTC)
Agriculture, Food and Rural Affairs (OMAFRA)	Labour (MOL)
Economic Development, Employment and Infrastructure (MEDEI)*	Municipal Affairs and Housing (MMAH)*
	Natural Resources and Forestry (MNRF)
Education (EDU)	Northern Development and Mines (MNDM)
Energy (ENG)	Tourism, Culture and Sport (MTCS)
Environment and Climate Change (MOECC)	Transportation (MTO)
Government and Consumer Services (MGCS)	

*In June 2016, the Ontario government re-organized several ministries: the Ministry of Aboriginal Affairs was renamed the Ministry of Indigenous Relations and Reconciliation; the Ministry of Economic Development, Employment and Infrastructure into two separate ministries: the Ministry of Economic Development and Growth, and the Ministry of Infrastructure; and, the Ministry of Municipal Affairs and Housing into two separate ministries: the Ministry of Municipal Affairs, and the Ministry of Housing.

The *EBR* recognizes that the people of Ontario have the right to participate in environmentally significant decision making.

Public Notice and Consultation through the Environmental Registry

The Environmental Registry is an online database that provides the public with access to information about environmentally significant proposals and decisions made by the Ontario government, and through which the government invites public comment on those proposals and decisions. The Registry is the key *EBR* tool facilitating public engagement in government environmental decision making. It can be accessed at ebr.gov.on.ca.

Under the *EBR*, prescribed ministries are required to give notice of and consult on certain environmentally significant proposals on the Environmental Registry. Specifically, ministries must give notice and consult on any proposed environmentally significant act or policy, as well as regulations made under prescribed acts. Currently, there are 36 acts prescribed (in whole or in part) under the *EBR*.

Five ministries (MGCS, MOECC, MMAH, MNRF and MNDM) are also prescribed for the purposes of giving notice and consulting on certain proposed "instruments" (e.g., permits, licences and other approvals) issued by those ministries. Currently, select instruments issued under 19 different acts are subject to the *EBR*. The responsible ministries must give notice on the Environmental Registry of any proposals and decisions related to those instruments, such as the decision to issue or revoke a prescribed permit.

See the ECO's website (eco.on.ca) for an up-to-date list of ministries, laws and instruments prescribed under the *EBR*.

Ministries must provide a minimum of 30 days for the public to submit comments on a proposal before making a final decision. Once a ministry has made a decision, it must post a notice on the Environmental Registry that describes the outcome and explains how public participation affected the decision. The ECO reviews and reports on ministry compliance with *EBR* public notice and consultation requirements. For information about prescribed ministries' use of the Environmental Registry during this reporting year, see **Chapter 1.2** of this report.

Applications for Review and Investigation

The *EBR* gives Ontario residents the right to ask a prescribed ministry to review an existing environmentally significant policy, act, regulation or instrument, or to review the need to develop one. These requests are called "applications for review."

There are currently nine ministries prescribed for purposes of receiving applications for review under the *EBR*:

- Ministry of Agriculture, Food and Rural Affairs (OMAFRA)
- Ministry of Energy (ENG)
- Ministry of the Environment and Climate Change (MOECC)
- Ministry of Government and Consumer Services (MGCS)
- Ministry of Health and Long-Term Care (MOHLTC)
- Ministry of Municipal Affairs and Housing (MMAH)
- Ministry of Natural Resources and Forestry (MNRF)
- Ministry of Northern Development and Mines (MNDM)
- Ministry of Transportation (MTO)

Specific acts must be prescribed under O. Reg. 73/94 in order for those acts and the regulations made under them to be subject to applications for review. Similarly, instruments must be prescribed under O. Reg. 681/94 to be subject to applications for review.

The *EBR* also provides Ontarians with the right to ask a prescribed ministry to investigate alleged contraventions of prescribed acts, regulations or instruments; this is called an "application for investigation." Applications for investigation may be filed for alleged contraventions of specific acts, regulations and instruments administered by the following six ministries:

- The Ministry of Government and Consumer Services (MGCS)
- The Ministry of Energy (ENG)
- The Ministry of the Environment and Climate Change (MOECC)

- The Ministry of Municipal Affairs and Housing (MMAH)
- The Ministry of Natural Resources and Forestry (MNRF)
- The Ministry of Northern Development and Mines (MNDM)

Applications are a powerful tool that the public can use to influence government decision making and to ensure environmental laws and policies are upheld. Ministries that receive applications must follow the procedures set out in the *EBR* when considering those applications. The ECO reviews and reports annually on how ministries handle applications. For this year's review and a detailed discussion of select applications, see **Chapter 2** of this report.

Appeals, Lawsuits and Whistleblower Protection

The *EBR* provides Ontarians with increased access to courts and tribunals for the purposes of environmental protection (referred to collectively as the *EBR*'s "legal tools"). The *EBR* provides a special right for members of the public to appeal (i.e., challenge) certain ministry decisions regarding instruments. Ontario residents may also take court action to prevent harm to a public resource and to seek damages for environmental harm caused by a public nuisance. Finally, the *EBR* provides enhanced protection for employees who suffer reprisals from their employers for exercising their *EBR* rights or for complying with or seeking the enforcement of environmental rules.

For information about the public's use of *EBR* appeals, lawsuits and whistleblower protection during this reporting year, see **Chapter 3** of this report.

The Environmental Commissioner of Ontario

The Environmental Commissioner of Ontario (ECO) is an independent Officer of the Legislative Assembly. Often referred to as Ontario's "environmental watchdog," the ECO is responsible for reviewing and reporting on the government's compliance with the *EBR*. To ensure that the *EBR* is upheld, the ECO monitors how prescribed ministries exercise their discretion and carry out their responsibilities under the *EBR*. Each year, the ECO reports on whether ministries have complied with the procedural requirements of the *EBR*, and whether ministry decisions were consistent with the purposes of the *EBR*. The ECO also reports on the progress of the Ontario government in keeping the *EBR* up to date by prescribing new ministries, laws and instruments that are environmentally significant. The ECO reports to the Legislative Assembly of Ontario – not to the governing political party or to a ministry.

The ECO also reviews and reports on a wide variety of environmental topics, often relating to recent provincial government decisions or issues raised by members of the public. Additionally, since 2009 the ECO has been mandated with reporting annually on the progress of activities in Ontario to reduce emissions of greenhouse gases, and to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels. You can find information about the ECO's work regarding climate change and energy conservation on the ECO's website at eco.on.ca.

The ECO also plays an important role in helping the public understand and navigate their environmental rights under the *EBR* and other Ontario laws. The ECO's Public Information and Outreach Officer, with assistance from other ECO staff, answers questions from the public and provides public education programs and workshops about the *EBR*. The ECO's Resource Centre, with an extensive collection of environmental resource documents, is open to the public. You can read more about the ECO's work on public education and assistance in **Chapter 4.2** of this report.

The ECO's Goals

This year, the ECO articulated three central goals that guide our work, and shared them with the public by posting them on our website (eco.on.ca):

Goal 1 – The public knows about the tools of the *EBR*, uses them effectively to the benefit of the environment, and the government respects the purposes and requirements of the *EBR*.

Goal 2 – The Legislative Assembly and residents of Ontario receive fair, balanced and accurate information about compliance with the *EBR*, and government progress towards its environmental, climate and energy conservation goals and responsibilities.

Goal 3 – The government creates and upholds legislation and policy that better protects the environment, reduces the use or makes more efficient use of energy, and reduces emissions of greenhouse gases.

In this Report

In the past, the ECO's annual reports have generally included the ECO's reporting of ministry compliance with the *EBR*, reviews of significant environmental policy issues and government decisions, and information about other work completed by the ECO during that reporting year, all packaged in a single document. The ECO also reports separately on climate change and energy conservation.

This year, we have changed both the name and presentation format of this annual report. It is now called the ECO's "Environmental Protection Report," and we are presenting it in two volumes under separate cover.

In **Volume 1** of the report, you will find:

- A summary of the ECO's findings on prescribed ministries' compliance with the *EBR* during our 2015/2016 reporting year, including discussions of: the release of the ECO's first *EBR* report cards on ministry compliance; ministries' use of the Environmental Registry; ministry co-operation with the ECO's requests for information; the government's progress keeping the *EBR* in sync with environmental laws; and ministries' consideration of their SEVs when making environmentally significant decisions (**Chapter 1)**;
- A detailed reporting of ministries' handling of applications for review and investigation submitted by the public (**Chapter 2**);
- A summary of the legal tools that enable Ontarians to enforce and protect their environmental rights, along with a discussion of how members of the public have used those tools in our 2015/2016 reporting year (**Chapter 3**); and
- A discussion of some other aspects of the ECO's work, including: a selection of ECO successes in moving the government forward on important issues in 2015/2016; the ECO's education and outreach efforts this year; and the recipients of the 2016 ECO Recognition Award (**Chapter 4**).

Volume 2 of our 2015/2016 Environmental Protection Report focuses on three significant environmental issues:

- Walking the Fire Line: Managing and Using Fire in Ontario's Northern Forests (**Chapter 1**);
- Invasive Species Management in Ontario: New Act, Little Action (**Chapter 2**); and
- Biodiversity Under Pressure: Wildlife Declines in Ontario (**Chapter 3**).

You can visit the ECO's website (eco.on.ca/reports/2016-small-steps-forward) to download each volume of the ECO's 2015/2016 Environmental Protection Report.

CHAPTER 1
MINISTRY COMPLIANCE WITH THE *EBR*

1.0 Introduction

One of the ECO's core functions is to monitor and report on how government ministries that have responsibilities under the *Environmental Bill of Rights* (*EBR*) carry out their obligations. This chapter reviews several key aspects of ministry compliance with the *EBR* in 2015/2016, including:

- ministries' use of the Environmental Registry to give notice of environmentally significant proposals and decisions, including the quality of the notices posted on the Registry and timeliness of posting decision notices;
- how ministries co-operated with information requests from the ECO;
- ministries' work to keep the *EBR* in sync with new laws, new ministries, and the shuffling of government portfolios; and
- whether ministries considered their Statements of Environmental Values when making environmentally significant decisions.

Ministries Reaffirm their Commitment to the *EBR*

In 2014, to mark the 20th anniversary of the *EBR* becoming law, the Premier of Ontario reaffirmed the government's commitment to the *EBR*.

In December 2015, shortly after the new Environmental Commissioner of Ontario, Dianne Saxe, took office, the Commissioner wrote to the 14 ministries then prescribed under the *EBR* and asked them to do the same. The ECO believed that the ministries' written commitments to the *EBR* would send an important signal to their staff and the public that the ministries intend to make the *EBR* – and the important rights that it gives to all Ontarians – matter more than ever before.

The ECO is greatly encouraged that all 14 ministries promptly provided written commitments to uphold the *EBR*, and acknowledged the *EBR*'s value in supporting public engagement and government performance on environmental stewardship. The ministries' *EBR* commitment letters can be viewed on the ECO's website (eco.on.ca).

1.1 Reviewing Ministry Performance: *EBR* Report Cards

One of the ECO's core functions is to review and report annually to the Legislative Assembly on whether prescribed government ministries have complied with the requirements of and carried out their responsibilities under the *Environmental Bill of Rights, 1993* (*EBR*).

In 2015/2016, the ECO took a new approach to reporting on prescribed ministries' compliance with the *EBR* by systematically evaluating how well each of the 14 prescribed ministries executed their *EBR* responsibilities in five key categories:

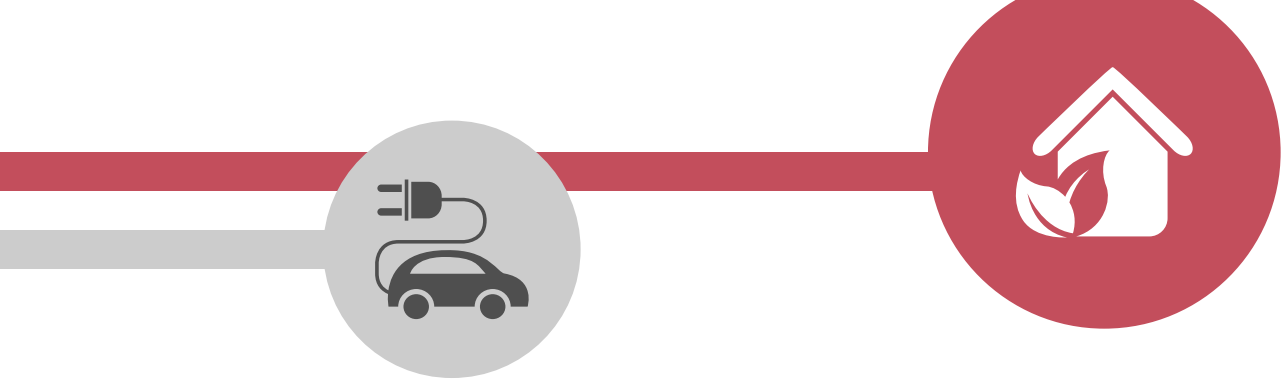
1. Quality of notices posted on the Environmental Registry;
2. Timeliness of decision notices, and avoiding outdated proposals on the Environmental Registry;
3. Handling of applications for review and investigation;
4. Considering Statements of Environmental Values; and
5. Co-operation with ECO requests.

The results of these evaluations were compiled into report cards for each ministry. In producing the report cards, the ECO evaluated not just whether each ministry complied with the *EBR*'s strict legal requirements, but also how well the ministry's actions supported public participation in government environmental decision making, keeping in mind the purposes of the *EBR*.

The report cards show the public whether the Ontario government respects their environmental rights under the *EBR*, and show ministries where they are succeeding and where they need to improve. The ECO believes these report cards will lead to better access to information about environmentally significant proposals and decisions for the public, and make the government more accountable for respecting *EBR* rights.

The ECO presented the report card results graphically, using coloured circles of varying sizes. The colour depicts the quality of a ministry's performance of its *EBR* duties, while the size represents the ministry's *EBR* workload relative to other ministries in the applicable category (for a summary of the results, see Table 1.1.1.). The ECO also provided comments in each report card, pointing out ministries' strengths and weaknesses and any special considerations or context. Each prescribed ministry had an opportunity to review their report card and provide a written comment that we published in our report.

The ECO tabled the 2015/2016 *EBR* report cards on June 21, 2016, in a Special Report to the Legislative Assembly entitled *EBR Performance Checkup: Respect for Ontario*



Environmental Rights 2015/2016. You can read the report and view the ministry report cards on the ECO's website at eco.on.ca.

EBR Report Card Results for 2015/2016

The ECO found that ministries with a relatively light *EBR* workload generally executed their few obligations well, while ministries with moderate and heavy *EBR* workloads were more likely to have instances of non-compliance or execute their responsibilities poorly. We identified four key areas of compliance that require improvement going forward, all of which are also discussed in this report:

- Content of instrument notices posted on the Environmental Registry (see Chapter 1.2.1 of this report);
- Prompt posting of decision notices on the Registry (see Chapter 1.2.1 of this report);
- Avoiding outdated proposals (see Chapter 1.2.3 of this report); and
- Avoiding overdue applications for review (see Chapter 2.1 of this report).

Encouragingly, ministry staff were receptive to the report cards throughout the process, engaging in constructive discussions with ECO staff about specific *EBR* compliance problems and how to remedy them. One of the ECO's functions is to provide guidance to ministries on how to comply with *EBR* requirements. The ECO is committed to maintaining an open and productive dialogue with all prescribed ministries to ensure that the public's rights under the *EBR* are upheld.

The ministries' formal comments on their individual report cards reflect a deep commitment to fulfilling their *EBR* obligations, and promise improvements in areas where they fell short in 2015/2016.

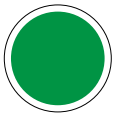
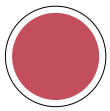
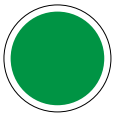
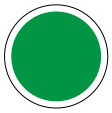
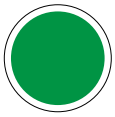
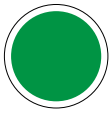
Some ministries have already made considerable improvements in the months since the *EBR* report card release, including remedying many of their outdated proposal notices on the Environmental Registry, improving the quality of some instrument notices, and providing updates on overdue applications for review.

Going Forward

The ECO plans to issue report cards annually, and track trends in ministry *EBR* performance year over year. However, in future years the ECO plans to release the report cards at the same time as our regular report on ministry *EBR* compliance.

The next *EBR* report cards will cover the ECO's 2016/2017 reporting year (ending on March 31, 2017), and are targeted for release in late 2017.

Table 1.1.1. Summary of Ministry *EBR* Report Card Results, 2015/2016 (Source: ECO Special Report, *EBR Performance Check-up: Respect for Ontario Environmental Rights 2015/2016*, tabled before the Legislative Assembly of Ontario on June 21, 2016)

Prescribed Ministry	Quality of Notices Posted on the Environmental Registry	Timeliness of Decision Notices and Avoiding Outdated Proposals	Handling of Applications for Review and Investigation	Considering Statements of Environmental Values (SEVs)	Co-operation With ECO Requests
Aboriginal Affairs (MAA)			N/A	N/A	
Agriculture, Food and Rural Affairs (OMAFRA)					
Economic Development, Employment and Infrastructure (MEDEI)			N/A	N/A	
Education (EDU)	N/A		N/A	N/A	
Energy (ENG)				N/A	
Environment and Climate Change (MOECC)					
Government and Consumer Services (MGCS)			N/A		
Heath and Long-Term Care (MOHLTC)	N/A			N/A	
Labour (MOL)	N/A		N/A	N/A	
Municipal Affairs and Housing (MMAH)					
Natural Resources and Forestry (MNRF)		N/A			

Prescribed Ministry	Quality of Notices Posted on the Environmental Registry	Timeliness of Decision Notices and Avoiding Outdated Proposals	Handling of Applications for Review and Investigation	Considering Statements of Environmental Values (SEVs)	Co-operation With ECO Requests
Northern Development and Mines (MNDM)			N/A		
Tourism, Culture and Sport (MTCS)			N/A		
Transportation (MTO)			N/A		

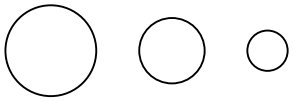
N/A (not applicable): The ministry is not prescribed for purpose of theis category of *EBR* performance, or the ministry did not execute any responsibilities under this category in 2015/2016.

LEGEND

Quality of performance:

- Meets or exceeds expectations
- Needs improvement
- Unacceptable

Relative EBR workload:



High Medium Low

The Environmental Registry enables the public to participate in government decision making that affects the environment.

1.2 Use of the Environmental Registry

The Environmental Registry enables the public to participate in government decision making that affects the environment. The *Environmental Bill of Rights, 1993* (*EBR*) requires prescribed ministries to post notices of proposals for environmentally significant policies, acts, regulations and instruments on the Registry, and to provide a minimum of 30 days to comment on such proposals. The public can submit comments online, by mail or by email. Ministries must consider the public's comments when making a decision on the proposal, and must explain how the comments affected the final decision.

The Registry provides other information that may help the public exercise their *EBR* rights, including:

- notice of appeals and leave to appeal applications related to prescribed instruments;
- background information about the *EBR*;
- links to the full text of the *EBR* and its regulations;
- links to prescribed ministries' Statements of Environmental Values (SEVs);
- in some cases, links to the full text of proposed and final policies, acts, regulations and instruments; and
- in some cases, links to other information relevant to a proposal.

The Ministry of the Environment and Climate Change (MOECC) hosts and maintains the Environmental Registry. The ECO monitors ministries' use of the Registry to ensure that prescribed ministries are fulfilling their responsibilities under the *EBR* and respecting the public's participation rights.

This year, the ECO took a new approach to reporting on ministry compliance with the *EBR*, including the quality and timeliness of notices posted on the Environmental Registry. In spring 2016, the ECO issued *EBR Performance Checkup*, a special report to the legislature that included report cards for each ministry showing how well they executed their *EBR* responsibilities in 2015/2016. For more information about the *EBR* report cards for 2015/2016, see Chapter 1.1 of this report.

1.2.1 Ministry Use of the Registry in 2015/2016

In this reporting year, prescribed ministries posted proposals for 53 policies, 30 regulations, and 3 acts on the Environmental Registry (Table 1.2.1.1).

Table 1.2.1.1. Number of Proposal Notices for Policies, Acts and Regulations Posted in the ECO's 2015/2016 Reporting Year (April 1, 2015 – March 31, 2016) by prescribed ministry.

Ministry	Total Number of Proposals Posted in 2015/2016	Number of Policy Proposals	Number of Regulation Proposals	Number of Act Proposals
Aborginal Affairs (MAA)	0	0	0	0
Agriculture, Food and Rural Affairs (OMAFRA)	2	2	0	0
Economic Development, Employment and Infrastructure (MEDEI)	2	2	0	0
Education (EDU)	0	0	0	0
Energy (ENG)	3	0	3	0
Environment and Climate Change (MOECC)	28	15	11	2
Government and Consumer Services/ Technical Standards and Safety Authoirty (MGCS/TSSA)	1	0	1	0
Health and Long-Term Care (MOHLTC)	0	0	0	0
Labour (MOL)	0	0	0	0
Municipal Affairs and Housing (MMAH)	6	1	5	0
Natural Resources and Forestry (MNRF)	41	31	10	0
Northern Development and Mines (MNDM)	0	0	0	0
Tourism, Culture and Sport (MTCS)	2	1	0	1
Transportation (MTO)	1	1	0	0
TOTAL	**86**	**53**	**30**	**3**

In addition, ministries posted more than 1,318 notices for proposed instruments, such as environmental compliance approvals, mining exploration permits, permits to take water, and overall benefit permits under the *Endangered Species Act, 2007* (Table 1.2.1.2).

Under section 58 of the *EBR*, the ECO is required to produce a list of all proposal notices posted on the Registry between April 1, 2015 and March 31, 2016 that were not decided by March 31, 2016. This list of open proposals included 1,528 instruments, 40 policies, 23 regulations and 4 acts, and is available from the ECO by request.

Table 1.2.1.2. Proposal Notices for Instruments Posted in the ECO's 2015/2016 Reporting Year (April 1, 2015 – March 31, 2016) by Prescribed Ministry.

Ministry	Approximate Total Number of Instrument Proposals Posted in 2015/2016
Government and Consumer Services/Technical Standards and Safety Authority (MGCS/TSSA)	> 4
Municipal Affairs and Housing (MMAH)	> 26
Northern Development and Mines (MNDM)	> 55
Natural Resources and Forestry (MNRF)	> 75
Environment and Climate Change (MOECC)	> 1,158
TOTAL	**> 1,318**

Quality of Notices Posted on the Environmental Registry

The *EBR* sets out certain content that Registry notices are required to include. For example, proposal notices must include a brief description of the proposal and information about how the public can participate in decision making on the proposal, and decision notices must briefly explain the effect, if any, of public participation on the final decision. Notices should fulfil the specific requirements of the *EBR* as well as the intent of the *EBR* by enabling any member of the public to understand and meaningfully comment on the proposal (or understand the decision).

Generally, ministries posted good quality notices for policies, acts and regulations in 2015/2016. The most common problems we observed with notices this year were unclear descriptions and missing links to key supporting information.

Instrument notices (e.g., for approvals, permits, orders, etc.) represent the majority of notices posted on the Registry. In our 2015/2016 reporting year, they were generally of poorer quality than notices for policies, acts or regulations. The most widespread problem with instrument notices is that ministries frequently fail to include key supporting information or links to that information – including copies of the instruments themselves. Substandard instrument notices may prevent the public from participating effectively in decisions about approvals for activities that affect the environment right in their own communities.

Some types of instrument notices, such as proposals for mining exploration permits, aggregate permits (see Chapter 1.2.2), and permits to take water routinely lack the supporting information required for members of the public to make informed comments on the proposal – or, in the case of some decisions, to exercise their right to seek leave to appeal. Ministries such as the Ministry of Northern Development and Mines (MNDM) and the Ministry of Natural Resources and Forestry (MNRF) could also do better by providing more user-friendly geographic information to describe the locations to which proposed instruments apply.

Ministries could significantly improve their instrument notices with relatively little effort. For example, they could:

Ministries frequently fail to include key supporting information or links.

- develop standard text for each type of instrument that explains what it is and how it could affect the environment, and include that text in every notice, in addition to specific information about the instrument being proposed (e.g., basic background information about permits to take water in every proposal notice for such a permit);
- make it a standard practice to include links to all proposed and final instrument documents;
- make it a standard practice to include links to any key supporting information that would be necessary for a member of the public to provide informed comment on the proposal; and
- consider whether the geographic information provided in an instrument notice would allow the general public to easily identify the relevant location (e.g., providing municipal addresses in addition to PIN or site and lot numbers).

These simple improvements to instrument notices would help the public engage meaningfully in many site-specific environmental decisions.

Prompt Posting of Decision Notices

The *EBR* requires a decision notice to be posted to the Environmental Registry "as soon as reasonably possible" after the government makes a decision on a proposal for an act, regulation, policy or instrument. The ECO considers two weeks to be the maximum time period a ministry should let elapse between making a decision and posting a decision notice.

When a ministry fails to post a decision notice at all, the ECO considers the corresponding proposal notice to be "outdated." The ECO has addressed the issue of outdated proposal notices languishing on the Registry for years in previous reports, and we discuss it again in Chapter 1.2.3 of this report.

Information Notices

When the government proposes or makes a decision that could affect the environment, but the *EBR* does not require the responsible ministry to post a proposal notice on the Environmental Registry, the ministry may choose to inform the public by voluntarily posting an "information notice" on the Registry.

Information notices are also used by ministries to fulfill requirements of other statutes to provide information to the public. These are some of the most common types of information notices posted on the Registry. Examples include amendments to Renewable Energy Approvals (required under the *Environmental Protection Act*) and Source Protection Plans (required under the *Clean Water Act*).

Proposal notices and information notices are different from each other. Ministries are required to invite and consider public comments on proposal notices, and they must also post decision notices explaining the effect of those comments on their final decisions. Information notices do not have to include invitations to the public to provide comments, and ministries are not required to consider public comments or subsequently post decision notices. Ministries should only post an information notice when the *EBR* does not require a proposal notice.

In the 2015/2016 reporting year, six ministries posted 167 information notices on the Environmental Registry (see Table 1.2.1.3).

The Ministry of Transportation (MTO) made excellent use of information notices on the Environmental Registry to notify the public and voluntarily solicit input through the government's Regulatory Registry on proposed high-occupancy toll lanes, and amendments under the *Highway Traffic Act* (which is not prescribed under the

Table 1.2.1.3. Number of Information Notices Posted by Ministry, 2015/2016 Reporting Year.

Ministry	Number of Information Notices Posted in 2015/2016
Agriculture, Food and Rural Affairs (OMAFRA)	1
Environment and Climate Change (MOECC)	58
Municipal Affairs and Housing (MMAH)	6
Natural Resources and Forestry (MNRF)	97
Northern Development and Mines (MNDM)	1
Transportation (MTO)	4
TOTAL	**167**

EBR) to permit taxicabs, airport limos and electric vehicles on high-occupancy vehicle lanes. These proposals had relevance to the environment, but the *EBR* does not require the MTO to post them on the Environmental Registry. By choosing to post information notices, the MTO ensured it was informing as many potential commenters as possible of its proposals.

The Ministry of Natural Resources and Forestry (MNRF) also made particularly good use of an information notice to voluntarily inform the public that the most recent Independent Forest Audit Reports and Action Plans for Crown forest management units were complete and available online. Anyone monitoring the registry for information about forests and forest management would likely be interested in the release of these reports, and the MNRF took advantage of the Registry as a forum to provide the public with easy access to these important documents.

Exception Notices

In certain situations, the *EBR* relieves prescribed ministries of their obligation to post proposal notices on the Environmental Registry before making an environmentally significant decision. In such situations, ministries must instead post an "exception notice" to inform the public of the decision and explain why it did not first post a proposal notice. There are two main circumstances under which ministries can post an exception notice instead of a proposal notice. First, ministries may post an exception notice under section 29 of the *EBR* when a decision has to be made quickly in order to deal with an emergency, and the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property. Second, under section 30 of the *EBR*, ministries can notify the public about an environmentally significant proposal using an exception notice when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the process required under the *EBR*.

