



Canadian Environmental Law Association  
L'Association canadienne du droit de l'environnement

243 Queen Street W., 4th Floor, Toronto, Ontario M5V 1Z4, telephone (416) 977-2410

MEMORANDUM

TO: MEMBERS OF THE PUBLIC INTEREST LIAISON COMMITTEE  
ON DRINKING WATER ISSUES

FROM: TOBY VIGOD, CELA

DATE: NOVEMBER 12, 1985

RE: DISCUSSION PAPER ON PUBLIC INVOLVEMENT IN THE DRINKING  
WATER PROTECTION STRATEGY

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I. OVERVIEW

CELA welcomes the opportunity for input into the drinking water protection strategy. As well, we believe that a number of the approaches and programs outlined are worthy of pursuit. We are concerned about the tone of this document and the stated rationale for developing a program for public input. For example, on page 5 of the document it is stated that "it would be advantageous for MOE in terms of public image, to subject its programs, strategies and initiatives to 'public' review." This surely should not be the rationale for developing a program for public input. The benefits of a more open process have been well documented. Increased public participation leads to better decision-making by making more viewpoints and information available; it fosters greater accountability in and support for decision-making institutions and it augments confidence in the regulations ultimately promulgated.

Again, the discussion paper states on page 2 that "the general public", without considerable re-education, probably cannot contribute effectively to the standard/objective setting process. CELA would suggest that this sounds familiarly like George Orwell's 1984 in 1985. The real issue here is the fact that standards are currently set between industry and the government without any formal opportunity for public input. The public in general is quite well informed on this issue due to its high profile in the last several years.

The remainder of our remarks will address the four specific programs set out in the discussion paper.



## II. PUBLIC INPUT INTO DRINKING WATER STANDARD/OBJECTIVE SETTING

Our first comment is the fact that we believe that the process should be one of standard rather than objective-setting. The obvious reason for this is the fact that an objective or guideline is not legally enforceable. It is our view that these standards should be developed in the context of safe drinking water legislation, and at a minimum as regulations under the Ontario Water Resources Act.

The discussion paper states that the current public perception of the regulation of toxic chemicals is that such regulation is inadequate for protection. We would note that this is more than a "perception" due to the fact that currently there are no regulations for the protection of drinking water and that even where we have laws dealing with toxic contamination, enforcement to date has not always been satisfactory. Again, the document becomes patronizing when it discusses the information that the "public lacks". It states that the public lacks information on the actual stringency of the levels of control now imposed. Again, the point here is that we have no legally enforceable standards.

We are also concerned about the second statement that the public lacks information of the benefits to society of potentially toxic chemicals and that cost/benefit analysis does not enter into their assessment of the impacts of chemicals. On the benefits issue, it appears to us that this is a matter for industry and not the government to promote. As far as cost/benefit analysis, CELA has serious reservations about such an approach. As has been well documented, it is almost impossible to document the benefits side of such an analysis as there are too many intangibles to measure, including the value of a life, aesthetic values and environmental benefits. Further, there are ethical issues such as voluntary versus involuntary risk and the fact that different segments of society may create the risk than those that bear the risk. Finally, it is CELA's position, shared by many others, that under no circumstances should cost/benefit analysis be used as a final decision-making tool.

Turning now to the approaches enumerated on pages 2 and 3 of the document:

1. Establishment of an environmental standards advisory committee. CELA believes that such a committee may be useful, but that it should not be a substitute for greater public input into the standard-setting process and should not be seen as the only avenue of public input. We would urge that such a committee include public interest group representation and labour representation as well as the other sectors listed. The preparation of a scientific criteria document is an important first step in the process and should be the basis for a draft



standard. We believe this approach should be integrated with some variation of point 3 discussed below.

2. Adoption of Standards by Reference. Obviously, other jurisdictions standards will be a starting point in the development of draft regulations. Again, this should not be a substitute for formalized process of public input.

3. Standard/Objective Setting by "Public Hearings". We would first note that in the United States under the Administrative Procedures Act (APA), there are two models of rulemaking: formal and informal. Briefly, informal rulemaking procedures consist mainly of publishing a notice and description of the proposed rule in the Federal Register, a minimum 30-day comment period, and an opportunity for "submission of written data, views or arguments with or without opportunity for oral presentation". Subsequently, the agency promulgating the rule must incorporate in the rule adopted a concise statement of its basis and purpose. Formal rulemaking involves the same procedural requirements as adjudication, including: opportunity for oral presentation, cross-examination and rebuttal.

In practice, there have been very few formal rulemaking hearings in the U.S. On the other hand, the informal process was often found to be lacking in providing opportunity for public participation and agency accountability. As a result, the judiciary during the 1970's created a middle ground known as "hybrid rulemaking".

This is the approach that CELA has urged be adopted for public input into regulation-making in Ontario. We have contended that the main policy goals should be to ensure increased and informed public participation in the regulation-making process; to enable the Minister of the Environment to exercise some discretion and flexibility in designing the particular set of proceedings to be used for each regulation; and the production of a detailed record. The following are the key features of such an approach which CELA has outlined to the Ministry in the past:

- general notice of regulation-making proceedings to be placed in the Ontario Gazette. The initial notice should include not only the details of the upcoming regulation-making process but also the legal authority, basis and purpose, and the factual data, methodology and legal and policy considerations used in formulating the rule;
- a 'notification list' requirement which would ensure that notice is given to most interested and affected persons (without putting undue burden on the Ministry). Seeking out interested members of the public and encouraging their participation will further the goal of gathering all points of view in regard to a specific regulation;



- a requirement to establish a "regulation-making" docket. The docket would include the initial notice, the proposed draft regulation, background documents used to develop the rule, written responses to the regulation, transcripts of any oral proceedings, any additional documents, and the final regulation;
- public accessibility of the docket;
- at least a 60-day period for public comment on the proposed regulation;
- during the period for public comment a number of additional procedures may be put in place. These would include:
  - (a) cross-examination of Ministry technical staff;
  - (b) conferences;
  - (c) interrogatories;
  - (d) second-round written comments;
  - (e) public hearings.

The Ministry will be able to use its discretion in choosing the additional procedures. Further rules may be developed to avoid unnecessary costs or delay;

- provisions for judicial review of Ministry actions if they are "unsupported by substantial evidence" in the record.

In addition, CELA sees benefit in developing mechanisms for public participation even earlier in the regulation-making process. This might include public input into general policy strategies, alternatives and priorities even before regulations are developed under a particular statute.

One final element that must be considered in the development of a more open standard-setting process is the funding of intervenors. It is trite to say that without funding, it is very difficult for public interest groups and others to make informed and well researched comments on proposed regulations.

Finally, we would like to comment on the issue of "acceptable risk". The issue of risk assessment is a difficult one to deal with. It has been well documented that mathematical risk models may result in many different risk estimates and may vary by as much as three orders of magnitude.

The underlying principle when dealing with drinking water should be to reduce the risk to the minimal level possible. The concept of best available technology is also problematic. However, it may be advisable to set standards based on best available technology with provisions for review of those standards built into the regulation (for example, every three years). CELA has not come to a final position regarding the best approach from an environmental and health perspective but would be interested in hearing more elaboration from the Ministry on their research.

However, CELA would urge that non-detectable standards be adopted for carcinogens. (This reflects our increased ability to detect chemicals - rather than setting a zero standard). As well, a cancer policy is needed in Canada.

### III. PUBLIC ACCESS TO DRINKING WATER QUALITY DATA AND ASSESSMENTS

CELA agrees with the principles and programs outlined in this section. We would strongly urge that the notification procedure be put in legislation, again ideally in a safe drinking water act.

### IV. PUBLIC EDUCATION

Clearly this is an important component of any drinking water program. However, the tone of the comments in this section are of concern. We would contend that where the public has been given a meaningful opportunity to participate in a regulatory process, the results have been extremely beneficial. One recent example was the PCB Commission of Inquiry in which both CELA and Pollution Probe participated. The hearing panel commented favourably about the contribution of these organizations and many of the conditions enumerated were the result of the submissions of the environmental and citizen group intervenors.

### V. PUBLIC REVIEW OF DRINKING WATER PROGRAMS AND INITIATIVES

As mentioned earlier, there are many real advantages for public review of initiatives other than MOE's public image. It is our opinion that an advisory council, consisting of a small number of people is not sufficient for review of MOE policies. Publication and a public comment period may be a more appropriate route. It would seem that both (a) and (b) need further elaboration.