



**Environmental
Commissioner
of Ontario**

1075 Bay Street
Suite 605
Toronto, Ontario
M5S 2B1
Tel: (416) 325-3377
Fax: (416) 325-3370
1-800-701-6454

Application For Review

Section 61, *Environmental Bill of Rights*

General Information About This Application

Under section 67 of the *Environmental Bill of Rights (EBR)* the minister must consider each Application for Review in a preliminary way to determine whether the public interest warrants a Review of the issues raised in your Application. Among other factors, the minister must consider:

1. The ministry Statement of Environmental Values;
2. The potential for harm to the environment if the Review applied for is not undertaken;
3. The fact that matters sought to be reviewed are otherwise subject to periodic review;
4. Any social, scientific or other evidence that the minister considers relevant;
5. Any submission from a person who may be directly interested in the Review who has been notified about the Review;
6. The resources required to conduct the Review; and
7. Any other matter the minister considers relevant.

If the decision asked to be reviewed was made within the last five years with public participation consistent with the *EBR*, the minister will not determine that the public interest warrants a Review. This provision does not apply where it appears to the minister that there is other evidence that failure to review the decision could result in significant harm to the environment and that this evidence was not considered when the decision sought to be reviewed was made.

The personal information requested in this Application is gathered under the legislative authority of the *EBR*. All the information requested on this form is required by the *EBR* for the minister to determine whether an existing policy, Act, regulation or instrument of Ontario should be reviewed, or to decide whether there is a need for a new policy, Act or regulation.

The *EBR* does not allow the Environmental Commissioner of Ontario or the ministry to disclose personal information about applicants. The *EBR* protects the personal information provided by applicants. Applicants' personal information may be disclosed if the Review results in further government action outside of the *EBR* such as:

- a prosecution, or
- other administrative action

For more information on the requirements of this Application and how to use the *EBR*, please contact:

Public Information Officer
Environmental Commissioner of Ontario
1075 Bay Street, Suite 605
Toronto, ON, M5S 2B1

Phone: (416) 325-3377
Fax: (416) 325-3370
Toll free: 1-800-701-6454



Instructions

1. Type or print clearly in ink.
2. Ensure both applicants provide proof of Ontario residency.
3. Ensure both applicants sign and date the Application.
4. Answer all the questions.
5. Keep a copy of the Application and any supporting documents for your files.
6. Submit your original Application and supporting documents to the Environmental Commissioner of Ontario.

Applicant Number One

<u>Winfield</u>	<u>Mark</u>	<u>S.</u>
Last Name	First Name	Initial
<u># 601 - 124 O'Connor ST</u>		
Address		Apartment
<u>Ottawa</u>	<u>ONTARIO</u>	<u>41P SM9</u>
City	Province	Postal Code
<u>(416) 425-7106</u>		<u>(416) 978-5656</u>
Residence Telephone		Business Telephone

Declaration of Ontario Residency:

I Mark Winfield am an Ontario resident and have been since 01/63
 (Name) (Month) (Year)

March 21/03 M.S. Winfield
 (Date) (Signature)

Applicant Number Two

<u>HORNUNG</u>	<u>ROBERT</u>	<u>G</u>
Last Name	First Name	Initial
<u>#601-124 O'CONNOR ST</u>		
Address		
<u>OTTAWA</u>	<u>ONTARIO</u>	<u>K1P 5M9</u>
City	Province	Postal Code
<u>613 722-1202</u>		<u>613 235-6288x22</u>
Residence Telephone		Business Telephone

Declaration Of Ontario Residency:

I ROBERT HORNUNG am an Ontario resident and have been since 05 1998
 (Name) (Month) (Year)

21/3/03 R. Hornung
 (Date) (Signature)

Corporate Applicant

_____	_____
Name of Corporation	Name and Position of Corporate Officer
_____	<u>ONTARIO</u>
Address	City Province
_____	()
Postal Code	Business Telephone

Declaration Of Incorporation In Ontario

_____ is an Ontario or Canadian federal corporation in good standing,
 (Name of Corporation)

carrying on business with its head office in Ontario*, established by articles of incorporation in

 (Year)

_____ (Name of Officer and Position)
 (Date)

_____ (Signature)
 (Company Number)

*If the company is a federal corporation, and its head office is not in Ontario, please contact the Environmental Commissioner.
 **If there are two corporate applicants, please copy this declaration form and attach the second completed declaration form to this application.