During the 2015/2016 reporting year, the MOECC posted three exception notices on the Environmental Registry and the MNRF posted two. The ECO believes that all were valid uses of this *EBR* provision, and the ministries gave acceptable reasons for making those decisions without soliciting public input. In all cases save one, the ministries explained that any delay posed a serious risk of harm to the environment. The remaining case was an exception notice notifying the public that land had been added to a protected area. The MNRF had already engaged in public consultation as part of the ministry's outreach during the land use planning processes that considered the expansion of the protected area with which the notice was concerned.

The MOECC's three exception notices informed the public that the ministry had issued director's orders to two mining companies and a steel mill. Although all three notices were valid uses of the emergency exception provision, the MOECC posted them between one and seven months after issuing the orders – even though the *EBR* states that notice should be given "as soon as reasonably possible after the decision is made." In cases where the public is deprived of the right to comment because of the risk of environmental harm, ministries should ensure the public is at least afforded the right to be informed of the decision as soon as possible.

Failures to Comply with *EBR* Public Consultation Requirements

The ECO has a statutory duty to report to the Ontario Legislature on how well ministries are fulfilling their obligations under the *EBR* to notify and consult the public on environmentally significant proposals through the Environmental Registry. These obligations seem simple enough, yet, every year, the ECO observes instances where ministries fail to post proposal notices for environmentally significant policies, regulations or laws (see Table 1.2.1.4).

Sometimes, ministries improperly post information notices for initiatives that should be posted as regular proposal notices. Such information

notices typically do not include the right to comment. Even when a ministry posts an information notice on the Registry that does invite public comment, the public is not assured that the ministry will post a decision notice that clearly indicates what was finally decided and how the public's comments were considered. Posting an information notice to the Registry when the *EBR* requires a proposal notice disregards the instructions of the legislature and misleads the public.

Several examples of ministries' failures to properly post proposal notices on the Environmental Registry are highlighted below.

No Chance to Comment: Energy Statute Law Amendment Act, 2016

The Ministry of Energy introduced Bill 135, the *Energy Statute Law Amendment Act, 2016* in October 2015. The bill was passed in June 2016, and made changes to the *Electricity Act, 1998*, the *Ontario Energy Board Act, 1998*, and the *Green Energy Act, 2009*. It included provisions that would give Ontario's Long-Term Energy Plan a substantive legal framework, enable the establishment of "Large Building Energy and Water Reporting and Benchmarking," and prescribe water efficiency standards for appliances or products that consume energy. However, the ministry did not post a proposal notice on the Environmental Registry informing the public and inviting comment on this environmentally significant act as it is required to.

Table 1.2.1.4. Ministry Non-compliance with the *EBR* by Failing to Post Proposal Notices on the Environmental Registry, 2015/2016 Reporting Year.

Ministry of Agriculture, Food and Rural Affairs (OMAFRA)
• Draft Guidelines on Permitted uses in Ontario's Prime Agricultural Areas
Ministry of Energy (ENG)
• Bill 135, *Energy Statute Law Amendment Act, 2016*
Ministry of the Environment and Climate Change (MOECC)
• Proposal to classify Avadex Mintill Herbicide (active ingredient: triallate) • Proposal to amend the Class Environmental Assessment for Resource Stewardship and Facility Development • Proposal to amend the Class Environmental Assessment for Provincial Parks and Conservation Reserves • Proposal to amend the Class Environmental Assessment for Water Power Projects
Ministry of Health and Long-term Care (MOHLTC)
• Beach Management Guidance Document • Environmental Health Standards Drinking Water and Beach Management Protocols
Ministry of Natural Resources and Forestry (MNRF)
• MNRF Horizons 2020 • Provincial Wildlife Population Monitoring Program Plan, Version 3.0 • Managing Ontario's Wildlife at Ecologically Relevant Scales: A Framework for Action
Ministry of Northern Development and Mines (MNDM)
• Northern Industrial Electricity Rate Program

When urged by the ECO to post an act proposal notice for Bill 135 on the Environmental Registry, the Ministry of Energy stated it would solicit public comments through the Registry when it drafts regulations that would implement the initiatives mentioned above.

Although the ECO agrees that the ministry must post forthcoming regulation proposals on the Registry for public comment, these future consultations do not fulfill the *EBR* requirement to notify the public about the proposed act and provide an opportunity to comment on it. Under the *EBR*, the public has a right to know about and comment on new acts with environmentally significant implications, and the Ministry of Energy's failure to post a proposal notice denies this right.

No Chance to Comment: Provincial Wildlife Population Monitoring Plan – Version 3.0

The MNRF is responsible for monitoring wildlife populations in the area where forest management operations take place on Crown land in order to collect long-term trend data. This is a requirement of a Declaration Order regarding forest management on Crown land under the *Environmental Assessment Act*. It is crucial for MNRF to understand how forest management operations affect wildlife populations in order to avoid and/or mitigate negative effects.

The Declaration Order requires the MNRF to implement a wildlife population monitoring program, produce a plan for the program, and update the plan periodically. The ministry produced the first version of its *Provincial Wildlife Population Monitoring Program Plan* in 2010, amended it in 2012 to produce version 2.0, and amended it again in 2015 to produce version 3.0.

The ECO believes that the goals, strategies, procedures, and methods for collecting information on wildlife in Ontario contained in the *Provincial Wildlife Population Monitoring Program Plan* have a direct effect on what information is collected and the quality of that information, which in turn affects the wildlife management guidance it informs. The plan and any amendments are therefore clearly environmentally significant, and should be posted on the Environmental Registry as a policy proposal notice to uphold the public's *EBR* right to have their comments considered and be notified of their effects.

The ECO has written to the MNRF twice before about their obligation to post the plan as a proposal notice: in 2010 after the ministry posted version 1.0 of the plan to its website without undertaking public consultation, and again in 2012 when the ministry incorrectly posted version 2.0 of the plan in an information notice (for details, see Part 2.3 of the ECO's 2011/2012 Annual Report). And yet, in 2015 the MNRF again failed to post a policy proposal notice on the Environmental Registry for the *Provincial Wildlife Population Monitoring Program Plan – Version 3.0*. It instead improperly posted it as an information notice, denying the public's right to have their comments considered and to learn their effects.

> The *Provincial Wildlife Population Monitoring Program Plan* has been in place for over 20 years, and the public has never had a chance to exercise their *EBR* right to comment on the plan...

When the ECO requested an explanation from the ministry for this decision, the MNRF stated that the plan in and of itself could not have a significant effect on the environment. It is difficult to understand how the ministry could come to this conclusion when, according to its own information notice, the purpose of the plan is to "describe the Wildlife Population Monitoring Program and outline priorities, representative species to be monitored and proposed activities and schedules."

The *Provincial Wildlife Population Monitoring Program Plan* has been in place for over 20 years, and the public has never had a chance to exercise their *EBR* right to comment on the plan, have those comments considered, and know their effects. If the MNRF persists in denying the public's right to participate in decision making about the environmentally significant issue of wildlife management on Crown land, the ECO must conclude that the ministry is deliberately circumventing the public consultation requirements of the *EBR*.

1.2.2 No Transparency for *Aggregate Resources Act* Instruments

There are thousands of pits and quarries in Ontario that produce sand, gravel, and crushed rock for road building and other construction projects. Most pits and quarries require an approval from the Ministry of Natural Resources and Forestry (MNRF) under the *Aggregate Resources Act* (*ARA*) in order to conduct their operations. A number of these approvals are "classified instruments" under the *Environmental Bill of Rights, 1993* (*EBR*), including most new aggregate licences, some permits, and certain amendments to licences, permits and site plans.

Notices for aggregate instruments are chronically inadequate.

This means that the MNRF must post instrument proposal notices for these approvals on the Environmental Registry, and solicit and consider public comments when making a decision on whether to issue the approval. Once the ministry makes its final decision, it must post a decision notice to explain the outcome of the decision and how public comments affected the decision. In some cases, the *EBR* also provides the public with the right to seek leave to appeal (i.e., challenge) a decision on an instrument, but only after the decision has been posted. Members of the public can also submit applications for review and applications for investigation pertaining to prescribed aggregate approvals.

Unfortunately, notices for aggregate instruments are chronically inadequate, and a lack of publicly available information on aggregate approvals may hinder the public from fully exercising their rights under the *EBR*.

Proposal notices for aggregate instruments generally contain very basic information, such as the type of approval or amendment proposed, the size of an operation, and a general location. Most proposal notices do not provide enough substantive information to allow members of the public to provide a reasonably informed comment. For example, the MNRF often does not provide the location of aggregate operations in a way that would be readily useful to the average person – the ministry usually includes lot and concession numbers rather than a municipal address or a nearby intersection. The ministry also fails to include descriptions of the potential environmental effects of issuing the instruments. Critically, these notices never include links to site plan information or background information such as technical reports (e.g., hydrogeological studies, etc.). Instead, members of the public must go to an MNRF district office in person to obtain details.

Aggregate instrument decision notices are also generally inadequate. The MNRF does not include links to the final instrument or site plan in the notice, leaving the public in the dark as to the final conditions of the approval. This omission is particularly troublesome, as anyone wishing to seek leave to appeal a decision on such an instrument must provide copies of the relevant approval documents (e.g., licence, site plan, technical reports, etc.) with their application for leave to appeal. Also, the ministry generally provides only a cursory explanation of how

public comments were considered in making the decision, and rarely addresses comments received through the *ARA* notification process.

The *EBR* generally requires a minimum 30-day public notice and comment period for aggregate instruments, but allows for longer consultation periods for certain instruments, including new aggregate licences. There is also a 45-day notification period for new aggregate licences under the *ARA* approval process, which is separate from the notification and comment period under the *EBR*. Although the *EBR* and *ARA* notification periods are usually aligned, on occasion the *EBR* period is shorter than or not aligned with the *ARA* period.

Aggregate operations in Ontario have a significant impact on the land and generate great public interest. Fostering informed public engagement in the aggregate approval process is important to resolve local concerns and improve environmental outcomes. The MNRF must fix these long-standing deficiencies in Environmental Registry notices for *ARA* instruments in order to ensure the public's right to be notified and comment on environmentally significant decisions is upheld.

The ECO recommends that the MNRF fix the long-standing deficiencies in Environmental Registry notices for *Aggregate Resources Act* instruments to ensure the public's right to be notified and comment.

1.2.3 Outdated Proposals

The public consultation process under the *Environmental Bill of Rights, 1993* (*EBR*) starts with a proposal notice – but it shouldn't end there. After a proposal notice has been posted on the Environmental Registry and the public has had an opportunity to submit comments, the next step is for the responsible ministry to consider those comments and decide whether or not to go ahead with the proposal. Once the ministry has made a decision, it must give notice on the Registry "as soon as reasonably possible." A decision notice informs the public of the outcome of the proposal, and explains how the public's comments affected the ministry's decision.

In practice, prescribed ministries have often left proposal notices on the Registry for many months or even years without posting a corresponding decision notice. In many cases, a decision was made but the responsible ministry neglected to post a notice of the decision on the Registry. Other times, the responsible ministry has put the proposal on hold or abandoned it in favour of another initiative, leaving the proposal notice on the Registry indefinitely without explaining what has transpired to the public; the same result may occur when an instrument proponent has withdrawn or abandoned an approval application after it has been posted as a proposal on the Registry. In some cases, proposals are under consideration by the responsible ministry for such an unusually long time that they may appear to have been abandoned or forgotten.

The public is left in the dark about the outcome of the proposal.

When proposal notices are left on the Registry without a corresponding decision – whether they are forgotten, withdrawn, abandoned or simply languishing while awaiting a decision – the public is left in the dark about the outcome of the proposal. If a decision has in fact been made, the public is denied its *EBR* right to know about the decision, or how public comments affected the outcome. In the case of decisions about some types of approvals, licences and permits, the public may be denied the *EBR* right to seek leave to appeal the decision if a notice is not posted promptly on the Registry.

Remedying Outdated Proposal Notices: Progress in 2015/2016

The ECO highlighted the problem of outdated proposal notices – not for the first time – in our 2014/2015 Annual Report (Part 1.2.2). We reported that over 200 proposal notices for policies, acts and regulations and over 1,700 proposal notices for instruments on the Registry that were posted on or before January 1, 2014, remained on the Registry, many of them dating back several years. The ECO urged ministries to address their outdated proposal notices by posting decision notices promptly.

This year, the ECO monitored the Registry to find out whether prescribed ministries were in fact making improvements. In late fall 2015, the Environmental Commissioner also provided several deputy ministers with lists of their ministries' outdated notices, and pressed them to take action to remedy those notices without further delay. An outdated notice may be remedied by posting a decision notice or, if the proposal is on hold or remains under consideration, updating the proposal notice to explain the status of the proposal.

Some ministries made significant efforts during our 2015/2016 reporting year to address this problem (see Table 1.2.3.1). The Ministry of Agriculture, Food and Rural Affairs and the Ministry of Tourism, Culture and Sport, which both had relatively few outdated notices to start with, remedied all of them; all of those ministries' notices on the Registry are now current. Other ministries made good headway: the Ministry of Northern Development and Mines (MNDM) remedied all of its 7 outdated policy, act and regulation notices and 17 (over 38 per cent) of its outdated instrument notices; and the Ministry of Municipal Affairs and Housing remedied one of its 2 outdated policy, act and regulation notices and 66 (over 87 per cent) of its outdated instrument notices. The Ministry of the Environment and Climate Change (MOECC) and the Ministry of Natural Resources and Forestry (MNRF) are responsible for the majority of outdated notices on the Registry. Both worked hard throughout the year to remedy their outdated notices: the MOECC remedied a total of 827 notices (about 59 per cent of its outdated notices), while the MNRF remedied 218 notices (over 70 per cent of its outdated notices). However, both ministries still had a long way to go as of April 1, 2016.

The Technical Standards and Safety Authority (TSSA) under the Ministry of Government and Consumer Services (MGCS), responsible for posting notices under the *Technical Standards*

and Safety Act, 2000, did not remedy any of its 12 outdated instrument notices, and only remedied two policy, act and regulation notices.

The ECO recommends that all prescribed ministries establish processes to ensure that decision notices are posted as soon as reasonably possible after decisions are made.

The ECO recommends that prescribed ministries remedy all of their outdated notices that remain on the Environmental Registry without a decision.

Table 1.2.3.1. Work by Ministries during 2015/2016 to Remedy Outdated Proposal Notices Reported in the ECO's 2014/2015 Annual Report.

Ministry	Outdated Policy, Act and Regulation Proposal Notices Remedied		Outdated Instrument Proposal Notices Remedied		Total Outdated Proposal Notices Remedied	
	Number Remedied	Percentage Remedied (%)	Number Remedied	Percentage Remedied (%)	Number Remedied	Percentage Remedied (%)
Agriculture, Food and Rural Affairs (OMAFRA)	4	100	N/A	N/A	4	100
Energy (ENG)	5	71	N/A	N/A	5	71
Environment and Climate Change (MOECC)	8	9	819	89	827	59
Government and Consumer Services/Technical Standards and Safety Authority (MGCS/TSSA)	2	50	0	0	2	13
Municipal Affairs and Housing (MMAH)	1	50	65	88	66	87
Natural Resources and Forestry (MNRF)	75	94	143	64	218	72
Northern Development and Mines (MNDM)	7	100	17	39	24	47
Tourism, Culture and Sport (MTCS)	2	100	N/A	N/A	2	100
Transportation (MTO)	6	60	N/A	N/A	6	60
Total	**110**	**52**	**1,044**	**63**	**1,154**	**62**

Outdated Proposal Notices as of April 1, 2016: More Work to Do

Although ministries are making progress, outdated proposal notices on the Environmental Registry remained a problem at the end of the ECO's 2015/2016 reporting year, especially for the MOECC.

In addition to outdated notices at the end of 2014/2015 that were not remedied during 2015/2016, other notices became outdated during the 2015/2016 reporting year. The ECO considers any notice that had been on the Registry for two years or more without a corresponding decision notice or update to be outdated.

As of April 1, 2016, there were 839 outdated proposal notices on the Environmental Registry: 101 outdated policy, act and regulation notices, and 738 outdated instrument notices (see Table 1.2.2.2).

Table 1.2.3.2. Outdated Proposals on the Environmental Registry as of April 1, 2016 (i.e., proposal notices that were posted before April 1, 2014 and for which no decision notice or update has been posted).

Ministry	Number of Outdated Proposals for Policies, Acts or Regulations as of April 1, 2016	Number of Outdated Proposals for Instruments as of April 1, 2016	Total Number of Outdated Proposals as of April 1, 2016
Energy (ENG)	2	N/A	2
Environment and Climate Change (MOECC)	87	599	686
Government and Consumer Services (MGCS)	2	12	14
Municipal Affairs and Housing (MMAH)	1	6	7
Natural Resources and Forestry (MNRF)	5	88	93
Northern Development and Mines (MNDM)	0	33	33
Transportation (MTO)	4	N/A	4
TOTAL	**101**	**738**	**839**

Fortunately, many ministries continue to demonstrate their commitment to address outdated proposals and bring the Environmental Registry up to date. For example, in the months following the end of the ECO's 2015/2016 reporting year, the Ministry of Energy remedied both of its outdated proposal notices, the MOECC posted decision notices for dozens of outdated proposals for permits to take water, and the MNDM posted decision notices or updates for all 33 of its instrument proposals that were outdated as of April 1, 2016. In the summer of 2016, the MGCS-TSSA advised it was working on remedying its outdated notices. The ECO again urges ministries to remedy all of their outdated notices, ensure that decision notices are posted as soon as reasonably possible after decisions are made, and update all proposal notices that remain on the Registry without a decision for more than two years.

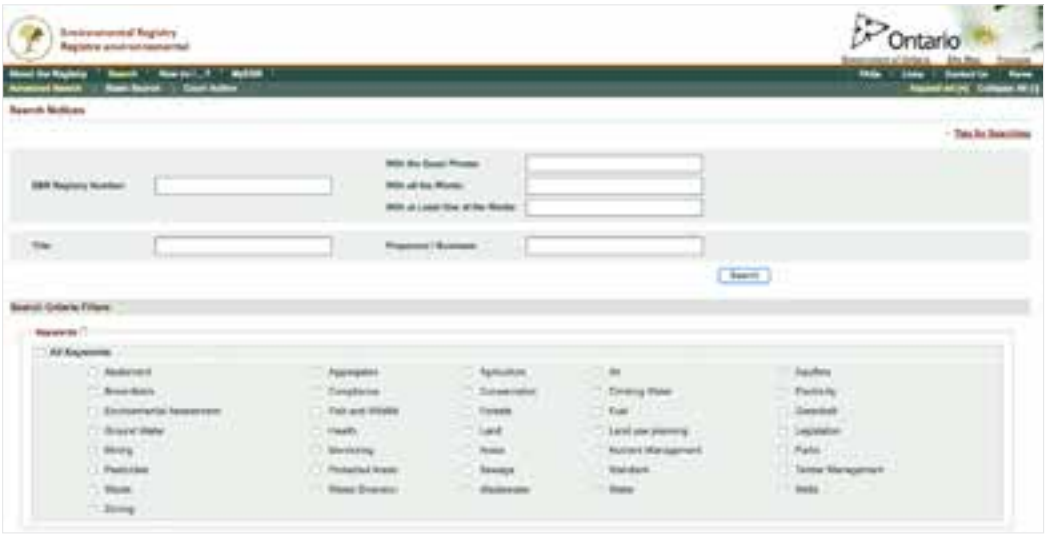
The ECO is hopeful that a planned overhaul of the Environmental Registry (see Chapter 1.2.4 of this report) will make it easier for ministries to keep their Registry notices current in the future, for the public to have access to more reliable and up-to-date information on specific proposals, and for the ECO to monitor the Registry for outdated notices.

1.2.4 Environmental Registry: Overhaul Discussions Begin

For engaged Ontarians wanting their say on environmental issues, few tools are as important as the Environmental Registry. This website allows the public to monitor and comment on a very wide range of environmental matters within the jurisdiction of the provincial government. Each year, Ontario ministries use the Environmental Registry to invite public comment on thousands of proposals as diverse as regional land use plans, province-wide climate change initiatives, site-specific water taking permits, plans for modernizing intercity bussing and rules for fish farming.

The Registry is showing its age.

But the Registry is showing its age. Its confusing search functions and dated layout are an ongoing source of frustration to Registry users. The ECO has often stressed this weakness, most recently in our 2014/2015 Annual Report (Part 1.2.1). The Ministry of the Environment and Climate Change (MOECC), which is responsible for operating the Registry, has agreed that it needs an overhaul.



To help the ministry get started on the Registry upgrade, the ECO solicited input from selected Registry users in spring 2016, and compiled the advice received, along with insights from ECO staff. The need for an email alert service, improved geographic search functions, and better background information for permits were part of the wish list that our office sent to the MOECC. A copy of the ECO's letter can be viewed on our website (eco.on.ca).

The ministry itself began a public dialogue on Registry improvements through a full-day "Ideation Session" held at Ryerson University in late June 2016. Attendees included numerous university students, a small number of representatives from non-government organizations, staff from some prescribed ministries, and the ECO. Discussion ranged broadly around the theme of government consultation tools, but attendees were encouraged to "think outside the box" to come up with creative ideas for a new Registry. However, few members of the public with first-hand experience searching the Registry took part in the day's discussion. The needs of existing Registry users will be an essential part of the context for designing a new Registry.

The ECO will stay engaged in the ongoing discussions on upgrading the Registry. A key priority remains the need to upgrade the core software platform of the Registry to make it more accessible to modern web users and optimize its usefulness to the broader public.

The ECO recommends that the MOECC give the needs of existing Environmental Registry users strong consideration in the design of a new Registry.

1.3 Ministry Co-operation

Ministry co-operation is vitally important to the ECO's ability to effectively carry out our mandate; without it, we could not review environmentally significant decisions in an efficient and timely manner. Each of the prescribed ministries, as well as the Technical Standards and Safety Authority (TSSA), designate at least one staff person as their "*EBR* co-ordinator"; this person is responsible for facilitating the implementation of the *Environmental Bill of Rights, 1993* (*EBR*) within their ministry. Most interactions between the ECO and the ministries occur via these co-ordinators; however, on occasion we also contact ministry staff responsible for program delivery directly, with specific, detailed information requests. The Commissioner herself also routinely engages with deputy ministers. These interactions include requests for: briefings on defined issues; data; internal documents; and explanations of ministry positions or interpretations. Under the *EBR*, the ECO is required to report on whether prescribed ministries have co-operated with these requests for information by the Commissioner.

During our 2015/2016 reporting year, ministry staff were co-operative, providing the ECO with clear responses to our enquiries and helpful updates, as well as meeting with ECO staff to discuss matters of interest. Seven ministries – the Ministry of Agriculture, Food and Rural Affairs (OMAFRA), the Ministry of Economic Development, Employment and Infrastructure (MEDEI), the Ministry of Energy, the Ministry of Municipal Affairs and Housing (MMAH), the Ministry of Natural Resources and Forestry

(MNRF), the Ministry of the Environment and Climate Change (MOECC), and the Ministry of Transportation (MTO) – were particularly co-operative, responding to multiple requests from the ECO. In some cases those ministries met tight deadlines to assist our office.

For example, staff from several ministries provided briefings to the ECO on a variety of issues. To name a few: the MNRF briefed the ECO on the *Wildland Fire Management Strategy*, the *Provincial Fish Strategy for Ontario*, *Ontario's White-nose Syndrome Response Plan*, the ministry's moose program, the *Lake Nipissing Fisheries Management Plan* and the *Far North Land Use Strategy*; the MOECC provided briefings on source water protection and the new greenhouse gas cap and trade program; the OMAFRA gave briefings on the ministry's new soil health initiative, phosphorus runoff from farmland, and the *Drainage Act*; and the MMAH briefed the ECO on the co-ordinated land use planning review.

Several ministries were also helpful to ECO staff during the preparation of our annual Energy Conservation Report. The ENG provided briefings and other information, often with tight turn-around times. MEDEI staff assisted the ECO's energy conservation staff by explaining the rules for funding infrastructure retrofits, the Ministry of Education provided data about energy use in Ontario's public schools, the MMAH provided input about land use planning for the transportation chapter of the report, and the MTO supplied information and reviewed draft material dealing with transit spending.

The ECO appreciates the ministry representatives who provided our office with timely information and explanations. The quality and completeness of our work is better as a result of their efforts.

1.4 Keeping the *EBR* in Sync with Government Changes and New Laws

The *Environmental Bill of Rights, 1993* (*EBR*) needs to be kept up to date with new laws, new ministries, and the shuffling of government portfolios. The ECO encourages the Ministry of the Environment and Climate Change (MOECC) to work with other ministries to regularly update the *EBR* regulations (O. Reg. 73/94 and O. Reg. 681/94) to ensure Ontario residents can continue to participate in all environmentally significant government decisions.

When ministries are prescribed, they must comply with the *EBR*'s public notice and consultation requirements for environmentally significant policies, acts and regulations. Proposals for environmentally significant regulations under prescribed acts must be posted to the Environmental Registry. Ministries also can be prescribed for applications for review.

Prescribed ministries are also required to develop a Statement of Environmental Values and consider those values when making any environmentally significant decisions. And once environmentally significant acts are prescribed, they can be made subject to applications for investigation.

Classifying instruments (e.g., permits, licences, etc.) under the *EBR* is important because it requires ministries to give notice on the Environmental Registry of any proposals and decisions related to those instruments, and to consider comments from the public during decision-making processes. Generally, classified instruments are also subject to applications for review and investigation. In many cases, classifying instruments provides members of the public with the right to seek leave to appeal decisions on those instruments.

Newly Prescribed Ministries and Acts

In May 2016, the government prescribed the Treasury Board Secretariat, the *Places to Grow Act, 2005* and the *Invasive Species Act, 2015* under the *EBR*, significantly expanding its reach and the application of Ontarians' environmental rights.

The Treasury Board Secretariat, which houses the Ontario Public Service Green Office, will now have to post environmentally significant proposals on the Environmental Registry, consider any public comments it receives before making a final decision, and draft a Statement of Environmental Values that it must consider when making decisions that could affect the environment.

Now that the *Places to Grow Act, 2005* and the *Invasive Species Act, 2015* are prescribed under the *EBR*, any proposal to make or change a regulation under either of these acts must be posted on the Environmental Registry for public comment. Both acts are also now subject to applications for review, and the *Invasive Species Act, 2015* is subject to applications for investigation.

The ECO asked the MOECC to prescribe the Treasury Board Secretariat under the *EBR* in our 2014/2015 Annual Report (the Secretariat was previously subject to *EBR* requirements as part of the Ministry of Government and Consumer Services), and commends the ministry for acting swiftly to uphold Ontarians' environmental rights.

The ECO has called on the MOECC to prescribe the *Places to Grow Act, 2005* for a number of years, and is pleased that the public will be informed about, and can properly comment on, proposed regulations under this environmentally significant law. The act sets out goals for decision making about growth policies for many municipalities. The ECO also commends the MOECC and the Ministry of Natural Resources and Forestry for acting quickly to prescribe the *Invasive Species Act, 2015*, and encourages the ministry to also prescribe the act's instruments in the near future to ensure the public knows about and can comment on proposals for licences, orders and permits issued under the act.

Ministry Name Changes

The government re-organized and changed the names of several ministries in June 2016, including some prescribed under the *EBR*:

- the Ministry of Infrastructure is again a stand-alone ministry, separate from the Ministry of Economic Development and Growth;
- the Ministry of Municipal Affairs and Housing was split into two ministries – the Ministry of Municipal Affairs and the Ministry of Housing; and
- the Ministry of Aboriginal Affairs was renamed the Ministry of Indigenous Relations and Reconciliation.

The MOECC should promptly amend O. Reg. 73/94 to reflect the ministry name changes and their status as prescribed ministries under the *EBR*.

