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RE: Review of Environmental Bill of Rights - A Provincial Dialogue (EBR Registry Number: 012-8002)

Dear Ms. Kalvins,

Thank you for the opportunity to provide comments to the Ontario Ministry of the Environment and Climate Change (MOECC) on the Review of the Environmental Bill of Rights. We are submitting this letter in our respective capacities as Wildlife Conservation Society (WCS) Canada scientists specializing in wildlife ecology, landscape ecology, fisheries, conservation biology, and cumulative impacts in northern Ontario. A national organization, our research and conservation priorities in Ontario are largely focused on the Far North, endangered species policy and legislation, and environmental assessment.

The *Environmental Bill of Rights, 1993* (EBR) is an environmental law unlike any other in the world. 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, and to hold the government accountable for those decisions. The EBR is an important and unique statute¹. The EBR has never been publicly reviewed by the Government of Ontario, yet the pressures on Ontario's environment continue to increase.

We provide our comments below on the MOECC **Discussion Guide to Review Ontario's Environmental Bill of Rights and Regulations and Consideration of Ontarians' Environmental Rights**. We answer questions where we have the most knowledge and/or experience and offer recommendations where possible.

¹ Other jurisdictions in Canada have either developed or are developing their own EBR, including British Columbia, Manitoba, and Nova Scotia while a federal effort to introduce a Canadian Environmental Bill of Rights last December is also underway emphasizing the importance of environmental rights throughout Canada.

Question 1: Should the EBR purposes and principles be expanded or modified? If so, how?

Purposes:

The preamble to the EBR acknowledges that the people of Ontario have a right to a healthful environment. But, what does this mean? A healthful environment could be described by the status and trend of key environmental indicators such as those tracked in Ontario's State of Biodiversity reports². However, these results are not very encouraging suggesting Ontario is failing to give the people their right to a healthful environment. At the same time, the Ontario Government, particularly the Ontario Ministry of Natural Resources and Forestry (MNRF) and the MOECC, have consistently lost their operational capacity to protect, conserve, and restore the environment. For example, the MNRF has not made substantive commitments to monitoring caribou. Too often, these ministries seem reliant on other groups (e.g., NGOs, Conservation Authorities) to deliver conservation outcomes around species at risk, wetland conservation, and invasive species actions, while depending on industry and private sector good will and best practices to mitigate impacts on the environment.

While the EBR gives us the right to know about what may be impacting our environment such as air and water pollution, it does not give us the right to be proactively protected from them. Another aspect of a healthful environment is when natural habitats are protected and/or restored to support all life and the relationships that sustain them (e.g., biodiversity). We suggest the purpose of the EBR needs to address the nature and scope of a "right to a healthy environment" based on the understanding of our dependence on the environment. We acknowledge that this would constitute a major shift from the current scope of the EBR and will require significant efforts on public consultation and engagement. Nevertheless, it seems prudent to act while we can now to ensure a better future for Ontarians rather than wait until inevitable environmental and associated human health crises necessitate reactive measures that will be far more costly.

Recommendation 1: Expand the EBR purposes to affirm the right of all persons to a healthy environment by addressing two particular areas of environmental harm: 1) pollution, such as air pollution, water contamination, and radiation; and, 2) destruction of the environment through the loss of biodiversity, intact and wild spaces, biocultural landscapes, and aesthetic and sacred spaces; and, 2).

Principles:

The EBR should be updated to reflect a number of principles such as environmental justice, the precautionary principle, and the principles of progressivity, zero discharge, and intergenerational equity. The inclusion of these guiding principles will assist policymakers, civil servants, businesses, citizens, and courts by providing substantive guidance for their decision-making and will provide far more clarity than there is today. In addition to pollution prevention, which is already one of the stated purposes of the EBR, some of the most important principles for inclusion in the Act include:

² <http://sobr.ca/>

Precautionary principle

The precautionary principle means that, “Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.” This principle is endorsed by the Supreme Court of Canada and widely found in Canadian environmental legislation.