Questions

1. (a) I request a Review of an existing policy, Act, regulation or instrument.

- Policy Act Regulation Instrument

Clearly identify the name of the Policy, Act, Regulation or Instrument that you wish reviewed. Please provide as much detail as possible, including the name, section numbers and instrument numbers where applicable.

Act

1. *The Crown Forest Sustainability Act, 1994, S.O. 1995, C25.*
 - s.21 Information
 - s.22 Minister's report
 - s.26(5) Contents of sustainable forest licences
 - s.27 Other Licences
 - s.28 Terms and conditions of forest resource licences
 - s.34 Amendments to forest resource licences
 - s.38 Overlapping licences
 - s.58 Administrative penalties
 - s.61 Entry onto private land
 - s.62 Inspection of records
 - s.64 Offences
 - s.64(1)(b) Compliance with forest resource licence
 - s.64(1)(f) False or misleading statements
 - s.64(1)(g) Failure to provide information
 - s.68(6) Forest information manual

Regulations

2. *Ontario Regulation 167/95*
 - s.7 Terms and conditions of forest resource licences
 - s.8 Information Provision by overlapping licensees
 - s.10 Amendment of forest resource licences
3. *Ontario Regulation 261/01 – MNR Instrument Classification Regulation under the Environmental Bill of Rights*
4. *The Forest Information Manual*
 - Part A – Information Policy
 - s.1.4.2. Source Data, Records and Information
 - s.1.6 Access to Information Prescribed by the Forest Information Manual
 - Part D – Monitoring, Reporting and Evaluation
 - s.5.0 Forest Operations Compliance Information

Instruments

5. *Sustainable Forest Licences*
 - Licences for all SFL Forest Management Units
 - s.21 (of the generic SLF) Compliance Planning and Monitoring
6. *Memoranda of Agreement with Major Licence Holders on Crown Management Units regarding Compliance Planning and Monitoring*

Policies

7. *Forest Compliance Handbook*
 - Policy Number ENF 22.01.01 Integration of Compliance Strategies, Resource Management Plans & District Compliance Plan
 - Policy Number ENF 22.02.01 Forest Operations Inspection Program
 - Definition and Inspection Report Terminology Sections
 - Procedure Number ENF.22.02.02
 - Inspection and Sampling Intensity
 - Reporting
 - Report Filing
 - Compliance/Non-Compliance
 - Report Distribution
8. *Independent Forest Audit Process and Protocol*

1. (b) I request a Review of the need for a new policy, Act or regulation.

Policy ___ Act ___ Regulation ___

Description of Policy, Act or Regulation:

1. Acts

The review of the need for the following amendments to the Crown Forest Sustainability Act is requested:

- To provide explicit authority to the Minister of Natural Resources for the transfer of primary compliance inspection functions to SFL and other licence holders;
- To establish criteria, including the confirmation of licensee capacity to carry out inspection functions, that must be met before such transfers can take place;
- To provide for the designation of non-MNR employed inspectors under the Act, and to establish their powers and duties;