Ministries, Agencies, Acts and Instruments still not Prescribed under the *EBR*

The ECO monitors the progress the government makes (or fails to make) to fully prescribe environmentally significant ministries, agencies and legislation under the *EBR*. Despite the significant progress made this year, the ECO continues to urge the government to address the remaining gaps in *EBR* coverage of environmentally significant ministries, acts, and instruments (see Table 1.4.1).

This year, the ECO requested that the Ministry of Education, which is prescribed for purposes of public participation in environmental decision-making, also be prescribed for applications for review. To date, this has not transpired.

The ECO recommends that the Ministry of Education be prescribed under the *EBR* for the purposes of applications for review.

Table 1.4.1. Environmentally Significant Ministries, Agencies, Acts and Instruments not Prescribed Under the *Environmental Bill of Rights, 1993* at the End of the 2015/2016 Reporting Year.

Ministries and Agencies Not Yet Prescribed	
Name	**Environmental Significance**
Ministry of Finance	Prepares Ontario budget, provides fiscal and economic policy advice to Cabinet and the Premier – affects all ministries and government programs.
Ministry of Research, Innovation and Science	Funds research and partners with universities, colleges, hospitals, entrepreneurs and business leaders – influences prioritization and funding of research projects.
Ontario Heritage Trust	Promotes natural heritage conservation through land acquisition, conservation easements, land donations and public awareness; holds more than 160 natural properties.

Acts Not Yet Prescribed	
Name	**Environmental Significance**
Building Code Act, 1992 in its entirety (MMAH)	Establishes the *Building Code* in regulation – the *Building Code* sets out the requirements and minimum standards for how structures must be built in Ontario.
Drainage Act (OMAFRA)	Directs the creation, maintenance and repair of municipal agricultural drains, including open ditches and tile drains, which are used to remove water from agricultural land – drainage works are allowed to occur in wetlands in Ontario, including provincially significant wetlands.
Electricity Act, 1998 (ENG)	Purpose includes ensuring sustainability and reliability of electricity supply, encouraging electricity conservation and the efficient use of electricity, and promoting the use of cleaner energy sources and technologies.
Forest Fires Prevention Act (MNRF)	Sets out forest fire prevention measures; responsibilities for fire extinguishment, reporting and evacuation; and prohibitions on actions that could cause forest fires.
Weed Control Act (OMAFRA)	Establishes a list of noxious weeds (plants that must be destroyed by landowners) and prescribes procedures for destroying them.
Instruments Not Yet Prescribed	
Name	**Environmental Significance**
Instruments issued under the *Food Safety and Quality Act, 2001* (OMAFRA)	Licences are required for off-farm disposal of deadstock, including licences to operate a transfer station, as well as salvaging, composting, and rendering facilities.
Water Management Plans under the *Lakes and Rivers Improvement Act* (MNRF)	Enable the construction of dams in lakes and rivers, subject to ministerial approval.
Nutrient Management Instruments under the *Nutrient Management Act, 2002* (OMAFRA)	Nutrient Management Strategies are required for certain building projects related to housing livestock or storing manure; Nutrient Management Plans are sometimes required before nutrients can be applied to lands; and Non-Agricultural Source Material Plans are sometimes required before nutrients from off-farm sources such as sewage biosolids or food processing washwater can be applied to lands.
Instruments issued under the *Provincial Parks and Conservation Reserves Act, 2006* (MNRF)	Land use permits, licences of occupation and leases for land in provincial parks and conservation reserves can be granted for private non-commercial purposes.

1.5 Statements of Environmental Values

Statements of Environmental Values (SEVs) set out how the purposes of the *Environmental Bill of Rights, 1993* (*EBR*) are to be applied whenever a prescribed ministry makes an environmentally significant decision. In addition, an SEV must explain how the purposes of the *EBR* will be integrated with other factors, including social, economic and scientific considerations, that inform ministry decision making.

An SEV should be both a statement of ministry-specific environmental principles, as well as a guidance document that sets out how these environmental principles will be integrated into ministry decision making in a meaningful way.

The *EBR* requires ministries to finalize their SEVs within nine months of becoming prescribed under the act. After becoming prescribed on January 1, 2015, the Ministry of Aboriginal Affairs and the Ministry of Economic Development, Employment and Infrastructure both finalized their new SEVs in late 2015 (for background information, see Part 1.5 of the ECO's 2014/2015 Annual Report). These new SEVs, along with the SEVs of all prescribed ministries, are available on the Environmental Registry website (ontario.ca/ebr).

Documentation of SEV Consideration

The ECO is required to report annually on ministries' compliance with the requirement to consider their SEVs. In order for the ECO to assess compliance, a prescribed ministry must be able to demonstrate, through documentation, that it considered its SEV when making environmentally significant decisions. The ECO typically requests "SEV consideration documents" for decisions on acts, regulations and policies, and for select instrument decisions (see Table 1.5.1).

In recent years, the ECO has repeatedly observed that some ministries are inadequately documenting their SEV consideration when making decisions related to certain prescribed instruments (e.g., approvals, permits, licences, etc.). As a result, the ECO has been urging the Ministry of the Environment and Climate Change (MOECC) and the Ministry of Natural Resources and Forestry (MNRF) to develop a new process, or improve existing processes, for documenting SEV consideration when making instrument decisions that affect the environment.

Once again, the MOECC and the MNRF failed to provide copies of a number of SEV consideration documents requested for instruments during the 2015/2016 reporting year. The MNRF continues to assert that SEV documentation and/or consideration is not required for certain instruments. Ministries were generally co-operative in providing SEV consideration documents for policies, acts and regulations – with a small number of exceptions. For example, the Ministry of Tourism, Culture and Sport did not provide any SEV documentation for its recent policy decision on strengthening Ontario's trails strategy, which, according to the ministry, received 80 comments from members of the public.

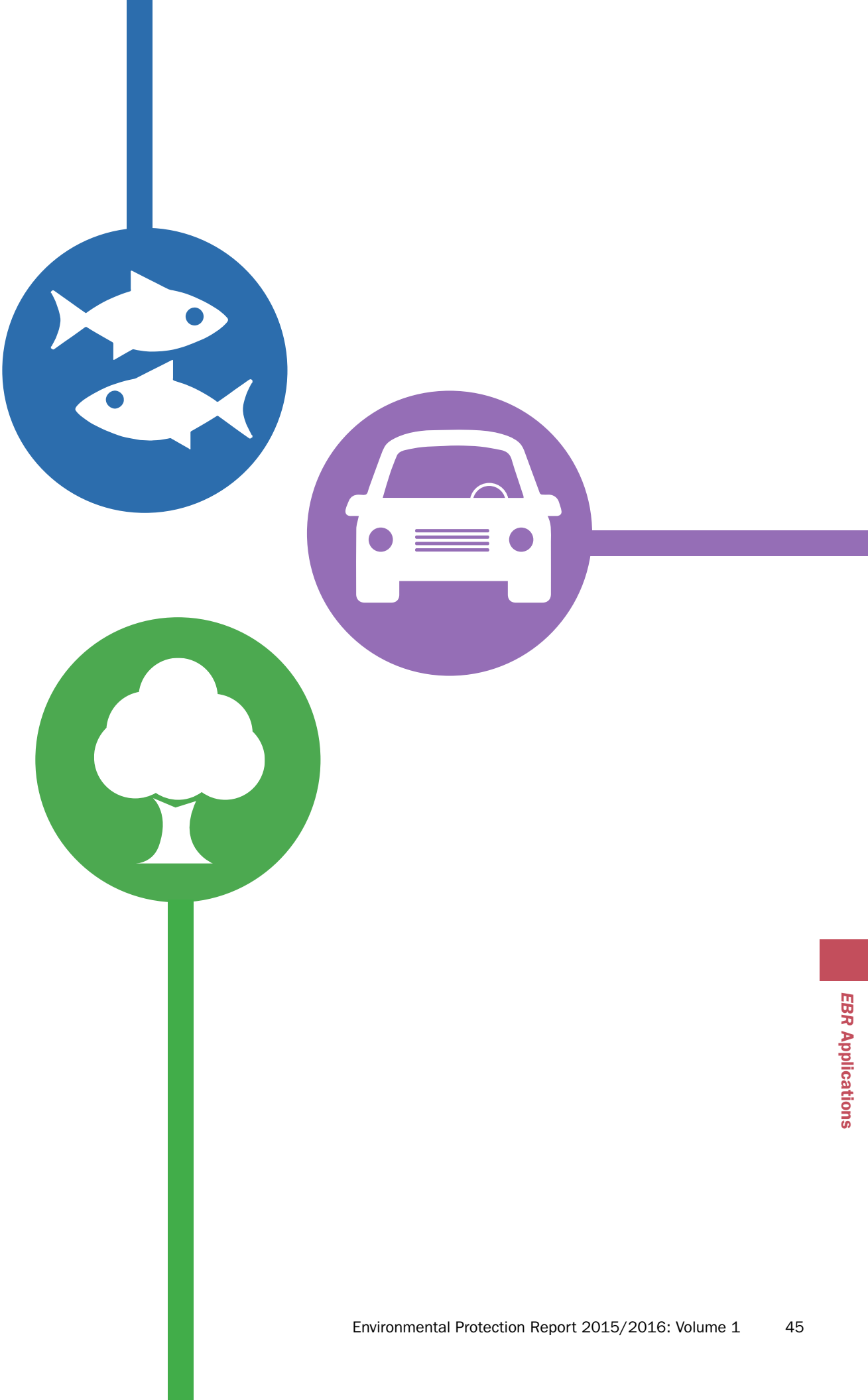
> The failure to provide SEV documentation is unacceptable.

The failure to provide SEV documentation is unacceptable – without these documents, the ECO is unable to assess ministry compliance with SEV consideration requirements. This lack of documentation is particularly troubling when the decisions in question are of great public interest and/or have the potential for substantial environmental impacts.

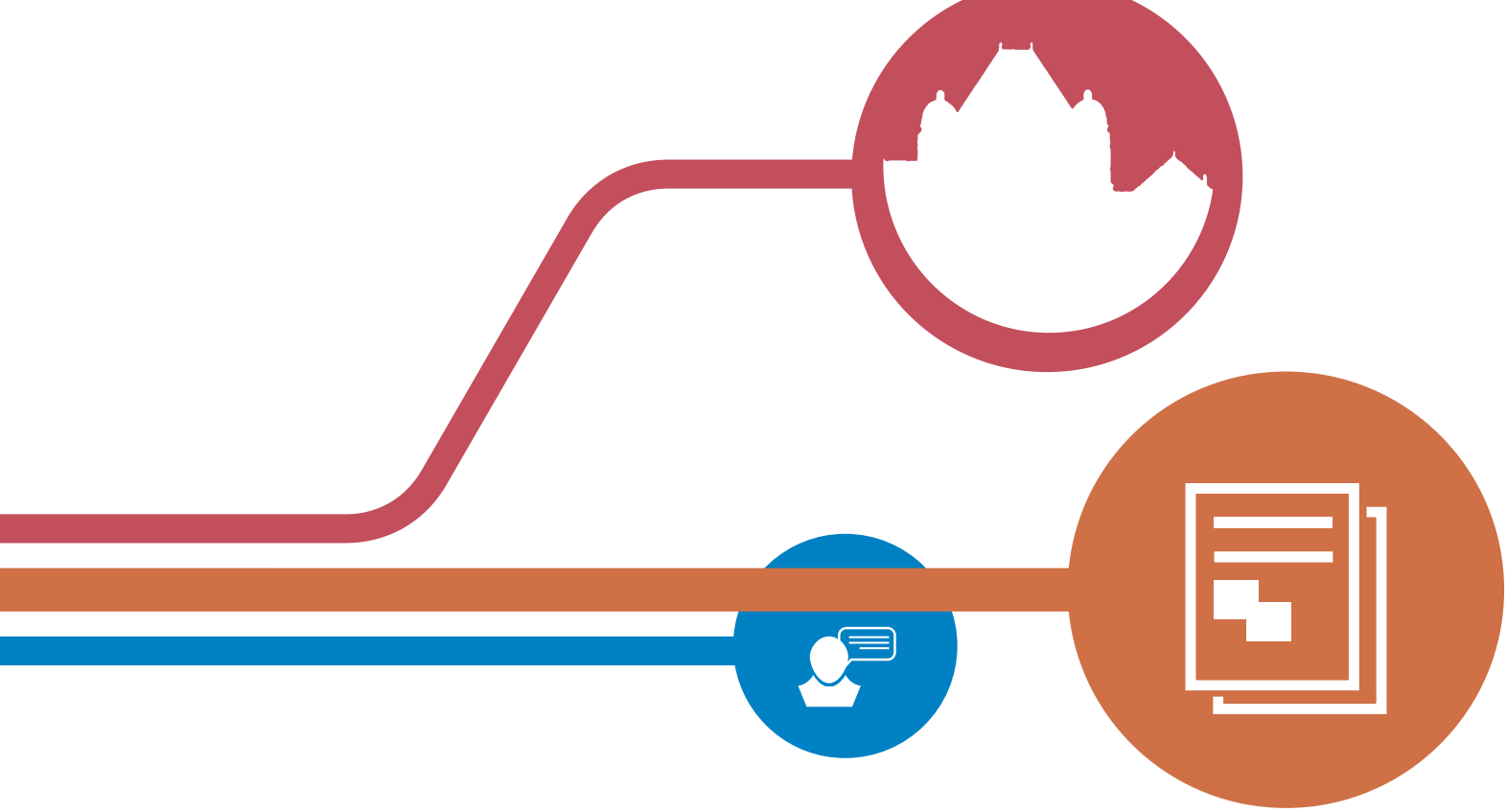
This year the ECO also assessed the timeliness of ministry responses to requests for SEV consideration documents. The ECO expects ministries to provide SEV consideration documents within four weeks of receiving a request from our office. The ECO considers this to be a reasonable period of time, given that our request is made after the ministry decision is completed, and SEV consideration should have occurred during the decision making process. Ministry compliance with the ECO's timelines was, however, highly variable during the 2015/2016 reporting year.

Table 1.5.1. Summary of Requests for SEV Consideration Documents for Decisions Between April 1, 2015 and March 31, 2016 (as of June 1, 2016). *[Note: the ECO did not request any SEV consideration documents in the 2015/2016 reporting year from the following ministries: Aboriginal Affairs; Economic Development, Employment and Infrastructure; Education; Energy; Health and Long Term Care; and Labour].*

Ministry	Number of SEV Consideration Document Requests	% SEV Consideration Documents Received	% SEV Consideration Documents Received within Four Weeks
Agriculture, Food and Rural Affairs (OMAFRA)	3	100%	33%
Environment and Climate Change (MOECC)	124	94%	69%
Government and Consumer Services (MGCS)	1	100%	100%
Municipal Affairs and Housing (MMAH)	4	100%	75%
Natural Resources and Forestry (MNRF)	50	86%	76%
Northern Development and Mines (MNDM)	6	100%	83%
Tourism, Culture and Sport (MTCS)	3	67%	0%
Transportation (MTO)	3	100%	100%



CHAPTER 2
EBR APPLICATIONS



2.0 Introduction

Applications for review and investigation are potentially powerful tools provided in the *Environmental Bill of Rights, 1993* (*EBR*) that the public can use to influence government decisions and to ensure environmental laws and policies are upheld. It is a formal process to ask the government to address an environmental issue by: reviewing an existing policy, law, regulation or instrument (e.g., a permit, license, etc.); reviewing the need for a new policy, law or regulation; or investigating an alleged contravention of a law, regulation or instrument.

Many Ontarians have used the *EBR* application process to urge the government to action, such as overhauling the *Endangered Species Act* and *Mining Act*, reviewing how road salts are applied to highways, and investigating bird collisions with tall buildings in Toronto. Since the *EBR* came into force in 1994, Ontarians have submitted over 600 applications for review and over 230 applications for investigation.

One of the roles of the ECO is to annually review and report on how ministries handle applications for review and investigation. This chapter of the report provides an overview of the application for review and investigation processes, as well as summarizes all applications submitted, concluded and that remain ongoing in our 2015/2016 reporting year (April 1, 2015 – March 31, 2016). This chapter also highlights in greater detail a handful of successful applications that were either completed this year or are ongoing.

In addition to this report, the ECO also issued a report card in June 2016 – *EBR Performance Checkup, Respect for Ontario Environmental Rights 2015/2016* – on how well the Ontario government respected Ontarians' environmental rights under the *EBR*, including how ministries handled applications for review and investigation. For more information on the report card, see Chapter 1.1 in this report or our website, eco.on.ca.

Ontarians have submitted over 600 applications for review and over 230 applications for investigation.

2.1 The *EBR* Application Process

Application for Review Process

The *Environmental Bill of Rights, 1993* (*EBR*) gives Ontario residents the right to ask a prescribed ministry to review (i.e., amend, repeal or revoke) an existing policy, act, regulation or instrument in order to protect the environment. The public also has the right to ask the government to review the need to develop a new policy, act or regulation in order to protect the environment. These requests are called "applications for review." Only ministries that are prescribed under the *EBR* for the purposes of applications for review can be asked to undertake a review. There are currently nine ministries that are prescribed:

- Ministry of Agriculture, Food and Rural Affairs (OMAFRA);
- Ministry of Energy (ENG);
- Ministry of the Environment and Climate Change (MOECC);
- Ministry of Government and Consumer Services (MGCS);
- Ministry of Health and Long-Term Care (MOHLTC);
- Ministry of Municipal Affairs and Housing (MMAH);
- Ministry of Natural Resources and Forestry (MNRF);
- Ministry of Northern Development and Mines (MNDM); and
- Ministry of Transportation (MTO).

The *EBR* contains a number of processes and timelines that the ECO and ministries must follow when handling applications for review. To make an application, two Ontarian residents must complete an Application for Review Form (available from the ECO) and submit it, along with all attachments, to the ECO.

Within 10 days of receiving an application, the ECO must forward the completed application to one or more appropriate ministries for consideration. Within 20 days of receiving an application from the ECO, the ministry must send a letter to the applicants acknowledging the application.

The ministry must consider each application in a preliminary way to determine whether the public interest warrants a review or not. There are a number of items a ministry may consider when deciding whether or not a review is warranted, including:

- The ministry's Statement of Environmental Values;
- The potential for harm to the environment if the review is not undertaken;
- Whether the matter is already subject to periodic review;
- Relevant social, economic, scientific or other evidence;
- Submissions from anyone else with a direct interest in the application;
- Resources needed to conduct the review;
- How recently the act, regulation, instrument or policy was proposed or approved;
- The extent to which the public had an opportunity to participate in the development of the policy, act, regulation or instrument; and/or
- Any other matter that the minister considers relevant.

If the policy, act, regulation or instrument was approved in the past five years – and underwent public participation consistent with the *EBR* – a ministry may deny a review on the basis that it is not in the public interest. However, the minister could decide to undertake a review if there is new evidence that failing to undertake the review could significantly harm the environment, and this evidence was not taken into account when the decision was made.

Within 60 days of receiving an application, the ministry must advise the applicants and the ECO of its decision whether or not it will undertake the requested review along with a brief statement of the reasons for the decision. If the ministry denies the application, the process ends. If the ministry agrees to undertake the review, there is no time limit on how long the ministry can take to complete the review, provided the review is carried out within "a reasonable time."

The ministry must notify the applicants and the ECO of the outcome of its review within 30 days of completing the review and state what action (if any) will be taken as a result of the review. The application for review process is then over. When the application process is over, the ECO then reviews how the ministry received, handled and disposed of applications for review.

Application for Investigation Process

The *EBR* also provides Ontarians with the right to ask a ministry to investigate alleged contraventions of prescribed acts, regulations or instruments through an "application for investigation." Applications for investigation may be filed for alleged contraventions of specific acts, regulations and instruments. The following acts are prescribed for the purposes of an investigation under the *EBR*:

- *Aggregate Resources Act*;
- *Conservation Authorities Act*;
- *Crown Forest Sustainability Act, 1994*;
- *Endangered Species Act, 2007*;
- *Environmental Assessment Act*;
- *Environmental Protection Act*;
- *Far North Act, 2010*;
- *Fish and Wildlife Conservation Act, 1997*;
- *Green Energy Act, 2009*;
- *Invasive Species Act, 2015* (on the day the act comes into force);
- *Kawartha Highlands Signature Site Park Act, 2003*;
- *Lakes and Rivers Improvement Act*;
- *Mining Act*;
- *Oil, Gas and Salt Resources Act*;
- *Ontario Water Resources Act*;
- *Pesticides Act*;
- *Provincial Parks and Conservation Reserves Act, 2006*;
- *Public Lands Act*; and
- *Toxics Reduction Act, 2009*.

The *EBR* contains a number of processes and timelines that the ECO and ministries must follow when handling applications for investigation. To make an application, two Ontarians must complete an Application for Investigation Form (available from the ECO) and submit it, along with all evidence of the alleged violation(s), to the ECO. The ECO will forward the application to the appropriate ministry within 10 days of receiving it. Within 20 days of receiving an application from the ECO, the ministry must send a letter to the applicants acknowledging the application.

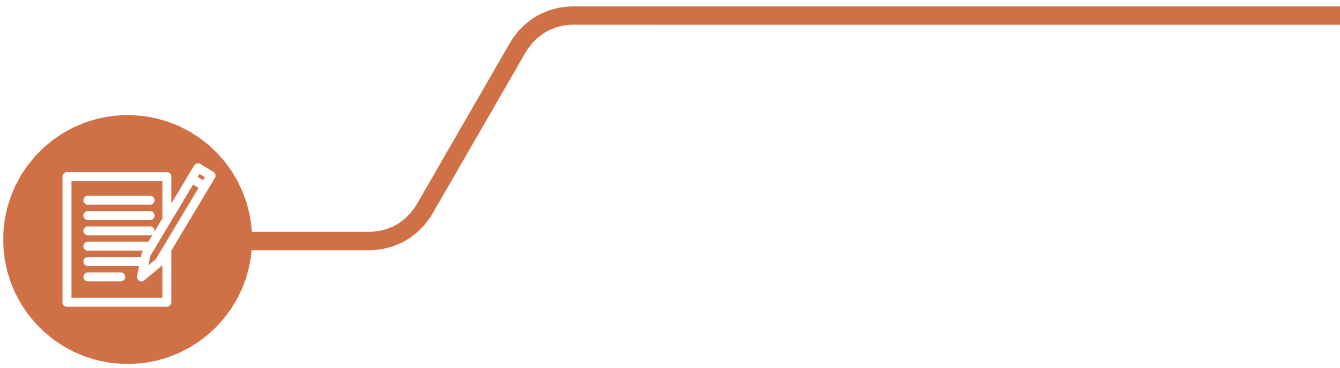
If the ministry decides not to investigate, it must let the applicants, the alleged contraveners, and the ECO know within 60 days of receiving the application. The ministry's response should indicate why it decided not to investigate. The ministry does not have to investigate if:

- The application is considered frivolous or vexatious;
- The alleged contravention isn't serious enough to warrant an investigation;
- The alleged contravention isn't likely to harm the environment; or
- An investigation is already under way or has already been completed.

If the ministry denies the application, the process comes to an end.

If the ministry decides that an investigation is warranted, it must complete the investigation, or give the applicants an estimate of the time required to complete it, within 120 days of receiving an application. Within 30 days of completing an investigation, the ministry must notify the applicants, the alleged contraveners, and the ECO. The notification must state what action, if any, the ministry has taken or proposes to take as a result of the investigation.

Once the process has come to an end, either because the ministry denied the application, or completed an investigation, the ECO will review and report on how the ministry handled the application.



2.2 Ministries' Handling of Applications for Review in 2015/2016

The Environmental Bill of Rights, 1993 (*EBR*) provides Ontario residents with the right to ask prescribed ministries to review environmental legislation, regulations, policies or instruments, or to review the need to develop new protections for the environment.

During the ECO's 2015/2016 reporting year (April 1, 2015 – March 31, 2016), Ontarians exercised their rights under the *Environmental Bill of Rights, 1993* (*EBR*) by submitting eight applications for review (the ECO received seven applications, but counts applications that go to more than one ministry as separate applications). The ECO sent four applications to the Ministry of the Environment and Climate Change (MOECC), two to the Ministry of Agriculture, Food and Rural Affairs (OMAFRA), one to the Ministry of Energy (ENG), and one to the Ministry of Health and Long-Term Care (MOHLTC) for consideration.

The applications submitted this year covered a range of environmental issues, including the regulation of a herbicide, an environmental compliance approval issued to an asphalt site, and how spills are regulated and communicated to the public. The MOECC determined that the issues brought forward in three of these applications merited a review; the remaining applications were denied. The MOECC also denied one application that had been submitted in the 2014/2015 reporting year.

The MOECC completed three reviews in this reporting year, two of which were submitted in previous reporting years. In addition, 12 reviews that the MOECC, the Ministry of Natural Resources and Forestry (MNRF) and the OMAFRA agreed to undertake remained ongoing, 10 of which were submitted in previous reporting years. Of the 12 ongoing reviews, the ECO considers 75 per cent of them to be overdue – a review that has not, in the ECO's opinion, been conducted within a reasonable time. In June 2016, MOECC published an information notice on the Environmental Registry providing updates on all outstanding applications, and committed to update it regularly.

For more details on these application for review, see Table 2.2.1 and the subsections below.

Table 2.2.1. Applications for Review in the 2015/2016 Reporting Year at a Glance (Concluded and Ongoing).

Review Number	Review Topic	Reporting Year Submitted	Ministry Responsible	Undertaken or Denied?	Status in 2015/2016 *
R2008014	Air pollution hot spots	2008/2009	MOECC	Undertaken	Ongoing/ Overdue
R2009016	*Environmental Bill of Rights* (*EBR*) (stays pending decisions on leave to appeal applications; reviewed with R2010009 and R2012003)	2009/2010	MOECC	Undertaken	Ongoing/ Overdue
R2010009	*EBR* (review of the *EBR*; reviewed with R2009016 and R2012003)	2010/2011	MOECC	Undertaken	Ongoing/ Overdue
R2012003	*EBR* (prescribed ministries post final copies of Statement of Environmental Values; reviewed with R2009016 and R2010009)	2012/2013	MOECC	Undertaken	Ongoing/ Overdue
R2012005	Hydraulic fracking (reviewed with R2012006)	2012/2013	MOECC	Undertaken	Ongoing/ Overdue**
R2012006	Hydraulic fracking (reviewed with R2012005)	2012/2013	MNRF	Undertaken	Ongoing/ Overdue**
R2012013	Industrial, commercial and institutional (IC&I) waste diversion	2012/2013	MOECC	Undertaken	Ongoing/ Overdue**
R2013002	Waste disposal site provisions (Richmond Landfill Site)	2013/2014	MOECC	Undertaken	Ongoing/ Overdue
R2013005	Regulation of excess soil	2013/2014	MOECC	Undertaken	Concluded
R2013009	Regulation of wells	2013/2014	MOECC	Undertaken	Ongoing/ Overdue
R2014001	Public notification of sewage bypasses	2014/2015	MOECC	Undertaken	Concluded
R2014002	Soil management in agricultural operations (linked to R2014003)	2014/2015	OMAFRA	Undertaken	Ongoing

Table 2.2.1. Applications for Review in the 2015/2016 Reporting Year at a Glance (Concluded and Ongoing).

Review Number	Review Topic	Reporting Year Submitted	Ministry Responsible	Undertaken or Denied?	Status in 2015/2016 *
R2014003	Soil management in agricultural operations (linked to R2014002)	2014/2015	MOECC	Denied	Concluded
R2015001	Regulation of glyphosate (linked to R2015002)	2015/2016	MOECC	Denied	Concluded
R2015002	Regulation of glyphosate (linked to R2015001)	2015/2016	OMAFRA	Denied	Concluded
R2015003	MicroFIT program	2015/2016	ENG	Denied	Concluded
R2015004	Spills from regulated pipelines	2015/2016	MOECC	Undertaken	Ongoing
R2015005	Standardize spills response plans	2015/2016	MOECC	Undertaken	Concluded
R2015006	Ingram Asphalt's environmental compliance approval	2015/2016	MOECC	Undertaken	Ongoing
R2015007	Vermicomposting policy	2015/2016	OMAFRA	Denied	Concluded
R2015008	Radiation Health Response Policy and potassium iodide distribution	2015/2016	MOHLTC	Denied	Concluded

* Concluded refers to: applications submitted and denied in the 2015/2016 reporting year; or applications submitted in a previous reporting year, undertaken, and concluded in 2015/2016. Ongoing refers to: applications submitted and undertaken in the 2015/2016 reporting year (but not concluded); or applications submitted in previous reporting years and have not been completed in 2015/2016. Overdue refers to: a review that a ministry has agreed to undertake but the review has not, in the ECO's opinion, been conducted within a reasonable time.

