

Rationale and Details

You have asked me to provide recommendations in relation to the draft Statement of Environmental Values (SEV) produced by the NWT government, pursuant to its *Environmental Rights Act*. I have set out my recommendations, with explanations for each. In Appendix A you will find a brief history of SEVs in the Ontario *Environmental Bill of Rights* and the extensive commentary on them from the Environment Commissioner of Ontario (and recently from the Auditor General of Ontario), the Ontario Environmental Review Tribunal and courts.

The NWT Environmental Rights Act (ERA) and Draft Statement of Environmental Values (SEV)

Sections 17 and 18 of the NWT *Environmental Rights Act* (NWT ERA) require the Executive Council to prepare a draft Statement of Environmental Values (SEV). Section 17 of the NWT ERA states that the SEV “explains how environmental considerations, including the right to a healthy environment, will be integrated into decisions that might have a significant impact on the environment.”

Section 17 also lists several principles that the Executive Council may consider when preparing the draft SEV. It also differs by specifically including the right to a healthy environment as one environmental consideration that must be integrated into environmental decisions. Section 2.2 of the Act lists the Purposes of the Act, which the SEV should also serve to achieve.

Section 18 of the Act states that the GNWT “shall take every reasonable step to ensure” that the SEV “is considered whenever decisions that might significantly affect the environment are made by the department or body”. This language is mandatory, creating an enforceable duty on the Minister.

NWT Executive Council’s Draft SEVs

The NWT Executive Council has issued a draft SEV for comment before February 10, 2022. The SEV contains 5 sections. I will highlight aspects that are admirable and areas needing improvement.

It is important to begin by highlighting the aspects of the draft SEV that are good. The strongest aspect of the draft NWT SEV is that it contains so many of the key principles of environmental law, and all of those suggested in the Act. The list of principles is far more comprehensive and up to date than comparable SEVs. The precautionary principle and the polluter pays principle have long been part of Canadian environmental law and policy. However, the draft NWT SEV also contained the principle of ecological sustainability, intergenerational equity, environmental justice, sustainable development, and a commitment to UNDRIP. While I will make suggestions below about improved wording, the very inclusion of these principles is a significant step forward compared to similar legislation and SEVs. For example, in its comments on the draft amendments to MOECP SEV, the Canadian Environmental Law Association (CELA) proposed that it be changed to include the principles of Environmental Justice and of Intergenerational

Equity. By contrast, the NWT draft SEV does not include some of the principles in the Ontario MOE SEV. The NWT government is to be commended for including many principles in the NWT ERA and draft SEV. However, the wording of some of these principles should be strengthened (in some cases to reflect the actual wording in the NWT ERA), and others should be added.

The main weakness of the draft SEV is that it fails to reflect the dire situation we are in with the triple crises of climate change, biodiversity loss and waste and pollution. Although seemingly enlightened by the idea that human beings should have a right to a healthy and intact environment, there is a status quo/business-as-usual feeling to the provisions of the SEV as if not a lot is really going to change as a result of the enactment of the NWT ERA and its SEV. There is no real acknowledgement of how deeply connected we are to the non-human species of the NWT and how together with them we are intimately connected to all life and life processes on Earth, and that by protecting the environment and all species of the NWT, we are helping to maintain the health of the entire biosphere and thereby ensuring that all life will survive into the future. Nor is there any indication in the SEV of how profound will be the changes that are required of us in everything we do, economically, culturally, socially, if we are to deal with the huge issues before us.

Recommendation #1: The SEV should state at the outset that “This SEV shall be applied consistently with the Purposes in Section 2.2 of the NWT ERA”.

Explanation: The SEV is designed to help achieve the purposes of the Act, and therefore should state this explicitly.

Recommendation #2: Rephrase the Statement of Policy to say “The Statement of Environmental Values **is a substantive framework for government decision-making**. As required by s. 17 of the NWT ERA, this SEV explains how environmental considerations, including the right to a healthy environment, **will be integrated** by the GNWT into actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments that might have a significant effect on **any part of the environment including the species that inhabit it as well as its ecological features and processes.**”

Explanation:

- The draft SEV says under “Statement of Policy” that the SEV “is a means to record the government’s commitment to the environment and to actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments made in the best interest of residents.” This is not in keeping with the wording of the NWT ERA.

- The Canadian Environmental Law Association (CELA) explains that when the Ontario *Environmental Bill of Rights* was being drafted, the original intent was for an SEV to be a “substantive framework for government decision-making”¹ on important environmental matters. SEVs should contain “robust, efficient and enforceable language”.²
- The NWT ERA uses the words “will be integrated” in s. 17. This expression should be used throughout the SEV (similar recommendations are made below in relation to other sections of the SEV).

Recommendation #3: Reword SEV Principle 1: “If there is a threat of significant harm to the environment, lack of complete scientific certainty **is not to be** a reason for postponing reasonable measures to prevent that harm (Precautionary Principle).”