- To establish mandatory training and certification requirements for any non-Ministry employee designated as an inspector for the purposes of the Act; and
- To establish a public register of designated and certified non-MNR employed inspectors for the purposes of the Act.
- To require that licence holders notify forthwith the MNR of all instances of non-compliance with forest management requirements as established under the CFSA and other federal and provincial legislation and regulations affecting forest operations. Failure to notify should constitute an offence under the CFSA.
- To strengthen the Act's provisions and penalties related to the failure to provide required information and the provision of false or misleading information to the MNR. Specifically, the penalty structure for violations related to information matters should be made comparable to those found in other federal and provincial environmental legislation, such as the Canadian Environmental Protection Act and the Ontario Environmental Protection Act.
- To establish the alteration or modification of inspection reports, as completed by inspectors, prior to their submission to the MNR, as an offence under the Act.
- To establish that it is an offence under the Act for an employer to dismiss, discipline, penalize, coerce or intimidate or attempt to coerce or intimidate, an employee for complying with the requirements of the Crown Forest Sustainability Act or other federal or provincial legislation affecting forest management in Ontario, or regulations, plans, approvals orders, or other instruments made under those Acts, or for providing the Ministry with information regarding non-compliance with those statutes, regulations or instruments.
- To provide a general information-gathering power to the Minister of Natural Resources, requiring that licence holders provide any information related to the management of forests under licences issued under the Act at the request of the minister.
- To state that for the purposes of the Freedom of Information and Protection of Privacy Act and the Audit Act, all source materials related to information products required under the Crown Forest Sustainability Act, are considered to be in the custody or control of the MNR.

2. Regulations

The review of the need for the following amendments to Ontario Regulation 261/01 – MNR Instrument Classification Regulation under the Environmental Bill of Rights is requested:

- The classification of the following instruments as being subject to the EBR's notice and comment provisions (Part II):

- Sustainable Forest Licences and all other forms of licences issued under the CFSA;
- Amendments to any licences issued under the CFSA;
- Five-year Forest Management Plans and any amendments to these plans;
- Annual Work Schedules and amendments to these schedules; and
- All regulations, guidelines and policies made under the CFSA.

3. Policies

The review of the need for the following new policies on the part of the Ontario Ministry of Natural Resources is requested.

- A review of alternatives to the compliance self-inspection regime established for forest licence holders from April 1998 onwards. The options to be considered in such a review should include:
 - The re-establishment of primary compliance inspection responsibilities for forest operations by the Ministry of Natural Resources, including the option of pursuing a this action on a cost-recovery basis; or
 - The establishment of a profession of independent forest operations inspectors, who are not employed or funded directly by forest licence holders, to conduct primary compliance inspections.

In the alternative, the review of the need for the following new policies is requested:

- The strengthening of the MNR's field inspection capacity with respect to forest operations (see Table 22 below)
- The retention of primary inspection responsibility by the MNR in the remaining Crown Forest Management Units.
- The establishment of mandatory training and certification requirements for non-MNR employees carrying out inspections of forest management operations.
- The conduct and advance public availability of assessments of the capacity of licence holders to carry out inspection functions before transferring inspection responsibilities to them.
- The modification of the provisions of SFL amendments and inspection-related guidelines and policies to provide that inspection reports be submitted directly to the MNR by licensee-employed inspectors, without company management/supervisor sign-off prior to submission.
- The amendment of the protocol for five-year independent audits of management units to include assessments of licence holder compliance inspection capacity and performance.

- The provision of additional resources to the MNR to ensure timely public reporting of forest management activities through annual reports on timber management and other documents.
- The modification of the Ministry’s reporting practices regarding forest operations inspections to clearly separate the data on instances of non-compliance identified through primary inspections by MNR staff from data on situations where MNR staff are following up reports of non-compliance by licence holders.
- The modification of the Ministry’s accounting and invoicing practices to clearly separate revenues from the minimum charge for timber resources and revenues from residual value charges.
- The reporting annually to the Legislature through the Ministry’s public accounts of revenues and expenditures for the Forestry Futures Trust and Forest Renewal Trust established under the CFSA.

2. Explain why you think there is a need for a review:

Refer to the attached report: *Industry Self-Inspection and Compliance in the Ontario Forest Sector*

3. The following is a summary of the evidence that supports my Application For Review. (For example, scientific studies and reports. Attach copies of written materials and photographs to this Application. Reference each document and photograph against the list you have created and reference them with this number — #3.)