** These reviews were completed after the end of our reporting year.

Applications for Review Denied in 2015/2016

The MOECC, the ENG, the OMAFRA and the MOHLTC decided that a review was not warranted for five applications that were submitted to the ECO. The reasons ministries gave for declining to undertake these requested reviews included that the responsibility for the subject matter falls to another ministry that is not prescribed under the *EBR*, or that the program or regulatory framework that applicants requested be reviewed was recently or is currently under review. In all of these cases, the ECO agreed with the ministries' conclusions that reviews were not warranted at this time based on the requirements of the *EBR*. These applications are summarized below:

Soil Management in Agricultural Operations

In January 2015, applicants requested a review of agricultural soil management in Ontario. In April 2016, the MOECC ministry denied this application because it was already working on a number of related initiatives in an effort to promote the heathy management of soil (e.g., Climate Change Strategy discussion paper and the *Great Lakes Protection Act*). The MMAH also denied this application in the 2014/2015 reporting year but the review was undertaken by the OMAFRA, and is therefore discussed below under ongoing applications.

Glyphosate is the most widely used broad-spectrum herbicide in the world.

Regulation of Glyphosate

In March 2015, applicants requested a review of policies, acts and regulations respecting the use of glyphosate (N-(phosphonomethyl) glycine) given the health and environmental consequences of its widespread use. Glyphosate is the most widely used broad-spectrum herbicide in the world. In June 2015, the MOECC and the OMAFRA decided not to undertake the review because the Pest Management Regulatory Agency, the federal agency responsible for assessing human health and ecological impacts of herbicides, previously determined that glyphosate does not present unacceptable risks to humans or the environment. The ministries also notified the applicants that the Pest Management Regulatory Agency is currently reviewing the safety and use of this herbicide.

MicroFIT Program

In April 2015, applicants requested a review of the implementation, rules and regulations of the microFIT program under the *Green Energy and Green Economy Act, 2009* (a program to encourage development of small or "micro" renewable electricity generation projects) because it is falling short of its targets and goals. In July 2015, the ENG decided that a review was not necessary because the act and the microFIT program had already been the subject of various regular reviews and stakeholder consultations. The ministry also stated that it is reviewing the potential to transition the microFIT program from a "feed-in-tariff" to a "net-metering" program.

Vermicomposting Policy

In November 2015, applicants requested that the OMAFRA review the need for a new policy on vermicomposting because it is a valuable agricultural activity that can both manage waste and rebuild soil. The applicants argued that vermicomposting is inadequately addressed by current provincial legislation and policy. In January 2016, the OMAFRA decided that a review was not warranted because on-farm vermicomposting can already occur under the existing regula-

...transition the microFIT program from a "feed-in-tariff" to a "net-metering" program.

tory framework in Ontario. Additionally, the ministry stated that the MOECC, the ministry with primary jurisdiction over waste management, was currently consulting on a new provincial waste policy – the *Strategy for a Waste Free Ontario: Building the Circular Economy* – which included a commitment to develop an Organics Action Plan, and a review by the OMAFRA in advance of the development of this strategy would not be in the public interest.

Radiation Health Response and Potassium Iodide Distribution

In December 2015, the Canadian Environmental Law Association and Greenpeace Canada requested a review of Ontario's *Provincial Nuclear Emergency Response Plan* (made under the *Provincial Nuclear Emergency Response Plan*), the *Potassium Iodide (KI) Guidelines* and potassium iodide (KI) distribution policies. The MOHLTC had recently pre-distributed KI pills to residents within 10 kilometres of the Pickering, Bruce and Darlington nuclear plants and the applicants requested that the province consider expanding the pre-distribution zone. The applicants argued that the province's current KI distribution inadequately protects Ontario's environment, public health and safety. In March 2016, the MOHLTC denied the application as it asserted that it is not the appropriate ministry to review this matter; the Ministry of Community Safety and Correctional Services is the primary ministry responsible for nuclear preparedness, but is not prescribed under the *EBR*.

Reviews Concluded in 2015/2016

In this reporting year, the MOECC concluded three reviews in response to *EBR* applications submitted by members of the public; one review was submitted in 2015/2016 and the remaining two were submitted in previous reporting years. The length of time for the ministry to conclude these reviews ranged from 9 months to over 2 years. The MOECC made a number of changes to environmentally significant policies as a result of these reviews. Namely, the MOECC created a new policy framework related to excess soil management, committed to develop messaging about the health risks of poor water quality, which will be communicated to the public following all storm events, and committed to provide public access to information on past spills through the Open Data Catalogue website. These applications are summarized briefly below and are also each discussed in greater detail in Chapter 2.3.

The MOECC made a number of changes to environmentally significant policies as a result of these reviews.

Regulation of Excess Soil

In November 2013, the ECO received an application requesting a review of the need for a new province-wide policy to address the issue of excess soil and to properly regulate how this "fill" is disposed of. Compromised soil can contain mercury, lead, PCBs, metals, petroleum, pesticides and other contaminants. The applicants argued that there is currently a patchwork of regulatory oversight by provincial and municipal authorities. In January 2014, the MOECC advised the applicants that it would undertake a review. However, the MMAH informed the applicants that a review was unwarranted. On January 26, 2016, the MOECC notified the applicants that it concluded its review (with the support of a multi-ministry working group) and that it determined that a new policy framework was necessary. On the same day, the MOECC posted the draft *Excess Soil Management Policy Framework* on the Environmental Registry (#012-6065) for public review. For more information on this review, see Chapter 2.3.1 of this report.

Public Notification of Sewage Bypasses

In July 2014, the Lake Ontario Waterkeeper requested that the MOECC amend the approvals of two Toronto wastewater treatment plants to require that the public be notified of bypasses and overflows, and to add a procedure for public notification of bypasses to their operations manuals. The applicants stated that combined sewer overflows and wastewater treatment plant bypasses are not required to be publicly reported, which puts public health at risk when people recreate in waters polluted by the overflows/bypasses. In September 2014, the MOECC notified the applicants that it would carry out a review of public reporting of water quality issues during severe weather events. In July 2015, the MOECC advised the applicants that the review was concluded. As a result of the review, the MOECC will develop messaging about the health risks of poor water quality, in consultation with other agencies and the applicants, which will be communicated to the public following all storm events. The ministry also stated that it will continue discussions with Toronto Water on how it could report bypass events to the public in real-time, and stated it may amend the water treatment plants' approvals. For more information on this review, see Chapter 2.3.2 in this report.

Combined sewer overflows and wastewater treatment plant bypasses are not required to be publicly reported.

Standardized Spills Response Plans

In June 2015, applicants requested a review of the need for a policy under the *Environmental Protection Act* (*EPA*) to standardize municipal spills responses. The applicants were concerned that responses to spills may be inconsistent and that the MOECC does not have data to determine if existing protocols are being implemented. Additionally, spills may not be reported in a timely manner (or at all) to all relevant agencies. The MOECC agreed to undertake a limited review of public transparency and access to spills response information. In March 2016, the MOECC notified the applicants that it concluded the review. As a result, the ministry determined that the most effective way to provide public access to information on past spills was to post it on the Open Data Catalogue website (ontario.ca/open-data), that the website would be updated twice a year, and that it is "pursuing a web-based system for real time spills event reporting." For more information on this review, see Chapter 2.3.3 in this report.

Ongoing Reviews in 2015/2016

By the end of the ECO's 2015/2016 reporting year, there were 12 applications for review that ministries agreed to undertake but were not yet concluded. The MOECC is responsible for 10 of these applications, and the OMAFRA and the MNRF are responsible for one application each. Two of these reviews were submitted this reporting year; the remainder were submitted in previous reporting years and are still ongoing. These applications are summarized below.

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Air Pollution Hot Spots Regulation

In January 2009, applicants asked for a review of the need for a new regulatory framework to address the gaps in Ontario's air pollution laws related to cumulative impacts of pollution. The applicants believe that air pollution "hot spots" (e.g., neighbourhoods where several types of heavy industry are clustered together) in Ontario threaten the physical and psychological health of people living in those areas, and compromise their right to live in a healthful environment. The applicants pointed to the environmental health crisis in Aamjiwnaang First Nation near Sarnia as evidence of significant deficiencies in Ontario's air pollution regulatory framework. In May 2009, the MOECC agreed to undertake the review. In June 2016, the MOECC said that it is working on developing "a policy to support decision-making with respect to Environmental Compliance Approval applications while taking into consideration cumulative effects where feasible" and that it convened a working group under the O. Reg. 419/05 External Working Group to make policy recommendations on cumulative effects. The MOECC also stated that it is "actively working on a number of related initiatives expected to have a positive impact on local air quality and/or cumulative effects concerns in the Sarnia area." The ministry anticipates that the review will be completed in early 2017.

Environmental Bill of Rights

Between 2010 and 2012, the ECO received three separate applications that requested a review of the *EBR* or various aspects of it. The applications asked for reviews of: the entire *EBR* and its regulations to better achieve its broad purposes; the need for jurisdiction to issue a stay of a decision on an instrument pending the outcome of a leave to appeal application under the *EBR*; and, the need for prescribed ministries to post final copies of their "SEV consideration documents" (i.e., documentation demonstrating that the ministry considered its Statement of Environmental Values when making a decision) on the Environmental Registry. The MOECC agreed to undertake these three reviews together. In June 2016, the MOECC advised that it is proceeding, in consultation with all prescribed Ontario ministries and stakeholders, to undertake a scoped review of the *EBR* and its regulations. On July 11, 2016, the ministry posted a notice on the Environmental Registry seeking feedback on select parts of the *EBR* through a discussion guide (Environmental Registry #012-8002). The ministry anticipates that the review will be completed by the spring of 2017.

The applicants pointed to the environmental health crisis in Aamjiwnaang First Nation near Sarnia as evidence of significant deficiencies in Ontario's air pollution regulatory framework.

Industrial, Commercial and Institutional (IC&I) Waste Diversion

In December 2012, applicants requested a review of O. Reg. 103/94 (Industrial, Commercial and Institutional Source Separation Programs) under the *EPA*. That regulation requires that certain types of industrial, commercial and institutional (IC&I) facilities (e.g., retail shopping complexes, schools, restaurants, office buildings, multi-residential buildings, and manufacturing sites) implement on-site source-separation programs for materials such as corrugated cardboard, food and beverage containers, fine paper and newsprint. However, the regulation only applies to retail establishments, retail shopping complexes and office buildings occupying more than 10,000 square metres. The applicants argue that O. Reg. 103/94 is too lenient on small businesses, which reduces the amount of recycling taking place in Ontario at a time when the province is trying to decrease the amount of waste going to landfills. In February 2012, the MOECC agreed to undertake a review of the IC&I Source Separation Programs to consider the applicants' claim that the regulation is too lenient on small businesses. The MOECC also expanded the review to include a broader review of all 3R regulations (O. Reg. 101/94, O. Reg. 102/94, O. Reg. 103/94, and O. Reg. 104/94). In June 2016, the MOECC stated that the review will identify the best tools to ensure all businesses take steps to divert their waste while carefully considering the implications to small businesses in particular. The ministry also stated that the *Strategy for a Waste-Free Ontario: Building the Circular Economy*, which will be finalized within 90 days of the proclamation of the *Waste-Free Ontario Act, 2016*, will commit the government to undertake a review of all three IC&I regulations, including stakeholder engagement and the creation of a stakeholder working group. The MOECC completed its review in September 2016 (after the ECO's 2015/2016 reporting year).

...reduces the amount of recycling taking place in Ontario at a time when the province is trying to decrease the amount of waste going to landfills.

Waste Disposal Site Provisions (Richmond Landfill Site)

In July 2013, the Canadian Environmental Law Association, a local environmental group and a First Nations community jointly submitted an application requesting that the government review the *EPA* to impose further and more stringent prohibitions on the establishment, use, operation, alteration or expansion of waste disposal sites at locations that are hydrogeologically unsuitable, such as fractured bedrock. The applicants said that the *EPA* is incomplete, outdated and inadequate to protect the environment, public health, and safety because it focuses on how landfills are built, not where they should or should not be built. They provided an example of alleged groundwater contamination from the Richmond Landfill, in the Town of Greater Napanee, as a case study for the need to review the *EPA* (for more information see Chapter 3.1.1 of this report). In October 2013, the MOECC determined that a prohibition on landfill siting in the *EPA* is not required because the current site specific assessment process allows the ministry to determine if a site is suitable for landfill pur-

poses. However, the ministry agreed to "conduct a review of guidance materials related to the ministry's landfill approvals processes, to determine if changes could be made to further enhance the level of protection to human health and the environment." In June 2016, the MOECC stated that the review includes two parts: a scan looking at best practices in leading jurisdictions (anticipated to be completed June 2016); and a review of the state of the science regarding site conditions and performance of selected existing Ontario landfills (anticipated to be completed in September 2016). The ministry anticipates that the review will be completed by October 2017.

Regulation of Wells

In January 2014, the Canadian Environmental Law Association submitted an application asking for a review of the current legislative and regulatory framework governing Ontario wells, specifically the *Ontario Water Resources Act* (*OWRA*) and Regulation 903 (Wells), because it is incomplete, outdated and inadequate to protect the environment and public health and safety. In December 2014 the MOECC agreed to undertake a focused review of the Wells Regulation and related sections of the *OWRA*. In June 2016, the MOECC reported that it had completed an initial technical assessment of the issues under review, including comments received by key stakeholders and a scientific/jurisdictional scan. The MOECC advised that it is consulting with other ministries and anticipates and that the review will be completed by fall 2016. For a detailed description of this application, refer to Chapter 2.3.4 of this report.

Soil Management in Agricultural Operations

In January 2015, applicants requested a review of the need for an act that makes the sustainable use of soil a goal of the Province of Ontario. Among other things, the applicants argued that recent trends in agriculture jeopardize sustainability in this sector and current policies, regulations and incentives are insufficient to encourage responsible soil management. In April 2015, the OMAFRA agreed to undertake this requested review, although the MOECC and the MNRF declined it. In June 2016, the OMAFRA notified the ECO that it is developing an *Agricultural Soil Health and Conservation Strategy* in collaboration with stakeholders. The OMAFRA anticipates that it will complete the strategy in 2017.

The MOECC agreed to undertake a focused review of the Wells Regulation and related sections of the *OWRA*.

Spills from Regulated Pipelines

In June 2015, Ecojustice requested a review of existing laws and regulations (i.e., the *OWRA* and the *EPA*) to protect Ontarians and the environment from the adverse effects of hydrocarbon spills from provincially regulated pipelines. Also, Ecojustice requested a number of amendments to the environmental penalties regulations (O. Reg. 222/07, 223/07 and 224/07), such as requiring spill prevention and contingency plans for pipelines because pipeline owners and operators are not always held accountable for spills when the MOECC decides not to lay charges. The applicants stated that an environmental penalty

regime could deter pipeline spills, as it would ensure that the polluter pays. In October 2015, the MOECC agreed to undertake a review as part of its next periodic review of the Environmental Penalties program, which is required every five years under legislation. In June 2016, the MOECC estimated that the review will be completed by December 2017.

Ingram Asphalt's Environmental Compliance Approval

In September 2015, applicants requested the revocation or substantial revision of an Environmental Compliance Approval (ECA) issued to Ingram Asphalt. The applicants argued that the ECA should not have been issued because Ingram Asphalt's operating site is located too close to residences and businesses, who are suffering adverse effects from continuous noise, vibrations, dust and odours emitted by operations on the site. In December 2015, the MOECC agreed to undertake a review of the ECA. In June 2016, the MOECC stated that this review is being conducted in conjunction with the MOECC's review of Ingram's application for amendments to its ECA for air and noise. The MOECC estimated that the review will be completed by November 2016.

> The MNRF...would not consider applications for the use of high-volume hydraulic fracturing before conducting proper consultations with stakeholders, Aboriginal communities, and the public.

Hydraulic Fracturing

In October 2012, Ecojustice submitted an application requesting a review of existing laws and the need for new laws to protect Ontarians and the environment from the adverse effects of high volume hydraulic fracturing ("fracking"). The applicants argued that Ontario's laws pre-date modern fracking practices and, therefore, are ill-equipped to manage the potential adverse environmental effects from fracking operations. They also noted that the current regulations make fracking-produced waters exempt from regimes of "hazardous waste" and/or "liquid industrial waste" under the *EPA* and its associated regulations, and asked the government to eliminate those exemptions. In January 2013, the MOECC and the MNRF jointly agreed to undertake this review, including a review of definitions and sections of the *Oil, Gas and Salt Resources Act* and the *EPA* that relate to high-volume hydraulic fracturing. In June 2016, the MOECC stated that both ministries are finalizing the review and continuing to monitor activities in other jurisdictions. Additionally, the MNRF issued a statement that it would not consider applications for the use of high-volume hydraulic fracturing before conducting proper consultations with stakeholders, Aboriginal communities, and the public. The ministries completed their reviews in July 2016 (after the ECO's 2015/2016 reporting year).

Overdue Reviews in 2015/2016

The *EBR* contains a number of timelines that a prescribed ministry must adhere to when it receives an application for review, such as sending the applicants an acknowledgment letter within 20 days of receiving an application, or notifying the applicants about whether it will conduct a review within 60 days or receiving an application. However, if a ministry decides to conduct a review, the *EBR* only states that the review must be completed in a "reasonable time" – it does not specify how long a ministry can take to review an application. As a result, some ministries take years to complete reviews under the *EBR*.

> Some ministries take years to complete reviews under the *EBR*.

The ECO considers an application to be "overdue" when a ministry has agreed to undertake a review but the review has not, in the ECO's opinion, been conducted within a reasonable time. Of the reviews that were undertaken but

that have not yet been concluded, the ECO considers 75 per cent to be overdue as of July 2016. The MOECC is responsible for all of these overdue reviews. In fact, one review – a request for a new regulatory framework for air pollution hot spots – has been going on for over seven years.

Failing to complete applications for review within a reasonable time is disrespectful of the public's environmental rights and undermines the integrity of the process. In the ECO's *EBR Performance Checkup: Respect for Ontario Environmental Rights 2015/2016*, we identified overdue applications as a priority area for improvement in 2016/2017; specifically that ministries should conclude all overdue reviews in 2016/2017 and conduct and provide decisions on reviews with greater alacrity going forward.

As of September 2016, the ECO considers the following six reviews to be overdue:

- New Air Pollution Hot Spots Regulation;
- *Environmental Bill of Rights, 1993* (three inter-related reviews);
- Waste Disposal Site Provisions under the *Environmental Protection Act* (Richmond Landfill Site); and
- *Ontario Water Resources Act* and Regulation 903 (Wells).

Following the end of the ECO's 2015/2016 reporting year, the MNRF and the MOECC finally completed three of the long-overdue applications for review.

Since some *EBR* reviews can take many months or years to complete, it is essential for ministries to provide regular updates on the progress of ongoing reviews to applicants and the ECO. Unfortunately, ministries have often left applicants and the ECO in the dark for years after an application is submitted.

In the spring of 2016, at the ECO's request, the MOECC took a number of steps to update applicants and the ECO on the progress of its ongoing reviews. The MOECC told the ECO in June 2016 that it met or talked with most of the applicants about the status of their requested reviews. The MOECC also posted an information notice on the Environmental Registry that provided an update about all of its ongoing reviews (see Environmental Registry #012-7383). The MOECC said that it would update this notice "on a regular basis."

The ECO commends the MOECC for its recent efforts to provide applicants and our office with updates on the progress of reviews that are not yet concluded. The ECO encourages the MOECC to continue these efforts in the future and provide updates on the Environmental Registry at least semi-annually. Additionally, the ECO urges other prescribed ministries to follow the MOECC's lead by providing applicants, the ECO and the public with regular updates for all ongoing reviews under the *EBR*.

The ECO recommends that the MOECC conclude all overdue reviews in 2016/2017 and, further, should conduct reviews with greater speed going forward.

2.3 *EBR* Application Success Stories

This section highlights three successful applications for review that were completed during the past reporting year, as well as one successful application for which the review is still ongoing.

2.3.1 *EBR* Application Prompts New Proposed Rules for Excess Soil Management

All over the province – but especially in the Greater Toronto Area – developers of new condo and office towers, and other projects, like sewer works, water mains, transit and roads, dig huge quantities of soil out of the ground. Sometimes this material can be incorporated back onto a project site, but often the excess soil is trucked off site for disposal elsewhere, at which point it is often referred to as "fill."

Most often, excess soil is deposited on rural land, although sometimes the soil is dumped in a landfill. Fill frequently ends up on farmland or is used to rehabilitate pits and quarries. Large fill sites have created huge conflicts in many parts of rural Ontario – particularly in communities close to Toronto. Several Ontario fill operations at small airport and airstrip sites have also generated controversy regarding the enforceability of local rules on these federally regulated sites.

> ...enough to fill the Rogers Centre between ten and sixteen times.

The Residential and Civil Construction Alliance of Ontario (RCCAO) estimated in 2012 that between 16 and 25 million cubic metres of fill were produced per year – enough to fill the Rogers Centre between ten and sixteen times. However, no comprehensive system currently exists for tracking the quantity or movement of excess soil.

Excess soil can have serious environmental, economic and social impacts. For example, if soil is contaminated, it can impair land quality, limit future uses, compromise water resources, and pose health risks when deposited on another property. Even clean fill when disposed of in bulk can have impacts. It can interfere with local hydrology by altering drainage or cause compatibility issues with adjacent land uses. Noise and dust from trucking and dumping large amounts of soil can constitute a nuisance to neighbouring properties. The transport fuel these trucks use also generates large quantities of greenhouse gas emissions. Moreover, soil is an important resource that should be put to good use, rather than dumped in a landfill, whenever possible. Excess soil management can also represent substantial project costs – for example, preliminary findings from a recent study found that handling and disposing of excess soils represents about 13 per cent of a total project cost, on average. For all these reasons, adequate oversight and protocols for proper disposal and reuse, such as rules for soil testing and tracking, are necessary.

In 2012, the ECO urged the government to review the management and disposal of excess soils (see "Waiting for a Change: The Oak Ridges Moraine Conservation Plan," Chapter 3.3 of the ECO's 2011/2012 Annual Report, Part 2).

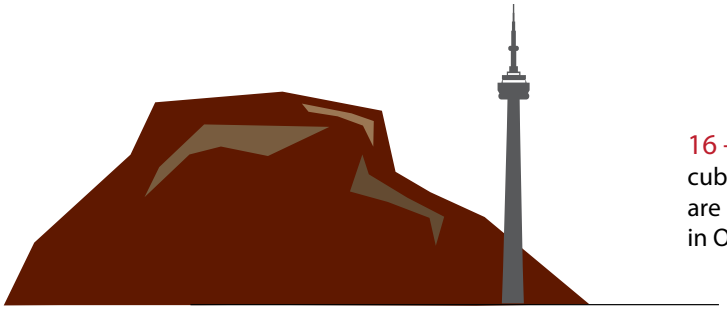
In 2013, two Ontario residents used the *Environmental Bill of Rights, 1993* to ask for a new province-wide policy to address compromised soil and to regulate the disposal of fill. This application for review outlined how there is currently a patchwork of regulatory oversight by provincial and municipal authorities. It also outlined how the failure to ensure the appropriate disposal of compromised soil creates significant environmental and health concerns.

Who's Responsible for Fill?

The Ministry of the Environment and Climate Change (MOECC), municipalities, and conservation authorities all have the authority to regulate certain aspects of excess soil disposal. However, amid this patchwork, no single body in Ontario bears the overall responsibility for regulating these materials.

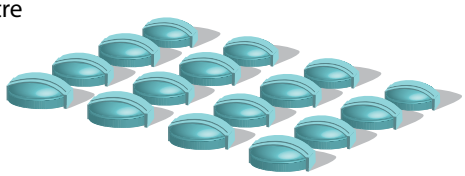
Ministry of the Environment and Climate Change

The MOECC can regulate excess soils that cause or may cause an "adverse effect" as defined under the *Environmental Protection Act* (*EPA*), or that could impair water quality in violation of the *Ontario Water Resources Act*. However, because there is currently little sampling and tracking of excess soils, the MOECC may be unaware when fill materials have the potential to cause an adverse effect. In some cases, badly contaminated fill has created huge enforcement challenges for the MOECC.



16 - 25 million
cubic metres of fill
are produced each year
in Ontario

That's enough
to fill the Rogers Centre
10-16 times



That's also 1.6 - 2.5 million
truckloads of fill

The MOECC also regulates materials that qualify as a "waste" under Regulation 347 (General – Waste Management) under the *EPA*, but it does not apply to soil that qualifies as "inert fill." Inert fill is defined as "earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances." This definition has proven close to unworkable because of a lack of specific quality criteria and site-specific guidance. Stakeholders, the MOECC and courts have all struggled to understand and apply the concept of "inert fill." For example, it is unclear whether soil with moderate contaminant levels could legitimately be moved to another site with similar contaminant levels. Similarly, soil containing road salt or weed seeds might qualify as inert fill but could be inappropriate for use on farmland.

The ministry also plays a role where former commercial or industrial lands are redeveloped for a more sensitive use (i.e., brownfields redevelopment). In these circumstances, O. Reg. 153/04 under the *EPA* usually requires such a site to obtain a Record of Site Condition that shows whether the site meets the applicable soil, groundwater and sediment criteria. While this regulation limits which soils may be imported into such a site, it does not address the issue of the potentially contaminated soils leaving a brownfield site (although MOECC's other regulatory tools might apply in such a case). Moreover, the soil standards set out in this regulation are specific to brownfields redevelopment and they are not applicable to soil management or fill in general.

In January 2014, the MOECC released *Management of Excess Soil – A Guide for Best Management Practices* (Environmental Registry #011-7523). The guide recommends best practices for very large source and receiving sites, transportation, procurement and temporary soil storage sites. It also encourages municipalities and conservation authorities to take a proactive approach to managing excess soil.

Conservation Authorities

Under the *Conservation Authorities Act*, conservation authorities are empowered to make regulations that apply to their area of jurisdiction to:

- Prohibit, regulate or require the conservation authority's permission to change or interfere in any way with a wetland or the existing channel of a river, creek, stream or watercourse; and
- Prohibit, regulate or require the conservation authority's permission for development that may affect the control of flooding, erosion, dynamic beaches, pollution or the conservation of land.

In other words, conservation authorities can regulate the placement of fill if there is a possibility of pollution or issues with water flow. However, conservation authorities are somewhat restricted in what they are legally allowed to consider when deciding whether to allow filling activities. For example, an authority cannot refuse to issue a permit due to social considerations such as truck traffic or noise. Moreover, the *Conservation Authorities Act* does not provide for public consultation on such decisions or the consideration of municipal by-laws.

While all of Ontario's 36 conservation authorities regulate filling activities in some form, the particular challenges of managing large-scale fill operations have prompted several conservation authorities to develop policies for regulating such projects, including the Central Lake Ontario Conservation Authority, the Credit Valley Conservation Authority, the Grand River Conservation Authority, Kawartha Conservation, the Lake Simcoe Region Conservation Authority and the Nottawasaga Valley Conservation Authority.

Municipalities

Under the *Municipal Act, 2001*, municipalities can adopt site alteration by-laws that prohibit or otherwise regulate the placing or dumping of fill, the removal of top soil and altering the grade of land. In 2013, a study commissioned by the RCCAO surveyed 143 upper and lower-tier municipalities and found that 70 had developed a fill by-law.