Explanation: The SEV should contain the same wording as that in the NWT ERA (the Act says, “is not to be a reason for postponing”, while the SEV says “is not considered to be a reason for postponing”). Capitalizing the Precautionary Principle makes it clearer that this section refers to the internationally recognized principle of environmental law.

Recommendation #4: Reword SEV Principle 2: “Polluters must bear the costs of their pollution, including the cost of measures taken to prevent, control and remedy pollution and the costs it imposes on society. (polluter pays principle)”

Explanation:

The Polluter Pays principle is designed not only to require polluters to pay after harm is done but to internalize the costs of externalities and incentivize polluters to prevent harm, in order to avoid having to pay for remediation. This wording is more in line with this fuller concept and echoes European Union approaches.³

At the very least, the SEV should adopt the same wording as the NWT ERA, which says “and **is to bear** the costs of that action” (instead of the wording in the draft SEV which says “and should bear the costs of that action”).

Recommendation #5: Reword SEV Principle 4: “Development of resources in the NWT shall only occur in a manner that supports the long-term environmental, economic, cultural and social well-being of the human residents of the NWT, together with the well-being of all other species and the ecosystems with which we co-exist and on which we mutually depend. Intergenerational Equity requires “conservation of options (defined as conserving the diversity of the natural and cultural resources base), conservation of quality (defined as leaving the planet no worse off than

¹ <https://cela.ca/wp-content/uploads/2021/01/CELA-ltr-re-MECP-SEV.pdf>.

² <https://cela.ca/wp-content/uploads/2021/01/CELA-ltr-re-MECP-SEV.pdf>.

³ https://www.eca.europa.eu/Lists/ECADocuments/SR21_12/SR_polluter_pays_principle_EN.pdf.

received), and conservation of access (defined as equitable access to the use and benefits of the legacy). (Intergenerational Equity principle)”

- The wording of Principle 4 in the SEV is actually the Sustainable Development principle enunciated by the Brundtland Report, not the intergenerational equity principle, although the definition does include the concept of intergenerational equity. Principle 4 as written does not reflect current understanding of this principle. Rather, it mixes in considerations of Sustainable Development with considerations of intergenerational equity.
- The proposed revised wording of Principle 4 reflects the intergenerational equity principle as created and developed by Prof. Edith Brown Weiss: “The intergenerational equity principle calls for 3 principles: “conservation of options (defined as conserving the diversity of the natural and cultural resources base), conservation of quality (defined as leaving the planet no worse off than received), and conservation of access (defined as equitable access to the use and benefits of the legacy).”⁴ For example, preserving an intact and sustainable Bathurst caribou herd would be an example of conserving the quality of the NWT environment.

Recommendation #6: Reword the SEV Principle 5: “There **is to be** a just distribution of environmental benefits and burdens among **all those living in** the NWT.”

Explanation:

- It is commendable that this Principle has been included. However, the SEV should adopt the wording in the Act: the Act says “there **is to be** a just distribution...” while the SEV says “there **should be** a just distribution...”

Recommendation #7: Reword SEV Principle 6 “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Development of resources should occur in a manner that supports long-term economic, environmental, cultural, and social well-being of residents of the NWT (sustainable development principle).”

Explanation for Recommendations #7:

- As noted, the wording of Principle 4 in the SEV is actually the Sustainable Development principle enunciated by the Brundtland Report.
- Sustainable development includes economic, social, cultural but also environmental well-being. The draft SEV omitted the word “environmental” here.

⁴ <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2637&context=facpub>.

- Focusing only on human residents of the NWT is an anthropocentric approach. We recommend taking an ecosystem approach which places humans within the environment, not separate from.

Recommendation #8: Reword Principle 7: “Decisions that may have a significant impact on the environment **shall be made in compliance with UNDRIP (particularly Article 26) and the rights of Indigenous Peoples.**”

Explanation: Section 4(4) of the draft SEV says that the GNWT is committed to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).” The Legislative Assembly of the NWT unanimously adopted UNDRIP on February 19th, 2008, and was an early adopter. Canada is a party UNDRIP, and Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2020. This wording of the principle in the SEV is more in keeping with this.

Recommendation #9: After the Principles, add a new section 3 called “**Tools for Applying the SEV**”. Below that, add the following: “The GNWT shall work to protect, restore and enhance the natural environment by:

- developing policies, legislation, regulations and standards to protect the environment and human health;
- using science and research to support policy development, environmental solutions and reporting;
- ensuring that planning, which aims to identify and evaluate environmental benefits and risks, takes place at the earliest stages in the decision- making process;
- adopting an ecosystem approach to environmental protection and resource management; this approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them;
- considering the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society;
- prioritizing preventing pollution and minimizing the creation of pollutants that can adversely affect the environment;
- supporting and promoting a range of tools that encourage environmental protection and sustainability (e.g. stewardship, outreach, education);
- undertaking compliance and enforcement actions to ensure consistency with the Act, the SEV and environmental laws;
- undertaking environmental monitoring and reporting to track progress over time and inform the public on environmental quality.