Intergenerational equity

The principle of intergenerational equity states that “each generation has an obligation to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation.” Currently, Ontario’s *Provincial Parks and Conservation Reserves Act*, includes this principle because it provides that these areas “shall be managed to maintain their ecological integrity and to leave them unimpaired for future generations”.

Environmental justice

There is increasing evidence that low-income Ontario communities and communities belonging to historically disadvantaged groups, including Indigenous peoples, are disproportionately exposed to and negatively affected by environmental hazards. Environmental justice is a framework for addressing the inequitable distribution of environmental hazards in the province and the EBR is an important opportunity to begin to do so.

Non-regression of environmental laws

A growing number of jurisdictions are recognizing that in light of widespread ecosystem decline, existing environmental laws and policies must be viewed as baselines that can only be strengthened in the future, and not weakened. Incorporating this principle into the EBR would help ensure the statute’s longevity and effectiveness regardless of changes in government or political climate.

Polluter pays principle

The polluter pays principle holds that those responsible for producing pollution should be held responsible for paying for damage to the natural environment.

Public trust duty

A public trust duty acknowledges that certain public goods (such as air and water, waterways and lands, as well as fisheries) are held by the government in trust for the benefit of all people, and, under the goal of sustainable development, for future generations. Decisions regarding the use of those collective resources must be made with a view to the trust-like duty the government holds. A public trust duty acknowledges the government’s special role in protecting the environment and our right to a healthy environment and ecologically sustainable one.

Recommendation 2: The EBR should be modified to include the principles listed above with respect to social and ecological systems.

Question 2: Are there additional ministries, instruments or legislation that should be covered under the EBR?

Ministries:

Prescribed Ministries most relevant to our conservation goals, include the Ministry of Northern Development and Mines (MNDM), Ministry of the Environment and Climate Change (MOECC) and the Ministry of Natural Resources and Forestry (MNRF).

The following Ministries should be included among those prescribed under the EBR, given the potential environmental significance of the work they undertake, the (ECO 2015/2016: 41):

- Ministry of Research, Innovation and Science, because they fund research and partners with universities, colleges, hospitals, entrepreneurs and business leaders and thereby influencing prioritization and funding of environmental research projects.
- Ministry of Finance, which prepares Ontario's budget, provides fiscal and economic policy advice to Cabinet and the Premier and ultimately affects all ministries and government programs.
- Ontario Heritage Trust, which promotes natural heritage conservation through land acquisition, conservation easements, land donations and public awareness and also holds more than 160 natural properties³.

Recommendation 3: The Ministries listed above should be prescribed under the EBR.

Instruments:

Relevant instruments that WCS Canada would like to see prescribed under the EBR, because of their potential influence on conservation, include:

- Water Management Plans under the *Lakes and Rivers Improvement Act* (MNRF), because these plans enable the construction of dams in lakes and rivers, subject to ministerial approval.
- Instruments issued under the *Provincial Parks and Conservation Reserves Act, 2006* (MNRF) including land use permits, licences of occupation and leases for land in provincial parks and conservation reserves that can be granted for private non-commercial purposes.

Recommendation 4: Relevant instruments listed above should be prescribed under the EBR.

³ <http://www.heritagetrust.on.ca/Conservation.aspx>

Question 3: Is there a need to adjust EBR requirements regarding the content, review and updating, or application of Statements of Environmental Values? If so, how?

The Statements of Environmental Values (SEVs) are an important tool for making sure an EBR influences government decision-making. SEVs enable WCS Canada staff to understand the commitments each ministry has articulated regarding its share of environmental responsibility. We also depend on the SEVs to describe how these environmental principles will be integrated into ministry decision-making in a meaningful way. However, the ministry does not always conform to its stated values. In these cases, the ministry must still explain how it considered its SEV in making the decision. Given that ministries do not always take their SEVs into account, it is not clear how effective these tools are for guiding environmental outcomes. We are also concerned that key ministries, such as the MOECC and the MNR have failed to provide copies of a number of SEV consideration documents for years and that the MNR continues to assert that SEV documentation and/or consideration is not required for certain instruments (ECO 2015/2016: 43)⁴. We concur with the current Environmental Commissioner of Ontario (ECO) that a review of the SEV process would be useful.