For example, a municipality can require a landowner to obtain a permit to place excess soil on a property, and may impose conditions on that permit, such as requiring a management plan, tracking and testing. Municipalities can also regulate the quality of the material. However, clear and consistent standards are not applied across municipalities. While some by-laws reference the *EPA* or the soil standards set out in O. Reg. 153/04, others simply include statements that soil should be "clean." Conversely, some municipalities have enacted highly restrictive by-laws, for example, the Municipality of Clarington's by-law prohibits any fill from outside of Clarington. The fees for site alteration permits are also inconsistent across municipalities, creating an uneven playing field across the province.

The fees for site alteration permits are inconsistent across municipalities, creating an uneven playing field across the province.

Such site alteration by-laws can be powerful regulatory tools, but generally only on the receiving end; municipalities have little control over practices at source sites. Moreover, there are a number of circumstances under which a site alteration by-law cannot apply; for example, municipal by-laws do not have any effect if there are applicable *Conservation Authorities Act* regulations in place. The *Municipal Act, 2001* also includes several exemptions to the types of activities a site alteration by-law may apply to (e.g., the use of fill as part of drain construction under the *Drainage Act* or the *Tile Drainage Act*). Similarly, the *Farming and Food Production Protection Act, 1998* prohibits municipal by-laws from restricting activities that qualify as a "normal farm practice."

Municipalities may also lack the technical expertise to establish effective site alteration by-laws or may not have the capacity for monitoring and enforcing such by-laws if they exist.

Other Ministry Roles

Several other ministries play a limited role in overseeing certain aspects of excess soils, including:

- the Ministry of Natural Resources and Forestry (MNRF), which may integrate soil management requirements into licences and

permits under the A*ggregate Resources Act*, and is responsible for conservation authorities and associated regulations;
- the Ministry of Transportation (MTO), which implements best management practices for highway construction; and
- the Ministry of Agriculture, Food and Rural Affairs, which promotes best management practices for agricultural operations.

The Ministry of Municipal Affairs and Housing (MMAH) and Ministry of Economic Development, Employment and Infrastructure (MEDEI) also play important roles in Ontario's excess soil problem. While these ministries do not directly regulate the transportation or placement of excess soil, their policies and projects (e.g., encouraging brownfield redevelopment and urban intensification, building transportation infrastructure, etc.) directly influence the huge amounts of excess soils produced in the province. For example, the MEDEI's 12-year infrastructure plan includes spending $160 billion on hundreds of projects like roads, bridges, transit systems, schools and hospitals. The MMAH is also responsible for administering the *Municipal Act, 2001* and the *Planning Act*.

What the Government Proposes to do about Fill

The ECO forwarded the November 2013 application for review to the MOECC and the MMAH. The MOECC agreed to undertake the review – with support from the MMAH – and in January 2016, concluded that a new policy framework for managing excess soil was necessary. The MOECC agreed with the applicants that the current excess soil management policy is in need of clarification and that new policies may be necessary to address key policy gaps, including: greater responsibility for source sites; clearer roles and responsibilities for all oversight and management bodies; better oversight of receiving sites; greater clarity on existing regulations; enhanced enforcement mechanisms; clearer technical guidance on soil reuse and testing; better tracking of soil movement; protection of sensitive sites; and greater consideration of excess soil management when planning for development and infrastructure.

To address these policy gaps, the ministry prepared the draft *Excess Soil Management Policy Framework*, and posted it on the Environmental Registry in January 2016 (#012-6065). The goals of the proposed framework are: to protect human health and the environment from the inappropriate management of excess soil; and to encourage the beneficial re-use of excess soil.

The framework proposes 21 actions to address the identified regulatory and policy gaps, under the broad categories of: source sites; interim sites; receiving sites; technical standards; planning for re-use opportunities; and integration and implementation. The framework also identifies the responsible party for each action, and, in some cases, provides rough timelines for implementation.

Greater Responsibility for Source Sites

Currently, responsibility for managing excess soils falls primarily on the receiving sites, leaving the sites that produce the materials largely unregulated. Yet source sites are often in the best position to manage the risks associated with the excess soils they produce.

The framework proposes a new regulation under the *EPA*, which would require large and/or riskier source sites to develop and implement an excess soil management plan; it would have to be certified by a Qualified Person and provided to the MOECC and local authorities. Such a plan would include: a characterization of the soil; a list of appropriate, authorized receiving sites; and testing, tracking and record-keeping requirements. Excess soil management plans could also be required for the issuance of certain building permits. The proposed framework also suggests that the MMAH and the MOECC will develop guidance to "promote" linking soil management requirements to *Planning Act* approvals.

This increased responsibility for source sites will be particularly important for brownfield sites, which often have to remove large quantities of soils with elevated contaminant levels. While stringent standards exist for the soil that is placed in these sites, the brownfields regulation (O. Reg. 153/04) does not include requirements for the management and tracking of materials that leave a site. The framework proposes regulatory amendments "to clarify requirements and ensure alignment both as a source site and receiving site."

These new requirements will likely represent increased costs for transit and other infrastructure projects. However, the magnitude of these costs is not yet clear and they may be offset by more efficient soil management achieved through improved planning (see below).

New Tools and Support for Receiving Sites

Municipalities and conservation authorities have the primary responsibility for regulating receiving sites for excess soils. However, as discussed above, there are jurisdictional and capacity issues that create challenges for municipalities in regulating such sites.

Currently, municipal site alteration by-laws have no effect in areas regulated by a conservation authority. This has proven to be somewhat problematic, as conservation authorities can only consider certain factors in making decisions about fill, while municipalities have much broader powers in this respect. This has also generated conflicts for sites that are partially covered by both municipal and conservation authority jurisdiction. The framework states that the MMAH and the MNRF will consider amending the *Municipal Act* to remove the restriction on the application of site alteration by-laws, allowing conservation authorities and municipalities to work together in regulating the placement of excess soils.

In addition, the MMAH and the MOECC are proposing to develop guidance to support municipalities in regulating excess soil (i.e., to inform site alteration by-laws and fill management plans). The framework also states that the MMAH and the MNRF will explore ways to improve compliance and enforcement with the *Municipal Act* and the *Conservation Authorities Act*. However, the framework does not provide any indication of plans to increase resources for additional compliance efforts by conservation authority staff or municipal by-law officers.

Finally, the MNRF will consider developing record-keeping requirements for excess soils that are brought onto aggregate sites for rehabilitation purposes.

Encouraging Storage and Beneficial Re-Use of Soil

The framework includes several proposed measures to encourage the temporary storage and beneficial re-use of soil. These measures should help reduce the negative impacts associated with transporting large quantities of soil, including greenhouse gas emissions.They should also reduce landfilling of soil resources.

As part of this initiative, the MOECC will clarify when soil processing (i.e., remediation) sites require waste approvals. Soil banking will be an important part of this effort, but such operations are challenging to regulate. A new *EPA* regulation will prescribe requirements for soil storage sites and clarify when such sites require an approval. The framework also proposes potential updates to the provincial land use planning framework to encourage municipalities to identify appropriate storage and processing sites for excess soil. The MMAH and the MOECC will encourage municipalities to develop soil

re-use strategies as part of planning processes. In addition, the province will support pilot projects to help promote opportunities for re-use. The MOECC, together with industry, will also investigate market mechanisms (similar to the United Kingdom's CL:AIRE program) to encourage soil reuse.

Challenges in managing excess soil stem from the lack of clarity on the applicable standards and practices.

Other New Standards and Guidance

Several of the challenges in managing excess soil stem from the lack of clarity on the applicable standards and practices, as well as the roles and responsibilities of industry and government bodies. The framework proposes several actions to address some of these ambiguities, including regulatory amendments, technical guidance, best management practices, and other types of guidance.

Two proposed actions are particularly significant. First, the MOECC has committed to developing new technical standards for excess soil re-use including: the protection of sensitive sites; appropriate siting based on background conditions; and the use of risk-based standards. The MOECC also proposes to amend the definition of "inert fill" under Regulation 347 to clarify when excess soil is a "waste" – this definition could tie in with the new re-use standards.

The MOECC has also committed to developing guidance on soil testing requirements, as well as guidance for smaller, lower risk source or receiving projects or sites (e.g., testing and inspection protocols).

Best management practices and other guidance proposed by the framework include: excess soil management guidance for Qualified Persons; best management practices for farmers that import excess soil on their lands; and guidance for considering excess soil in environmental assessment processes. The Ontario government (including the MOECC, the MTO and the MEDEI) will also review and update guidance for provincial projects like transportation and infrastructure.

ECO Comment

For many years the Ontario government has failed to comprehensively manage the excess soils generated by large development and infrastructure projects like condo and office buildings, subdivisions, subway tunnels, and highways. This significant regulatory gap has caused a great deal of turmoil within numerous communities in Ontario as they struggle to deal with large amounts of soil being trucked in and dumped onto local land on a daily basis. Until now, the people living in these communities have seen little action to alleviate concerns about potential contamination and other impacts from the huge mounds of dirt that can appear on neighbouring properties, often with little warning or public consultation.

This significant regulatory gap has caused a great deal of turmoil within numerous communities in Ontario as they struggle to deal with large amounts of soil.

The new actions proposed in the MOECC's draft framework have the potential to prevent and control the major environmental effects from excess soils. Notably, the requirement for a soil management plan could be a powerful tool for environmental protection. New soil quality standards, along with testing and tracking requirements, will also help to minimize the risks often associated with excess soils. Perhaps equally as important is the framework's recognition of the need to conserve soil – a limited and valuable natural resource. Hopefully, the actions proposed under the framework will create clarity on the requirements for storing and remediating excess soils, and measures to encourage re-use will mean that less material ends up in landfills.

Properly managing excess soil is a complex and multifaceted challenge. The ECO is optimistic about the suite of legislative, regulatory and policy tools that the MOECC has proposed to address this issue going forward. However, the effectiveness of the proposed approach hinges on the details of this new regulatory scheme still to come, and on adequate enforcement efforts by the MOECC. For example, it is not clear which sites will be required to develop materials management plans (e.g., volume thresholds, types of properties). Critically, it is not apparent how the materials management plan requirement will be integrated into decisions on building permits and *Planning Act* approvals. Similarly, the technical details of soil quality standards and forthcoming guidance will also help determine the effectiveness of these proposals. Municipalities and conservation authorities will be largely responsible for compliance with most of these new measures on the ground, so it will be critical to ensure that they have the technical capacity and the resources to effectively fulfill their responsibilities.

The ECO applauds the applicants for initiating these changes with their effective use of the *Environmental Bill of Rights, 1993*. The ECO also commends the MOECC for undertaking this review and taking the first steps to develop and implement measures to protect Ontario's land, water, and health from the impacts of improperly managed excess soils. The ECO is also pleased to see that many ministries and external stakeholders co-operated extensively with the MOECC on this review and the development of the framework. While the MOECC is in the best position to regulate the risks associated with excess soils, the policies of the MMAH and the resources of the MEDEI encourage the generation of massive quantities of excess soil. The quality and extent of ongoing involvement of the MMAH and the MEDEI will be crucial elements in resolving the problems associated with excess soil management in Ontario.

The ECO applauds the applicants for initiating these changes with their effective use of the *Environmental Bill of Rights, 1993.*

2.3.2 Public Should be Alerted to Poor Water Quality After Wastewater Overflows and Bypasses

In natural settings, rain and melted snow ("stormwater") is absorbed and filtered by soil, but urban areas are rife with impermeable surfaces like asphalt, concrete, and roofs that do not absorb this precipitation. "Stormwater runoff" is the stormwater that flows across these hard surfaces, picking up garbage, pesticides, animal wastes, salts, grease and other pollutants before flowing into storm sewers and ultimately discharging into nearby lakes and rivers.

"Wastewater" is the contaminated water that residents and businesses flush down toilets and empty down drains. Modern sewer systems transport stormwater and wastewater in two separate pipes. But some older systems, like those in older parts of Toronto, Hamilton and Ottawa, collect both in "combined sewers," which transport both stormwater and wastewater in a single pipe.

In most combined sewer systems, the pipe transports the water to a treatment plant before it is discharged into a waterbody. But during heavy rainfalls and snowmelts, the large volume of wastewater and stormwater can cause the combined sewer to overflow into lakes, rivers, streets, and sometimes people's basements. This is referred to as a "combined sewer overflow." A large volume of rain or snowmelt can also cause water treatment plants to redirect wastewater and stormwater into waterbodies with little or no treatment. This is called a "wastewater bypass" or a "sewage bypass." Both combined sewer overflows and sewage bypasses result in degraded water quality that can affect environmental and human health. Without upgrades to sewage systems, overflows and bypasses could increase as a result of the higher number of severe storms that is an expected consequence of climate change. (For more information about combined sewer overflows and sewage bypasses, see pages 132-133 of the ECO's 2004/2005 Annual Report and pages 145-150 of the ECO's 2005/2006 Annual Report.)

Thunderstorms dropped a record-breaking 126 millimetres of rain in just a few hours.

Sewage Bypasses in Toronto

On July 8, 2013, Toronto experienced one of the most intense rainfalls in its history. Thunderstorms dropped a record-breaking 126 millimetres of rain in just a few hours in some areas, far exceeding storm sewer capacity and flooding homes, streets and railroad tracks. Because Toronto is serviced by a combination of stormwater sewers, sanitary sewers that transport only wastewater, and combined sewers, two wastewater treatment plants bypassed large volumes of mixed wastewater and stormwater into Lake Ontario; the Ashbridges Bay Treatment Plant bypassed an estimated 704,846 cubic metres (m^3), and the Humber Wastewater Treatment Plant bypassed an estimated 367,364 m^3. That combined volume would more than half-fill the Rogers Centre.

Although the 2013 storm was an extreme event, both treatment plants have had numerous bypasses over the past few years (see Table 2.3.2.1). The City of Toronto adopted a *Wet Weather Flow Master Plan* and accompanying 25-year implementation plan in 2003. The goal of the Master Plan is to "reduce and ultimately eliminate the adverse impacts of wet weather flow."

Table 2.3.2.1. The Number and Total Reported Volume of Bypass Events at Ashbridges Bay and Humber Wastewater Treatment Plants (Sources: Ashbridges Bay and Humber Wastewater Treatment Plant Annual Reports, 2010–2015, Toronto Water).

	Ashbridges Bay		Humber	
	Number of Bypass Events	Total Reported Volume (m^3)	Number of Bypass Events	Total Reported Volume (m^3)
2015	13	2,811,214	11	387,944
2014	20	2,175,150	16	348,061
2013	10	2,074,320	28	2,081,851
2012	9	1,774,760	21	433,977
2011	15	4,650,406	48	1,138,334
2010	10	1,161,506	31	484,668

Reporting Sewage Bypasses

Operators of wastewater treatment plants must notify the Ministry of the Environment and Climate Change (MOECC) when a sewage bypass occurs, according to subsection 92(1) of the *Environmental Protection Act*. However, the law does not require water treatment plant operators or the MOECC to also alert the public of bypasses.

In July 2014, two Ontarians with the charitable organization Lake Ontario Waterkeeper submitted an application under the *Environmental Bill of Rights, 1993* asking the MOECC to review and amend the approvals for the Ashbridges Bay and Humber wastewater treatment plants to require the operators to alert the public when combined sewer overflows or treatment plant bypasses pollute waterbodies.

The applicants stated that people were swimming and boating in Lake Ontario during the days following the bypasses after the 2013 storm, unknowingly putting their health at risk. They were successful with their application – the MOECC agreed to carry out a review of public reporting of water quality issues during severe weather events, and completed its review in July 2015.

The ministry concluded that surface water quality does decline following storms and that high volumes of stormwater directed to wastewater treatment plants can result in bypasses to the receiving waterbody without any treatment, and the stormwater may be combined with treated wastewater before being discharged. Regarding the 2013 storm in Toronto, the ministry confirmed that *E. coli* levels had risen in Lake Ontario after the bypasses at the two water treatment plants. As part of the review, the MOECC consulted with the Ministry of Health and Long-Term Care (MOHLTC), which is responsible for the Public Health Standard for Safe Water including the Recreational Water Quality protocol; and the Ministry of Natural Resources and Forestry, which co-ordinates a flood forecasting and warning program. It also reviewed how or if municipalities communicated overflow and/or bypass events to the public (several do via their websites, but only weeks after the events occur).

Neither approval contains requirements for public notification of bypass events.

As a result of the review, the MOECC decided to consult with Toronto Public Health, Toronto Water, the MOHLTC, Lake Ontario Waterkeeper and other stakeholders to develop messaging about the health risks of poor water quality, which will be communicated to the public following all storm events. The ministry stated it was continuing discussions with Toronto Water (the operator of the two treatment plants) on how it could report bypass events to the public in real-time, and also stated it may amend the water treatment plants' Environmental Compliance Approvals.

Both plants' Environmental Compliance Approvals were amended in July, 2016; however neither approval contains requirements for public notification of bypass events – the City of Toronto is only required to report bypass events to the MOECC. On August 13, 2016, there was another large storm. Toronto bypassed sewage into Lake Ontario but did not notify the public.

ECO Comment

The success of this application demonstrates the power of the *EBR* right to request that the government review environmentally significant laws, regulations and policies. Because the applicants exercised this right, the MOECC committed to taking positive steps towards increasing public transparency about water quality in recreational waters, as well as reducing public health risk due to sewage bypasses and overflows.

However, it has been two years since the ministry began this review and the public is still not being notified of sewage bypasses. The MOECC should work with Toronto Water to implement procedures for public notification as soon as possible. The applicants clearly demonstrated that without such transparency and communication, public health will continue to be jeopardized by sewage bypasses into lakes and rivers.

The ECO recommends that the MOECC work with Toronto Water to implement procedures for public notification of sewage bypass events as soon as possible.

2.3.3 Government to Give Public Access to Spills Information through Open Data Catalogue

The Ministry of the Environment and Climate Change (MOECC) says it will make historical information on responses to spills in Ontario publicly available through Ontario's Open Data Catalogue, thanks to an application for review on spills response submitted to the ECO in June 2015.

The applicants asked the MOECC to review the need for a policy under the *Environmental Protection Act* (*EPA*) to standardize spills responses by municipalities. The applicants referred specifically to a spill of unidentified oily liquid discovered in the Humber River on May 31, 2014, near Albion and Islington Roads in Toronto. City departments including Toronto Fire, Water, and Works responded to the spill, worked to contain it using booms and absorbent pads, and investigated to try to determine its source. The MOECC ultimately recorded the spill as 925 litres of petroleum-based liquid from an undetermined source, and stated that it did not anticipate an environmental impact.

Overall the applicants were unsatisfied with the outcome of the response to the Humber River spill for a number of reasons, including a "lack of a coordinated response, lack of evidence to support causality, [and a] lack of proof to negate future risks." They argued that spills responses may be inconsistent, and that public accountability for how municipalities respond to spills is insufficient. They were also concerned that spills may not be reported in a timely manner (or at all) to all relevant agencies, including conservation authorities, municipalities, the Transportation Safety Board, and – in cases where a spill occurs in an area near pipelines – the Ontario or National Energy Boards. The applicants suggested that the MOECC send out mass notifications of spills to relevant agencies, and create an online record of spill responses.

In its initial letter to the applicants, the MOECC stated that it had reviewed current legislation and procedures related to spills and concluded that they were comprehensive and consistent. The ministry informed the applicants that ministry officers "follow up on every spill to confirm the spill has been cleaned up and the environment remediated," and that it has notification agreements with other levels of government regarding spills and other environmental events. However, the MOECC did agree to undertake a further limited review of spills response focusing on public transparency and access to information.

The MOECC subsequently conducted a review of spills reporting practices within the MOECC, other Ontario ministries and federal and international agencies, and determined that the most effective way to provide public access to information on past spills was to post it on the Open Data Catalogue website (ontario.ca/open-data) and update it twice a year. The ministry also stated that it is "pursuing a web-based system for real time spills event reporting."

Spills may not be reported in a timely manner (or at all) to all relevant agencies.

ECO Comment

The ECO is pleased that the MOECC has committed to providing historical spill event information through the government's Open Data Catalogue, which will make finding information about spills much easier for the public. The potential for real-time reporting of spills information online is promising – if such information was accessible to the applicants it would have saved them time and frustration. The ECO encourages the MOECC to update the applicants and our office as these projects progress.

2.3.4 Improving Well Water Safety

Since the Walkerton tragedy in 2000, Ontario has significantly redesigned and enhanced the legal regime that protects drinking water from source to tap, making the province's drinking water among the best protected in the world. However, concerns persist that gaps in regulating wells leave some Ontarians exposed to health and environmental risks. Almost one-third of Ontarians – roughly four million people – rely on municipal and private wells for their drinking water. Moreover, wells that are not properly constructed, maintained and decommissioned can also introduce contaminants into groundwater.

The Canadian Environmental Law Association (CELA) has been a particularly vocal critic of the province's wells regulations. CELA represented a key party in the Walkerton Inquiry (more on this below) and submitted an application for review in 2003 relating to the regulation of wells. In January 2014, two representatives of CELA submitted a second wells-related application for review to the ECO asking the Ministry of the Environment and Climate Change (MOECC) to review the *Ontario Water Resources Act* (*OWRA*) and Regulation 903 (Wells), made under the *OWRA* (the "Wells regulation").

Two Decades of Concern about Wells Regulation

Much of Ontario's current approach to regulating drinking water is a direct result of the Commission of Inquiry into the 7 deaths and 2,300 cases of illness from the contamination of Walkerton's municipal drinking water system in May 2000. The Walkerton Commission's final report included 93 recommendations for how the provincial government could better ensure safe drinking water for all Ontarians, many of which targeted municipal drinking water supplies, including those that draw groundwater. The Commission also made recommendations specific to private drinking water systems (namely, privately owned wells), encouraging the provincial government to: maintain a licensing system for well drillers; ensure that microbiological testing is available; and distribute information about water safety to system owners.

Today, the *OWRA* regulates most aspects of constructing, using and abandoning wells. The Wells regulation made under the *OWRA*, sets out permit requirements for wells and well construction, and licensing requirements for those who work on wells. For example, it sets out minimum standards or requirements for constructing, operating, reporting on and abandoning wells, such as basic material and design standards. Although the province states that it has fully implemented all of the Walk-

Drinking Water Regulation in Ontario

Several pieces of legislation protect Ontario's water supply and govern the construction and use of drinking water systems; they include the following:

The *Clean Water Act, 2006* creates a source protection planning program that establishes local policies to manage significant drinking water threats (for example, the storage or application of road salt, pesticides or fuel near drinking water intakes or wellheads). (For more on the *Clean Water Act, 2006* see Part 4.2 in the ECO's 2010/2011 Annual Report.)

The *Ontario Water Resources Act* is intended to ensure the conservation, protection and management of Ontario waters. In addition to prohibiting the discharge of polluting materials into or near waters, the act also deals with many technical water management details; for example, it governs the approval, construction and operation of "water works" and establishes a framework for issuing permits to take large volumes of water.

The *Safe Drinking Water Act, 2002* sets mandatory drinking water standards and baseline requirements for operators and testing labs. It also governs the licensing of municipal residential drinking water systems. (For more on the *Safe Drinking Water Act, 2002* see pages 80-85 in the ECO's 2002/2003 Annual Report.)

erton Commission's recommendations, and despite the many improvements that have been made to Wells regulation since 2000, concerns still remain as discussed below.

2003 Amendments to the Wells Regulation

In 2003, shortly after the release of the Walkerton Commission's final report, the MOECC made a number of amendments to the Wells regulation. These amendments introduced a tagging system to track wells, a new disinfection standard and stricter requirements relating to installation and abandonment. In the ECO's 2003/2004 Annual Report, we acknowledged that these changes were an improvement, but recommended that the MOECC ensure that the regulations' key provisions were clear and enforceable, and that the ministry provide a plain language guide to the regulation for well installers and other practitioners.

Also in 2003, two representatives of CELA submitted an *EBR* application for review expressing dissatisfaction with the new provisions (particularly the disinfection requirements) and requesting a full review of the regulation. The MOECC denied the application because it believed the regulation was sufficiently protective of the environment and human health. However, the ECO noted in its review of the handling of the application that the applicants had raised several valid issues, and echoed their concerns about disinfection standards, clarity of design requirements and enforcement capabilities. (To read the full ECO application for review summary, see pages 223-233 of the Supplement to the ECO's 2003/2004 Annual Report.)

Concerns Persist in 2005

In June 2005, Ontario's Advisory Council on Drinking Water Quality and Testing Standards concluded that the Wells regulation's disinfection requirement was deficient in a number of ways, and made several recommendations for how the ministry could improve it. Three months later, CELA publicly complained that the MOECC had failed to take any action in response to the Advisory Council's letter. In November 2005, the MOECC committed to undertake technical amendments to the Wells regulation. However, in fall 2006, the ECO noted in our 2005/2006 Annual Report that the ministry still had not acted on the Advisory Council's recommendations, and reiterated our concerns about inadequate disinfection requirements.

2007 Amendments to the Wells Regulation

In 2007, the MOECC introduced another round of amendments to the Wells regulation, which responded to some of the ECO's recommendations regarding the 2003 amendments. Numerous substantive changes included new disinfection requirements, as well as the creation of a new

class of well technician licence, new exemptions for certain wells and low-risk construction activities, and expanded well abandonment provisions.

Although these amendments were widely recognized as a step in the right direction, CELA, along with many others who commented on the regulatory proposal notice, were dissatisfied with many of the changes and expressed continued concern about the interpretation and application of the regulation. These issues were not fully addressed in the final version of the amended regulation. In our 2007/2008 Annual Report, the ECO worried that the wells regulatory regime was becoming unwieldy and unworkable and that, without additional funding for wells and groundwater programs, the MOECC would be unable to properly enforce the regulation.

...unclear or non-existent definitions; inappropriate exemptions; and inadequate technical, reporting and abandonment requirements...

Remaining Barriers to Well Water Safety

In their 2014 application for review, the CELA representatives state that the "current legislative and regulatory framework regarding Ontario wells is incomplete, outdated and inadequate to protect the environment and public health and safety." The applicants identify many detailed and specific issues, most of which centre on concerns that regulatory deficiencies remain and that there are inconsistencies between legal requirements and best management practices.

For example, the applicants express concern about a number of issues they perceive including: unclear or non-existent definitions; inappropriate exemptions; and inadequate technical, reporting and abandonment requirements, including those relating to the disinfection of wells. The applicants are also concerned about the non-legal nature of the water supply wells manual and the test holes/dewatering wells manual (finalized after the application was submitted). Although these documents together set out hundreds of best management practices they are not legally mandated under the Wells regulation and are thus not enforceable. The applicants argue that the essential elements of best management practices should be incorporated into the standards set out in the Wells regulation.

What You Can Do

Although both municipal and private wells can be susceptible to contamination, those who rely on private wells are most at risk because they do not benefit from the extensive monitoring and testing that occurs for municipal water supplies. To help ensure that your well water is safe, you should:

- Regularly test your water at a professional lab;
- Make sure you properly maintain your well;
- When doing repair work, use licensed well technicians who follow the MOECC's best management practices; and
- Properly decommission wells you are no longer using.

For more information on well safety, visit ontario.ca/page/wells-your-property.

The MOECC's Ongoing Review

The ECO received the application on January 2, 2014 and forwarded it to the MOECC later that same day. The MOECC acknowledged receipt of the application on January 6, 2014 and advised the applicants that it would make the decision whether or not to undertake the review by March 7, 2014 (i.e., within 60 days). By law, under section 70 of the *Environmental Bill of Rights, 1993* ministries must make a decision whether or not to conduct a review within 60 days of receiving the application.

The MOECC wrote the applicants in both March and May 2014 to tell them it needed more time to decide whether or not to undertake the application. The *Environmental Bill of Rights, 1993* does not permit ministries to take additional time to consider an application beyond the 60-day deadline, as the MOECC did in this case. On December 5, 2014 – over nine months after the statutory deadline – the MOECC advised the applicants that the ministry would be undertaking the review, but did not provide an estimated timeline for the review's completion.

