

**ECO 10 YEAR REVIEW OF THE *EBR***

**Results of the Pre-Consultation Questionnaire**

Submitted to:

**Environmental Commissioner of Ontario**

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## 1 Introduction

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### 1.1 Background

In 2004, Ontario's *Environmental Bill of Rights (EBR)* turned 10 years old. This unique law gives the general public, politicians, policy-makers, lawyers, business people, and activists legal rights and formal procedures for participating in most environmental decisions made by provincial ministries subject to the *EBR*.

To mark the milestone of the *EBR*'s 10<sup>th</sup> Anniversary, the Environmental Commissioner of Ontario (ECO), with the assistance of Stratos Inc., developed a questionnaire to seek feedback on the use of the *EBR*. The ECO distributed the questionnaire to the public and stakeholders. Input was sought through this pre-consultation process to scope a 10-year review of the *EBR* that will take place over the coming months. Appendix 1 provides a copy of the survey methodology and Appendix 2 provides a copy of the questionnaire. Appendices 3 through 8 provide a record of notification regarding the questionnaire. Appendix 9 describes the interpretation of questionnaire results while Appendices 10 through 17 present the findings in more detail. Appendices 3 through 17 are not included in this paper but are available by contacting the ECO.

This report provides a summary and analysis of the questionnaire results, and makes recommendations to the Environmental Commissioner regarding possible next steps of the 10-Year review of the *EBR*. Some text has been blocked out ( ) to avoid a potential identifier of a respondent.

### 1.2 Response to the Questionnaire

Seventy people responded to the survey (22 hard copies and 48 electronic submissions). The response rate is 9.6%, based on 727 invitations as described in Appendix 1.

Questionnaires were filled out to various degrees of consistency and completeness. Two individuals returned blank questionnaires, and one questionnaire was returned without pages one to four.

The following quotes are from the two individuals who returned blank questionnaires:

*"I was going to complete this questionnaire, but what is the use when a government like the current Liberals can simply pass the "Adams Mine Lake Act" to circumvent the EA process and its CofA's?"*

*"My present address [in New Brunswick] should tell the Environmental Commission what I think of their bill of rights. The citizens of Ontario have no rights under the current laws."*

See Appendix 9 for a description of the interpretation of questionnaire responses (not included in this paper but available by contacting the ECO). Please note that responses have been lightly edited for grammar and spelling where necessary, unless included as direct quotes.

Paper copies of the questionnaires with all personal identifiers removed have been provided to the ECO.

## **2 Results of the Questionnaire**

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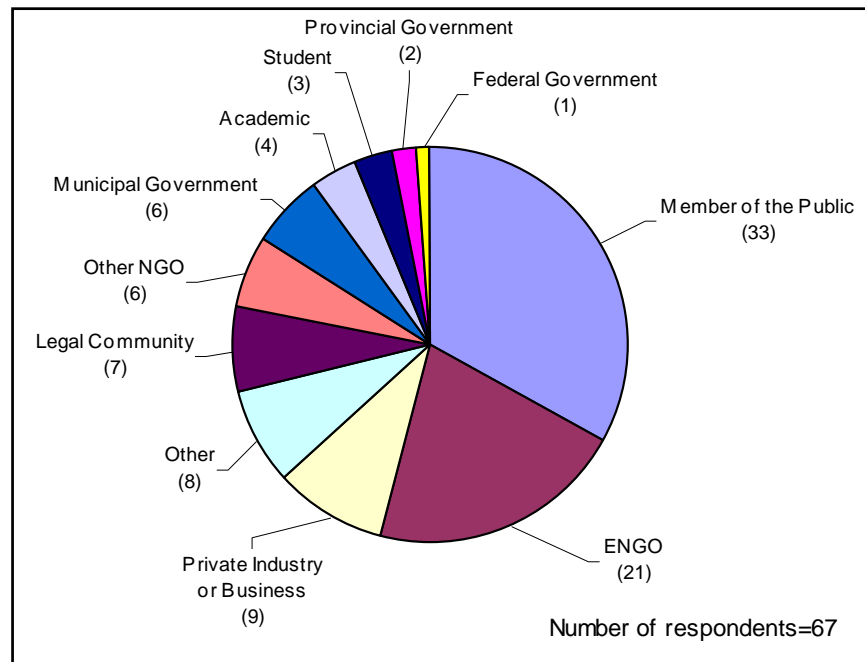
### **2.1 Use of the *EBR***

#### ***2.1.1 Respondents' Affiliations***

Seventy people responded to the survey (22 hard copies and 48 electronic submissions). Two individuals (one from Ontario and one from New Brunswick) returned blank questionnaires, and one questionnaire was returned without pages one to four (which included all questions on use of the *EBR*, and the first three questions on the Environmental Registry). Therefore, all analyses in this section are based on a total of 67 completed questionnaires, all from Ontario residents.

Respondents to the questionnaire were encouraged to indicate their affiliation and to check any of the choices that applied. For example, an individual working for an ENGO may also use the Registry in a personal capacity, thus selecting both ENGO and member of the public as his or her affiliation. As a result, the total number of affiliations shown in Figure 1 exceeds the total number of respondents for that question.

As shown in Figure 1, 33 out of 67 respondents (49%) used the *EBR* as members of the public, 21 (31%) used it as an ENGO, and 9 (13%) used the *EBR* from a position of private industry or business.

**Figure 1: Affiliation of Respondents**

### 2.1.2 How Respondents Learned About the EBR

Respondents indicated that they initially found out about the *EBR* in various ways, the most common being through presentations, conferences, training course, academic studies and personal research on specific issues (13 respondents); through employment (12 respondents); and from the MOE or ECO directly, or other provincial government ministry or employee (9 respondents). Appendix 10 provides more information on how respondents found out about the *EBR* (not included in this paper but available by contacting the ECO).

## 2.2 The Environmental Registry

As one questionnaire was missing two pages from this section, responses for the subsections on type and frequency of registry uses (Section 2.2.1), use of the registry to request enhanced public participation (Section 2.2.2), and use of the registry to comment on environmentally significant proposals (Section 2.2.3) are based on a total of 67 completed questionnaires. All remaining sections in the report are based on a total of 68 completed questionnaires.