Recommendation 5: Amend the EBR to clarify that a Ministry's SEV is to be considered whenever environmentally significant decisions are made within the Ministry, including decisions on policies, laws, regulations, and prescribed instruments. These considerations should be posted.

Recommendation 6: Provide guidance materials to ensure SEVs are comprehensive across ministries and offer direction on how the purposes and principles of the EBR are to be applied in decision-making.

Recommendation 7: Amend the EBR to require ministers to undertake public reviews of their SEVs at least once every 5 years to ensure they stay current and comprehensive. The results of the review and statements on how public comments on Ministry SEVs were considered in the review, should be tabled in the Legislative Assembly.

Question 4: Should changes be made to the EBR's requirements for "Public Participation in Decision-making" to improve engagement of the public regarding acts, regulations, policies, instruments and other processes? If so, what changes are necessary, particularly regarding the Environmental Registry and its notice requirements?

WCS Canada staff participates in environmental decision-making in Ontario through the Environmental Registry. In our opinion, this tool remains one of the most positive and useful developments under the EBR. Consistent in-house weekly searches of the EBR enable us to locate, learn about, and comment on specific significant environmental proposals that support our conservation priorities, particularly in Ontario's Far North. For example, in 2016 so far, WCS Canada staff have commented on the Far North Land Use Strategy (EBR Registry Number:

⁴ Available online at: <https://eco.on.ca/reports/2016-small-steps-forward/>

012-0598), mandated by the *Far North Act, 2010*; the Northern Ontario Multi-modal Transportation Strategy (EBR Registry Number: 012-7763), under direction from the Growth Plan for Northern Ontario, 2011; the Ontario government response statements for polar bear (EBR Registry Number: 012-7323) and wolverine (EBR Registry Number: 012-7323) mandated by Ontario's *Endangered Species Act, 2007*, and the Guide: Consideration of Climate Change in Environmental Assessment in Ontario (EBR Registry Number: 012-5806) developed under Ontario's *Environmental Assessment Act*. We have been tracking permit applications, including those for mineral exploration in boreal caribou ranges, and overall benefit permit applications for species at risk (see below). We also use the additional information, when provided by the ministries, and appreciate the links to the full text of relevant acts, policies, regulations, and instruments (e.g., permits, licences and other approvals). We submit our comments online and via e-mail and use our comments to engage directly with relevant ministry staff and Ministers, the Premier of Ontario, the ECO, First Nations, and other stakeholders and partners. Finally, we share this information with the public through our website and encourage their submissions on the Environmental Registry as well (www.wcscanada.org).

We commend the MOECC for agreeing to the need to overhaul the Environmental Registry. We generally find the interface cumbersome and in need of upgrades to make it more user-friendly. Also, given the often-limited timeframes for comment (e.g., a minimum of 30 days), just being aware of various proposals available for comment through the Environmental Registry is challenging. We have relied on the e-mail alerts provided through the ECO office⁵ and recently created our own "work around" for searching the Environmental Registry for proposals of interest.

In making our recommendations to the MOECC on improving the functionality, and by default, public use of the Environmental Registry, we support the ECO's recent "wish list"⁶ including: the need for an e-mail alert service, improved geographic search functions, and better background information for permits (water, exploration, overall benefit).

Recommendation 8: Rebuild the Environmental Registry's technical platform to facilitate public participation by improving the interface, search tools, mapping capabilities, and layout and offering a public e-mail alert service or similar tool.