In June 2016, the MOECC posted a Status Report on the Environmental Registry that included updates on all of its current applications, including this one. The ministry reported that it had completed its initial "technical assessment" of the issues under review, which included assessing comments received from key stakeholders, and undertaking a scientific and jurisdictional scan. The MOECC reported that it was now consulting with other ministries and would be receiving and considering their input before finalizing the review by fall 2016.

> ...over nine months after the statutory deadline — the MOECC advised the applicants...

2.4 Ministries' Handling of Applications for Investigation in 2015/2016

The *Environmental Bill of Rights, 1993* (*EBR*) provides Ontarians with the right to ask a ministry to investigate alleged contraventions of prescribed acts, regulations or instruments (e.g., permits, approvals, licences, etc.) through an "application for investigation." During the ECO's 2015/2016 reporting year (April 1, 2015 – March 31, 2016), the ECO received five applications for investigation (the ECO received four applications, but counts applications that go to more than one ministry as separate applications). The ECO sent four applications to the Ministry of the Environment and Climate Change (MOECC) and one application to the Ministry of Natural Resources and Forestry (MNRF) for consideration. This year's requests for investigation dealt with concerns about noise, dust, emissions and water drains. The MNRF determined that an investigation was not warranted in the case of the one application that it received. The MOECC denied one of the requests for investigation, but agreed to undertake investigations in response to the remaining three applications.

The MOECC completed two investigations in this reporting year; one was submitted in a previous reporting years and the other was submitted in this reporting year. In addition, two investigations that the MOECC agreed to undertake remained ongoing by the end of our reporting year.

For more details on these applications for review, see Table 2.4.1, the subsections below, and our website (eco.on.ca).

Table 2.4.1. Applications for Investigation in the 2015/2016 Reporting Year at a Glance (Concluded and Ongoing).

Investigation Number	Investigation Topic	Reporting Year Submitted	Ministry Responsible	Undertaken or Denied?	Status in 2015/2016 *
I2014006	Illegal waste disposal on a farm	2014/2015	MOECC	Undertaken	Concluded
I2015001	Noise from an Eganville quarry	2015/2016	MOECC	Undertaken	Ongoing
I2015002	Dust and noise from Ingram Asphalt	2015/2016	MOECC	Undertaken	Ongoing
I2015003	Altering a wetland in the Niagara region	2015/2016	MOECC	Undertaken	Concluded
I2015004	Altering a wetland in the Niagara region	2015/2016	MNRF	Denied	Concluded
I2015005	Emissions from Tobler's Woodland	2015/2016	MOECC	Denied	Concluded

* Concluded refers to: applications submitted and denied in the 2015/2016 reporting year; or applications submitted in either this reporting year or a previous reporting year, undertaken, and concluded in 2015/2016. Ongoing refers to: applications submitted and undertaken in the 2015/2016 reporting year (but not concluded); or applications submitted in previous reporting years and have not been completed in 2015/2016.

Applications for Investigation Denied in 2015/2016

This subsection summarizes applications that the ministry denied at the preliminary stage in our 2015/2016 reporting year. The MOECC and the MNRF decided that an investigation was not warranted for two applications that were submitted to the ECO in 2015/2016. The reason the ministries gave for declining to undertake these requested investigations is that it would duplicate ongoing or completed investigations. In both of these cases, the ECO agreed that the applicants raised some valid concerns, but agreed with the ministries' conclusions that reviews were not warranted at this time based on the requirements of the *EBR*. These applications are summarized below.

Emissions from Tobler's Woodland

In March 2016, applicants alleged that a neighbour's wood framing business caused diesel fumes, wood smoke and sandblasting particles to blow onto the applicants' property and into their home. The applicants claimed that the fumes and particulate matter were causing an adverse effect, contrary to section 14 of the *Environmental Protection Act* (*EPA*). In May 2016, the MOECC advised the applicants that an investigation was not warranted because the issues raised by the applicants related to local municipal by-laws, and it would be duplicative of inspections and engagement previously undertaken by the MOECC and the local fire department.

Altering a Wetland in the Niagara Region

In November 2015, applicants alleged that neighbouring property owners are draining and polluting a provincially significant wetland on their property. They alleged that neighbours undertook these drainage works without proper consent, permits, approvals, assessments and/or studies and have violated the following: O. Reg. 155/06 under the *Conservation Authorities Act* (*CA Act*); the *EPA*; the *Ontario Water Resources Act* (*OWRA*); the *Endangered Species Act, 2007* (*ESA*); and the *Pesticides Act*. In February 2016 the MNRF advised the applicants that an investigation was unwarranted. The ministry stated that an investigation of the alleged contraventions of O. Reg. 155/06 under the *CA Act* and the *ESA* prohibitions would duplicate an ongoing or completed investigation. However, the MOECC agreed to undertake an investigation of this application (see Altering a Wetland in the Niagara Region, R2015003, below).

Investigations Completed in 2015/2016

In this reporting year, the MOECC completed two investigations in response to *EBR* applications submitted by members of the public. While the MOECC decided not to take any additional action as a result of one investigation, it issued a Provincial Officer's Order and committed to conduct further scientific review of evidence and evaluate whether grounds exist for further action for the other investigation. These applications are summarized below.

Illegal Waste Disposal on a Farm

In March 2015, applicants alleged that in 1995 a large quantity of fibreglass waste was deposited in a gravel pit on a farm that was not approved as a waste disposal site, in contravention of the *EPA*. In addition, that the owner of the property never removed the material despite being issued a Field Order (now called a Provincial Officer's Order) in 1995 to do so. In May 2015, the MOECC determined that it would conduct an investigation of the alleged contraventions. In August 2015, the MOECC notified the applicants that it concluded its investigation and found that while adverse impacts to the environment are unlikely, it will conduct further scientific review of evidence and evaluate whether grounds exist for further action. Also, as a result of the investigation the MOECC issued a Provincial Officer's Order to the owner to ensure that any prospective buyer is made aware of the presence of buried waste fibreglass at the site. For more information on this investigation, see Chapter 2.4.1 of this report.

Altering a Wetland in the Niagara Region

In November 2015, applicants alleged that neighbouring property owners were draining and polluting a provincially significant wetland on their property. They alleged that neighbours undertook these drainage works without proper consent, permits, approvals, assessments and/or studies and have violated the following: O. Reg. 155/06 under the *CA Act*; the *EPA*; the *OWRA*; the *ESA*; and the *Pesticides Act*. In February 2016, the MOECC notified the applicants that it undertook an investigation of the alleged contraventions of the *EPA*, *OWRA* and *Pesticides Act*. The ministry stated that it conducted two site visits to observe water quantity and quality and gather information about local farminig practices but it did not find any violations of those acts. The MNRF denied this application (see Altering a Wetland in the Niagara Region, R2015004, above).

Ongoing Investigations in 2015/2016

This subsection summarizes applications that are "ongoing" by the end of our 2015/2016 reporting year, meaning applications submitted and undertaken in the 2015/2016 reporting year, but not concluded. By the end of the ECO's 2015/2016 reporting year, there were two ongoing investigations and the MOECC is responsible for both of these investigations. The ongoing investigations include:

Noise from Eganville Quarry

In September 2015, applicants requested an investigation of rock breaking operations and the use of heavy construction equipment in a nearby quarry, which they alleged were generating excessive noise. The applicants claimed the noise was causing an adverse effect and was negatively impacting their enjoyment of their property, contravening the *EPA*. In October 2015, the MOECC informed the applicants that an investigation was warranted. The investigation is ongoing, but the MOECC anticipates that it will be completed by June 30, 2017.

Dust and Noise from Ingram Asphalt

In September 2015, applicants alleged that dust, noise, vibration, odour and smoke emissions from Ingram Asphalt's asphalt plant is adversely affecting their health, business and quality of life, and that the operator was contravening section 14 of the *EPA*. The company operates under an air approval that the MOECC issued in 1999, but the ministry is in the process of reviewing the operations in order to issue an updated and amended Environmental Compliance Approval. In December 2015, the MOECC advised the applicants that an investigation was warranted. The investigation is ongoing but the MOECC anticipates that the investigation would be completed by November 30, 2016.

2.4.1 Decades-old Non-Compliance on Illegal Dump Investigated by the MOECC

This section highlights one example of a successful application for investigation, which the Ministry of the Environment and Climate Change (MOECC) undertook this reporting year.

In Ontario, waste materials must be deposited at a licensed waste disposal facility, in accordance with the *Environmental Protection Act* (*EPA*). Materials disposed of at unregulated sites can potentially lead to serious environmental harms, such as groundwater and soil contamination.

In March of 2015, two Ontario residents submitted an application for investigation regarding a Guelph-area farm, where up to 100,000 tonnes of waste fibreglass had been illegally buried in a gravel pit more than 20 years ago. The applicants stated that they found it hard to understand how the owners – Cox Farms Ltd. ("Cox Farms") – are being allowed to benefit from the continued commercial use of this property, given that they remain in non-compliance with a long-standing MOECC Order requiring them to clean up the site. Furthermore, they stated, Cox Farms has recently arranged to lease the property to a company who has applied to expand the gravel pit.

The applicants argued that the buried fibreglass presents a significant environmental risk because it is laced with chemicals and is close to the Speed River. They stated that the proposed gravel pit expansion should be denied until the waste is removed, or, alternatively, that new revenue from the expansion should go to pay for removal and disposal of the waste.

Background

The material in question is off-spec (i.e., below acceptable standards) fibreglass generated in the early 1990s by Owens Corning in Guelph. A company named Wil-Manufacturing accepted the waste from Owens in the early 1990s, on the latter's understanding that it would be recycled. This never happened, however, and Wil-Manufacturing arranged to dispose of the material in an aggregate pit located on Cox Farms' property. When the MOECC became aware of this situation in 1995, it issued Field Orders to both Wil-Manufacturing and Cox Farms requiring the material's removal and proper disposal at an approved site. The Orders were appealed by Wil-Manufacturing, but not by Cox Farms. The Appeal Board upheld the Orders in 1996, but noted in its decision that the material likely posed little or no risk to the environment.

The ministry subsequently laid charges.

In 1997, Cox Farms removed all above-ground fibreglass, leaving the buried material in place. The ministry subsequently laid charges for failing to comply with the Orders and between 1997 and 1998 both parties were either convicted or pled guilty and both were fined. Cox Farms paid its fine, but Wil-Manufacturing went bankrupt and its fine remains outstanding. During the prosecution for failing to comply with the Orders, the MOECC asked the court to issue a Court Order under section 190 of the *Environmental Protection Act* requiring removal of the material, but according to the MOECC, the Court found this request to be excessive.

In 2006, Cox Farms transferred its aggregate licence to St. Mary's Cement/Canadian Building Materials (CBM) and leased the site to this company, which is now seeking to expand the aggregate operations. The MOECC reports that the fibreglass is not a factor in the expansion application process because it is buried in an area covered by the original licence. In addition, according to the MOECC, CBM is not the legal property owner and thus has no responsibility for the waste's removal.

The MOECC's Decision

In response to the application, the ministry explained that it had done everything that it could to force Cox Farms to remove the material, including issuing Orders, laying charges, prosecuting the company, and levying fines. Its own legal counsel and enforcement staff have confirmed that the ministry lacks the legal grounds to pursue the matter further.

Nevertheless, the ministry stated that it recognized the applicants' concern over both the leasing of the land for expanded aggregate extraction and the potential environmental impacts of the buried fibreglass. Accordingly, the ministry issued Cox Farms a new Provincial Officer's Order in May 2015, requiring the company to register the new Order on title to the property, to give any person with interest in the property a copy of the Order prior to any dealings, and to inform the local MOECC office in advance of any plans to disturb the waste. (In June 2015, Cox Farms appealed this Order, but the Environmental Review Tribunal dismissed the appeal; in August 2015, Cox Farms notified the ministry that it would comply with the Order.)

In addition, the MOECC sent its surface-water technical experts to visit the site to investigate whether there was cause for environmental concern. They found no evidence of disturbance and no visual evidence of adverse effects.

Furthermore, ministry consultation with the company that originally produced the fibreglass confirmed, based on company knowledge and experience, that the material poses little risk to the environment. Accordingly, the ministry determined that off-site impacts are unlikely. The MOECC also decided, however, that a scientific review of evidence related to buried waste fibreglass and its potential for environmental impairment over time is in the public interest. The MOECC promised to undertake this review and to update the applicants on the findings.

In July 2016, the MOECC notified both the applicants and Cox Farms that the scientific review had been completed. The review's findings were that "potential contaminants in the waste have little potential to adversely impact the environment," and, accordingly, no further investigation of the site is warranted. The review also recommended that the waste be kept under proper cover to minimize the possibility of airborne release of fibreglass. The MOECC's letter to Cox Farms indicated that the local district office would follow-up with the company "to discuss timelines for completion" of the recommended action.

ECO Comment

The ECO commends the MOECC for taking on this investigation. The ministry wisely used the application as an opportunity to further its long-term efforts to bring this situation to a more satisfactory conclusion.

The ECO also recognizes the unusual difficulties faced by the ministry in this troubling case. Cox Farms paid its fines but never fully acted on the Field Order (they did remove the above-grade material); however, the inability to obtain a Court Order and the lack of evidence of adverse effects caused by the fibreglass left the ministry without the necessary legal tools to pursue the issue further.

Given the legal constraints involved, the ECO finds the ministry's decisions in this investigation to be both thoughtful and practical. The new Order's requirement of full disclosure to potential buyers of the property deals with, to the highest degree possible, the owner's ongoing refusal to take responsibility for the improper disposal of these materials. This disclosure may make it more difficult to sell the property, or may even reduce its market value. At the very least, it will ensure any potential new owner is made aware of the buried waste onsite. The second requirement in the Order – that the ministry be notified prior to any disturbance of the waste – combined with the recommendation of the subsequent review that the material be kept properly covered, show that the ministry is doing what is within its power to address any lingering environmental concerns.

CHAPTER 3
USE OF THE *EBR*'S LEGAL TOOLS

3.0 Introduction

The *Environmental Bill of Rights, 1993* (*EBR*) provides Ontarians with several legal tools that enable them to better enforce and protect their environmental rights, including:

- third party appeal rights;
- the right to sue for public nuisance and for harm to a public resource; and
- protection from employer reprisals (known as "whistleblower protection").

In this chapter, we describe these legal tools and provide an update on how they were used during the ECO's 2015/2016 reporting year.

3.1 Appeals of Prescribed Instruments

The *Environmental Bill of Rights, 1993* (*EBR*) provides Ontarians with the right to appeal (i.e., challenge) government decisions about certain classified "instruments" (e.g., a permit, licence or approval). This section provides an overview of appeals of classified instruments that were initiated or decided during the ECO's 2015/2016 reporting year.

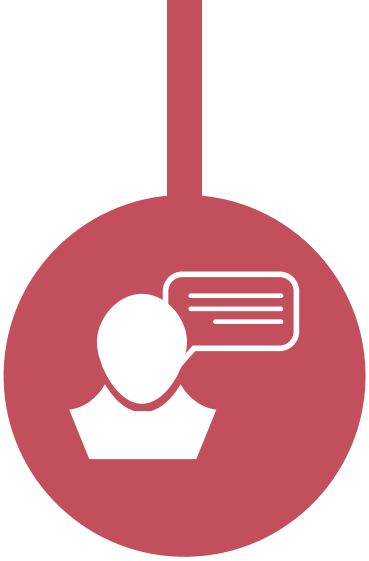
Instrument Holder Appeals

Many Ontario statutes provide individuals and companies with a right to appeal government decisions that directly affect them, such as a decision to deny, amend or revoke an instrument for which they applied or that was issued to them. These are called "instrument holder appeals." If an instrument holder appeal relates to an instrument classified in O. Reg. 681/94 under the *EBR*, the public has a right to receive notice of that appeal. Accordingly, the ECO posts notice of instrument holder appeals on the Environmental Registry; the ECO also posts notices on the Environmental Registry of the final dispositions of these appeals (i.e., whether the appeal was allowed, denied or withdrawn).

During the 2015/2016 reporting year, the ECO posted eight new instrument holder notices of appeal on the Registry and six decision notices for appeals initiated in earlier reporting years (see Table 3.1.1).

Table 3.1.1. Instrument Holder Appeals of *EBR*-Prescribed Instruments Initiated or Decided in the ECO's 2015/2016 Reporting Year.

Instrument Holder	Instrument	Registry #	Date Appeal Received	Outcome
Nortel Networks Limited/ Corporation Nortel Networks Limitee	Director's Order	011-4072	09/19/2011	Settlement agreement
Trillium Recovery Inc.	Environmental Compliance Approval (Waste)	011-6141	01/04/2013	Withdrawn
ML Ready Mix Concrete Inc.	Environmental Compliance Approval (Air)	011-7505	10/04/2013	Appeal denied
2157536 Ontario Inc.	Environmental Compliance Approval (Air)	011-7964	02/28/2014	Withdrawn
Sault Ste. Marie North Planning Board	Approval of an Official Plan	012-0980	09/15/2014	Settlement agreement
1336518 Ontario Limited	Environmental Compliance Approval (Air)	011-5286	09/29/2014	Withdrawn
Township of East Garafraxa	Approval of an Official Plan	011-1765	04/20/2015	Not decided as of 03/31/2016
Township of Melancthon	Approval of an Official Plan	012-2866	05/01/2015	Not decided as of 03/31/2016
Kimco Steel Sales Limited	Environmental Compliance Approval (Waste)	012-1493	08/06/2015	Not decided as of 03/31/2016
835267 Ontario Inc.	Director's Order	012-3873	09/16/2015	Not decided as of 03/31/2016
Trillium Recovery Inc.	Director's Order	012-4877	10/28/2015	Settlement agreement
Horizon Wind Inc.	Renewable Energy Approval (Wind)	011-8937	11/13/2015	Withdrawn
Keswick Presbyterian Church	Director's Order	012-2643	12/04/2015	Not decided as of 03/31/2016
Township of Tarbutt and Tarbutt Additional	Approval of an Official Plan	012-4224	12/30/2015	Not decided as of 03/31/2016



Many Ontario statutes provide individuals and companies with a right to appeal government decisions.

Third Party Appeals

The *EBR* broadens the basic appeal rights held by instrument holders under other laws by allowing members of the general public ("third parties") to apply for "leave" (i.e., permission) to appeal ministry decisions about instruments classified in O. Reg. 681/94 under the *EBR*. These are called "third party appeals." Ontario residents who wish to seek leave to appeal a decision must apply to the proper appellate body – usually the Environmental Review Tribunal or the Ontario Municipal Board – within 15 days of the instrument decision notice being posted on the Environmental Registry.

Like instrument holder appeals, the public has a right to receive notice of third party leave to appeal applications. Accordingly, the ECO posts notices of third party leave to appeal applications and of the final dispositions of these appeals on the Environmental Registry.

To be granted leave to appeal, applicants must first establish that they have an interest in the decision at issue. This is generally a low threshold to meet; for example, the applicant may live near the facility that holds the instrument or may have commented on the original proposal to issue the instrument. If they meet this preliminary threshold, then the applicant must satisfy the more onerous, two-part test for leave to appeal set out in section 41 of the *EBR* by successfully demonstrating that:

1. there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
2. the decision could result in significant harm to the environment.

If a third party is granted leave, they may then proceed to file their appeal of the decision, which will be heard and decided by the appellate body. During the 2015/2016 reporting period, members of the public sought leave to appeal four instrument decisions. The ECO also received notice of three decisions for applications initiated in an earlier reporting year (see Table 3.1.2) – the appellants in all three of these appeals were successful in part. For details on one of these decisions see Chapter 3.1.1 – *Improving Environmental Protection at the Richmond Landfill: Successful Use of EBR Third Party Appeal Rights*.

Table 3.1.2. Third Party Applications for Leave to Appeal (LTA) Initiated or Decided Under the *EBR* in the ECO's 2015/2016 Reporting Year.

Instrument Holder	Instrument	Registry #	LTA Applicants	Date LTA Application Received	Outcome
Waste Management of Canada Corporation	Environmental Compliance Approval (Waste)	011-0671	Concerned Citizens Committee of Tyendinaga and Environs	01/30/2012	Leave to appeal granted; appeal allowed in part*
atPlay Adventures Inc.	Environmental Compliance Approval (Sewage)	011-8044	Claudia Unterstab	03/06/2014	Leave to appeal granted; appeal allowed in part
C.H. Demill Holdings Inc.	Permit to Take Water	012-0410	Citizens Against Melrose Quarry	07/18/2014	Leave to appeal granted; appeal allowed in part
1684567 Ontario Inc.	Environmental Compliance Approval (Waste)	012-1610	Jeffery Levesque	08/28/2015	Leave to appeal denied
Miller Paving Limited	Environmental Compliance Approval (Air)	012-3991	Sharp Lake Area Residents Association	09/25/2015	Leave to appeal denied
CRH Canada Group Inc.	Permit to Take Water	011-8609	County of Brant; Concerned Citizens of Brant	11/13/2015	Leave to appeal granted in part; appeal not decided as of 03/31/2016
CRH Canada Group Inc.	Environmental Compliance Approval (Sewage)	012-4127	County of Brant; Concerned Citizens of Brant	11/13/2015	Leave to appeal granted in part; appeal not decided as of 03/31/2016

* This appeal was resolved through two decisions issued by the Environmental Review Tribunal on December 24, 2016, and April 14, 2016.

Direct Right of Appeal by Third Parties

There is a separate set of rules for third party appeals of Renewable Energy Approvals (REAs) issued under the *Environmental Protection Act* (*EPA*) for solar, wind or bioenergy projects (see Chapter 3.1.2 – *Public Appeals of Renewable Energy Approvals*). Under the *EPA*, residents of Ontario have an automatic right to appeal a ministry decision about a REA, meaning they do not have to seek leave from the appellate body. Unlike third party appeals under the *EBR*, however, a REA appeal is only permitted on the grounds that engaging in the renewable energy project in accordance with the REA will either:

1. cause serious harm to human health; or
2. cause serious and irreversible harm to plant life, animal life or the natural environment.

Notices of third party appeals of REAs are also posted on the Environmental Registry.

Similarly, the *Planning Act* also provides a direct right of appeal for third parties, which is broader than the third party rights under the *EBR*. Therefore, third party appeals of prescribed *Planning Act* instrument decisions are usually made under the *Planning Act* rather than the *EBR*. Notices of such appeals are still posted on the Environmental Registry.

During the ECO's 2015/2016 reporting period, members of the public appealed nine wind energy REAs under the *EPA* and two instruments under the *Planning Act* (see Table 3.1.3). The ECO also posted decision notices for eleven appeals that were initiated in an earlier reporting year.

Table 3.1.3. Direct Third Party Appeals of *EBR*-Prescribed Instruments Initiated or Decided in the ECO's 2015/2016 Reporting Year.

Instrument Holder	Instrument	Registry #	Appellant(s)	Date Appeal Received	Outcome
City of Belleville	Approval of an Official Plan	IF01E50017	Leo Craig; CN Rail	02/22/2002	Settlement agreement
Regional Municipality of Peel	Approval of an Official Plan Amendment	011-0328	James Dick Construction Limited	06/18/2012	Appeal allowed in part
County of Brant	Approval of an Official Plan	011-1770	City of Brantford; Hopewell Developments (Ontario) Inc.	09/04/2012	Appeal allowed
Regional Municipality of Muskoka	Approval of an Official Plan Amendment	011-8845	Robert List and Marie Poirier	10/28/2013	Closed
8437084 Canada Inc. operating as Port Ryerse Wind Farm Limited Partnership	Renewable Energy Approval (Wind)	012-0611	William Irvin; Scott Biddle	09/04/2014	Appeal dismissed
Suncor Energy Products Inc.	Renewable Energy Approval (Wind)	012-0630	Kimberly and Richard Bryce; Corporation of the County of Lambton	09/05/2014	Appeal dismissed
Niagara Region Wind Corporation	Renewable Energy Approval (Wind)	012-0613	Mothers Against Wind Turbines Inc.	11/24/2014	Appeal dismissed
Clarington Wind Power (GP) Inc. o/a Clarington Wind Power LP	Renewable Energy Approval (Wind)	012-0615	Municipality of Clarington; Donald Katsumi	12/22/2014	Settlement agreement
Ganaraska Nominee Ltd.	Renewable Energy Approval (Wind)	012-0793	Municipality of Clarington; Clarington Wind Concerns Inc.	02/13/2015	Withdrawn; Appeal dismissed
Grey Highlands Nominee (No. 1) Ltd.	Renewable Energy Approval (Wind)	012-0683	Douglas Edward Dingeldein	02/17/2015	Appeal dismissed
City of Toronto	Approval of an Official Plan	012-2651	Freedent Sheppard	03/31/2015	Closed

Table 3.1.3. Direct Third Party Appeals of *EBR*-Prescribed Instruments Initiated or Decided in the ECO's 2015/2016 Reporting Year.

Instrument Holder	Instrument	Registry #	Appellant(s)	Date Appeal Received	Outcome
Grey Highlands Clean Energy Limited Partnership	Renewable Energy Approval (Wind)	012-0792	Gary Fohr	04/17/2015	Appeal dismissed
Gunn's Hill Windfarm Inc.	Renewable Energy Approval (Wind)	012-1069	East Oxford Community Alliance Inc.	04/24/2015	Appeal dismissed
County of Dufferin	Official Plan Approval	012-2871	Valley Grove Investments Inc. et al.	05/04/2015	Not decided as of 03/31/2016
Settlers Landing Nominee Ltd.	Renewable Energy Approval (Wind)	012-2374	SLWP Opposition Corp.	05/22/2015	Not decided as of 03/31/2016
Meyer Wind Power (GP) Inc. o/a Meyer Wind Power LP	Renewable Energy Approval (Wind)	012-0569	Patti Hutton and William Ernest Young	06/08/2015	Settlement agreement
Snowy Ridge Nominee Ltd.	Renewable Energy Approval (Wind)	012-2430	SR Opposition Corp.	07/03/2015	Appeal dismissed
Municipality of Chatham-Kent	Approval of an Official Plan Amendment	012-1029	Forest Glade East Developments Ltd. And Kringa Incorporated	07/16/2015	Not decided as of 03/31/2016
Majestic Wind Power (GP) Inc. o/a Majestic Wind Power LP	Renewable Energy Approval (Wind)	012-0570	Patti Hutton and William Ernest Young	07/27/2015	Settlement agreement
wpd White Pines Wind Incorporated	Renewable Energy Approval (Wind)	012-1279	John Hirsch; Alliance to Protect Prince Edward County and the Price Edward County South Shore Conservancy	07/30/2015	Not decided as of 03/31/2016
Windlectric Inc.	Renewable Energy Approval (Wind)	012-0774	Association for the Protection of Amherst Island	09/08/2015	Not decided as of 03/31/2016
wpd Fairview Wind Incorporated	Renewable Energy Approval (Wind)	012-0614	John Wiggins et al.	03/01/2016	Not decided as of 03/31/2016

3.1.1 Improving Environmental Protection at the Richmond Landfill: Successful Use of *EBR* Third Party Appeal Rights

The Richmond Landfill in the Town of Greater Napanee has been a long-standing environmental concern to local residents. Located on thin soils and highly fractured bedrock, the Richmond Landfill site was established in 1954, before landfills required government approval under the *Environmental Protection Act* (*EPA*). The site does not meet modern standards for managing leachate (the liquid that drains out from landfill waste) – presenting substantial risks of groundwater contamination. This is of particular concern because local residents, farmers and businesses rely on groundwater for their drinking water.

The site does not meet modern standards for managing leachate.

In the 1990s, the site owner initiated an application to expand the footprint, capacity and lifespan of the landfill. Ultimately, the MOECC refused the application under the *Environmental Assessment Act* in 2006. Then, in 2007, the ministry amended the site's approval to require the submission of a closure plan – but did not set a specific date for the actual closure of the landfill.