The following summary tables are extracted from the above referenced report.

Table 21: Summary of Findings against Governance Criteria

Criteria	Assessment
Adequacy of Legal and Policy Frameworks	<p>The legal basis for the transfer of primary inspection responsibility from the MNR to licence holders is uncertain.</p> <ul style="list-style-type: none"> • The amendments to SFLs transferring responsibility to SFL holders may have exceeded the minister’s authority to amend SFLs under the CFSA. • The legal basis for the agreements to transfer of primary inspection responsibility to non-SFL licence holders

	<p>on Crown management units is unclear.</p> <ul style="list-style-type: none"> • Although it may be possible to accommodate the transfer of primary inspection responsibility to licence holders through a very broad reading of the terms and conditions of the Class Environmental Assessment, such an arrangement was clearly not contemplated by the Environmental Assessment Board in its decision. <p>There is no statutory or regulatory framework for the designation of SFL-employed inspectors other than nomination by SFL holders in their compliance plans. The MNR indicates inspectors are not considered agents of the Ministry, and therefore they have no inspection powers with respect to overlapping licensees except for what they can observe directly on public lands.</p> <p>The only protections available to SFL-employed inspectors in these circumstances are those provided in the general provisions of the Environmental Bill of Rights (EBR). These protections are relatively weak compared with those in other provincial statutes, such as the Environmental Protection Act, and do not contemplate situations in which employees would have primary inspection responsibilities with respect to their employer's activities, as opposed to one-off whistleblower situations.</p>
<p>Industry Capacity to Undertake Transferred Functions</p>	<p>The MNR did not undertake assessments of the capacity of individual SFL holders to take on inspection responsibilities prior to the 1998 transfer, beyond the conduct of seven pilot studies. Nor have such assessments been undertaken on SFLs issued post-1998.</p> <p>No mandatory training and certification requirements have been established for SFL-employed inspectors through which the Ministry might confirm qualifications to carry out inspections.</p> <p>Some subsequent assessments of SFL capacity have occurred through the five-year independent forest audit process mandated through the class environmental assessment, although the level of attention given to inspection capacity issues in these audits varies widely. The review of compliance and inspection systems is not mandated in the MNR protocols for the conduct of these audits.</p>

<p>Conflict of Interest</p>	<p>The self-inspection regime raises significant issues of conflict of interest.</p> <p>SFL holders have strong incentives to minimize the instances of non-compliance reported to the MNR through the system. Such reports may make SFL holders liable for APs or prosecutions under the CFSA, and may even threaten the renewal of their forest licences. The absence of protections for SFL-employed inspectors is particularly problematic in this context.</p> <p>Potential economic conflicts exist in situations where SFL holders have inspection and compliance responsibilities for overlapping licence holders.</p> <p>More generally, the self-inspection system involves a fundamental alteration of the power relationships between the Ministry and regulated industry, and regulated industry and all other stakeholders in forest management. This problem is not limited to the inspection aspects of the system.</p>
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Table 22: Summary of Findings against Accountability Criteria

Criteria	Assessment
<p>MNR Oversight Capacity</p>	<p>The MNR's capacity to oversee the self-inspection regime effectively is doubtful.</p> <ul style="list-style-type: none"> ▪ There have been major losses of capacity within the Ministry as a whole and with respect to forest management activities, with a reduction of approximately 50% of field staff relative to 1994/95. ▪ Losses are even more significant with respect to forest management inspections, with a 66% reduction in the number of MNR inspectors related to forest operations relative to 1994/95. With a total of 45.5 MNR full-time equivalents now dedicated to forest inspection activities, there is currently less than one MNR inspector per management unit, or one MNR inspector per 550,000 hectares of Crown forest under licence. ▪ The MNR's internal reviews of the self-inspection system have indicated that the Ministry is having trouble meeting the prescribed timelines for follow-up of SFL-holder reports of non-compliance, and in fulfilling other commitments under the self-inspection regime.