Another area of concern on the Environmental Registry is the lack of information made available for some types of instruments. WCS Canada is particularly concerned about the limited information in exploration permits posted by the MNDM under the *Mining Act*. Currently, notices that appear on the ER do not include an explanation, in plain language, of what the proposed activities entail or, more importantly, what their effects could be. The location information provided is inadequate and cumbersome requiring the public to also access the MNDM's online map of claims (CLAIMaps)⁷ and search the claim number manually to see where the exploration activities are proposed to take place. The MNDM neither links to this

⁵ <http://alerts.ecoissues.ca/>

⁶ Available online at: <https://eco.on.ca/reports/2016-small-steps-forward/> (see pg. 38)

⁷ <http://www.mndm.gov.on.ca/en/mines-and-minerals/applications/claimaps>

map nor mentions its existence in its notices. From a public participation perspective, this limited amount of information and lack of a geographic interface has hindered our own engagement on the Environmental Registry with respect to exploration permits, and we have in-house technical GIS capacity. As a “work around”, we recently developed a data-driven web application⁸ to track and share information about mineral exploration permits on Ontario’s caribou ranges that consolidates information across the MNDM’s websites and the Environmental Registry and provides maps of permits and mining claims in relation to caribou ranges. We also have the same concerns about permits to take water, and overall benefit permits for species at risk.

Recommendation 9: Improve information available to the public in notices on the Environmental Registry by:

- Developing clear standards for content of registry notices. This should include a clear explanation of what it is and how it could affect the environment and relevant contextual information (e.g., how many other permits for a similar activity have been issued nearby). Include this in every notice, in addition to specific information about the proposal.
- Standardize the practice of including links and/or attachments to key supporting information that may be necessary for informed feedback and comment.
- Consider how the public can “see” where a permit is proposed in a more user-friendly and geographical way e.g., a map, in order to provide more informed feedback and comment.

Question 5: Do you have any comments on the Leave to Appeal process?

WCS Canada has not engaged directly with this aspect of the EBR to date, but strongly supports the right to apply to the ERT for leave to appeal the Director’s decision to approve such proposals and issue such instruments. As citizens, applying for leave to appeal the Director’s decision and the jurisdiction of the ERT to grant leave is currently limited to a very narrow set of circumstances in which the applicant must provide strong evidence that “no reasonable person could have made the decision” *and* that the decision could cause “significant harm to the environment” (c. 28, s. 41).

These restrictions have created a significantly high barrier to public access to justice. In addition, the few individuals and groups who have been fortunate enough to obtain leave to appeal, must pay for the costs of participating in ERT proceedings. There is no participant or intervenor funding available to defray the cost of public interest participation under the EBR.

Recommendation 10: Amend the EBR to provide for an appeal as of right of any decision to issue an instrument that could have a significant effect on the environment, or significantly lower the barrier to be met in the test. Meaningful public participation in these processes

⁸ <http://muddybootswcs.blogspot.ca/2016/06/who-owns-that-mining-claim-developing.html>

should be encouraged by re-introducing an intervenor/participant funding program (funded by proponents).

Question 6: Should the section 32 “EA exception” to public participation be modified? If so, how?

Section 32 of the EBR exempts instruments from the Act's public notice and consultation requirements if an instrument is part of an undertaking or project approved under the *Environmental Assessment Act* (EAA), or approved under an act affording an opportunity for public participation. However, the ECO has reported in past Annual Reports that the practical effect of section 32 is that the public has no rights to receive notice or comment on instruments related to the many projects or undertakings subject to the EAA. The exemption also prevents public scrutiny of the broad range of activities explicitly exempted under the EAA.

Recommendation 9: This exemption should be eliminated or scoped (e.g., to apply only where the undertaking has been subject to a public hearing under the EAA) in order to allow Ontarians to participate fully in these decisions.

Question 7: Should changes be made to Applications for Review part of the EBR, specifically, timelines and content of governmental responses? If so, how?

Part IV of the EBR enables citizens to file applications for review of Acts, regulations, policies and instruments. Yet, the EBR grants ministries nearly absolute discretion to refuse to carry out requested reviews and investigations. The ECO has described in past Annual Reports that ministries have made excessive use of their power to refuse such applications. While the EBR also requires the ministry to complete a review “within a reasonable time”, it provides no remedy for failure to do so.

Recommendation 11: Amend Part IV to clarify that nothing prevents ministries from granting Applications for Review and amend the EBR to prescribe 60 days as the deadline for the ministry's preliminary response. The EBR should specify that it is a contravention of the EBR to fail to meet this deadline.

Question 8: Should changes be made to the Application for Investigation part of the EBR, specifically, timelines and content of governmental responses? If so, how?

Part V of the EBR allows citizens to file applications for investigation of suspected environmental offences. Similar to the above, the EBR grants ministries almost absolute discretion to refuse to carry out requested investigations. The EBR requires the ministry complete an investigation within 120 days or provide the applicant and the ECO with an estimate of the additional time required.

Recommendation 12: Amend Part V to clarify that nothing prevents ministries from granting Applications for Investigation. Consideration should be given to granting the ECO the power to

order the ministry to meet a deadline established by the ECO and require the ministry to report on progress to the applicants and to the ECO every 90 days until the review or investigation has been completed. The EBR should specify that it is a contravention of the EBR to fail to meet this deadline.

Please share any additional comments you may have about Ontario's Environmental Bill of Rights and its associated regulations.

Aboriginal Rights:

Indigenous people are important potential beneficiaries of an EBR. Properly drafted, such a law will reflect fundamental principles of Indigenous law, protect the environments upon which Indigenous communities are particularly dependent, and reduce the current level of environmental injustice in Canada.

Recommendation 13: We recommend that the preamble to the Act be amended to include wording to recognize and acknowledge the special significance of the environment to Indigenous peoples.

The Environmental Commissioner of Ontario:

The role of the ECO is central to the effective implementation of the EBR. WCS Canada frequently relies on the ECO's work and the excellent reports prepared by the ECO to support our own work and recommendations to the MNRF, the MOECC, and the MNDM, particularly on wildlife research and conservation, environmental planning, and monitoring.

Yet, the powers of the ECO are fairly limited. For example, the EBR does not require ministries to cooperate with the ECO. Similarly, the EBR requires that the ECO submit Annual Reports and is permitted to submit Special Reports. However, the EBR does not expressly authorize the ECO to make recommendations in these annual reports. While the ECO has done so regardless, in order to improve the content and operation of the EBR, the MOECC is not required to respond to these recommendations. The result is that many key ECO recommendations do not receive acknowledgement or response, often for years.

Recommendation 14: Amend the EBR to empower the ECO to make recommendations in the Annual and Special Reports, and to impose a duty upon the MOECC and other prescribed ministries to provide the Ontario Legislature with a written response to the ECO's recommendations within 90 days of their being tabled in the Legislative Assembly.

Elimination or scoping of the budget proposals exemption:

In 2012, Bill 55, *Strong Action for Ontario Act (Budget Measures)*, 2012 amended six EBR prescribed acts' without notifying or consulting the public under Section 33 of the EBR. While this exemption is intended to protect the parliamentary convention of budget secrecy, we remain concerned that it was used to exempt non-financial changes to environmental legislation and deny public participation in these environmentally significant decisions. We

support the need for legislative reform as called for by the ECO⁹ so that prescribed ministries cannot use this exemption to avoid public consultation.

Recommendation 15: Amend the EBR to require prescribed ministries to post any non-financial, environmentally significant proposals from budget bills on the Environmental Registry.

In conclusion, we commend the MOECC for beginning a long-overdue review of the EBR. As citizens and practitioners engaged with a number of tools for implementing the EBR in addition to working for organization dedicated to conserving the environment for the benefit of nature and humanity, we trust that the MOECC will consider our recommendations carefully.

If you have any questions, please contact Cheryl Chetkiewicz (cchetkiewicz@wcs.org or 807-285-9125).

Sincerely yours,



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⁹ <https://media.assets.eco.on.ca/web/2016/07/EBR-Reform-Letter-to-Minister-Murray-June-9-2016.pdf>