In 2008, three groups filed an application for review under the *Environmental Bill of Rights, 1993* (*EBR*), requesting that the site owner stop accepting waste, implement closure requirements, and implement a monitoring and reporting program to assess and track issues related to leachate from the landfill. After the MOECC denied the application, the ECO recommended the immediate closure of the site, based on evidence of the ongoing potential for environmental harm.

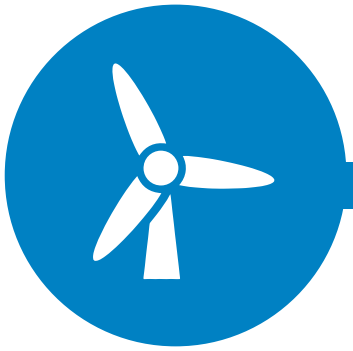
The Tribunal found that there was evidence of leachate-contaminated groundwater in certain areas adjacent to the landfill, causing the contamination of a number of domestic wells.

In the ensuing years, the MOECC and the owner of the site began to take steps towards closing the landfill. In 2010, the MOECC amended the landfill's approval, requiring the site owner to stop accepting waste and put a cap on the site. The MOECC also required the proponent to submit several reports as part of the site's closure plan, including an environmental monitoring plan and contingency plans for leachate collection, landfill gas collection, and groundwater and surface water impacts. In January 2012, the MOECC further amended the approval to incorporate the monitoring and contingency plans and associated reports (see Environmental Registry #011-0671).

Shortly after the MOECC approved this amendment, the Concerned Citizens Committee of Tyendinaga and Environs filed an application for leave to appeal the ministry's decision, under the *EBR*. The appellant challenged the adequacy of the conditions in the approval related to monitoring for contamination in surface and groundwater, reporting and notification obligations for such monitoring, and contingency planning.

After winning leave to appeal in March 2012, the appellant progressed through the appeal process over the next four years, along with two added parties (Mohawks of the Bay of Quinte and Napanee Green Lights). Following several motions, the settlement of various portions of the appeal, and a hearing lasting several weeks, the Environmental Review Tribunal released decisions allowing (i.e., granting) the appeal in part in December 2015 and April 2016.

The Tribunal found that there was evidence of leachate-contaminated groundwater in certain areas adjacent to the landfill, causing the contamination of a number of domestic wells. The Tribunal also noted that "there continues to be a significant degree of uncertainty regarding the hydrogeological conditions at the Site and the extent of contamination from the Landfill." As a result, the Tribunal held that additional investigations are needed, and required that amendments be made to the approval with respect to the environmental monitoring plan and the contingency plans. The Tribunal also found that monitoring the levels of 1,4-dioxane is the most effective indicator for identifying leachate contamination, and established a limit of 1ug/L as the threshold for establishing the extent of the contamination.



The new, stricter monitoring and contingency requirements represent years of hard work by residents to protect their water supply and the local environment. This case also represents a success that would not have been possible without the *EBR* right to seek leave to appeal environmental decisions.

The issues raised by the Richmond Landfill are also the subject of an ongoing application for review regarding waste disposal site provisions under the *Environmental Protection Act*. For further information see Chapter 2.2 of this report.

3.1.2 Public Appeals of Renewable Energy Approvals

Every year the ECO hears from Ontarians who are interested in the way the province regulates large-scale solar, wind and bio-energy projects. Although many people support the renewable energy mandate set out in the *Green Energy Act, 2009*, there is also often confusion and sometimes frustration surrounding the province's process for deciding which projects should go ahead.

Each renewable electricity generation project requires a number of different agreements and approvals, depending on the specific circumstances. First, all proponents need a contract with the Independent Electricity System Operator confirming that the project meets technical requirements and will be able to connect to the electricity grid. Next, proponents may have to obtain a number of different approvals from provincial ministries and other entities just as any other project would. For example, a permit under the *Endangered Species Act, 2007* may be required if the project will affect species at risk; or, if the project is on Crown land it will likely require approval under the *Public Lands Act*. However, some renewable energy projects are exempt from some types of legal requirements such as *Planning Act* instruments (e.g., amendments to zoning by-laws and official plans). This exemption limits the ability of municipalities to influence the location of some renewable energy projects, including wind farms.

Finally, under the *Environmental Protection Act*, large-scale wind, solar and bio-energy projects require a Renewable Energy Approval (REA) issued by the Ministry of the Environment and Climate Change (MOECC). As part of a REA application, a proponent must provide information about the likely environmental effects associated with each stage of the project and plans to mitigate those effects. The proponent must also consult with the public, including any Aboriginal communities that may have an interest in the project. In determining whether or not to issue the REA, the MOECC will consider a number of factors, including the potential environmental impacts on the surrounding landscape. As part of this consideration, the ministry will also determine the appropriate conditions to include in a project's REA to help mitigate any potential negative impacts.

When a REA is issued, the ministry posts a decision notice on the Environmental Registry.

Any resident of Ontario can appeal (i.e., challenge) a decision to issue a REA.

Any resident of Ontario can appeal (i.e., challenge) a decision to issue a REA. This is an unusual appeal right among environmental approvals; for other approvals issued by the MOECC, third parties (i.e., anyone other than the applicant or instrument holder) must first obtain special permission ("leave") from the Environmental Review Tribunal (the "Tribunal") before they can appeal. (For a list of appeals filed this reporting year, see previous section on direct rights of appeal by third parties.)

For a member of the public to be successful in their appeal of a REA, the *Environmental Protection Act* requires the appellant to prove to the Tribunal that engaging in the project in accordance with the terms of the REA will cause either: (1) serious harm to human health; or (2) serious and irreversible harm to plant life, animal life or the natural environment. (In 2015, the Ontario Court of Appeal rejected a claim that this appeal test violated the *Canadian Charter of Rights and Freedoms*.) Generally, both the MOECC and the project proponent will also participate in the appeal, arguing against the allegations of harm. The MOECC participates in the appeal process because it is defending its decision to issue the REA.

Because the legal test requires the Tribunal to assume that the project will follow the conditions of the REA, the appellant cannot argue that the proponent is unlikely to comply with the approval; they can only argue that harm will occur even if the REA is followed.

Many REAs have been appealed by members of the public, most regarding wind energy projects. However, very few of these appeals have been successful, and to date, no appeals have succeeded on the grounds of harm to human health. In order to win an appeal on this ground, the appellant must prove that it is more likely than not that harm will occur as a result of the project; it is insufficient to just raise concerns or prove a possibility of harm. Such a claim could only be proven by presenting the Tribunal with sufficient, credible evidence (such as the testimony of appropriately qualified expert witnesses and academic studies) that specific types of renewable energy activities, such as the operation of wind turbines, will cause health problems in the circumstances of the specific project at issue.

Three cases have succeeded on the "environmental harm" argument as of August 2016. The Tribunal assesses such harm on a case-by-case basis and considers the impact of the project on the local environment. Two of these successful appeals were based on findings that the projects in dispute would cause serious and irreversible harm to species at risk. In the first case (*Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, also referred to as "Ostrander Point"), the Tribunal found that the local population of the threatened Blanding's turtle would experience increased incidents of vehicle collisions, poaching and nest predation resulting from improved access roads. The second case (*Hirsch et al. v. Director, MOECC*) made similar findings with respect to Blanding's turtle, and also found that the endangered little brown bat would suffer collisions with turbines. Central to the Tribunal's findings in these cases is the fact that both Blanding's turtle and little brown bat are species that would be severely affected by even a small increase in adult mortality. In the third case (*SLWP Opposition Corp. v. Director, MOECC*), the Tribunal found

The Tribunal assesses such harm on a case-by-case basis and considers the impact of the project on the local environment.

that the construction and decommissioning of turbines and access roads associated with the project would cause harm to "significant woodland" within the Oak Ridges Moraine Conservation Plan area.

A successful appeal does not necessarily mean that the project will not proceed in some form.

It is worth noting that in the fall of 2015, the MOECC refused to issue a REA for a proposed wind facility because the proponent failed to provide information about the potential impacts of the project on moose and moose habitat. The proponent appealed the decision to the Environmental Review Tribunal (*Horizon Wind Inc. v. Director, MOECC*), but subsequently withdrew its appeal. The proponent is proceeding with a lawsuit against the provincial government.

A successful appeal does not necessarily mean that the project will not proceed in some form. It is open to the Tribunal to revoke the REA altogether, amend it to include new conditions that address the issues raised, or order the MOECC Director to take other actions. As of August 2016, the Tribunal has reached a final decision on this point in only one case (*Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*), wherein it decided to revoke the permit altogether, finding that not proceeding with the project best served the *Environmental Protection Act*'s purposes, the precautionary principle, and the ecosystem approach.

For each REA appeal, along with appeals of any other instrument posted on the Environmental Registry, the ECO posts a summary of the appellant's reasons for appealing (i.e., the "grounds for appeal") on the Registry. Once the Tribunal has reached a decision, the ECO also posts a summary of that decision on the Registry. In this way, the Registry can help Ontarians understand why their neighbours might be objecting to a proposed approval, and how the Tribunal is applying the laws governing approvals to weigh concerns raised by members of the public.

3.2 Lawsuits and Whistleblower Protection

Public Nuisance Cases

In Ontario, it is possible to sue someone who unreasonably interferes with the use and enjoyment of your property; this cause of action is called "nuisance." In lawsuits relating to environmental issues, it is not uncommon for plaintiffs to claim that their neighbour's excessive noise, odour or other pollution constitutes a nuisance. A "public nuisance" is a particular type of nuisance where the interference affects many people or the public at large, rather than the private interests of a neighbouring owner.

Before the *Environmental Bill of Rights, 1993* (*EBR*) came into force in 1994, claims for public nuisance in Ontario had to be brought by, or with the permission of, the Attorney General. Under section 103 of the *EBR*, however, someone who has suffered "direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment" can bring a claim without the approval of the Attorney General. Section 103 of the *EBR* does not create a new cause of action (i.e., a new basis for claiming a legal entitlement), since public nuisance was already a recognized claim; rather, the provision makes it easier for Ontarians to advance such a claim by removing administrative barriers. It also specifies that the person does not have to suffer unique harm in order to receive compensation, as is the case in many other jurisdictions.

Reviewing the Use of Public Nuisance

The ECO is required to review the public's reliance on section 103 of the *EBR*. However, there is no obligation for parties who rely on section 103 in a lawsuit to notify the ECO. As a result, there is no reliable mechanism for the ECO to track the use of this legal tool. Sometimes, a party will choose to notify the ECO directly. Otherwise, the only practical way for the ECO to learn about a public nuisance claim is through a court decision. This is a problematic method of tracking cases because the vast majority of lawsuits are settled before they reach a courtroom. In those cases, there is no court decision and it is unlikely that the ECO will ever know about these claims.

Despite these challenges, the ECO is aware of seven cases since 1994 where public nuisance was claimed pursuant to section 103 of the *EBR*. One of these cases is a collection of claims filed by multiple individuals in 2001, all relating to soil and groundwater contamination resulting from an escape of gasoline from a fuel service station (one of which is *Anderson and Anderson v. Gulf Canada Resources Limited et al.*); they were all settled. The six other cases were each brought as a class action. This pattern makes sense because public nuisance claims, by definition, involve situations in which numerous people are affected. These claims alleged public nuisance and other causes of action relating to pollution and damage from:

- an industrial fire that allegedly released poisons into the air (*Cotter v. Levy*);
- a municipal landfill (*Hollick v. Toronto (City)*);
- discoloured and odorous drinking water (*Wallington Grace v. Fort Erie (City of)*);
- a petroleum refinery that allegedly released contaminants into the air (*Lewis and Weeke v. Shell Canada Limited and Shell Canada Products Limited*);
- a propane facility explosion (*Durling et al. v. Sunrise Propane Energy Group Inc. et al.*); and
- nickel emissions from a now-closed refinery that caused soil contamination (*Smith v. Inco*).

Under Ontario law, class actions must get court approval (i.e., be "certified"). Certification is based on whether a class action is the most practical and appropriate means of dealing with the issues raised in the case. Although the court usually considers the nature of the claim, the certification decision is not a pre-consideration of the merits of the case (i.e., being awarded or denied certification does not reflect the validity of the claim itself; it only means that a class action is or is not the best way to proceed with the matter). Of the six class actions, only three made it past the certification stage of the proceeding.

Parties to two of the three class actions that advanced beyond certification settled the matter out of court. As a result, the only adjudication of a claim for public nuisance is found in the case of *Smith v. Inco* (originally called *Pearson v. Inco*). In 2010, the trial court dismissed the public nuisance claim because the plaintiffs had only alleged an interference with private property rights (i.e., a reduction of individual property values), and not an interference with a public right or resource. While this case went through several appeals, this decision regarding public nuisance was not part of those appeals.

No new lawsuits claiming public nuisance as a cause of action were brought to the ECO's attention during this reporting year. Although the ECO has not been alerted to any newly commenced claims for the past several years, it is likely that public nuisance is regularly claimed in cases alleging other environmental torts such as negligence and private nuisance. However, like all legal cases generally, most environmental cases are resolved via a settlement agreement, which does not make any specific findings with respect to different causes of action. Furthermore, for those that do proceed, it can take many years for a case to make it to trial, especially in the case of a class action; this means there may be several years between when an action is commenced and when the court decision is released, which may be the first the ECO learns of a case. For example *Smith v. Inco*, commenced in 2001, but only reached trial in late 2009 and was not finally decided until 2011.

The Right to Sue for Harm to a Public Resource

The *EBR* gives Ontarians the right to sue any person who is breaking, or is about to break, an environmental law, regulation or instrument that has caused, or will cause, harm to a public resource. This provision creates a new cause of action.

In these cases, the *EBR* requires that plaintiffs notify the ECO so that we can place a notice of the action on the Environmental Registry. As a result, the ECO should be aware of all cases alleging harm to a public resource pursuant to the *EBR*. While this process tells us when a case has commenced, there is no special mechanism for the ECO to learn of the outcome. As in the case of public nuisance, if a case goes to trial the decision will usually be publically available. However,

this is not a guarantee and if an action settles or is discontinued for other reasons (as is most often the case), the ECO may not have access to that information. In these cases, we depend on parties voluntarily advising us of the status of the matter.

The *EBR* requires the ECO to review the use of this right of action. The ECO is aware of three cases where harm to a public resource was alleged. The first, commenced in 1998, is *Braeker et al. v. The Queen et al.*; this case involved allegations that a property owner had been illegally dumping and burying scrap tires that, in turn, contaminated subsoil, groundwater and surface water in the surrounding area. The ECO was advised in late 2014 that this case was still open, but had made no progress since 2001 to proceed to trial. The second, *Brennan et al. v. the Board of Health for the Simcoe County District Health Unit* was commenced in 1999 and alleged that substandard sewage systems were polluting ground and surface water. This case was dismissed in 2002 because the plaintiffs did not wish to continue. The third action, *Campbell et al. v. Powassan (Municipality of) et al.*, was commenced in 2002 and related to a municipal decision to develop a snowmobile trail without undertaking an environmental study; the status of this case is unknown.

No new claims for harm to a public resource were brought to the ECO's attention during this reporting year.

Whistleblower Rights

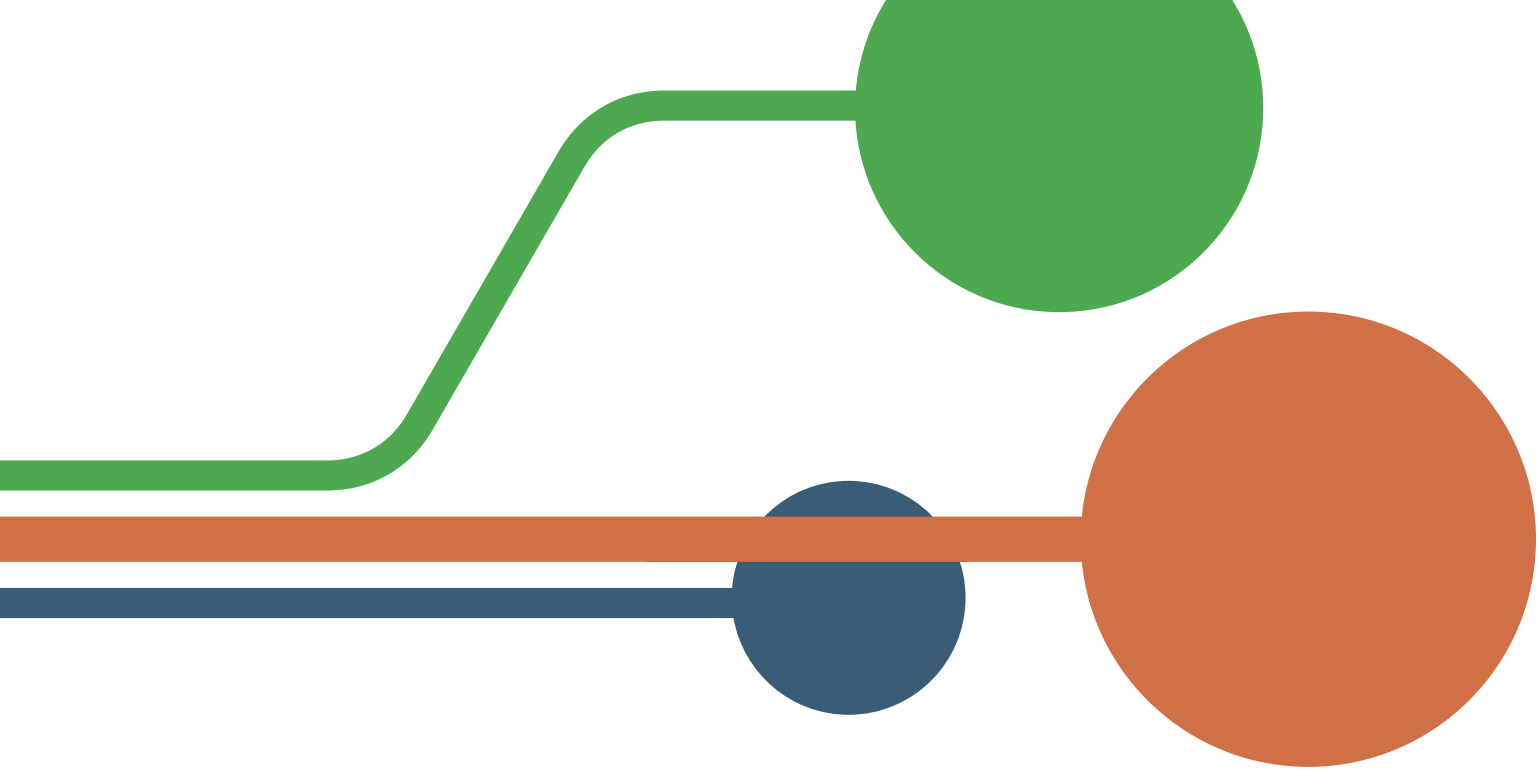
The *EBR* provides rights to employees who experience reprisals (e.g., dismissal, discipline, etc.) by their employers for reporting environmental violations or otherwise exercising their rights under the *EBR*. Anyone who believes they have experienced such a reprisal may file a complaint with the Ontario Labour Relations Board (the "Board") and the Board may then take steps to resolve the issue.

The *EBR* requires the ECO to review recourse to the procedure for complaints about employer reprisals. However, there is no requirement for parties who rely on these provisions to notify the ECO. As a result, there is no reliable mechanism for the ECO to track the use of this right. The only practical way for the ECO to know about a case is if a decision is posted online after it is heard by the Board. However, this is an unreliable method of tracking cases.

As a result of following publicly available Board decisions, the ECO is aware of a handful of cases in which employees have claimed entitlement to this "whistleblower" protection under the *EBR* – roughly one per year since 2005 (the earliest record the ECO has identified). Most of these cases settled before reaching a hearing, were withdrawn by the applicant, or the *EBR* component of the case was dismissed prior to a full hearing because the Board found that there was an insufficient basis for the claim (i.e., even if the applicant's account of events was assumed to be true, it did not fulfil the statutory requirements under this section of the *EBR*). The ECO is not aware of any case where the Board found that an employer took reprisal action as prohibited by the *EBR*.

In 2015/2016, the ECO learned of one new case, *William Arthur Shannon, Applicant v. Toronto Star Newspapers*, alleging employer reprisal; this application was withdrawn by the applicant in May 2016. In addition, the ECO learned that the matter of *Tirone v. Ontario (Ministry of the Environment)*, which we reported upon in the 2014/2015 Annual Report, was resolved by way of a settlement agreement in 2015.

CHAPTER 4
THE ECO AT WORK



4.0 Introduction

The ECO works on many fronts to uphold the *Environmental Bill of Rights, 1993* (*EBR*). While one of our core functions is to encourage ministries' compliance with their *EBR* obligations, as described in earlier chapters of this report, equally important is our role in promoting public awareness of the *EBR* and helping Ontarians exercise their *EBR* rights.

The ECO also serves an important function by informing the public about government decisions that affect the environment, and raising the profile of other new or significant environmental issues relevant to Ontario. We often urge the government to take strong action on these issues to better protect the environment.

Last but not least, the ECO provides guidance to ministries on *EBR* matters, and encouragement to ministries that initiate programs that further the purposes of the *EBR*. We acknowledge the most exceptional of such initiatives by publicly recognizing their work.

In this chapter, we describe some of the ECO's work on these fronts in 2015/2016. We recount three examples of the ECO's role in successfully moving the government forward on important environmental issues. We also report on the ECO's extensive public education and outreach work, and we describe a commendable ministry initiative that we have chosen to acknowledge with this year's ECO Recognition Award.

4.1 ECO Successes: Moving the Government Forward on Important Issues

Big government decisions usually involve many players. New laws, policies or programs designed to protect the environment are based on a wide variety of inputs and often take a long time from first consideration to final action. In fact, it can take months or years of work by groups or individuals, often working separately, to prompt the government to take action.

When the ECO has played a role in moving the government forward on an important environmental issue – by making recommendations in our reports, drawing attention to the issue through blogs, speaking out about the issue at conferences and in the media, or holding a ministry's feet to the fire through direct correspondence and meetings – we consider the outcome a success for our office, even if many others have also contributed to the effort.

...making recommendations in our reports, drawing attention to the issue through blogs, speaking out about the issue at conferences and in the media, or holding a ministry's feet to the fire through direct correspondence and meetings...

Since the *EBR* came into force in 1994, the ECO has prompted the government to act on many environmental issues; you can read about some of these successes on our website at eco.on.ca. In this part of our report, we highlight three ECO "success stories" from our 2015/2016 reporting year, in which the ECO played a significant role in moving the government forward.

4.1.1 Reducing the Use of Neonicotinoid Pesticides in Ontario

We humans tend to take nature's intricate workings for granted. Take insects, for example. Unless they are devastating our garden plants, crawling into our picnic basket, or drinking our blood at sunset, we don't often think about these tiny creatures at all, let alone the roles they play in natural ecosystems. In the last few years, however, the cloak of anonymity around beneficial insect services has been at least partially breached. Prominent media stories have described the ongoing decimation of honey bee populations, and warned us of the corresponding threat to many of our important food crops that depend on bees for pollination. These honey bee die-offs have been linked to a variety of factors, including diseases, pests, habitat loss and pesticides. However, one group of insecticides in particular – neonicotinoids – has justifiably come under heavy fire.

The threat of losing our bees is certainly notable and newsworthy. The problem, however, does not begin or end with honey bees. A parallel decline in the population of other beneficial insects, such as bumble bees and some types of butterflies, has largely gone unreported. Unless you watch the nature channel regularly, you won't see many media stories on the gradual reduction in insect populations, or the resulting decline of creatures that depend on insects for food, such as insectivorous birds. Yet these declines are happening both within Ontario and worldwide and have many scientists very concerned. Pollination, plant litter recycling, soil building, and acting as a primary food source for the entire food web: these are just a few of the fundamental services insects provide. Without this diverse and industrious army of arthropods, life as we know it on this planet would be impossible.

The problem, however, does not begin or end with honey bees.

The ECO has been concerned about insect population declines and the impacts on ecosystems for several years. We first wrote about the potential link between pesticides and declining pollinator populations in our 2008/2009 Annual Report (Part 4.6). At that time, we congratulated the Ontario government for implementing its cosmetic pesticide ban, while stating that, "the ECO would like to see efforts at pesticide reduction in all contexts." We pointed out the alarming declines in pollinator populations around the world, which go well beyond honey bees to include species such as wild bees, bats, and hummingbirds. We noted that pesticides "are biologically active substances specifically designed to kill target organisms, but can also impact non-target organisms."

The ECO's 2013/2014 Annual Report (Section 2.2) included a more in-depth analysis of the threat to pollinators posed by pesticides, this time focusing on neonicotinoids specifically. We pointed out that the Committee on the Status of Pollinators in North America has identified downward population trends for several wild bee species, some butterflies, bats and hummingbirds, and that "evidence of declines among insectivorous birds may also suggest broader negative trends in insect populations." Although several factors are likely causing the declines, our report explained why neonicotinoid pesticides are dangerous to insects in particular and to natural ecosystems in general.

Neonicotinoids are "systemic" pesticides. Unlike earlier pesticides, such as DDT, which remained on a plant's treated surfaces, neonicotinoids are water soluble and are taken up by plants through their roots. They are widely distributed to all parts of the plant, including leaves, pollen, and seeds. This solubility also results in the mobility of neonicotinoids in both soil and aquatic ecosystems, where they may impact non-target organisms and be taken up by non-target plants. The ECO expressed concern regarding the government's "relatively narrow focus on pollinators" and recommended "that the Ministry of Agriculture and Food and the Ministry of the Environment undertake monitoring to determine the prevalence and effects of neonicotinoids in soil, waterways and wild plants."

By the following year, the worldwide body of scientific evidence regarding the effects of neonicotinoids had expanded enormously. However, the public debate and media were still focusing primarily on bees and on the need to reduce the insecticide-laden dust generated by planting equipment, while ignoring many of the broader ecological risks identified by scientists. Accordingly, our 2014/2015 Annual Report (Part 2.2) included a primer on systemic pesticides, in which the bigger picture, as summarized from hundreds of scientific papers, was presented in considerable detail. The primer described the risks associated with the main exposure routes – air, soil, water, and plants – and summarized the documented effects on non-target organisms, such as pollinators, aquatic invertebrates, vertebrates, and soil organisms. The ECO concluded that there was compelling evidence that neonicotinoids have the potential for disrupting entire food webs, and that these insecticides could have cascading impacts on vital ecosystem functions.

The worldwide body of scientific evidence regarding the effects of neonicotinoids had expanded enormously.

Our report had an impact. On June 9, 2015, the Ministry of the Environment and Climate Change (MOECC) filed a regulation amending O. Reg. 63/09 made under the *Pesticides Act*, intended to reduce the use of neonicotinoid insecticides. The ministry stated that the regulatory amendments, as well as associated guidelines, constituted the first step in the implementation of a comprehensive *Pollinator Health Action Plan*. In summary, the amendments established: a new class of pesticides, consisting of seeds treated with three specific neonicotinoid insecticides; rules for the sale and use of these treated seeds; and the timing and implementation of the regulation's requirements.

The new rules require farmers to: take training in integrated pest management; obtain regular assessments of the presence of pests in their soil before being allowed to purchase treated seed; and lastly, use these pesticides in a manner that reduces their impact on pollinators (e.g., controlling insecticide-laden dust emitted from planting equipment). The goal of this new regulatory framework and policy is to reduce the number of the province's farmland acres that annually receive treated seeds by 80 per cent by 2017.

Many farmers expressed legitimate concerns about their ability to protect their crops from pests under this new regulatory framework. They also questioned the practicality of the regulation. In fact, the Grain Farmers of Ontario challenged the new rules in court, arguing that the regulation is unworkable, will produce little benefit, and will impair the ability of its members to protect their crops. The lawsuit was ultimately dismissed by Ontario's Court of Appeal in April 2016.

The ECO continues to engage in an open dialogue about these issues with concerned farming groups. These efforts include sharing up-to-date science on neonicotinoids, and working to raise awareness about the importance of improving soil health as a means of reducing the need for pesticides. Neonicotinoids are the most widely used insecticides in the world, and reducing their use is undoubtedly a politically difficult proposition.

Few jurisdictions outside of the European Union have taken steps to restrict the use of neonicotinoids. The MOECC deserves credit for taking this important action – in doing so Ontario has demonstrated its leadership in protecting our ecosystems from the harmful effects of pesticides. The ECO is gratified to see that our message regarding the broader implications and risks of neonicotinoid use has been both heard by the ministry and reflected in its new program. The ECO strongly supports both the new rules for neonicotinoid use and the 80 per cent goal set by the ministry; we will be monitoring progress on this file very closely over the next few years.

Ontario has demonstrated its leadership in protecting our ecosystems from the harmful effects of pesticides.

4.1.2 Stopping SLAPPs in Their Tracks

In Ontario, there is keen public interest in matters that affect the environment. In fact, thanks to the *Environmental Bill of Rights, 1993*, Ontarians have the legal right to participate in the government's environmental decision making. Ontarians also take action on environmental issues in many other ways; for example, by speaking out publicly about possible negative environmental consequences of certain activities, or by otherwise opposing proposed projects. But the power and resource imbalance that sometimes exists between big corporations undertaking activities that negatively affect the environment and the ordinary citizens that speak out in opposition can create a chilling effect on public participation. The ECO and others have long called for legal reforms to protect individuals and organizations from "SLAPP suits" initiated to silence legitimate public discourse on environmental issues.

New rules brought in under the *Protection of Public Participation Act, 2015* in the fall of 2015 are therefore a welcome change; one that should enable engaged citizens to freely voice their concerns about environmental matters without the overshadowing threat of retaliatory legal action.

The Lowdown on SLAPPs

SLAPPs – short for "strategic lawsuits against public participation" – refer to civil actions (usually defamation lawsuits) that are initiated, without merit, for the purpose of intimidating or silencing critics who speak out on matters of public interest. In the environmental context, SLAPPs (or the threat thereof) may be advanced by the proponents of proposed land use or resource development, major industrial projects or other activities that affect the environment in order to quell public opposition.

The effects of a SLAPP can reverberate well beyond the specific person or group targeted by the lawsuit. The time and money that a person may be forced to expend defending a SLAPP (not to mention the stress of being sued) may discourage not only that person from continuing to speak out, but it may also dissuade others from engaging in matters of public interest due to fear of similar legal action.

The ECO's call for an Anti-SLAPP Law in Ontario

SLAPPs began to emerge in Canada in the late 1980s and early 1990s, often involving environmental and land use issues. Calls for anti-SLAPP legislation were not far behind. The ECO first recommended that Ontario enact anti-SLAPP legislation in our 2008/2009 Annual Report (Part 3.1), when we noted the power and resource imbalance between developers and local residents engaged in planning disputes.

> ...the need to protect public participation in environmental decision-making.

In May 2010, mere months after the ECO recommended that Ontario enact an anti-SLAPP law, the Ontario government struck an Anti-SLAPP Advisory Panel to report on "how the Ontario justice system should be designed to prevent the misuse of the courts and other agencies of justice without depriving anyone of appropriate remedies for expression that goes too far." Members of the public were invited to provide suggestions to the Panel.

The Panel sought the ECO's input, and we provided the Panel with past ECO commentary about the public interest and the need to protect public participation in environmental decision-making. Others also referred the Panel to the ECO's 2008/2009 Annual Report in their submissions to the Panel supporting an anti-SLAPP law in Ontario.

The Panel released its report in December 2010, finding that "threats of lawsuits for speaking out on matters of public interest, combined with a number of actual lawsuits, deter significant numbers of people from participating in discussions on such matters." The Panel concluded that the value of public participation warranted the enactment of legislation aimed at deterring SLAPPs in Ontario. While the Panel's report brought reason for optimism, the government seemed to lose momentum after its release. For over a year, no action followed, and in response to an enquiry by the ECO in early 2012 the Ministry of the Attorney General would only say that it was continuing to study the report. The ECO reiterated our call for the government to enact anti-SLAPP legislation without further delay in our 2011/2012 Annual Report (Part 6.2).

Following a first attempt in 2013 with an anti-SLAPP bill that died on the order paper, the Ontario government introduced Bill 52 in December 2014. The *Protection of Public Participation Act, 2015* – Ontario's first anti-SLAPP law – finally came into force on November 3, 2015.

The *Protection of Public Participation Act, 2015*

The amendments made by the *Protection of Public Participation Act, 2015* to other relevant acts created a new process that allows the courts to identify and dismiss SLAPPs relatively quickly, with the following purposes:

(a) to encourage individuals to express themselves on matters of public interest;
(b) to promote broad participation in debates on matters of public interest;
(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Now, a person targeted by a SLAPP (the defendant) can make a request (called a "motion") to have the lawsuit thrown out (i.e., "dismissed") at any time. To succeed, the defendant must satisfy the judge that the lawsuit arises from an "expression" (i.e., any communication, verbal or non-verbal, public or private) made by the defendant that relates to a matter of public interest.

However, to ensure that legitimate lawsuits are not dismissed using this process, the judge will not dismiss a lawsuit if the person who initiated the claim (the plaintiff) can satisfy the judge that:

- there is reason to believe the claim has substantial merit, and the defendant has no valid defence to the lawsuit; and
- the public interest in allowing the lawsuit to continue outweighs the public interest in protecting the expression.

The court must hear a motion to dismiss a SLAPP suit within 60 days after it is filed – a short timeframe in the context of civil lawsuits. The SLAPP suit and any related proceedings will be automatically suspended until the motion is decided. These provisions should help limit the time and resources that a defendant must invest to fight a SLAPP. Further, if a defendant succeeds in having a lawsuit dismissed as a SLAPP, the defendant is entitled to have their full legal costs on the motion and the lawsuit paid by the plaintiff; additional compensation may be awarded if the judge finds that the plaintiff brought the lawsuit in bad faith or for an "improper purpose." By contrast, if a SLAPP motion fails, the defendant generally does not have to pay the plaintiff's legal costs. These untraditional costs provisions should act as a significant deterrent to prospective SLAPP plaintiffs.

Controversially, anti-SLAPP motions may only be brought in lawsuits commenced on or after December 1, 2014 (the date the bill received first reading); the 2013 bill would have applied retroactively.

Looking Ahead

The ECO applauds the Ontario government for listening to us and many other stakeholders, and finally passing legislation to stop SLAPPs in their tracks. While the amendments made by the *Protection of Public Participation Act, 2015* apply to all matters of public interest, they represent a particularly important improvement for the environmental community.

Environmental organizations and private citizens need to be free to voice their concerns about issues that affect the environment without fear of becoming embroiled in protracted and expensive litigation. The new law has created a faster way to weed out SLAPPs that, ideally, should deter prospective SLAPP plaintiffs from initiating such claims in the first place and help to redress power imbalances on public interest matters, while still allowing legitimate claims to proceed.

But there is much uncertainty, criticism and skepticism about the new law, from how the ambitious timelines will be achieved to how key terms will be interpreted. Some critics argue the law will protect "professional campaigners" and prevent companies from protecting themselves against defamation. Further, the new rules only apply to SLAPPs initiated in the court system. They cannot be used to address the use of similar tactics in other contexts, such as the use of exorbitant costs motions at the Ontario Municipal Board to discourage public involvement – an issue the ECO raised in our 2008/2009 Annual Report, and which continues to be a problem.

The ECO will keep watching to find out – and report to Ontarians – how well the *Protection of Public Participation Act, 2015* is, in fact, serving its purpose.

4.1.3 Changes to Development Charges

New development brings more people to an area, either as residents or through employment, and this can bolster the local economy and municipal revenues. However, new development can also result in increased costs for municipalities, such as building new roads or expanding wastewater treatment plants. To help cover these increased capital costs, the *Development Charges Act, 1997* allows Ontario's municipalities to impose development charges for an area by passing a by-law. In 2011, about 200 municipalities collected $1.3 billion in development charges to help pay for increased capital costs associated with growth. While this amount is large, many municipalities maintain that this revenue was not fully covering the capital costs related to growth.

In September 2013, the ECO reported on a number of issues with the development charges system (see *Building Momentum, Provincial Policies for Municipal Energy and Carbon Reductions*, the ECO's Annual Energy Conservation Progress Report 2012 – Volume 1), specifically:

- municipalities could only calculate transit-related development charges based on 10-year historical service level averages – not on future service needs that would be driven by increased population and employment growth;
- in calculating development charges, the growth-related capital costs for transit were subject to a mandatory 10 per cent reduction, whereas other services like roads, water and wastewater were exempt from this mandatory reduction; and
- development charges could be better used to strategically direct growth to achieve intensification and density targets under the *Growth Plan for the Greater Golden Horseshoe, 2006*; this would mean using area-specific development charges rather than an average-cost-per-unit approach, which essentially subsidizes the costs of servicing large lots on greenfield sites.

The ECO recommended that the Ministry of Municipal Affairs and Housing (MMAH) amend the *Development Charges Act, 1997* to expand the ability of municipalities to fund growth-related public transit services through development charges. It was also recommended that the ministry produce a best practices guide that outlines how development charges can be used to encourage more compact and sustainable communities.

Shortly after, in October 2013, the MMAH undertook a review of the development charges system along with a review of the land use planning and appeal system. The government subsequently passed the *Smart Growth for Our Communities Act, 2015*, which made a number of amendments to the *Development Charges Act, 1997* and the *Planning Act*. Some of these amendments should help municipalities recover, through development charges, more of the capital costs for infrastructure needed to support growth. Notably, the government implemented the ECO's recommendation to add transit to the list of services that are not subject to a 10 per cent reduction. Additionally, capital costs for certain services (to be defined later by regulation) will be calculated based on the planned level of services over the next 10 years instead of the average level over the last 10 years.

Together, these amendments should enable municipalities to plan, finance and build more and better public transit to meet growing populations. This, in turn, should help reduce greenhouse gas emissions and air pollution by making it more convenient for people to travel via transit instead of using their cars. Public transit is also a cornerstone to building compact communities that should lessen urban sprawl and the development of greenfield areas.

While these are encouraging steps forward, guidance for municipalities on how to better use development charges to create more compact and sustainable communities is still outstanding. Given the recent changes to the development charges system and the continued rapid rate of growth in southern Ontario, the need for such a guidance document continues to exist.

4.2 Education and Outreach

People across Ontario face a wide range of environmental issues every day, from questions about local matters such as waterways or air quality, to broader concerns about a changing climate. Part of our job is helping the public understand and navigate their environmental rights under the *Environmental Bill of Rights, 1993* (*EBR*), so they can engage directly with Ontario ministries on environmental decisions that matter to them. Another core part of our job is reporting to the Ontario Legislature and the broader public on how well ministries are delivering their environmental responsibilities. Making these reports accessible and relevant to the people who need them is a key goal of our public education and outreach work.

To strengthen our outreach, we revamped our website (eco.on.ca) in early 2016. Our website is now much easier to navigate and mobile-friendly, allowing for more effective access to our publications and research. We have also introduced a Registry Alert service (alerts.ecoissues.ca), allowing the public to receive customized email alerts when topics that interest them show up on the Environmental Registry. Ontarians can also follow the ECO through our blog, Twitter and Facebook accounts and YouTube channel. Stay tuned for more updates to the ECO's website in the coming year.

Each year we also offer the public training on how to use the *EBR*. In March 2016, we collaborated with the Sustainability Network to host an *EBR* workshop for environmental non-profit groups in the Greater Toronto Area. The Sustainability Network also hosted a webinar for us in November 2015, allowing us to share highlights of our 2014/2015 Annual Report with a Canada-wide audience.

The Environmental Commissioner and Deputy Commissioner make a point of including information about the *EBR* as part of their

presentations to audiences across the province. Since being appointed in December 2015, Commissioner Saxe has spoken at numerous venues, reaching thousands of people, from Thunder Bay and Pikangikum in northwestern Ontario, to biodiversity groups on the shores of Lake Erie, to boardrooms in downtown Toronto. Commissioner Saxe also met with each of the three party caucuses at the Ontario Legislature, and is visiting ridings across the province to introduce herself, share her priorities and hear about environmental issues from the Members of Provincial Parliament (MPPs) and their constituents.

Every year, our Public Information and Outreach Officer receives a wide range of public enquiries on a variety of environmental concerns – about 1,400 enquiries each year, by phone and email. Common concerns include: difficulties accessing information about environmental assessment processes, questions about the use of the Environmental Registry, and questions about the ECO's position on a variety of topics. We also help redirect some callers to information and services they seek within provincial and municipal governments or other agencies.

The ECO is always on the lookout for new audiences, to share information about the citizen rights toolkit available under the *EBR*, and to update Ontarians on current environmental issues. The ECO is happy to offer presentations about the *EBR* to audiences across Ontario, including lecture and classroom settings, service clubs, private sector groups, ratepayer groups and non-profits. For more information, contact us at commissioner@eco.on.ca.

4.3 The ECO Recognition Award

Every year, we ask prescribed ministries to submit outstanding programs and projects to be considered for the ECO's Recognition Award. This award is meant to recognize the hard work of ministry staff (not ministers) in an initiative that is innovative, goes above and beyond legal mandates, betters Ontario's environment, and that meets the requirements and purposes of the *Environmental Bill of Rights, 1993* (*EBR*).

This year, the ECO received nominations for 11 projects and programs from 5 ministries. One worthy initiative was disqualified because it had not been posted on the Environmental Registry, as required by law.

After careful consideration, the ECO decided to give the 2016 ECO Recognition Award to Ministry of Natural Resources and Forestry (MNRF) staff for the Mid-Canada Radar Site Clean-up in Polar Bear Provincial Park. This is the seventh time that staff from the MNRF has received this award. The ECO is also giving an honourable mention to the Ministry of Transportation (MTO) staff for their project to restore fish passage in a tributary to the Saugeen River, near Southampton, Ontario. The ECO congratulates all the ministry staff who implemented these exceptional environmental projects.

> The ECO decided to give the 2016 ECO Recognition Award to Ministry of Natural Resources and Forestry staff.

Award Winner: The Ministry of Natural Resources and Forestry's Mid-Canada Radar Site Clean-Up in Polar Bear Provincial Park

The MNRF, with support from the federal Department of National Defense and local First Nations' communities, planned and implemented a remediation project to clean up a Cold War-era abandoned radar site in Polar

Bear Provincial Park, known as Site 415. This 2.3 million hectare park, situated along the Hudson and James Bay coasts, is home to polar bears, caribou, seals and beluga whales. The park also contains the world's third largest wetland, which is globally recognized for its importance to migratory birds.

The military constructed several radar sites within Polar Bear Provincial Park during the Cold War, but they were abandoned in the mid-1960s. For decades, they blemished the landscape with derelict contaminated buildings of steel and cement; abandoned vehicles and equipment; radio towers and massive radar screens. Additionally, the site contained barrels (some that still contained gasoline and oil), garbage dumps, hazardous and non-hazardous waste (e.g., asbestos, mercury, and oil) and contaminated soils.

This area of the park is still extensively used by First Nations people living in nearby communities such as Attawapiskat, Fort Severn and Peawanuk. The MNRF held several meetings and open houses in affected Indigenous communities to explain the clean-up project, engage the communities, and provide opportunities for input. Community members actively worked with the MNRF in this clean-up project by putting in more than 27,000 hours of work. Additionally, more than 1,800 hours of classroom and on-the-job training was provided to community members.

Over a period of two years, the Mid-Canada Line team, including ministry staff and the local members, cleaned-up several dilapidated buildings, leaking generators, vehicles, tractors and refuse dumps from the park.

The team also cleaned-up:

- 6,520 drums (excluding drums from Sites 418 and 421) that contained 30,000 litres of gas, oil and other toxic or harmful liquids;
- 126 m^3 of Tier 1 materials including mostly asbestos;
- 1,640 litres of PCB liquids;
- An additional 90 m^3 of Tier 1 materials (asbestos) from Doppler sites 418 and 421;
- 3,970 tonnes of low-level PCB contaminated soils; and
- 280 tonnes of PCB hazardous soils and debris.

The MNRF reported that it transported the contaminated waste over land to the James Bay coast, mostly in the winter on winter trails, to lessen the impact to the fragile James Bay inner landscape. It then used a barge to transport the contaminants to a ship that carried it to proper treatment facilities in the Montreal area.

Once materials were removed from the park, the ministry also stated that it worked to "restore the site to as near a natural state as possible," by reshaping road and trails to resemble a natural landscape and seeding them with naturally sourced native seed. Additionally, the team constructed habitat for at-risk barn swallows on site, and included interpretive education panels. The ministry is confident that the park is now much cleaner and safer, and local communities can continue to use the remediated area for their traditional hunting practices as wildlife migrate through and live in the park.

Mid-Canada Radar Site Clean-up in Polar Bear Provincial Park.
Source: Ontario Parks/MNRF

Honourable Mention: Ministry of Transportation Restoring Fish Passage in a Tributary to the Saugeen River

In 2015, a team led by MTO staff restored fish passage in a tributary of the Saugeen River, within the Saugeen First Nation Reserve #29 (near Southhampton), by creatively replacing an aging highway culvert. This team included numerous MTO staff, as well as external consultants, researchers, and a representative from the Saugeen Ojibway Nation. The outlet for the old culvert was perched above the streambed, impeding the movement of fish such as rainbow trout. Restoring fish passage upstream of the culvert was made possible by installing a new culvert with an innovative fish ladder within it.

The fish ladder is made of a corrugated steel liner with evenly spaced baffles bolted throughout the length of the culvert. The baffles are designed to slow the water flow and create fish refuge areas within the culvert. They also serve to reduce the accumulation of debris within the culvert, which can also act as a barrier to fish.

The MTO reported that as a result of this new culvert, "sensitive fish species may now increase their range, accessing reaches of the stream they have not been able to access for over seventy-five years. This will not only have a positive effect in restoring the natural ecosystem, but will also serve to expand the habitat of a valuable natural resource to the First Nations community."

Past Recipients of the ECO's Recognition Award	
2015	No submission found to be acceptable
2014	Water Chestnut Management in Voyageur Provincial Park (MNRF)
2013	Wasaga Beach Provincial Park Piping Plover Program (MNRF)
2012	Algonquin Provincial Park's Waste Management System (MNRF)
2011	Bioretention Cells and Rubber Modified Asphalt at the QEW Ontario Street Carpool Lot, Beamsville (MTO)
2010	Green Power for the Summer Beaver Airport (MTO)
2009	Project Green (MOECC)
2008	Zero Waste Events at the Metro Toronto Convention Centre (MTCS)
2007	No submission found to be acceptable
2006	Southern Ontario Land Resource Information System (MNRF)
2005	Conservation of Alfred Bog (MNRF, MOECC, MMAH)
2004	Environmental Monitoring (MOECC)
2003	Ontario's Living Legacy (MNRF)
2002	Oak Ridges Moraine Strategy (MMAH)
2001	Eastern Massasauga Rattlesnake Project for Highway 69 Reconstruction (MTO)
2000	Septic System Program (MMAH)

MOECC – Ministry of the Environment and Climate Change; MMAH – Ministry of Municipal Affairs and Housing; MNRF – Ministry of Natural Resources and Forestry; MTCS – Ministry of Tourism, Culture and Sport; MTO – Ministry of Transportation.

CHAPTER 5
RECOMMENDATIONS

Recommendations

No Transparency for *Aggregate Resources Act* Instruments (Chapter 1.2.2)

The Ministry of Natural Resources and Forestry should fix the long-standing deficiencies in Environmental Registry notices for *Aggregate Resources Act* instruments to ensure the public's right to be notified and comment.

Outdated Proposals (Chapter 1.2.3)

All prescribed ministries should establish processes to ensure that decision notices are posted as soon as reasonably possible after decisions are made.

All prescribed ministries should remedy all of their outdated notices that remain on the Environmental Registry without a decision.

Environmental Registry: Overhaul Discussions Begin (Chapter 1.2.4)

The Ministry of the Environment and Climate Change should give the needs of existing Environmental Registry users strong consideration in the design of a new Registry.

Keeping the *EBR* in Sync with Government Changes and New Laws (Chapter 1.4)

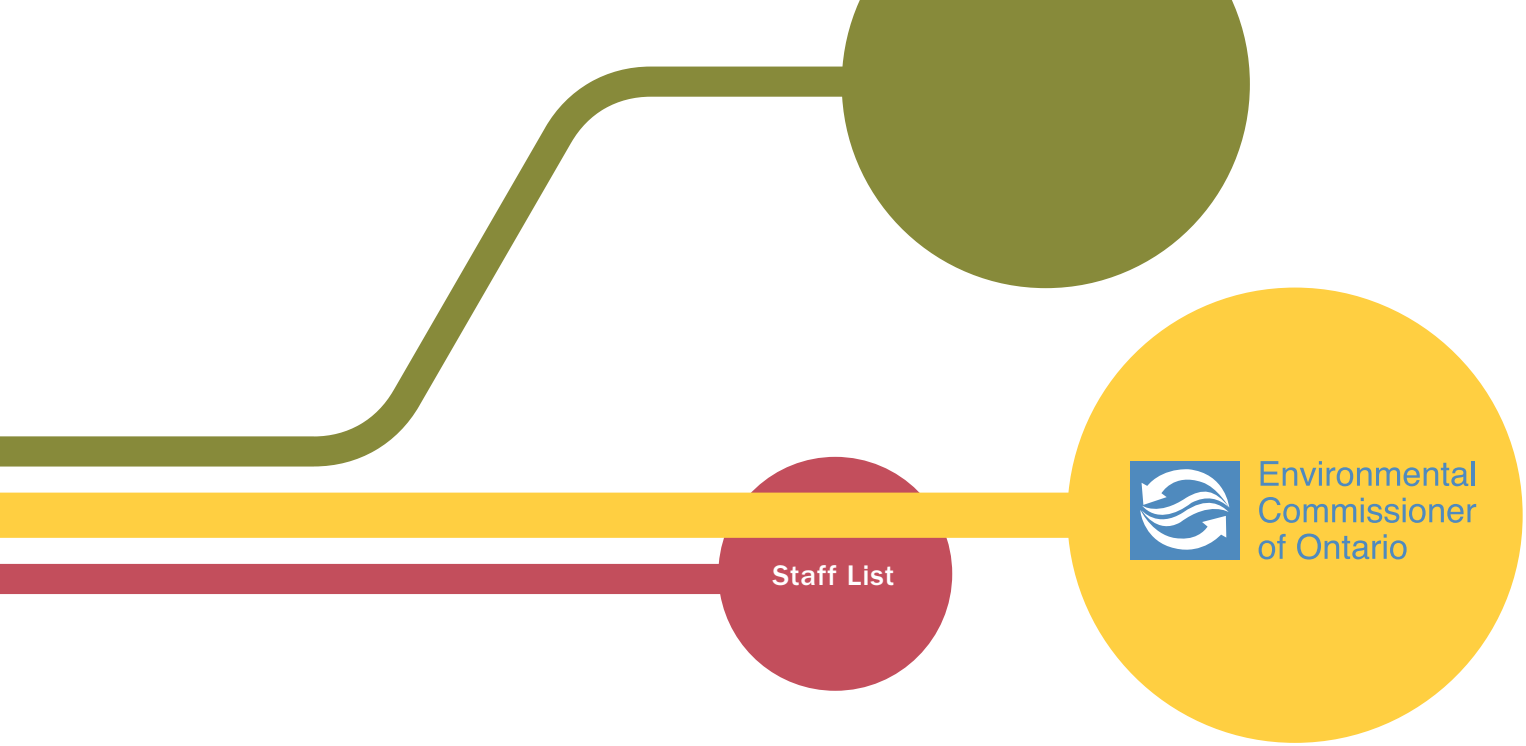
The Ministry of Education should be prescribed under the *EBR* for the purposes of applications for review.

Ministries' Handling of Applications for Review in 2015/2016 (Chapter 2.2)

The Ministry of the Environment and Climate Change should conclude all overdue reviews in 2016/2017 and, further, should conduct reviews with greater speed going forward.

Public Should be Alerted to Poor Water Quality After Wastewater Overflows and Bypasses (Chapter 2.3.2)

The Ministry of the Environment and Climate Change should work with Toronto Water to implement procedures for public notification of sewage bypass events as soon as possible.



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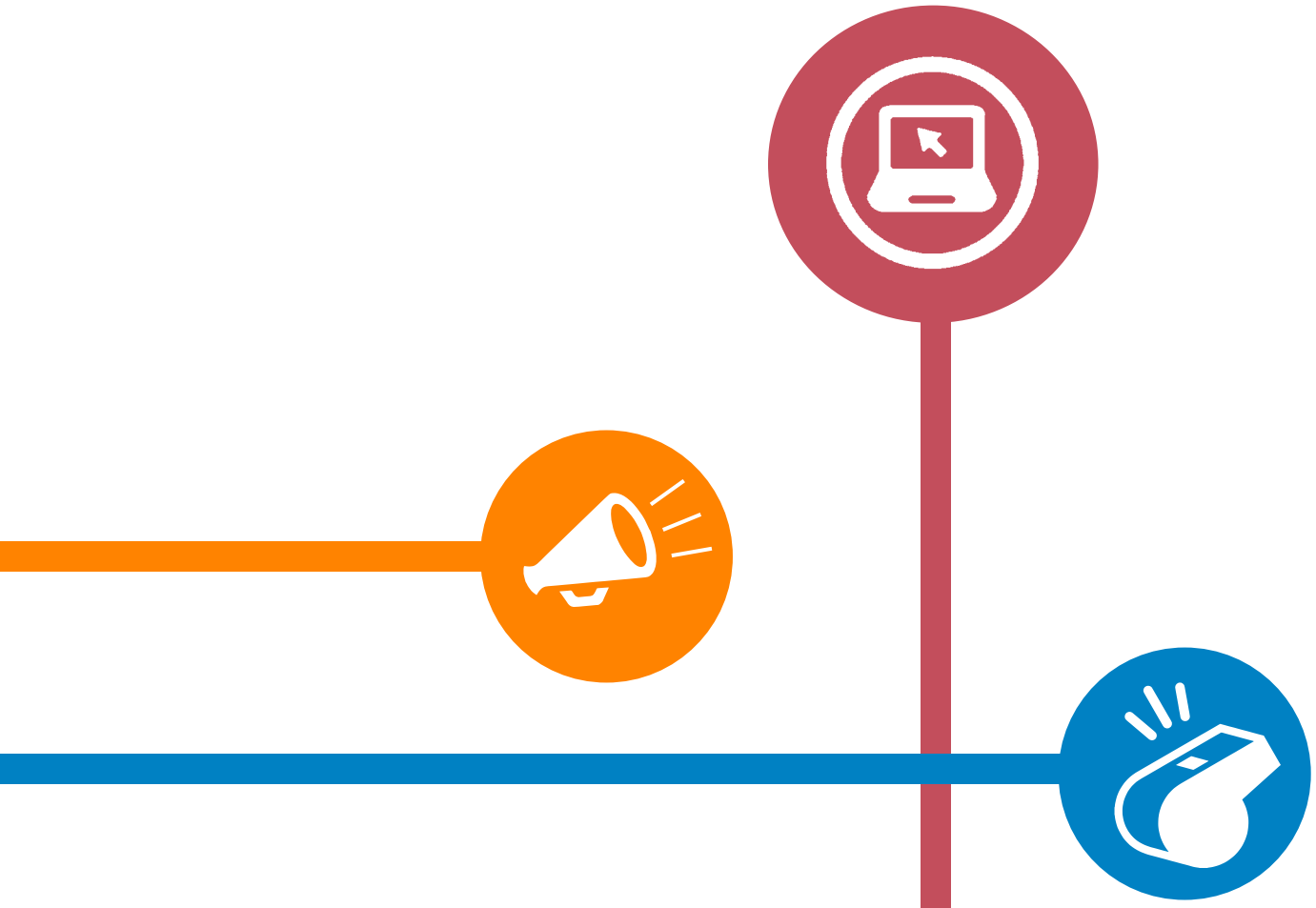

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