	<ul style="list-style-type: none">▪ The Environmental Commissioner of Ontario (ECO) and others have highlighted that the resources available to the Ministry for the conduct of inspections beyond responses to SFL-identified non-compliance are very limited. In some cases, the MNR has been unable to follow up before limitation periods for initiation of prosecutions under the relevant legislation have expired.▪ It is difficult to envision how the MNR can assess how well the self-inspection system is working without the capacity to conduct proactive inspection activities, in addition to responding to licence-holder reports of non-compliance.▪ The ECO, the Provincial Auditor and litigation initiated by environmental groups have raised questions as to whether the MNR has sufficient overall resources to implement the terms and conditions of the class environmental assessment and the requirements of the CFSA.▪ The delays inherent in the self-inspection system, where the MNR responds to licensee-generated reports of non-compliance, may make the pursuit of effective enforcement actions difficult, particularly with respect to violations, such as those related to forest fire prevention practices, that can only be detected and confirmed through immediate and direct observation.▪ CFSA penalties related to information issues, under which compliance inspection reporting system falls, are very weak relative to other legislation, such as the federal Canadian Environmental Protection Act and the provincial Environmental Protection Act. This is particularly noteworthy given the Ministry's heavy reliance on licensee-generated information for both compliance and more general forest management purposes.▪ There is no general obligation on the part of SFL holders to report all potential violations of forest management requirements or other applicable legislation under the CFSA or the licences, regulations, or manuals made under it. This
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	<p>is in contrast to the provisions of the Environmental Protection Act, which includes a number of provisions requiring that potential violations be reported to the Ministry of the Environment immediately.</p> <ul style="list-style-type: none"> ▪ The MNR's capacity to withdraw the transfer of inspection responsibilities to licence holders is doubtful given the Ministry's lack of resources, and declining role and experience in the conduct of primary compliance inspections. Indeed, the withdrawal of the transfer of inspection responsibilities to SFL and other licence holders does not appear to be contemplated as a possibility by the Ministry, regardless of SFL-holder performance.
<p>Oversight by Legislative Officers</p>	<p>The self-inspection system has resulted in some loss of oversight capacity by the Provincial Auditor, Information and Privacy Commissioner and Ombudsman. The Provincial Auditor, for example, no longer has a right of access to SFL-holder-generated inspection-related source materials, contrary to when all inspections were conducted by the MNR, except where these materials have been requested from SFL holders by the Ministry.</p> <p>The scope of the Information and Privacy Commissioner's oversight function is also reduced as more and more information on forest management is generated and held by licence holders rather than the MNR.</p> <p>The role of the ombudsman in overlapping licensee inspection situations is uncertain.</p>
<p>Oversight by the Public</p>	<p>Public access to key documents and instruments related to the self-inspection regime is limited. This limited access is a result of the absence of provisions in the CFSA requiring that licences be tabled in the legislature, and the provisions of the MNR's instrument classification regulation adopted under the EBR in June 2001. The instrument classification regulation fails to designate SFLs, SFL amendments and any related instruments, such as five-year Forest Management Plans and Annual Work Schedules, as instruments for the purposes of the EBR. As a result, there are no public rights of notice and comment under the Act with respect to these instruments.</p> <p>The Ministry has voluntarily posted notices of the major stages in five-year Forest Management Plan development on the EBR registry. The Forest Management Planning Manual does establish public consultation requirements related to the</p>

	<p>development of five-year plans.</p> <p>The SFL self-inspection regime has also had a significant effect on the public right of access to information. Except where inspection-related source materials are requested from licence holders by the MNR, members of the public are unlikely to have a right of access to these materials under the FIPPA. A right of access would exist, subject to the normal exemptions in the FIPPA related to law enforcement and confidential third-party information, with respect to MNR-generated inspection-related source materials.</p> <p>More generally, the FIM attempts to place restrictions on the use of information generated under its auspices in a manner inconsistent with the FIPPA.</p>
<p>Implications for Crown Liability</p>	<p>The Crown is liable for regulatory and general negligence on the basis of oversights by SFL-employed inspectors. The government's duty of care in implementing the statutory duty to inspect is non-delegable.</p> <p>SFL holders may be liable for negligence in cases of oversights of their inspectors and will not have the policy defence available to governments in regulatory negligence situations.</p>