In addition, the GNWT shall use a range of innovative programs and initiatives, including strong partnerships, public engagement, strategic knowledge management, and economic incentives and

disincentives to carry out its responsibilities under the NWT ERA, and through integrating the SEV into its work.

Explanation: Much of this text is taken from the draft amendments to the Ontario Ministry of the Environment and Climate Change. They add to the Principles in the draft NWT SEV by setting out tools for applying the principles and achieving compliance with the NWT ERA. Including these tools helps the SEV to be more of a “substantive framework for government decision-making”. It contains many best practice approaches such as the ecosystem approach and consideration of cumulative effects.

Recommendation #10: Add a specific Commitment to Address Climate Change as Section 4 of the SEV, worded as follows:

“The GNWT is committed to tackling climate change, as evidenced by its policies, frameworks, action plans and other approved instruments or measures. The GNWT believes that the public interest requires a broad effort to reduce greenhouse gases and to build a cleaner and more resilient NWT. The GNWT will continue to involve and engage individuals, businesses, communities, municipalities, non-governmental organizations and Indigenous governments in the ultimate goal of fostering a high-productivity, resilient, low-carbon economy and society in the NWT.”

Explanation:

- The NWT has a 2030 NWT Climate Change Strategic Framework with accompanying Action Plan, has a target of reducing emissions 30% below 2005 levels by 2030, a 2030 Energy Strategy and related Action Plan, and a “Guide to Integrating Climate Change Considerations into Government of the Northwest Territories Decision-Making Instruments”.⁵ Given the GNWT’s commitment to tackling climate change, the SEV should also reflect this.
- This proposed wording is taken in part from the Ontario MOECC SEV.

Recommendation #11: Renumber “Scope” to be section 3 and amend to read as follows:

“This Statement applies to all actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments made or used **by the GNWT, its departments and the above-mentioned agencies** that may have significant impact on the environment.”

⁵ November 16, 2020.

Explanation:

- In reviewing the proposed changes to the Ontario MOECP SEV, CELA commented that the SEV changed from the previous version - which applied to the “Government of Ontario” - to apply only to “prescribed ministries.” While only prescribed ministries in Ontario have the duty to create SEVs, CELA noted that the Ontario EBR says that the “government” has “primary responsibility” for protecting the environment. Similarly, s. 17 of the NWT Act says that “The Minister of a department or deputy head of a body listed in paragraph 17(1)(b)” must create an SEV and ensure that it is considered when environmental decisions are made. However, s. 2 says that the Act is designed “to ensure that the Government of the Northwest Territories carries out its responsibility... to protect the environmental rights of the people of the Northwest Territories”. CELA argued that “the Ontario legislature decided to explicitly refer to the ‘Government of Ontario’ in subsection 2(3) in order to ensure that EBR [Environmental Bill of Rights] accountability was applicable to the provincial government as a whole, not to individual ministries as may be prescribed from time to time under the EBR. Accordingly, CELA submits that the proposed SEV’s reference to ‘prescribed ministries’ is a clear rollback from the existing SEV and current EBR purposes”⁶ and recommended the reference be deleted. This is why we recommend that the SEV be amended to say “actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments made and used **by the GNWT, its departments and the above-mentioned agencies.**”
- One of the key criticisms of the Ontario MOE SEV by CELA and others is that when challenged before the Ontario Environmental Review Tribunal or a court, the government often argued that the SEV only applied when government creates laws, regulations and policies, but not to decisions to issue instruments. The draft NWT SEV states that the SEV applies to “all decisions and actions”. This must clearly include submissions made by the GNWT to co-management bodies responsible for resource management decisions and decisions made by GNWT Ministers on recommendations from co-management bodies.

Recommendation #12: Section 3(1) should adopt wording similar to that in s. 2.01 of the NWT *Environmental Protection Act*:

“(1) This Statement is issued under the Authority of the Executive Council. The authority to make exceptions and approve revisions to this Statement rests with the Executive Council in accordance with the *Environmental Rights Act*.

(2) If the Commissioner in Executive Council intends to exempt any person or class of persons, equipment or contaminant from all or any provision of this SEV, the Commissioner in Executive Council shall

⁶ <https://cela.ca/wp-content/uploads/2021/01/CELA-ltr-re-MECP-SEV.pdf>, p 7.

- (a) make notice of the proposed exemption publicly available;
- (b) provide the public with a reasonable opportunity to make representations with respect to the proposed exemption, and make these representations public;
- (c) provide the public with written reasons for its decision; and
- (d) allow for appeals of that decision.

(3) Where Cabinet is of the view that actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments made or used by the GNWT may have significant impact on the environment but does not apply or use the SEV, it shall provide written reasons and provide notice of these to the public as soon as reasonably possible.

(4) Notwithstanding subsections (1) and (2), if an emergency threatens public safety, life, property or the environment, or if the Commissioner of the Executive Council is of the opinion that an emergency situation requires an immediate response:

- (a) the Commissioner in Executive Council may exempt any person or class of persons, equipment or contaminant from all or any provision of this Statement to the extent and for as long as necessary to cope with the emergency, without providing either notice of the proposed exemption or an opportunity to make representations with respect to it.
- (b) The Executive Council shall send a written report to the Legislative Assembly describing the duration, nature and extent of the activities, and what restorative measures are planned, within a reasonable time.

Explanation: While the Executive Council needs some discretion to make exceptions to and exemptions from the SEV, this discretion should be limited, transparent and accountable. The approach recommended here is in keeping with the emergency provisions of the NWT *Environmental Protection Act*, and the Sahtu Land Use Plan on Emergency Activities.

Recommendation #13: Establish an Environmental Commissioner of the NWT.

Recommendation #14: Create an Environmental registry for the NWT.

Explanation:

- Section 2 sets out the accountability for applying the SEV, and says that the Premier, Ministers, Boards, Deputy Heads, the Executive Council etc are “accountable for” the implementation of the SEV, yet the Statement does not state how they are to be held accountable.

- Both a Commissioner of the Environment and an Environmental Registry would help with the monitoring and accountability of the GNWT under the Act, including how the SEV is being applied. These were both created by the Ontario *Environmental Bill of Rights*, specifically in order to ensure public accountability.
- As an interim step, GNWT might like to promote and ensure a stronger and more active oversight role for the Commissioner of the Environment and Sustainable Development within the Office of the Auditor General of Canada that already has oversight on GNWT finances.

Recommendation #15: Mandate letters issued by the Premier to Cabinet Ministers in the GNWT should include an obligation for office holders to integrate the SEV in all actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments.

Explanation: In some public and private sector organizations, means are being developed to tie individual job performance or evaluation to obligations such as reaching targets on GHG emission reductions, etc. In the NWT, Deputy Minister job evaluations include showing progress on things like the Affirmative Action Policy.⁷ Adding an obligation in mandate letters to Ministers and Deputy Ministers about implementation of the SEV in actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments, and monitoring, and considering performance of this obligation during job evaluations, would incentivize this. This would help to increase accountability.

Recommendation #16: Add the following as a new section 4:

“MONITORING AND REPORTING ON THE USE OF THE SEV

The GNWT, its Ministers, Boards and Deputy Heads shall document and make public how the SEV was considered each time a decision on an Act, regulation or policy is made or any other decision, action, recommendation or decision-making instrument is made that may have significant impact on the environment. Ministers, Boards and Deputy Heads will ensure that staff involved in decisions that might significantly affect the environment are aware of and comply with *Environmental Rights Act* and SEV obligations. Ministers, Boards and Deputy Heads shall review and report, both internally and to the Executive Council, on their progress in implementing the SEV.

The Executive Council shall draft a “Guide to Integrating the Statement of Environmental Values into Government of the Northwest Territories Actions, Decisions, Recommendations and Submissions to Boards (such as the Mackenzie Valley Boards) and Decision-making Instruments.”

⁷ https://my.hr.gov.nt.ca/sites/myhr/files/15.04_-_affirmative_action_2017-04-01_0.pdf.

The Executive Council shall submit an Annual Report on the Integration of the SEV into GNWT Actions, Decisions, and Submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments to the Legislative Assembly as soon as possible after the end of each year.”

Explanation:

- The Environment Commissioner of Ontario said about the MOE SEV, “openly explaining to the public how specific SEV principles were considered and accounted for during the decision-making process would provide clarity about the ministry’s rationale for the decision and would improve assurance that SEV principles were taken into account.” This should be required whenever a decision, action, recommendation or decision-making instrument that could have significant impact on the environment is made in the NWT. Make reporting on how the SEV was integrated into actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments will facilitate consolidated reporting on the SEV.
- Requiring an Annual Report enhances transparency and accountability about how the SEV has been integrated into GNWT actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments. Annual reporting is already part of the NWT ERA under s. 19 and reporting on the implementation of the SEV should be integrated into, and would be consistent with, this requirement.
- The proposed wording is modified from s. 5 of the Ontario MOECC SEV.

Recommendation #17: Amend s. 3(2)(a) as follows:

“(i) The Executive Council is accountable for the application of this Statement, including the principles and provisions within, to all actions, decisions, recommendations and submissions to Boards (such as the Mackenzie Valley Boards) and decision-making instruments that might significantly affect the environment.

(ii) The Executive Council may, in accordance with the *Environmental Rights Act*, amend this Statement from time to time. If the Executive Council proposes amendments to the Statement, it shall comply with the process set out in s. 17 (2), (3) and (4) of the *Environmental Rights Act*.

(iii) The Executive Council shall review the SEV within 5 years of its start date, and every 5 years after that, and may suggest amendments to the SEV at that time. If the Executive Council proposes amendments to the Statement, it shall comply with the process set out in s. 17 (2), (3) and (4) of the *Environmental Rights Act*.

Explanation:

- Instead of the Executive Council having discretion whether to amend the SEV “from time to time”, the SEV should include a minimum period for mandatory revision of the SEV to ensure it remains up to date. For example, the NWT State of the Environment Report must be issued every 4 years. There should be a similar duty to regularly review the SEV.
- When the Executive Council proposes amendments to the SEV, it should be required to publish the proposed amendments for comment in the same way as it is currently publishing and allowing comments on this initial draft SEV.

Recommendation #18 Amend section 3: Wherever it currently says, “take reasonable measures”, change this to “shall take every reasonable step” (s. 3(2)(b), (c), (d)(i) & (ii), (e)(iii) & (iv)).

Explanation: Section 18 of the NWT ERA states that “The Minister of a department or deputy head of a body listed in paragraph 17(1)(b) shall take **every reasonable step to ensure** that a statement of environmental values prepared or amended under section 17 is considered whenever decisions that might significantly affect the environment are made by the department or body.” The language of the SEV should be consistent with the Act.

Recommendation #19: Amend the Statement wherever it says: “adheres to the principles and provisions of this Statement” to “integrates the principles and provisions of this Statement”.

Explanation: Section 17 of the NWT ERA uses the expression “will be integrated”. The language of the SEV should be consistent with the Act.

Recommendation #20: Amend the Statement wherever it says, “will integrate environmental considerations into...” to “will integrate the Statement of Environmental Values into...”.

Explanation: The expression “environmental considerations” is much vaguer than the explicit elements of the SEV which the Legislative Assembly has worked hard to create and already requires.

Recommendation # 21: Change to s. 4(1) General , first paragraph to stay: “The GNWT and the residents of the NWT have a shared responsibility and goal to ensure the wise use and

management of the environment on behalf of present and future generations **of all species in the North.**

Explanation: This once again emphasizes that the NWT ERA and SEV are not solely anthropocentric but recognize our interconnections and interdependence in the ecosystem.

Recommendation #22: Change s. 4(1) General, second paragraph to read “The GNWT **shall** enact public policy that reflects a desire for environmental protection at the territorial, regional and local levels, and the promotion of related internationally recognized best practices.”

Explanation: The expression “strive to enact” is not strong enough. The word “shall enact” is in keeping with the purposes of the NWT ERA and SEV.

Recommendation #23: After the second paragraph in s 4(5), add: “Meaningful involvement and appropriate consideration of interests means:

- (i) people have an opportunity to participate in decisions about activities that may affect their environment and/or health;
- (ii) the public’s contributions can influence the decision;
- (iii) community concerns will be considered in the decision-making process; and
- (iv) decision makers will seek out and facilitate the involvement of those potentially affected by or genuinely interested in by a proposed action or decision.

Explanation: The SEV includes the Environmental Justice principles. CELA points out⁸ that the US Environmental Protection Agency defines Environmental Justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.” It defines “fair treatment” to mean that “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, Governmental and commercial operations or policies”. It also defines “meaningful involvement” as including 4 ideas: “People have an opportunity to participate in decisions about activities that may affect their environment and/or health; the public’s contribution can influence the regulatory agency’s decision; community concerns will be considered in the decision-making process; and decision makers will seek out and facilitate the involvement of those potentially affected.”⁹ This wording is much more comprehensive in terms of the meaning of Environmental Justice and also processes for helping to achieve it.

⁸ <https://cela.ca/wp-content/uploads/2021/01/CELA-ltr-re-MECP-SEV.pdf>, p 12-13.

⁹ US EPA : <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=EPA%20and%20Environmental%20Justice.%20EPA's%20goal%20is%20to,the%20Agency's%20work,%20including:%20setting%20standards;%20permitting.>

Recommendation #24: Change the last paragraph of s. 4(5) to read “Whereas the GNWT and Northwest Territories residents have a shared responsibility and goal to ensure the wise management of the environment, including all species and ecosystems, on behalf of present and future generations, the GNWT will provide...”

Explanation: This wording is more specific and detailed and reflects the purposes of the NWT ERA and the Principles in the SEV.

Recommendation #25: Add a new Section to s 4 after “Public Engagement and Open Government: “**PUBLIC EDUCATION:** The Minister of Environment and Natural Resources shall undertake a public awareness campaign of the *Environmental Rights Act* and this Statement, including plain language materials on how the public can avail themselves of the various protections and provisions of the Act.”

Explanation:

- Since the SEV states that the residents of the NWT have a shared responsibility to protect the environment, the GNWT might wish to undertake public education about the NWT ERA and the SEV.
- In the NWT Standing Committee on Economic Development and Environment’s Report on Bill 39, *Environmental Rights Act*,¹⁰ their Recommendation 4 was that “the Department of Environment and Natural Resources undertake a public awareness campaign of the Environmental Rights Act, including plain language materials on how the public can avail themselves of the various protections and provisions of the Act.” It explained that “several submissions received by the Committee stressed that the public needs to be more aware of their ability to protect the environment, and the Committee noted that under the existing *Environmental Rights Act*, there have been very limited actions started by members of the public. To improve the public’s awareness of their rights under Bill 39, the Committee strongly supports a public awareness campaign to highlight what is in the Act, as well as the creation of plain language documents on how to use the various provisions of the Act.”
- If a Commissioner for the Environment of the NWT is created, this education mandate could be assigned to them. If not, such an undertaking should be included in the SEV.
- For examples of public education tools and activities, the work of the former Environment Commissioner of Ontario is useful.

¹⁰ https://www.ntassembly.ca/sites/assembly/files/19-08-13_cr_27-183_report_on_bill_39_enviro_rights_act_-_final_0.pdf.

Recommendation #26: Add a new section after s. 4:

GREENING INTERNAL OPERATIONS

The GNWT is committed to reducing its environmental footprint by greening its internal operations, and supporting environmentally sustainable practices for its partners, stakeholders and suppliers. This includes but is not limited to reducing the GNWTs air emissions, energy use, water consumption, and waste generation. Activities include: monitoring and reducing the GNWTs carbon footprint, promoting energy and water conservation in GNWT outreach and educational activities, and supporting government-wide greening and sustainability initiatives.”

Explanation:

- The NWT Waste Resources Management Strategy goal #4 (2019) includes similar wording, so this would make the SEV consistent with other GNWT undertakings to lead by example by reducing its own environmental footprint.
- A similar section is found in the Ontario MOE SEV.

Recommendation #27: Delete Section 5.

Explanation: Section 5 of the draft SEV is highly problematic. After the significant effort put into drafting the *ERA* and the SEV, and the extensive feedback and consultation undertaken to improve them, this seems to be an extremely wide discretion given to the Executive Council to disregard these obligations. No such clause is found in the Ontario MOE SEV. This section should be removed.

If the section is to remain, there should at a minimum be public notice of any exemptions made on the application of the SEV with reasons, in compliance with the process set out in s. 17 (2), (3) and (4) of the NWT ERA.

Thank you for the discussions we had on developing these recommendations. I hope these comments are useful to you in your response to the GNWT’s invitation to comment on the draft SEV. I would be very pleased to discuss them with you further, or with members of the GNWT, and to answer any questions on this material.

Sincerely,



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APPENDIX A

History of Statements of Environmental Values and the Ontario *Environmental Bill of Rights*

The Ontario *Environmental Bill of Rights, 1993* was enacted in 1994, modelled on the *Michigan Environmental Protection Act*.¹¹ It provided greater access to environmental information by creating an Environmental Registry, and increased access to justice by providing citizens with the right to ask for investigations and reviews of government actions and to appeal government decisions on environmental matters. It provided protection for whistleblowers. It also created a Commissioner of the Environment who reported to the Legislature on the operation of the EBR.¹²

Sections 7-11 of the OEBR requires certain ministries¹³ to develop Statements of Environmental Values. The SEV was designed to explain “**how the purposes of this Act are to be applied** when decisions that might significantly affect the environment are made in the ministry; and (b) explain[n] **how consideration of the purposes of this Act should be integrated with other** considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry” (s. 7). Section 11 provides that “the minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.” This wording is virtually identical to the wording in s. 18 of the NWT ERA.¹⁴

The Canadian Environmental Law Association has written extensively about the OEBR SEVs. CELA notes the history and purposes of the SEV:

The Ontario Task Force that developed the EBR in the early 1990s anticipated SEVs becoming key components in establishing and maintaining **governmental accountability** in environmental decision-making. The SEV (along with EBR oversight provided by the ECO) was primarily intended to serve as Ontario’s substitute approach for the public trust doctrine.¹⁵ The Ontario Task Force ... envisioned a ministry’s SEV to be **a statement of environmental ethic, plan,**

¹¹

<https://gsg.uottawa.ca/gov/Ont/ECO/The%20Environmental%20Bill%20of%20Rights/1999%20The%20Nuts,%20the%20Bolts%20and%20the%20Rest%20of%20the%20Machinery.pdf>.

¹² Nov 2021 report: https://www.auditor.on.ca/en/content/annualreports/arreports/en21/ENV_EBR_en21.pdf.

¹³ Only 13 ministries must create SEVs:

<https://gsg.uottawa.ca/gov/Ont/ECO/The%20Environmental%20Bill%20of%20Rights/1999%20The%20Nuts,%20the%20Bolts%20and%20the%20Rest%20of%20the%20Machinery.pdf>. See also

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjQz5Tp9vX1AhWGjYkEHXHBBSYQFnoECAUQAQ&url=https%3A%2F%2Fjournals.lib.unb.ca%2Findex.php%2Ffunblj%2Farticle%2Fdownload%2F29551%2F1882524734%2F1882524845&usq=AOvVaw3ScMOlruqYKEf2mmQNORtb>.

¹⁴ “The Minister of a department or deputy head of a body listed in paragraph 17(1)(b) shall take every reasonable step to ensure that a statement of environmental values prepared or amended under section 17 is considered whenever decisions that might significantly affect the environment are made by the department or body.”

¹⁵ “A 19th century doctrine developed by, and enforced in, the courts of the United States that has since evolved to hold federal, state, and local governments in that country to what amounts to a fiduciary standard of conduct with respect to protection of public natural resources. The concept of a public trust enforceable in the courts is not foreign to Canadian law; the Yukon has had such a regime for decades under its *Environment Act*” <https://cela.ca/ministries-new-statement-of-environmental-values-ignores-long-standing-problems/>. I note is also part of the NWT ERA, in sections 13, 15, in the expression “the right to protect the environment and the public trust”.

practice, or mission that would help integrate environmental considerations into overall decision-making for a ministry.¹⁶

However, the SEVs originally created were generally seen as inadequate by critics because they were “vague statements of philosophy that lacked implementation details, measurable targets, or clear timelines” and were not the “strong action plans” they had hoped for.¹⁷

Enforceability of SEVs – Ontario Environmental Review Tribunal and the *Lafarge* decision

The Ontario Environmental Review Tribunal has been dealing with SEVs for many years. In particular, cases have dealt with the effect of SEVs when people seek leave to appeal decisions of the Minister of Environment. A party will not succeed in getting leave to appeal a decision of under s 41 of the Ontario EBR unless they can show that “(a) 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 (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.” The Tribunal has held on many occasions that “relevant law and ... government policies” includes SEVs.¹⁸ The *Dawber* decision of the ERT¹⁹ was appealed to the Ontario Divisional Court, which confirmed the role of SEVs in the *Lafarge*²⁰ case.

The Ministry of the Environment had granted a license to the Lafarge cement plant to burn scrap tires, plastic and other waste as ‘alternative fuel’.²¹ The MOE’s SEV had “three guiding principles: the ecosystem approach, environmental protection (which includes the precautionary approach) and resource conservation.”²²

The Tribunal held since the MOE SEV “endorses an ecosystem approach as a guiding principle” and that this “requires an assessment of the cumulative effects of a proposed project on ecosystems”, it was an error for the Director to have considered the applicable “regulations and guidelines, but not the potential cumulative ecological consequences of the project” and therefore “there was good reason to believe that no reasonable person could have reached the decision to issue the [Certificates of Approval].” It also held that allowing burning of tires was “not consistent with the precautionary principle” in the SEV. While the Tribunal could not critique the content of the SEV, they must assess whether it was considered:

The Tribunal agrees that the laws and policies that apply to the Directors’ decisions are not themselves the subject of the test under the first branch of section 41, and the Tribunal is not seized with the task of assessing the reasonableness or adequacy of

¹⁶ <https://cela.ca/ministrys-new-statement-of-environmental-values-ignores-long-standing-problems/>.

¹⁷ <https://cela.ca/ministrys-new-statement-of-environmental-values-ignores-long-standing-problems/>.

¹⁸ The 2003 Environmental Commissioner booklet on the EBR included a form explaining how to make an Application for Review by the Minister of a decision under s. 67 of the EBR, which also advised citizens that in considering such an application, the Minister MUST consider “The Ministry Statement of Environmental Values”, p 35 - <https://www.energy.gov/sites/prod/files/2015/06/f22/OEBRG.pdf>

¹⁹ *Dawber v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 25.

²⁰ *Lafarge v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191.

²¹ *Dawber v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 25.

²² *Lafarge v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191, para 7.

their content, at least not directly. The Tribunal does not have the mandate to require changes to those laws and policies or to impose upon the Directors a duty to achieve a higher standard of environmental protection than those laws and policies require. Instead, the reasonableness of the Directors' decisions must be assessed in the context of the legal regime within which they occur. ... However, it is appropriate to inquire whether and to what extent the Directors' decisions considered, incorporated and reflected **relevant laws and policies**. (para 49 *Lafarge*)

The Tribunal held that the SEV was a part of the “relevant laws and policies” and that the Directors had failed to “consider or apply the guiding principles in the Ministry SEV” which were relevant policies. (para 50 *Lafarge*)

The Ministry applied for judicial review of this Tribunal decision to the Ontario Divisional Court, arguing that the Directors were not required to consider the SEV in this case because SEVs were only intended “to be applied by the Ministry as it developed legislation”. It argued that the MOE SEV “reads like a mission statement with wide-sweeping language” and that s.7 of the EBR grants ministers “significant latitude” as to how to “apply and integrate these values with other considerations”. It argued that there is “nothing in the SEV that provides guidance to Directors as to how to exercise discretion, and it provides no assistance to them as to what kind of conditions should be imposed.” Finally, it argued that “if the Legislature intended a SEV to be part of the s. 41 considerations, it would have said so expressly” instead of just saying “relevant laws and policies.” (parags 54-55 *Lafarge*) The court disagreed and held that “the Tribunal was reasonable in finding that leave should be granted because of the failure **to apply** the SEV. The Tribunal concluded that the SEV falls within ‘government policies developed to guide decisions of that kind’, which was consistent with past jurisprudence of the Tribunal on SEVs.” (para 57 *Lafarge*) The Court of Appeal refused to grant leave to appeal this decision of the Divisional Court.

The practical effect of this decision was that “the two approvals were ultimately revoked by the Ministry without being used by the company.”²³ From a legal standpoint, according to CELA, “*Lafarge* ended [the Ministry of Environment’s] narrow interpretation that its SEV only applied to Acts, regulations, and policies. Henceforth, instruments issued directly to companies would be subject to the SEV requirement.”²⁴ *Lafarge* also made clear that failure to consider *and apply* the SEV could be a ground for appealing a Ministry decision. *Lafarge* has been cited and applied in over 50 decisions by the ERT since then.

Of course, much depends on government attitudes. For example, CELA argues that the MOE got around this decision by “introducing a permit-by-rule (“PBR”) regime in 2010 that eliminates the need for industry to obtain instruments when engaging in certain types of activities and, thereby, eliminates the opportunity for the public to seek leave to appeal under the EBR activities previously covered by such instruments; and expanding the PBR initiative under successive provincial governments.”²⁵ This shows that even the best SEVs might be circumvented by governments keen to avoid them. However, it is clear that SEVs are intended to have, and do

²³ <https://cela.ca/accessing-environmental-justice-the-10th-anniversary-of-the-landmark-lafarge-decision/>.

²⁴ *Ibid.*

²⁵ <https://cela.ca/ministrys-new-statement-of-environmental-values-ignores-long-standing-problems/>.

have, teeth in Ontario, although mainly due to this important decision by the Environmental Review Tribunal, upheld by the courts. The fact that the NWT ERA requires SEVs suggests that the GNWT is committed to the environmental protection, government accountability and public participation they can help to provide.

Proposed amendments to Ontario Ministry of Environment, Conservation and Parks SEV

As mentioned above, the SEVs originally created were generally seen as inadequate by critics. The Environment Commissioner of Ontario critiqued the use of SEVs on many occasions in their reports. The ECO's 2011-12 Annual Report in particular criticized the lack of transparency in how SEVs are considered: "Openly explaining to the public how specific SEV principles were considered and accounted for during the decision-making process would provide clarity about the ministry's rationale for the decision and would improve assurance that SEV principles were taken into account even if the decision does not fully conform to them."²⁶ (p 25)

The Ontario Ministry of Environment, Conservation and Parks proposed changes to its SEV. CELA produced detailed comments on this draft,²⁷ and this CELA document has strongly influenced my review of the draft NWT SEV. While the revised SEV was not adopted, it is useful to highlight CELA's main recommendations for change as many are applicable to the draft NWT SEV.

CELA argued that the draft 2020 SEV failed to correct longstanding weaknesses in the old SEV,²⁸ mainly that the proposed new SEV did not specifically affirm that it must be considered when issuing instruments. CELA made 12 specific recommendations for improvement,²⁹ which to date have not been adopted, but which will inform my comments on the NWT draft SEV.

²⁶ <https://www.auditor.on.ca/en/content/reporttopics/envreports/env12/2011-12-AR.2.pdf>, p. 26. This critique was repeated in the 2017 report: <https://www.auditor.on.ca/en/content/reporttopics/envreports/env17/Good-Choices-Bad-Choices.pdf>, p 19.

²⁷ <https://cela.ca/wp-content/uploads/2021/01/CELA-ltr-re-MECP-SEV.pdf>.

²⁸ <https://cela.ca/ministrys-new-statement-of-environmental-values-ignores-long-standing-problems/>.

²⁹ <https://cela.ca/wp-content/uploads/2021/01/CELA-ltr-re-MECP-SEV.pdf>.