Only six of 67 respondents indicated not using the Registry at all, three of whom identified themselves as members of the public, one as an ENGO, one as a federal government employee, and one did not provide an identity. Affiliations of the 61 respondents who use the registry are provided below (note that respondents could choose more than one affiliation):

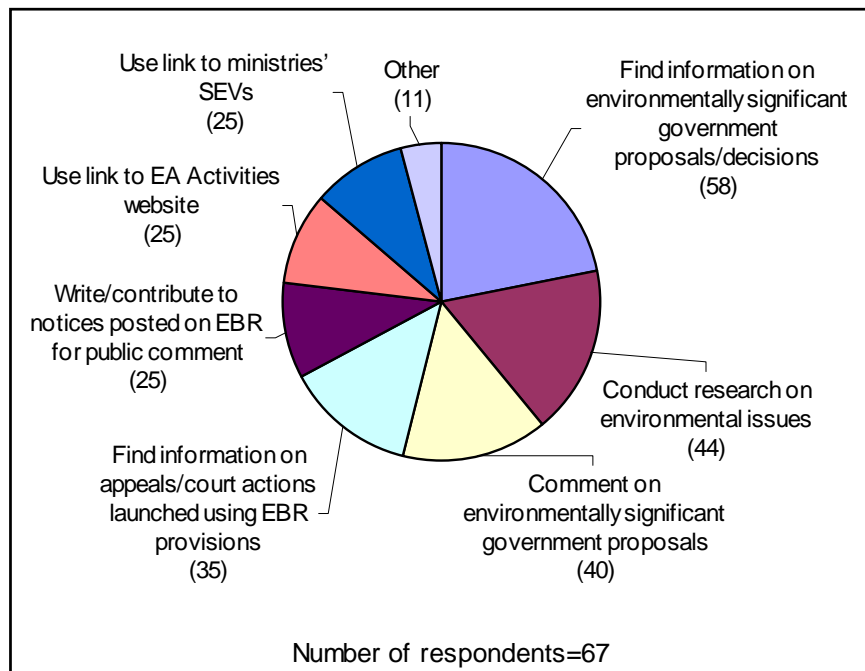
**Table 1: Affiliations of Respondents Who Use the Registry**

|                                     |                                   |                                      |                                   |                                   |                                       |  |                                      |                                     |   |  |
|-------------------------------------|-----------------------------------|--------------------------------------|-----------------------------------|-----------------------------------|---------------------------------------|--|--------------------------------------|-------------------------------------|---|--|
| <b>Public</b><br>(survey total: 33) | <b>ENGO</b><br>(survey total: 21) | <b>Industry</b><br>(survey total: 9) | <b>Other</b><br>(survey total: 8) | <b>Legal</b><br>(survey total: 7) | <b>Other NGO</b><br>(survey total: 6) | <b>Municipal Government</b><br>(survey total: 6) | <b>Academic</b><br>(survey total: 4) | <b>Student</b><br>(survey total: 3) | <b>Provincial Government</b><br>(survey total: 2) | <b>Federal Government</b><br>(survey total: 1) |
| 30                                  | 20                                | 9                                    | 8                                 | 7                                 | 6                                     | 6  | 4                                    | 3                                   | 2   | 0  |

**2.2.1 Uses of the Environmental Registry**

Respondents were asked to select all the ways in which they use the Registry. As a result, the total number of uses shown in Figure 2 exceeds the total number of respondents for that question. As shown in Figure 2, the top three purposes for using the Registry are to find information on environmentally significant government proposals or decisions for policies, Acts, regulations or instruments; to conduct research on environmental issues; or to comment on environmentally significant government proposals for policies, Acts, regulations or instruments. One individual noted that the registry is not a first choice for information because the website is too time consuming. Appendix 11 lists the eleven “other” uses (not included in this paper but available by contacting the ECO).

**Figure 2: Uses of the Environmental Registry**



## Frequency of Registry Uses

Respondents were asked to select the frequency with which they use various aspects of the Registry. Table 2 illustrates that the most frequent use is to find environmental information on environmentally significant proposal or decisions for policies, Acts, regulations or instruments, with ten respondents using the Registry for this use weekly, and four more than weekly.

**Table 2: Frequency of Registry Uses**

|  | Less than once a month | Once or twice a month | Weekly | More than weekly | Variable/ as required | TOTAL     |
|--|------------------------|-----------------------|--------|------------------|-----------------------|-----------|
| To find information on environmentally significant government proposals or decisions for policies, Acts, regulations or instruments (permits, licenses etc.) | 16                     | 8                     | 10     | 4                | 5                     | <b>43</b> |
| To comment on environmentally significant government proposals for policies, Acts, regulations or instruments (permits, licenses etc.)                       | 24                     | 2                     | 2      | 2                | 3                     | <b>33</b> |
| To conduct research on environmental issues  | 11                     | 6                     | 4      | 2                | 4                     | <b>27</b> |
| To find information on appeals or court actions launched using the provisions of the <i>EBR</i>  | 12                     | 4                     | 5      | 0                | 2                     | <b>23</b> |
| To write or contribute to notices that are posted on the Environmental Registry for public comment   | 15                     | 0                     | 2      | 0                | 1                     | <b>18</b> |
| To use the link to ministries' Statements of Environmental Values  | 12                     | 0                     | 1      | 0                | 4                     | <b>17</b> |
| To use the link to the Environmental Assessment Activities Web site  | 7                      | 2                     | 1      | 0                | 4                     | <b>14</b> |

### 2.2.2 Enhanced Public Participation

Twenty-three respondents have requested enhanced public participation for proposals posted on the Environmental Registry. Affiliations of these 23 respondents are provided below (note that respondents could choose more than one affiliation:

**Table 3: Affiliations of Respondents Who Have Requested Enhanced Public Participation**

| ENGO<br>(survey total: 21) | Public<br>(survey total: 33) | Legal<br>(survey total: 7) | Other NGO<br>(survey total: 6) | Industry<br>(survey total: 9) | Academic<br>(survey total: 4) | Municipal<br>Government<br>(survey total: 6) | Other<br>(survey total: 8) | Provincial<br>Government<br>(survey total: 2) | Federal<br>Government<br>(survey total: 1) | Student<br>(survey total: 3) |
|----------------------------|------------------------------|----------------------------|--------------------------------|-------------------------------|-------------------------------|--|----------------------------|---|--|------------------------------|
| 12                         | 11                           | 4                          | 3                              | 3                             | 2                             | 1  | 1                          | 0   | 0  | 0                            |

Eighteen respondents requested a longer Registry comment period; 15 requested a meeting with a minister/ministry staff about a proposal; and six requested mediation related to a Registry Proposal (respondents were encouraged to select more than one use if applicable).

### Frequency of Registry Use for Requesting Enhanced Public Participation

The following table illustrates how frequently respondents used various enhanced public participation features available through the *EBR*.

**Table 4: Frequency of Requesting Enhanced Public Participation**

|  | Once | 2-5x | 5-10x | >10x | TOTAL     |
|--|------|------|-------|------|-----------|
| Requested a longer Registry comment period:                          | 8    | 7    | 2     | 1    | <b>18</b> |
| Requested a meeting with a minister/ministry staff about a proposal: | 2    | 9    | 0     | 4    | <b>15</b> |
| Requested mediation related to a Registry Proposal:                  | 1    | 4    | 0     | 1    | <b>6</b>  |

### Reasons for Not Requesting Enhanced Public Participation

Thirty-one of the respondents who have not requested enhanced public participation explained why (the remaining 13 respondents did not comment). The most common reasons include:

- No reason as of yet (12);
- Unaware this could be done (3);
- Do not feel it is worthwhile (3); and
- Potential conflict of interest (2).

One respondent felt that the *EBR* is primarily a government public relations tool, and that the statute has no meaningful impact on actions/decisions undertaken by the province. Another respondent remarked that while enhanced public participation is the part of the *EBR* with the most potential, that potential is unrealized because so few people are aware of the mechanism. Appendix 11 provides more information on the

reasons given for not using the Registry to request enhanced public participation (not included in this paper but available by contacting the ECO).

### **2.2.3 Use of the Registry to Comment on Environmentally Significant Proposals**

Almost half (33 of 67) of respondents have used the Registry to comment on environmentally significant proposals. Twenty-one of these 33 respondents indicated that they believe that the government had not considered their comments when making a decision, or they had no way of knowing whether their input had any influence.

Six respondents felt their comments were dealt with properly, and six felt that the consideration of comments is variable. Four respondents provided other comments. One of these four respondents felt that the government has a bias towards large consulting firms with "large business" clients. Please see Appendix 11 for a list of all comments (not included in this paper but available by contacting the ECO).

*"There was no measurable way to determine whether 'my comments' were considered."*

*"...In my experience working in the provincial government I found that staff frequently view Registry postings as a formality and that their decision on a topic has often been made long before the first comment arrives."*

*"My comments were subsequently published, indicating proper consideration."*

*"I believe that my submissions have had an impact every time that I have made them. I am not always happy with the outcome, and have pursued appeals in these cases. But, for the most part, I have been pleased with the outcome of my submission of comments via the EBR."*

### **2.2.4 Positive Aspects of the Registry**

Forty-four respondents provided comments on positive aspects of the registry. Many respondents noted the searchability, availability of comprehensive information in a timely manner (including additional information on issues via hotlinks at the bottom of the posting), the ability to review proposals, decisions and activities, and the general ease of operation as positive aspects of the Registry. Appendix 11 provides a summary of all positive aspects noted by respondents (not included in this paper but available by contacting the ECO).

One respondent commented that while the general approach of giving the concerned public an opportunity to comment on or participate in new regulations or permits is good, the opportunity must be meaningful.

### **2.2.5 Suggested Improvements to the Registry**

Thirty-eight respondents suggested improvements to the Registry. These comments focused on issues pertaining to technology, Registry notices, and process. Suggestions in each category are summarized below, and a full list of suggestions is provided in Appendix 11 (not included in this paper but available by contacting the ECO).

#### **Technology**

Respondents provided a number of technological suggestions for improving the Registry. These suggestions included the use of "push" technology (users submit key words and applicable registry notices are sent directly to their email); improvements to the format and searchability of listings as well as the overall look and feel of the website; a mechanism to indicate that comments were received and reviewed; an "e-mailable" comment forms to make participation easier; and the need for a way to present information in a single PDF document.

#### **Process**

Respondents provided many process-related suggestions, including the need for responses to comments from relevant government agencies as well as direct contact with a facilitator for an appeal type of participation; making the Registry available to those who do not have the Internet; ensuring that all comment period postings are notified via automatic e-mail on the day of the posting; providing longer comment periods and more time to appeal; funding for on-going public review and intervention; improved access to comments submitted; and more education/awareness-raising regarding the *EBR*.

#### **Notices**

Examples of suggestions regarding Registry notices include appending copies of certificates, permits, etc. to the decision notice; better explanation of 'whistle-blower' provisions; posting information beyond minimum legislative requirements; expanding the ECO's role to filter private proposals; posting municipal proposals; including sludge spreading permits on the Registry and making them subject to appeal; providing clearer information on the date and time of comment deadlines, as well as complete contact information; and maintaining original postings and decisions on-line as distinct postings.

### **2.2.6 Proposal Notices for Posting on the Registry**

Nine respondents indicated that they have prepared or helped to prepare a proposal notice for posting on the Registry. Of these nine respondents, six answered the supplemental questions in Part B (questions B6 to B10 on posting proposal notices on the Registry). Of these six respondents, two wrote or contributed to notices as provincial government employees, and four as employees in private industry or business (who's permit proposals are subject to *EBR* requirements).

Regarding the obligation to post notices for policies, Acts, regulation or instruments on the Registry, two of the six respondents felt that the obligation to post notices or to post appeal notices does not affect the way they and their organizations make decisions. The other four respondents indicated that this obligation does affect their decision-making. One respondent noted that, at a minimum, this obligation increases the time required to obtain planning approvals, and another commented that “I must advise clients (typically seeking Certificate of Approval for air emissions) that a minimum 30-day period is required to obtain an approval – although with Ministry cutbacks the 30 days is a fraction of the waiting period.” Another respondent noted “Environmental Registry obligations create timing and logistical headaches where Planning Act timelines are concerned”.

Three of the six respondents indicated that the public comments gathered through proposal or appeal notices posted on the Registry have not affected decisions by them and their organizations. One respondent noted that they are still in the process of preparing a proposal notice and have no experience on which to comment (and answered the remaining two questions with the same answer). Another noted that very few public comments have been gathered on development proposals. The sixth respondent did not answer this question.

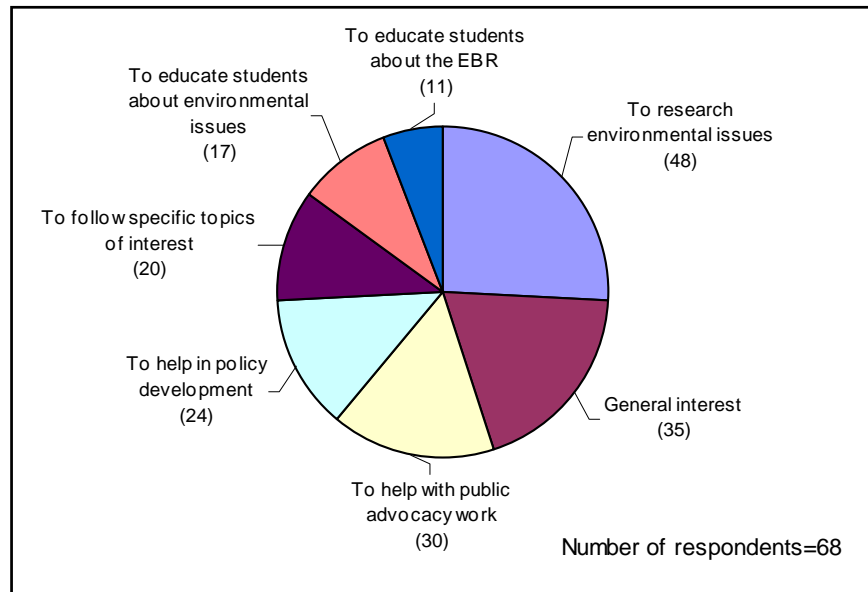
One of the six respondents indicated that they responded to the public comments in writing. One respondent indicated that they remain neutral on comments. Another explained that in the few instances where there were public concerns, the Ministry had already addressed the issues, so no further action was required. Two respondents did not answer this question.

Two of the six respondents felt that the public comments did not provide new ideas or perspectives. A third respondent felt that public comments are valuable and should be encouraged. Two respondents did not answer this question.

## **2.3 The Environmental Commissioner of Ontario**

### ***2.3.1 ECO Annual Reports***

Sixty respondents have read an ECO annual report (or portion thereof). As illustrated in Figure 3, the top two reasons for reading the ECO annual reports are to research environmental issues and for general interest. See Figure 3 for a summary, and note that respondents were encouraged to select all that apply. As a result, the total number of uses shown in Figure 3 exceeds the total number of respondents for that question.

**Figure 3: Uses of the ECO Annual Reports**

### Positive Aspects of the Annual Reports

Forty-three respondents provided comments on the positive aspects of ECO annual reports. Many were pleased with the comprehensiveness and usefulness of the reports; the clarity of presentation and scope; readability; and the ease of accessibility (available in a number of formats) and use. A respondent noted that the reports help highlight legislative developments over the past year and what is and is not working in the EBR system, as well as provide useful practical suggestions for Ontario ministries to enhance and protect the environment. Appendix 12 provides a full list of positive comments on the ECO annual reports (not included in this paper but available by contacting the ECO).

*"The reports have evolved a great deal over the last few years, particularly under the present Commissioner, and are now excellent. I often refer colleagues to the reports as a "heads up" for emerging environmental issues."*

*"There is no other source anywhere that provides as broad an analysis of the state of the environment in Ontario and highlights those areas that need attention."*

## Suggestions to Improve the Annual Reports

Twenty-four respondents provided suggestions on how the annual reports might be improved. These comments focused on issues pertaining to content, format, and the overall approach to annual reporting. Suggestions in each category are summarized below. A full list of categorized suggestions is provided in Appendix 12 (not included in this paper but available by contacting the ECO).

*"I think that if more ministers referred to them (even if they are negative to their operations) it would give the ECO and EBR a higher profile in the eyes of the people of Ontario. For it to be useful, the people who are advocates need to make use of the thoughtful statements and comments of the ECO as they would an independent audit."*

*"Use of graphs and tables whereby comparisons can be made are easier to track than long explanatory paragraphs."*

### Content

With regard to the content of the annual reports, respondents suggested such improvements as more in-depth analysis of specific topics and less process description; more/better facts; more consistency in tracking and updating issues; more information on the way other jurisdictions are working towards improvements and how Ontario compares; and addressing essential problems of how government allocates resources.

### Format

Respondents felt that the annual reports should provide links to more information on the topics covered; provide more information in tables or graphs format; integrate the main report and the supplement online; communicate who the Minister was during the time that something occurred; provide more contact information; and be available as an HTML document in addition to the PDF version.

### Overall Approach

Respondents felt that the overall approach to the annual reports could be improved by reducing sensitivity to political concerns; being more specific about decisions and answering direct questions; encouraging the Ministers to use the reports more often; printing fewer hard copies and making them recyclable; reporting more frequently; and conducting more consultation on topics. One respondent felt that the annual reports should be discontinued.

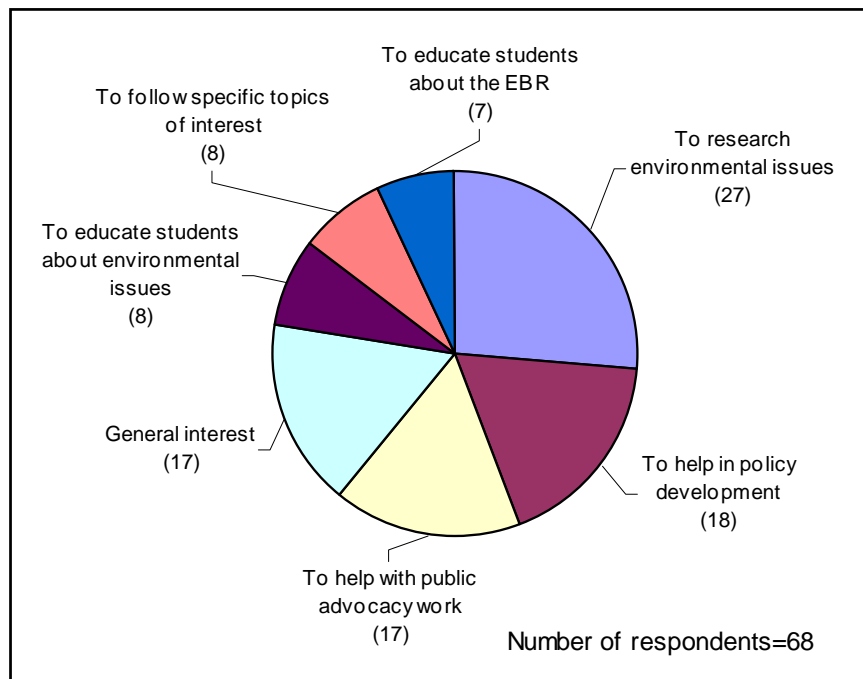
Suggestions to encourage reading of annual reports are provided in Appendix 12 (not included in this paper but available by contacting the ECO).

### 2.3.2 ECO Special Reports

Thirty-three respondents have read an ECO special report (or portion thereof). As illustrated in Figure 4, the top two reasons for reading the ECO special report are to

research environmental issues and for policy development. Helping with public advocacy work and general interest are tied for third). See Figure 4 for a summary, and note that respondents were encouraged to select all that apply. As a result, the total number of uses shown in Figure 4 exceeds the total number of respondents for that question.

**Figure 4: Uses of the ECO Special Reports**



### Positive Aspects of the Special Reports

Twenty respondents provided comments on the positive aspects of ECO special reports, including the scope of the issues; depth and specificity of coverage and analysis; the extent of background

information; and the content versus process focus. A few respondents commented that the special reports are user-friendly and easy to understand, as well as more timely than the annual reports. One respondent compared the annual and special reports more extensively, stating that the special reports are easier to read, more focused, and more digestible than the annual reports, as well as more modestly printed, which saves money and time and conserves paper. Another respondent felt that the special reports provide a succinct clear warning to the Ontario government of current problems that should be of concern to all Ontarians.

*"A succinct clear warning to the Ontario government of current problems that should be of concern to all Ontarians."*

## Suggestions to Improve the Special Reports

Fourteen respondents provided suggestions on how the annual reports might be improved. The most common suggestions were that the special reports should be produced more often. Other suggestions include:

*“Unless the statute is changed to give the commissioner independent investigatory and remedial powers these reports are at best interesting reading.”*

- Keep them short and to the point.
- Special reports could be written on media-specific concerns, such as air, water, and soil, or other topics of interest as identified by the public.
- Provide list of special report titles for the past five years in ECO's annual report.
- The ability to print ECO reports as HTML documents versus protected (PDF) documents would promote greater use as educational material.

Suggestions to encourage reading of special reports are provided in Appendix 12 (not included in this paper but available by contacting the ECO).

### 2.3.3 Priority Issues for the ECO

Respondents made many suggestions for environmental issues that should be a priority for the ECO over the next year and the next five years. The most commonly suggested related to source water protection, general water quality and/or quantity, water/groundwater supply and water taking issues, and general air quality. The full list of suggestions appears in Appendix 12 (not included in this paper but available by contacting the ECO).

## 2.4 Ministry Statements of Environmental Values (SEVs)

### 2.4.1 Experience with the SEVs

Over half of respondents (38) have had little or no experiences with SEVs. Those respondents who do have some experience criticized the SEVs and felt that they are essentially ignored and have little impact on ministries' actions. One respondent felt that SEVs are simply a political requirement that does not really commit a ministry to change behaviour. Another respondent commented that while the intent of the SEVs is good, the ECO lacks the power to enforce or at least require the responsible agencies to do their own enforcement. A third respondent commented that the SEVs are too vague and the legislation does not enforce them properly.

Based on their experiences with SEVs, five respondents answered “yes” to the question of whether the SEVs are advancing the goals of the EBR. One of these five noted that the advancement is too slow, and that the “the policy breakers are ahead of the policy makers”. About 14 respondents were undecided or answered “sometimes” or “maybe”. One respondent suggested that the reason for lack of impact is that SEVs are not

sufficiently tied in with the ministries' business plans, and there is no penalty if they are not followed.

*"The content of the SEVs certainly appears to advance the goals of the EBR. But many of the principles that are meant to guide the activities of the ministries when it comes to environmental issues, are often not being paid appropriate attention."*

*"Having SEVs was an important first step. Having the ability to enforce them would be the next."*

*"The previous government fatally weakened the SEV concept by diluting the required degree of adherence to them."*

### **2.4.2 Improving the SEVs**

Thirty-eight respondents provided suggestions for enhancing the effectiveness of the SEVs. A common theme in many of the suggestions is that SEVs need to be updated to become more measurable and prescriptive, and perhaps be implemented in all government policy decisions as a statutory/legislative obligation. There needs to be stronger direction from the legislation to indicate to ministries, tribunals and the courts that the SEVs are significant and must be considered and applied. A respondent made the point that ministries other than the MOE do not comply with existing environmental legislation and thereby set a poor example. It was suggested that the ECO needs more power to ensure that ministries adhere to their SEVs (enforcement), perhaps to audit for compliance, and increased accountability for non-compliance. Also encouraged was more coordination between ministries. Other suggestions for improvements are listed in Appendix 13 (not included in this paper but available by contacting the ECO).

## **2.5 Application for Investigation**

### **2.5.1 Results of Application for Investigation**

Of the 13 respondents who have used the *EBR* to apply for an investigation of a suspected contravention of an environmentally significant Act, regulation or instrument, one reported receiving a positive outcome, and remarked that the outcome was "excellent". The remaining 12 expressed a number of concerns. One respondent noted that the MOE covered up its own errors and did not conduct an arms length investigation. This respondent suggested that any request for investigation should be done by an outside agency. The suggestion was made that outside pressure on a department, combined with appropriate disciplines for failures, would create stronger results that are less prone to outside interference.

Another respondent noted that the MNR chose not to investigate based on the rationale that the facts as they were presented allowed for the possibility that there not might be a contravention. A third respondent remarked that as of last December, the facility of

concern is not properly licensed and is still a source of pollution. In another circumstance, a respondent noted that while the Commissioner found the complaint to be of significant interest, he was powerless to do anything more than comment on it in the annual report. A full list of comments is provided in Appendix 14 (not included in this paper but available by contacting the ECO).

### **2.5.2 Strengths and Weaknesses of the Application for Investigation Process**

The same 13 respondents provided feedback on the strengths and weaknesses of the application for investigation process. Three respondents made positive comments – one remarked that the process is thorough and objective; another commented on the use of published examples as templates, which makes it simple to produce a request; and a third indicated that the process provides additional accountability in that it allows citizen to monitor compliance with environmental laws (extra “eyes and ears”), and thus is an affordable way to expand the monitoring effectiveness of limited enforcement staff.

The remaining respondents noted that the process is not effective, takes too long, is too repetitive and restrictive, does not give the public the power to solve problems, and requires extensive resources to marshal the necessary evidence to have concerns taken seriously (lots of work for low reward). One respondent noted that the *EBR* lacks the legislative clout to make ministries comply, thus the “eyes and ears” potential is not realized. Another noted that the ECO should not rely so heavily on MOE comments when making its decision whether to investigate. Several other weaknesses were raised as follows: each Ministry decides whether or not it should be investigating itself; investigations often do not address the facts; and the Ministry is not required to provide sufficient proof that an investigation was actually conducted.

### **2.5.3 Suggestions for Improving the Application for Investigation Process**

Twelve respondents provided suggestions for improving the application for investigation process. Some key suggestions include:

- All acts under prescribed ministries should be subject to investigation.
- Instil confidence in the results. The process within the ECO is good, but the internal cover-ups by the ministries reduce confidence in the process.
- The ECO should be more independent from the MOE.
- Lower the burden on ordinary Ontario residents to bring matters to a serious level of resolution.
- Make sludge spreading subject to the *EBR* and subject to notification, comment, appeal and investigation.
- Have enough staff in the ministry who are available to conduct investigations and make the process more transparent.

A full list of suggestions is provided in Appendix 14 (not included in this paper but available by contacting the ECO).

#### **2.5.4 Additional Comments on the Application for Investigation Process**

All respondents were asked to provide additional comments on the application for investigation process. Seven respondents provided such comments. A few key comments are discussed below, and a full list of comments is provided in Appendix 14 (not included in this paper but available by contacting the ECO).

One respondent was cynical about the probability of the Ministry effectively investigating anything, given alleged recent interventions by former Ministers that abused environmental power, and previous experience on several occasions with corrupt investigators and Ministry personnel in conflict of interest positions. This respondent noted that the “window dressing” of this survey and other “dead-end” measures are about all that can be expected from the Ministry. Another respondent remarked that the application for investigation process is a very slow and frustrating process. A third respondent felt that the application for investigation process is a powerful right that he/she has considered using, but a situation serious enough has not yet arisen.

### **2.6 Application for Review**

#### **2.6.1 Results of Application for Review**

Ten respondents have used the *EBR* to apply for a review of a provincial Act, regulation, policy or instrument (permit, license, etc.) These ten respondents were asked to provide the outcome of their application for review – two were happy with the outcome, four were unhappy, and four provided neutral comments. Several key comments are summarized below, and the full list of comments is provided in Appendix 15 (not included in this paper but available by contacting the ECO).

One respondent noted that his/her opinions were considered, and another felt that the application for review led to significant results.

One respondent explained that while the MNR disagreed with the application, a change in government resulted in a change of heart. The Environmental Commissioner had agreed with the original application, and the MOE agreed after a lengthy delay and a change in government as well.

Two of the four respondents who were unhappy with the process commented that the very people who had issues the permit were the ones who refused the review, and that a ministry provided a very perfunctory response quite out of keeping with the level of effort that was put into the application for review.

#### **2.6.2 Strengths and Weaknesses of the Application for Review Process**

Ten respondents provided feedback on the strengths and weaknesses of the application for review process. One respondent felt that the process is fine, but the quality of reviewers is the real issue. Another noted that while the potential exists to tap the

wisdom of the public and ENGOs to improve public policy, the potential is not realized because the ECO lacks “teeth”, and the usefulness of the application for review provision is often limited to a media stunt or awareness-raising tool. Another respondent indicated that it takes a certain level of understanding to know how to use the application for review process, and ordinary citizens may not understand how it could be used to bring some problems to greater prominence.

One respondent felt that the ECO, not the MOE, should determine if a review is warranted. Another remarked that there appears to be no consideration of one’s ability to comply, creating an unlevel playing field. For example, those who apply for an instrument put their business in an unfair competition with companies who dodge their responsibilities.

Other respondents felt that the process is inadequate or onerous, not taken seriously, and that for complex matters it is difficult to apply solely in writing. The lack of recourse in the event that an application is turned down, as well as the significant time required to prepare the application for review, were also identified as significant weaknesses.

### ***2.6.3 Suggestions for Improving the Application for Review Process***

Nine respondents provided suggestions for improving the application for review process. A sample of suggestions is provided below, and the full list is provided in Appendix 15 (not included in this paper but available by contacting the ECO).

- Remove the review process from those who issue the permits.
- ECO should be able to self-initiate reviews like the Ombudsman.
- The most significant issue should be to try effect legislative change to make the tests less onerous.
- Some guidelines that if met would allow for an application to have a "day in court". Perhaps a face-to-face meeting with ECO and Minister and applicant.

### ***2.6.4 Additional Comments on the Application for Review Process***

All respondents were asked to provide additional comments on the application for review process – seven respondents provided such comments. A discussion of a few key comments is provided below, and a full list of comments is provided in Appendix 15 (not included in this paper but available by contacting the ECO).

One respondent noted that the application for review process is a last resort, and another felt that the process is a waste of time and that the government will do whatever it wants in any event. One respondent was unaware that the option was available, and another remarked that the public at large is not aware of the option. Two respondents expected to exercise this right in the near future.

## **2.7 Right to Appeal Ministry Decisions**

### **2.7.1 Results of Appeals of Ministry Decisions**

Ten respondents have used the *EBR* to seek leave to appeal a ministry decision. Regarding the outcome of their leave to appeal applications: one respondent indicated that the decision is pending; three noted that appeal was not granted (in one case the appeal improved mitigation but there was no fundamental reanalysis of the need for the project); three noted that the appeal was granted; and three provided mixed results (some granted and some denied) or other comments. A sample of comments is provided below, and the full list is provided in Appendix 16 (not included in this paper but available by contacting the ECO).

- Leave was not granted because the application was not received within the 10 day comment period, even though there were irregularities in the posting and approval of the decision.
- Involved indirectly. Only improved mitigation, no fundamental re-analysis of need for project.
- We won the right to a full hearing under the ERT (Environmental Review Tribunal). After a two-year process we won a fair decision from the ERT. The company involved appealed to the court and the Minister. The then-Minister reversed the ERT decision. The new government promised to correct the Minister's intervention and did so with a moratorium.
- Application No. 1 - the request was denied. Application No. 2 - the application was granted. The process is certainly not a citizen-friendly one but we are keeping detailed notes and will certainly share what we have learned with other citizens who might find themselves in this same situation.

### **2.7.2 Strengths and Weaknesses of the Right to Appeal Ministry Decisions**

Eight respondents provided feedback on the strengths and weaknesses of the leave to appeal process. One respondent noted that the process made him/her feel empowered as a citizen, and accepted that the process (in his/her case) was long and arduous because it led to a long and expensive hearing. One of the strengths noted by this respondent was the ability to represent oneself without legal counsel. However, this respondent suggested that the process should include intervenor funding, and more guidance for citizens who decide to proceed without legal counsel.

Most of the remaining respondents commented that the process is too time consuming, and the financial and evidentiary burden is too high (especially given the time available). One respondent commented that while the process is efficient, the outcome is more or less already decided before the hearing. Another respondent noted that while the process is binding and impartial, it lacks co-ordination between departments, is difficult to get documents, and bureaucratic problems always result in cover-ups. One respondent noted that the leave to appeal process is based on the understanding and assumption that fiduciaries of the Crown will act in good faith and provide the ERT truthful, accurate, and complete information in their sworn affidavits. This respondent

claimed that the fiduciaries of the Crown knowingly concealed relevant material facts and provided knowingly inaccurate, misleading and incomplete information in a sworn affidavit to the ERT.

### ***2.7.3 Suggestions for Improving the Right to Appeal Ministry Decisions***

Ten respondents provided suggestions for improving the leave to appeal process. A sample of suggestions is provided below, and the full list is provided in Appendix 16 (not included in this paper but available by contacting the ECO).

- Look at the underlying causes for non-compliance, not just the non-compliance. Perhaps have a jury of peers.
- Send e-mail notices to registered users of the Registry. The 10-day appeal period does not allow for any error in posting a request. Small groups and individuals cannot check the Registry every day.
- Lower the threshold and the burden of proof in order that an appeal be granted; extend the time available for appeal or at least for obtaining necessary technical evidence considerably. Provide more time for citizens to prepare
- Make the ERT booklet available in a better format than the photocopied version, and edit it to avoid repetition of page numbers. It should also contain an index and glossary of common legal terms. Added to that should be a legal hotline where one might call with questions.
- Simple announcement in rural newspapers (biannually?) stating situations in which rights occur and telephone numbers for information. Many rural residents do not have computers or access those in libraries.

### ***2.7.4 Additional Comments on the Right to Appeal Ministry Decisions***

All respondents were asked to provide additional comments on the right to appeal ministry decisions – eight respondents provided such comments. A discussion of a few key comments is provided below, and a full list of comments is provided in Appendix 16 (not included in this paper but available by contacting the ECO).

Two respondents noted that the leave test is too stringent and should be more attainable. One suggested that the leave test should be on the balance of probabilities, and other suggested that intervenor funding should be considered again to make the appeal process more accessible. Another respondent noted that the current process tends to protect the decision makers and the proponents rather than the public, and felt that the investigation process should rarely cause the public to need access to the appeal. However, as a result of self-investigation by the ministries, the process becomes “elongated” and many times results in the necessity of an appeal.

*"A waste of time and money. No changes."*

*"Proving unreasonableness on the part of the issuing director is too difficult. Environmental impact should be the main hinge and if there is reason to believe the science is controversial - the precautionary principle should prevail in allowing a public hearing."*

## 2.8 Other Comments

Twenty-six respondents provided additional comments about the *EBR*. A full list of these comments is provided in Appendix 17 (not included in this paper but available by contacting the ECO). Some have been edited for length and grammar. A discussion of key comments is provided below.

Some respondents provided positive comments on the *EBR*. One felt that the *EBR* is a very useful education tool that permits easy access to current developments by Government, and another commented that the *EBR* is a wonderful concept that should be used and protected. A third respondent noted that the *EBR* is a fantastic tool that is critical for the protection of Ontario's environment.

Some respondents identified what they feel to be current inadequacies and problems regarding the *EBR*. Many felt that the ECO and *EBR* need "more teeth":

- "...I have no faith in the Approvals Branch of the MOE and only wish the ECO had more power. I find the whole process after 20 years to be flawed even at the MOE."
- "At present the ECO is a "toothless tiger". He/she should have a staff capable of conducting their own "objective" investigations and the right to press charges where deemed necessary. The present concept is good, but lacks enforcement/compliance capability."
- "Generally pleased we have an *EBR* but it needs more teeth. If these really are "rights" then they need to be treated as such. Decisions made need to be done so with the utmost of transparency and accountability, which they are not, and while the Commissioner's role is absolutely indispensable in highlighting problem areas, its too easy for complacent or self-serving ministers to make bad, sometimes irreversible and damaging decisions, with no consequences..."

One respondent noted that the *EBR* "has not been the shining example of environmental governance we had hoped it would be", and suggested that "we need to build on the early years of the *EBR* and extend it". One respondent suggested that the *EBR* be integrated into school curricula as a mandatory subject, and that the ECO should continue its "*EBR and You*" workshops. The same respondent also suggested that intervenor funding should be promoted for those who win leave to appeal. The expectation that more citizens will win leave to appeal and will proceed without legal counsel should be addressed and suitable materials provided to aid in their success.

One respondent noted that many citizens are still unaware that the *EBR* exists, and even where there is awareness, the tools are very modest in their usefulness (especially given the ratio of effort and knowledge required on the part of the citizen to likely

*"I would entertain a candid conversation. I have been dealing in the business for 10 years, and competing with large consulting groups. I believe the little voices need to be heard."*

*"There is a great deal of room for improvement in the EBR process. Hopefully this government will recognize this and get on with it in the best interests of the environment and the residents of Ontario."*

*"After many years of discussions, complaints and continued problems with little or no action from MNR and MOE, I gave up! Frustration is not an emotion I thrive on. The [redacted] operators have too much power and influence to challenge. All I ask for is a compromise. To them this is not a solution. It is all or nothing."*

improvements to environmental protection). This respondent suggested that the *EBR* should be more like a Charter of Rights in its power to trump actions that do not meet the requirements of sustainability.

Other suggestions for improvements include:

- "Make sure Ministries do not make changes after posting on *EBR* that were not consulted on by those directly impacted by the legislation."
- "The *EBR* and ECO play a crucial role in safeguarding sound environmental policy in Ontario. Both should be strengthened."
- "Basic structure of the Act should not be altered. ECO powers should be expanded to ability to initiate own investigations and reviews (like Ombudsman) and to comment on legislation affecting mandate. ECO could also be given role in state of the environment reporting."
- The *EBR* lacks publicized mediation. Make more information available to the public: "When you asked the *EBR* people about something on the investigation their answer is we can't tell you. And I feel that we should get some report on how or what is happening with the investigation. Because with all the information we gave them, we got nothing reported back on what is being done or what was the outcome from the investigation".

## Appendix 1: Methodology

The ECO distributed the questionnaire broadly, inviting the public and stakeholders to provide feedback during the 52-day comment period from March 31, 2004 through May 21, 2004. An extension to the reply date was provided to May 27<sup>th</sup> upon request.

Notices provided through the Environmental Registry and the ECO website would have reached anyone who visited either site through the Internet. The ECO also sent 727 targeted invitations to stakeholders through a combination of regular mail and e-mail.

The notification process is summarized below.

### *Invitations to ECO Stakeholders*

- Personal invitations from the Environmental Commissioner were sent via regular mail to 172 individuals on March 26, 2004, with an attached paper copy of the questionnaire. These letters were mailed so that the invitation would arrive by the start of the comment period. The mail-out was directed to people who had used the *EBR* in the past two years to apply for appeals, investigations and reviews, as well as to all members of the ECO's Advisory Committees (see Appendix 3 for a copy of the letters) (not included in this paper but available by contacting the ECO).
- On March 31<sup>st</sup>, an email announcement was sent to 521 addresses on the ECO's email notification list (comprised of people who have requested notification of ECO activities). Thirteen of these emails bounced back due to invalid addresses, for a total of 508 email notifications (see Appendix 4 for a copy of the notification) (not included in this paper but available by contacting the ECO). On May 13<sup>th</sup>, an email reminder was sent to the 508 individuals on the email contact list (see Appendix 5) (not included in this paper but available by contacting the ECO).
- On April 29<sup>th</sup>, the ECO sent an email to six Ontario newspaper reporters to spark additional interest in the pre-consultation process (see Appendix 6 for a copy of this email) (not included in this paper but available by contacting the ECO).
- On May 5<sup>th</sup>, the ECO sent an invitation to 21 Ontario Bar Association contacts who are actively involved in practicing environmental law. This email was the same as the announcement sent out on March 31<sup>st</sup> (see Appendix 4) (not included in this paper but available by contacting the ECO).
- On May 13<sup>th</sup>, the ECO sent a copy of the original e-mail notification to a group of 20 stakeholders that the ECO believed might have been missed during the first round of e-mail notifications. This email was the same as the announcement sent out on March 31<sup>st</sup> (see Appendix 4) (not included in this paper but available by contacting the ECO).

*Information Notice on the Environmental Registry*

- An Information Notice was posted on the Registry on March 31, 2004. Appendix 7 provides a copy of the information notice (not included in this paper but available by contacting the ECO). The notice was available in English and French.

*Notice on the ECO Web Site*

- The ECO's website (in English and French) provided an invitation to respond to the questionnaire. Please note that the invitation was dated March 22<sup>nd</sup>, which was the initial launch date, but was posted on March 31<sup>st</sup> (the actual launch date). Appendix 8 provides a copy of this notice (not included in this paper but available by contacting the ECO).
- On April 29<sup>th</sup>, the ECO added a header at the top of their "Welcome" message page to steer more people towards the questionnaire.