Table 23: Summary of Findings against Performance Criteria

Criteria	Assessment
<p>Enforcement Outcomes</p>	<p>There are major gaps in information available from the MNR on which to base assessments of the performance of the self-inspection system. The most recent publicly available information is for 1999/00 (i.e., the year ending March 2000).</p> <p>The total number of inspections conducted on Ontario forest operations has risen significantly since adoption of the self-inspection system in 1998.</p> <p>The shrinking role of the MNR in conduct of primary inspections, even in Crown management units, makes comparisons of the performance of the MNR and licensee staff increasingly difficult.</p> <p>The evidence that is available indicates that the MNR inspectors identify instances of non-compliance at a rate two to three times higher than licensee-employed inspectors in primary inspection situations.</p> <p>Reported compliance rates in the key areas of access and harvest have declined significantly since</p>

	<p>1995/96. At the same time, the portion of significant incidents of non-compliance has risen. Given the tendency of SFLs to under report instances of non-compliance, these figures may underestimate the extent and significance of instances of non-compliance.</p> <p>There have been significant variations in the levels of fines and administrative Penalties (APs) applied under the CFSA from year to year over the 1996/97 to 2000/01 period and a 90% reduction in the application of APs in 2001/02 relative to the previous year. The MNR provided no explanation for these variations.</p> <p>The self-inspection system highlights the issue of the exercise of discretion in inspection and enforcement issues. This is particularly relevant in the case of forestry in Ontario, where the MNR itself admits that the definitions of forest management requirements can be “ambiguous and confusing.” The Ontario system gives rise to the question whether such discretion in the identification and determination of the significance of violations should rest in the hands of actors who have strong interests in minimizing the number and significance of reported incidents of non-compliance.</p>
<p>Information Flows</p>	<p>The self-inspection system involves a major “de-coupling” of operational and policy functions.</p> <p>The self-inspection system carries with it a significant loss of first-hand information for MNR staff on forestry field conditions and operations, given the greatly reduced presence of MNR inspectors in the field.</p> <p>The MNR conducts field inspections on the basis of what SFL holders identify as “significant.” In effect, SFL holders have the ability to shape what is seen as significant.</p> <p>More generally, the Ministry is increasingly dependent on industry-generated information as a basis for forest management policies under the SFL regime.</p>
<p>Cost-effectiveness</p>	<p>The self-inspection system creates a double-inspection regime, due to the requirement for the MNR to follow up industry inspections. It may be more cost-effective for all inspections to be conducted by the MNR.</p>

Application Checklist . . .

Before you send your Application to the Environmental Commissioner of Ontario, make sure you've:

‣ Reviewed what the minister must consider before undertaking the Review you have requested:

‣ Used a typewriter or pen, not pencil.

‣ Included someone as your co-applicant.

‣ Completely filled out Applicant Number One AND Applicant Number Two sections

and signed both.

‣ Provided the proper legal name of the corporation AND completed the declaration of incorporation in Ontario, if you are a corporate applicant.

‣ Made it clear what existing policy, Act, regulation or instrument you want reviewed and explained in detail why.

OR

Made it clear what new policy, Act, or regulation you believe should be developed and explained in detail why.

‣ Provided a summary of the evidence that supports your Application For Review.

‣ Kept copies of your Application.

‣ Addressed your original Application to:

Environmental Commissioner of Ontario

1075 Bay Street, Suite 605

Toronto, ON, M5S 2B1

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Box For Office Use Only

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Date Received: Date Received:

Ministry Submitted To: Date Acknowledgement

Date Submitted to the Ministry: Letter Sent to Applicant:

Reference Number: Reference Number: