# SUBMISSION OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON GENERAL GOVERNMENT

## RE: *The Safe Drinking Water Act*, 2002 (Bill 195) EBR REGISTRY NO. AA02E0002

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Prepared by
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## A. INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") regarding Bill 195, the proposed *Safe Drinking Water Act, 2002* ("SDWA").[2]

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

For the past two decades, CELA's casework and law reform activities have focused on drinking water quality and quantity issues. For example, CELA has advocated passage of the SDWA since the early 1980s.[3] More recently, CELA has been involved in a number of drinking water matters, such as:

- representing the Concerned Walkerton Citizens during all phases of the Walkerton Inquiry;
- preparing various issue papers for Part II of the Walkerton Inquiry, including *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act*;[4]
- applying under the *Environmental Bill of Rights* ("EBR") for a review of the need for the SDWA in Ontario;[5]
- submitting model water legislation to entrench watershed planning and water conservation in Ontario;[6]
- commenting on the Drinking Water Protection Regulation (O.Reg. 459/00), the *Sustainable Water and Sewage Systems Act, 2001* (now Bill 175), the *Nutrient Management Act* (Bill 81), and proposed regulations thereunder;[7] and

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[1] Counsel, Canadian Environmental Law Association. The assistance of CELA staff during the preparation of this brief is gratefully acknowledged by the author.
[2] The SDWA was introduced for First Reading on October 29, 2002, and received Second Reading on November 7, 2002.
[3] T. Vigod and A. Wordsworth, "Water Fit to Drink: The Need for a *Safe Drinking Water Act* in Canada", (1982) 11 C.E.L.R. 80.
[4] These documents are available at: www.cela.ca.
[5] Ironically, this EBR Application for Review was rejected by the Ministry of the Environment in 2000 on the grounds that a SDWA was unnecessary in Ontario.
[6] These documents are available at: www.cela.ca.
[7] *Ibid.*

- commenting on various municipal land use planning reforms and amendments to the *Municipal Act*.[8]

In addition, CELA recently provided detailed comments to the Ministry of the Environment ("MOE") on the discussion paper entitled *Proposed Components of a Safe Drinking Water Act* (MOE, August 2002).[9] Unfortunately, it appears that only a few of CELA's recommendations regarding the MOE discussion paper have been reflected in the legislative text of the SDWA, as discussed below.

It is against this extensive background and experience that CELA has reviewed the provisions of the proposed SDWA. For comparative purposes, we have also considered various relevant documents, including:

- Commissioner O'Connor's Part I and II Reports of the Walkerton Inquiry;
- Bill 3 (SDWA, 2001), as introduced by MPP Marilyn Churley;
- other components of the Ontario government's "Clean Water Strategy"; and
- provisions of safe drinking water legislation in other jurisdictions (eg. the U.S. *Safe Drinking Water Act*).

## B. GENERAL COMMENTS REGARDING BILL 195

In principle, CELA strongly supports the SDWA, and urges Ontario legislators to work towards the expeditious passage and implementation of the SDWA (provided that the SDWA is amended as described below). On this point, CELA is relieved that the question is no longer *whether* Ontario needs a SDWA, but rather *how* the SDWA should be drafted. Accordingly, CELA concurs with the views expressed by Premier Ernie Eves upon introduction of the SDWA:

> Ontarians deserve to have safe and clean drinking water… Commissioner O'Connor was firm about Ontario's need for legislation that would ensure the safety and sustainability of our drinking water.[10]

Similarly, CELA is pleased by Environment Minister Chris Stockwell's commitment to enacting strong and effective drinking water legislation:

> Safe drinking water remains a top priority of this government. We are committed to ensuring that Ontario has, and enforces, the best and toughest clean water policies in the world…
>
> By passing [the SDWA], the members of this House will make Ontario a world leader in drinking water protection and preservation.[11]

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[8] *Ibid.*
[9] *Ibid.*
[10] Media Release, "Eves Moves to Protect Ontario's Drinking Water" (Oct. 29, 2002).
[11] The Hon. Chris Stockwell, Minister's Statement on Bill 195 (*Hansard*, Oct. 29, 2002).

This commitment to passing the "best" and "toughest" drinking water legislation was repeated by the Minister during Second Reading debate on the SDWA:

> We are strongly committed… to ensuring that the people of Ontario have safe drinking water, and that all of Justice O'Connor's recommendations are implemented…
>
> The proposed SDWA is an environmental milestone… [Bill 195] is the toughest legislation in the world for safe drinking water – not Canada and not North America; it's the toughest legislation in the world.[12]

Despite such assurances, however, CELA has significant concerns about the SDWA as drafted, and CELA submits that a number of amendments are necessary to transform the SDWA into effective and enforceable legislation. Without such amendments, the SDWA, on its face, will be incapable of achieving its public policy objectives, *viz.* to prevent a recurrence of the Walkerton Tragedy, and to ensure that Ontarians have the "best" and "toughest" drinking water protection "in the world".

In summary, CELA's main concerns are that the proposed SDWA:

- fails to include a preamble or comprehensive statement of purpose;
- fails to impose mandatory duties upon the Minister;
- fails to require the establishment of financial/technical assistance programs;
- fails to address the paramount issues of source protection and watershed planning;
- fails to ensure meaningful public participation in standard-setting and decision-making under the Act;
- fails to impose all necessary operational duties upon drinking water suppliers;
- fails to fully entrench community "right to know" principles;
- fails to include all necessary accreditation and licencing provisions;
- fails to prohibit the transfer of ownership of municipal drinking water systems to private companies;
- fails to ensure adequate regulation of non-municipal drinking water systems;
- fails to prohibit the approval of drinking water systems where the source is vulnerable to contamination or degradation that may cause drinking water health hazards;
- fails to ensure that there will be timely and effective inspections under the Act;
- fails to include a procedure for citizens to require investigations under the Act;
- fails to include all necessary compliance/enforcement measures, including citizen suit provisions;
- fails to impose minimum fines for the most serious offences under the Act;
- fails to require periodic review of drinking water standards or the Act itself; and
- fails to ensure that all sections of the Act will be proclaimed in force in a timely and coordinated manner.

[12] The Hon. Chris Stockwell, Second Reading Debate on Bill 195 (*Hansard*, October 31, 2002).

In many instances, we have concluded that the proposed SDWA is inconsistent with Commissioner O'Connor's recommendations, or that the proposed SDWA does not implement Commissioner O'Connor's recommendations adequately or at all.

These and other concerns are elaborated upon below, and are accompanied by CELA's recommendations for legislative amendments to Bill 195 in order to address our concerns. On this point, we note that Minister Stockwell has already committed to "fixing" any flaws found in Bill 195:

> If you find flaws as we debate the Bill, tell me because I want to hear it. I didn't draft this Bill in a partisan way. I want to hear the flaws, and if we can fix them, we can.[13]

As described herein, CELA submits that there are numerous "flaws" in Bill 195 as drafted. Therefore, we are pleased by the Minister's commitment to fix the flaws in order to improve and strengthen the proposed SDWA.

## C. CLAUSE-BY-CLAUSE REVIEW OF BILL 195

This section of CELA's submission on Bill 195 consists of our comments on the various Parts of the SDWA (in chronological order), as well as CELA's recommendations for legislative amendments where necessary and appropriate.

### Part I – Interpretation

*(a) Lack of A Preamble*

The first and most obvious omission in the proposed SDWA is the lack of a preamble outlining the public policy underpinnings of the Act.

CELA is aware that under current legislative drafting practice, most statutes do not include preambles. There are, however, some notable exceptions, particularly in relation to environmental statutes. At the federal level, for example, a detailed and lengthy preamble is found within the *Canadian Environmental Protection Act, 1999*. Similarly, Ontario's *Environmental Bill of Rights* ("EBR"), which is generally regarded as an environmental milestone, includes a preamble.

Given that SDWA has also been characterized as an "environmental milestone" by Minister Stockwell, CELA submits that it is reasonable and appropriate to include a preamble in the SDWA. Indeed, CELA previously made this recommendation in its submissions on the MOE discussion paper,[14] but it appears that this recommendation has not been reflected in the SDWA as drafted.

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[13] *Ibid.*

[14] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 21, Recommendation 15 (b).

On this point, it should be recalled that Marilyn Churley's Bill 3 (SDWA, 2001) included a brief preamble that included the following recitals:

> The people of Ontario have the right to clean and safe drinking water.
>
> Clean, safe drinking water is a basic human entitlement and essential for the protection of human health.

It is CELA's understanding that the Ontario government's proposed SDWA was supposed to build upon the contents of Bill 3.[15] However, it appears that the Bill 3 preamble was simply jettisoned from the SDWA as drafted.

In CELA's view, this omission is unfortunate and significant. As a matter of statutory interpretation, a preamble confers no substantive rights, but can serve as an important legislative mechanism to assist in the proper implementation of an Act's provisions.

The legal effect of a preamble is specified by section 8 of Ontario's *Interpretation Act* as follows:

> 8. The preamble of an Act shall be deemed a part thereof and is intended to assist in the purport and object of the Act.

Similarly, a leading authority on statutory interpretation has summarized the function and value of a preamble as follows:

> The primary function of a preamble is to recite the circumstances and considerations that gave rise to the need for legislation or the "mischief" the legislation is designed to cure. However, the recitals constituting a preamble may mention not only the facts which the legislature thought was important, but also principles or policies which it sought to implement or goals to which it aspired…
>
> Along with purpose statements, [preambles] are often included in modern regulatory legislation, and with the current emphasis on purposive analysis, they are often relied upon by the courts…
>
> Preambles are relied upon most often to reveal legislative purpose… Given the traditional importance of legislative intent, an explanation of purpose that emanates from the legislature itself carries a desirable authority…
>
> Preambles are an important source of legislative values and assumptions… By spelling out the assumptions *the legislature* takes to be true, the policies and principles *it* wants to advance and the values to which *it* is committed, the preamble offers interpreters an authoritative form of guidance…

[15] Media Release, "Eves Moves to Protect Drinking Water" (October 29, 2002): "The proposed legislation builds upon a private member's bill introduced by NDP MPP Marilyn Churley."

> Since preambles are an integral part of an enactment, they are part of the context in which the words of the enactment must be read. As such, they may be relied on to resolve ambiguity, determine scope or generally understand the meaning and effect of legislative language (original emphasis).[16]

Accordingly, CELA again recommends that the SDWA include a preamble that contains the above-noted Bill 3 recitals, as well as other appropriate recitals (eg. the relevant "Congressional Findings" that underlie the U.S SDWA). CELA's suggested language for the SDWA preamble is set out below.

**CELA RECOMMENDATION #1: The SDWA should be amended to include a preamble as follows:**

> **The people of Ontario have the right to safe drinking water;**
>
> **Safe drinking water is a basic human entitlement and essential for the protection of human health;**
>
> **Effective protection of drinking water requires a multi-barrier approach that includes assessing and protecting sources of drinking water;**
>
> **The public has the right to participate in decision-making and standard-setting in relation to drinking water and its sources;**
>
> **The public has the right to information about drinking water and its sources, and to prompt notification where there are violations of regulatory requirements for protection of drinking water and its sources;**
>
> **The process for identifying and regulating current and future drinking water contaminants must be open, transparent, based upon the precautionary principle, and aimed at protecting public health and safety;**
>
> **Since protecting drinking water and its sources may exceed the technical and financial capability of smaller municipal and non-municipal drinking water systems, the Government of Ontario has the responsibility to provide assistance to ensure that such systems comply with regulatory requirements; and**
>
> **The Government of Ontario has the primary responsibility to prevent a recurrence of the Walkerton Tragedy, and has committed to the full implementation of all recommendations in the Reports of the Walkerton Inquiry.**

[16] *Driedger on the Construction of Statutes*, pages 259-61 (footnotes omitted).

*(b) Purposes*

We have reviewed the statement of purpose reflected in section 1 of the proposed SDWA, and we find it deficient for various reasons, as described below.

It is beyond dispute that a purpose statement plays a number of important roles in modern regulatory legislation. These roles may be summarized as follows:

> First, purpose statements reveal the underlying principles and policies that the legislature intends to achieve by enacting the statute in question. Second, purpose statements help define the limits of discretion granted under the statute, such as administrative discretion conferred upon a minister, official or tribunal. Third, purpose statements carry more legal weight than preambles, and can be an invaluable source of legislative intent when courts are attempting to construe the meaning of substantive provisions which may be vague or reasonably capable of alternative interpretations.[17]

Accordingly, in our submission on the MOE's discussion paper on the SDWA, CELA clearly recommended that the SDWA include "a comprehensive statement of legislative purpose similar to that found in Bill 3".[18] On this point, it is noteworthy that the Bill 3 purpose statement provided as follows:

> 1.(1) The purposes of this Act are,
>
> (a) to recognize that people who use public water systems have a right to receive clean and safe drinking water from them;
> (b) to restore public confidence in the quality of drinking water throughout Ontario; and
> (c) to protect and enhance the quality of drinking water in Ontario.
>
> (2) In order to fulfill the purposes set out in subsection 1, this Act provides,
>
> (a) means for reviewing decisions about drinking water quality made by the Government of Ontario and holding it accountable for those decisions; and
> (b) increased access to the courts for the protection of drinking water quality.

Unfortunately, CELA's recommendation regarding the purpose statement was not reflected in section 1 of the SDWA as drafted. Instead, section 1 of the SDWA states that Ontarians are merely entitled to "expect" safe drinking water, and that the Act is intended to protect human health and to prevent drinking water health hazards. In our view, this purpose statement is problematic for several reasons.

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[17] CELA, *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act* (2001), Vol. II, page 113.
[18] CELA, *Comment on Proposed Components of the Safe Drinking Water Act* (September 2002), page 8, Recommendation 4.

First, the minimalist language of section 1 inadequately addresses the various functions of a proper statement of legislative purpose, as described above. Second, the trite recognition of a public "expectation" of safe drinking water is virtually meaningless (surely, there is no public expectation of poisoned water). In our view, saying Ontarians "expect" clean water is no different than repeating other self-evident facts or well-known platitudes (eg. that Ontarians expect to breath clean air, to enjoy good health, to have adequate housing, etc.). Third, and more fundamentally, it is our view that the SDWA, as drafted, is unlikely to even achieve the modest objectives of section 1, for the reasons described throughout this brief.

On this point, it must be recalled that Commissioner O'Connor declined to recommend the creation of a stand-alone, substantive right to clean water in the SDWA (eg. something analogous to a *Charter* right enforceable by legal action). Instead, he commented that the "ultimate goal" of the SDWA was to ensure safe drinking water (which all Ontarians reasonably expect), and that this goal should be recognized in the SDWA.[19] Aside from this limited commentary, Commissioner O'Connor made no explicit recommendation on the actual legislative text of the SDWA purpose statement. In these circumstances, CELA submits that there is considerable room for the Ontario Legislature to expand and improve upon the statement of purpose in section 1 of the SDWA.

Moreover, even if "rights" language is used in the SDWA purpose statement, this terminology does not create an enforceable legal right per se, nor does it run afoul of Commissioner O'Connor's decision not to endorse a substantive right to safe drinking water. By way of comparison, it is noteworthy that in the EBR, the Ontario Legislature recognized the "right to a healthful environment" in both the preamble and section 1(1)(c). Using "rights" language in this manner helped recognize and emphasize the importance of the public right, but did not create a legally enforceable right in and of itself. Instead, persons wishing to assert or protect that right had to do so through the means specifically provided in the EBR itself (eg. application for review, application for investigation, etc.). In CELA's view, the Ontario Legislature would be well-advised to follow this EBR precedent in the SDWA if the Legislature is otherwise unwilling to create a substantive right to safe drinking water.

Accordingly, CELA again finds it necessary to recommend the inclusion of a comprehensive statement of purpose in the SDWA. In particular, CELA prefers and endorses the statement of purpose found in Bill 3, but suggests some slight modifications and some additional legislative language, as set out below.

**CELA RECOMMENDATION #2: The SDWA should be amended to include the following statement of purpose:**

**1(1) The purposes of this Act are,**

[19] Part II Report, page 405.

**(a) to recognize that persons in Ontario expect, and have the right to receive, safe drinking water;**

**(b) to protect and enhance the quality of drinking water and its sources in Ontario; and**

**(c) to protect human health by protecting drinking water and its sources in Ontario through a multi-barrier approach.**

**(2) In order to fulfill the purposes of subsection (1), this Act provides,**

**(a) means to ensure that persons in Ontario have safe drinking water;**

**(b) increased public access to information about drinking water and its sources;**

**(c) enhanced public participation in decision-making and standard-setting in relation to drinking water and its sources;**

**(d) means to ensure that drinking water standards are set, reviewed, revised and enforced in order to protect public health;**

**(e) funding and technical assistance programs for smaller municipal and non-municipal drinking water systems; and**

**(f) increased accountability of the Government of Ontario for protecting drinking water and its sources.**

*(c) Definitions*

We have reviewed the numerous definitions found in section 2(1) of the SDWA, and we generally have no objection to them, except as set out below.

First, we note that the SDWA definition of "municipality" includes a "local board as defined under the *Municipal Affairs Act* ". It is unclear whether this definition also includes municipal service boards ("MSBs") under the *Municipal Act, 2001*, but we make no recommendations regarding this definition at the present time.

Second, we note that the SDWA definition of "raw water supply" simply refers to "water outside the drinking water system that is a source of water in the system". For the purposes of greater certainty (and to better integrate source protection measures), CELA recommends that this definition should be extended to include the relevant elements of

the OWRA definition of "water" (which, curiously, has been omitted from the SDWA). Without this extended definition, there will undoubtedly be debate about what exactly constitutes "raw water supply" for the purposes of the SDWA.

**CELA RECOMMENDATION #3: The SDWA's definition section should be amended as follows: "raw water supply" means water outside a drinking water system that is a source of water for the system, and includes a well, lake, river, spring, stream, reservoir, artificial watercourse, groundwater, or other water or watercourse.**

## Part II – Administration

*(a) Powers and Duties of the Minister*

We note that section 3 of the SDWA designates the Minister of the Environment as the Minister responsible for "overseeing the regulation of safe drinking water in Ontario". In our view, this is the appropriate lead ministry for the overall administration of the Act.

However, section 3 goes on to indicate that the Minister "may" undertake various activities in relation to drinking water safety. First, CELA objects to the use of the permissive word "may" since that word means, in effect, that the Minister has discretion to do none of the listed activities.[20] In our view, the SDWA should utilize the mandatory word "shall" in order to impose positive duties on the Minister to undertake the measures contemplated in section 3(1). On this point, we note that Bill 3 used "shall" so as to impose a number of specific tasks and duties upon the Minister (eg. section 6 (water quality registry); section 13 (research); section 14 (private water testing); section 15 (annual reports); and section 18(5) (annual review of regulations)).[21]

Second, it appears that there several important drinking water matters that have been omitted from the section 3(1) list in the SDWA. For example, no reference is made in section 3(1) to the comprehensive, "source to tap" Drinking Water Policy that Commissioner O'Connor recommended the Ministry develop (Recommendations 65 and 66).[22] To ensure this Drinking Water Policy actually gets developed (and to better integrate source protection within the SDWA), CELA recommends that the section 3(1) list must include reference to the Policy and the need to develop it expeditiously.

Third, we note that the proposed SDWA makes no reference to the creation of a Drinking Water Branch or Watershed Management Branch within MOE, despite the fact that Commissioner O'Connor expressly recommended the creation of these specialized Branches (Recommendations 69 and 70). It may be suggested that these new Branches

[20] See Ontario's *Interpretation Act*, section 29(2): "The word 'shall' shall be construed as imperative, and the word 'may' as permissive."

[21] Another example of an environmental statute that uses "shall" to impose specific governmental duties is the *Canadian Environmental Protection Act, 1999*, section 2.

[22] It should be noted, however, that Commissioner O'Connor envisioned an overarching, "government-wide" water policy covering all ministries and legislation, not just the MOE and its programs: see Part II Report, page 4.

can be created within the MOE by corporate restructuring rather than by legislative fiat. However, it should be pointed out that the SDWA legislatively creates the office of Chief Inspector (see below), although arguably it was open to MOE to establish this office through corporate restructuring.

In any event, CELA is concerned that unless the two specialized Branches are legislatively recognized by the SDWA, there is no guarantee that the Branches will be created in a timely manner, nor is there any guarantee that the Branches will be adequately staffed and resourced in accordance with Commissioner O'Connor's Recommendation 78.[23] Accordingly, CELA recommends that the list of mandatory Ministerial duties under section 3(1) should require the Minister to establish these two Branches within 45 days of the Act's coming into force, and to ensure that the two Branches are adequately funded.

Other drinking water matters that should also be included on the section 3(1) list of mandatory Ministerial duties include: (a) conducting annual public reviews of drinking water standards to evaluate their adequacy in protecting public health; (b) conducting five-year public reviews of the SDWA itself to evaluate its effectiveness in protecting public health;[24] (c) researching and developing measures for protecting sources of drinking water; and (d) researching and developing water conservation measures.

*(b) Annual Reports*

We strongly support the use of the word "shall" in section 3(4) of the SDWA so as to impose a mandatory duty on the Minister to table annual reports on drinking water with the Ontario Legislature. The section 3(4) list of the minimum content requirements for the annual report represents a good starting point, but fall short of the Bill 3 list (see section 15) and should be expanded to include other important monitoring/reporting matters related to drinking water safety.

For example, the Minister should also be required by the SDWA to review and report upon: (a) the work of the Advisory Council established under section 4 of the SDWA (including information posted by the Advisory Council on the EBR Registry); (b) the findings and recommendations arising from the public annual review of the adequacy of drinking water standards; (c) the findings and recommendations arising from the five-year public review of the SDWA; (d) summaries of financial assistance provided by the Government of Ontario to the owners/operators of municipal and non-municipal drinking water systems; (e) researching and developing water conservation measures. In our

[23] Recommendation 78 provides that "the provincial government should ensure that programs relating to the safety of drinking water are adequately funded." Similarly, Commissioner O'Connor's Recommendation 7 provides that "the provincial government should ensure that sufficient funds are available to complete the planning and adoption of source protection plans."

[24] Other examples of statutory review mechanisms include: public review of the Niagara Escarpment Plan under section 17 of the *Niagara Escarpment Planning and Development Act*; parliamentary review under section 343 of the *Canadian Environmental Protection Act, 1999*; and parliamentary review under section 72 of the *Canadian Environmental Assessment Act*. It should be further noted that the U.S. SDWA has also been periodically reviewed and strengthened since its original enactment in 1974.

view, the inclusion of these additional items in the Minister's annual report will significantly improve the effectiveness of this accountability mechanism.

We are somewhat surprised that the SDWA does not describe when the first annual report is due to be tabled by the Minister with the Ontario Legislature. To avoid any confusion or uncertainty over this reporting obligation, CELA recommends the inclusion of reporting frequency provisions similar to those found in subsections 15(2) and (4) of Bill 3.

**CELA RECOMMENDATION #4: The SDWA should be amended to:**

**(a) use the word "shall" in section 3(1) so as to impose a mandatory duty on the Minister to undertake the various activities, programs and research listed therein;**

**(b) expand the section 3(1) list of the Minister's drinking water duties to include:**

- **developing a comprehensive, "source to tap" Drinking Water Policy for Ontario as soon as practicable;**

- **within 45 days of the Act's coming into force, establishing and adequately funding the Drinking Water Branch within the Ministry for overseeing drinking water treatment and distribution systems;**

- **within 45 days of the Act's coming into force, establishing and adequately funding the Watershed Management Branch within the Ministry for overseeing watershed-based source protection plans and watershed management plans;**

- **conducting annual public reviews of the adequacy of drinking water standards to protect public health;**

- **conducting five-year public reviews of the effectiveness of the SDWA in protecting public health;**

- **researching and developing measures for the protection of sources of drinking water; and**

- **researching and developing water conservation measures;**

**(c) expand the list of prescribed content requirements for the Minister's annual reports to include:**

- **the work of the Advisory Council established under section 4 (including information posted by the Advisory Committee on the EBR Registry);**

- **the findings and recommendations arising out of the public annual review of the adequacy of drinking water standards;**

- **the findings and recommendations arising out of five-year annual review of the SDWA; and**

- **summaries of financial assistance provided by the Government of Ontario to owners/operators of municipal and non-municipal drinking water systems;**

**(d) specify that:**

- **the annual report for a calendar year shall be tabled by the Minister on or before April 1 of the following calendar year; and**

- **the first annual report shall be tabled by the Minister on or before April 1, 2004, and shall cover the period that begins on the day that this Act comes into force and ends on December 31, 2003.**

*(c) Advisory Council*

CELA strongly supports the mandatory creation of the Advisory Council on Drinking Water Quality and Testing Standards pursuant to section 4 of the SDWA. We are also supportive of the section 5 requirement that the Minister shall consider the views of the Advisory Committee when setting or revising drinking water standards. Given such provisions, we believe that the Advisory Council should prove to be a valuable accountability mechanism as well as an important avenue for stakeholder input into standard-setting under the SDWA. In light of CELA's extensive involvement with other provincial advisory bodies,[25] we hereby request an opportunity to serve as a member of the Advisory Council.

Having said this, however, it is CELA's view that the SDWA should provide greater detail on the composition and mandate of the Advisory Council. In fact, the SDWA, as drafted, is silent on who is eligible to sit on the Advisory Council, and provides little direction on what the Advisory Council is supposed to do under the Act (other than to "consider" drinking water issues and "provide recommendations" to the Minister). In addition, the SDWA, as drafted, fails to impose a deadline for the Minister to actually establish the Advisory Council. In our view, these are legislative oversights that can be

[25] For example, CELA staff and/or directors have participated on the EBR Task Force, MISA Advisory Committee, Advisory Committee on Environmental Standards (ACES), and numerous other advisory panels. As described below, CELA is also participating on the source protection/watershed planning advisory committee.

easily corrected. Indeed, in our comments on the MOE's SDWA discussion paper, CELA made recommendations to address these matters, but the SDWA, as drafted, failed to incorporate such recommendations.[26]

For example, CELA recommends that the SDWA should compel the Minister to establish the Council and appoint its members (including the Chair and Vice-Chair) within 45 days of the Act's coming into force. It should be pointed out that similar provisions were contained within Bill 3.

With respect to the composition of the Advisory Council, CELA recommends that the SDWA should set minimum and maximum numbers for Council membership in order to keep Council proceedings efficient and manageable. In addition, the SDWA should specify the qualifications of persons who may be appointed to the Advisory Council. Again, it should be pointed out that both matters were addressed in Bill 3.

CELA further recommends that to reinforce the independence of the Advisory Council, the members of the Advisory Council should not be provincial employees. Instead, Council members should be drawn, *inter alia*, from academia, municipalities, First Nations, public health organizations, environmental groups, and the waterworks industry. However, the work of the Advisory Council would be greatly assisted with input from an inter-ministerial technical working group, and the Minister should be compelled by the SDWA to provide sufficient resources to the Advisory Committee.[27]

Finally, CELA recommends that the SDWA should more fully articulate the various functions of the Advisory Council. In our view, the SDWA should set out a non-exhaustive list of matters that the Council can address, either upon request by the Minister or upon its own initiative. Section 12 of Bill 3 included such a list, but should be expanded upon to capture the full range of relevant drinking water matters.

**CELA RECOMMENDATION #5: The SDWA should be amended to provide that:**

**(a) the Minister shall establish the Advisory Council and appoint its members (including the Chair and Vice-Chair) within 45 days of the Act's coming into force;**

**(b) the Advisory Council shall consist of not fewer than seven and not more than twelve members, who shall not be part of the public service of Ontario;**

**(c) members of the Advisory Council shall be persons who are unbiased, free of conflict of interest, and have knowledge or experience in drinking water matters;**

[26] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 12, Recommendation 7.

[27] For example, section 20 of the *Species at Risk Act* compels the federal Environment Minister to provide sufficient resources to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

**(d) the mandate of the Advisory Council shall be to:**

- **generally assist the Minister in carrying out the duties imposed by section 3 of the Act;**

- **review and report upon the adequacy of current drinking water standards, and to recommend revisions thereto as may be necessary to protect public health;**

- **identify, evaluate and make recommendations in relation to new or emerging drinking water contaminants;**

- **review and comment upon the annual reports tabled by the Minister under section 3(4) of the Act;**

- **undertake and disseminate research into drinking water treatment, drinking water testing, source protection measures, or the diagnosis, treatment and prevention of health effects caused by drinking water contaminants;**

- **consider any matter affecting drinking water or its sources that the Minister refers to the Advisory Council or that the Advisory Council decides to consider on its own initiative; and**

- **address such matters as may be prescribed by regulation;**

**(e) the Minister shall provide the Advisory Council with sufficient professional, technical, secretarial, clerical resources, and any other facilities or supplies, that are necessary for the Advisory Council to carry out its mandate under the Act.**

*(d) Chief Inspector*

In principle, CELA supports the creation of the office of the "Chief Inspector" pursuant to section 7 of the SDWA. At the very least, establishing and empowering this specialized office should, in theory, raise the priority and profile of drinking water safety within the MOE's institutional structure and day-to-day operations.

As a matter of legislative drafting, CELA queries whether it would be more appropriate to place section 7 within Part VIII of the SDWA, which deals specifically with inspections. However, we make no specific recommendations with respect to this issue.

More importantly, we have serious concerns about the efficacy of this new office, particularly in light of Commissioner O'Connor's findings and recommendations

regarding MOE budget cuts, staff reductions, and inspection/enforcement practices and protocols, as described below.

First, it goes without saying that this new office cannot perform effectively unless it is adequately resourced and properly staffed. On this point, CELA takes little comfort in the MOE's claim that a number of drinking water inspectors have been rehired by the provincial government. Given the massive MOE budget cuts and staff reductions documented by Commissioner O'Connor,[28] it cannot be concluded that these belated hirings fully restore the MOE's inspection/enforcement capabilities to pre-1995 levels. Indeed, merely hiring back inspectors – but not restoring the institutional resources (eg. laboratory services) required by inspectors – can only serve to undermine rather than enhance enforcement efforts. Accordingly, CELA recommends that the SDWA must be amended so as to compel the Minister to provide adequate staffing, funding and other resources to enable the Chief Inspector to properly carry out his/her duties under the Act. Indeed, this is precisely what Commissioner O'Connor recommended in the Part I Report:

> The government should ensure that adequate resources are provided to ensure that these inspections are thorough and effective (Recommendation 17).

Second, it appears to us that the Chief Inspector's duties under section 7 of the SDWA are far more bureaucratic than investigative in nature. Among other things, for example, the Chief Inspector is obliged to provide "advice" and "recommendations" to the Minister regarding inspections, and to develop training programs for inspectors under the SDWA. While such activities are important, they do not necessarily translate into effective and timely inspections of drinking water systems across Ontario. Indeed, there is no guarantee that the Chief Inspector's review and training efforts will actually produce inspection policies and procedures that are responsive to Commissioner O'Connor's detailed critique of MOE inspections (and lack of followup) in the context of the Walkerton Tragedy.[29]

For this reason, CELA recommends that section 7 should be amended to require the Chief Inspector to immediately develop a new SDWA compliance/enforcement manual[30] that, *inter alia*, entrenches the following principles:[31]

- inspectors shall have the same or higher qualifications as the operators of the drinking water systems they inspect;
- inspectors shall receive special training;
- there shall be increased use of mandatory abatement;

[28] Part I Report, pages Chapter 11.
[29] Part I Report, pages 299 to 232; Part II Report, pages 209 to 10.
[30] This manual would be analogous to the *Code of Enforcement* utilized by England's Drinking Water Inspectorate to govern inspections and enforcement activities in relation to drinking water suppliers.
[31] These principles are drawn from Recommendations 13 to 19 of the Part I Report, and Recommendations 73 to 76 of the Part II Report.

- there shall be strict enforcement of all regulations and provisions related to the safety of drinking water;
- the inspection program shall should consist of announced and unannounced inspections to be undertaken at least annually for each drinking water system;
- inspectors shall review all relevant MOE records (eg. approvals, orders, consultants' reports, etc.) prior to the annual inspection of a drinking water system;
- the checklist of mandatory inspection items should include: review of the system's operating, training and maintenance records; water testing results, especially exceedances of prescribed standards; sampling of raw and treated water; state of monitoring, alarms, treatment, and distribution equipment; and other prescribed matters;
- copies of inspection reports shall be retained on file at the local MOE office and the Approvals Branch, and shall be provided to the owner/operators of the drinking water system, the medical officer of health, and the public upon request; and
- there shall be strict adherence to the prescribed timelines for the preparation and delivery of inspection reports, responses by owners/operators, and the submission of interim status reports regarding remedial action;

CELA further recommends that this SDWA manual shall be subject to public review/comment prior to its finalization, and that the Chief Inspector should approve and implement the manual within 45 days of the Act's coming into force.

CELA's additional concerns and recommendations regarding inspection/enforcement matters are set out below in the context of Parts VIII (Inspections) and IX (Compliance and Enforcement) of the SDWA.

**CELA RECOMMENDATION #6: The SDWA should be amended to:**

**(a) require the Minister to provide adequate funding, staffing and other resources to enable the Chief Inspector carry out the duties imposed by section 7;**

**(b) require the Chief Inspector to develop a new compliance/enforcement manual that specifies that the Ministry shall:**

- **ensure that inspectors have the same or higher qualifications as the operators of the drinking water systems they inspect;**
- **ensure that inspectors shall receive special training;**
- **increase the use of mandatory abatement;**
- **strictly enforce all regulations and provisions related to the safety of drinking water;**

- **the inspection program shall consist of announced and unannounced inspections to be undertaken at least annually for each drinking water system;**

- **inspectors shall review all relevant MOE records (eg. approvals, orders, consultants' reports, etc.) prior to the annual inspection of a drinking water system;**

- **the checklist of mandatory inspection items should include: review of the system's operating, training and maintenance records; water testing results, especially exceedances of prescribed standards; sampling of raw and treated water; state of monitoring, alarms, treatment, and distribution equipment; and other prescribed matters;**

- **copies of inspection reports shall be retained on file at the local MOE office and the Approvals Branch, and shall be provided to the owner/operators of the drinking water system, the medical officer of health, and the public upon request; and**

- **there shall be strict adherence to the prescribed timelines for the preparation and delivery of inspection reports, responses by owners/operators, and the submission of interim status reports regarding remedial action;**

**in accordance with this Act and the regulations.**

**(c) require the Chief Inspector to undertake public consultation on the new compliance/enforcement manual prior to its finalization, and to approve and implement the manual within 45 days of the Act's coming into force.**

*(e) Public Participation in SDWA Decision-Making*

CELA submits that Part II is seriously flawed by its failure to entrench public participation rights in relation to provincial decision-making under the SDWA. In our view, public participation rights are the *sine qua non* of the community "right-to-know" principle.

In particular, CELA strongly submits that members of the public should be given proper notice of proposed policies, regulations, standards, orders, and approvals under the SDWA. At the same time, there should be meaningful public comment periods in relation to such matters, and there should be a duty on the Minister and Directors to consider public and agency comments before final decisions are made.

On this point, we note that public access to the decision-making process was endorsed by Commissioner O'Connor as follows:

> My recommendations are intended to improve both transparency and accountability in the water supply system. Public confidence will be fostered by ensuring that members of the public have access to current information about the different components of the system, about the quality of water, and about decisions that affect water safety.[32]

It should be further noted that a mandatory public notice/comment regime already exists under Part II of the EBR in relation to environmentally significant Acts, policies, regulations, and "instruments" (eg. licences, permits, directions, orders, and approvals). It goes without saying that the SDWA itself – as well as the statutory decision-making under the Act – involves environmentally significant matters and raises profoundly important issues related to public health and safety. Therefore, CELA submits that the SDWA should be prescribed as a statute to which Part II of the EBR applies.

In particular, proposals to amend the SDWA after its enactment, or proposals to make or amend policies or regulations under SDWA, should be subject to sections 15 and 16 of the EBR. Similarly, proposals to make or amend orders, approvals, licences, directions, or variances under the SDWA should be classified as Class I or II "instruments" for the purposes of section 22 of the EBR. For licences and permits for municipal drinking water systems, it will be necessary to specify that section 32 of the EBR (exception for instruments for undertakings approved/exempted under the *Environmental Assessment Act*) is <u>not</u> applicable in order to ensure proper public/notice in respect of such instruments.

Finally, if Part II of the EBR is made applicable, then it necessarily follows that Part IV (Application for Review) should also apply to the SDWA and statutory decisions made under the Act. However, it may not be necessary to apply Parts V (Application for Investigation) and Part VI (Right to Sue) to the SDWA, provided that CELA's recommendations below regarding investigation and enforcement are adopted within the SDWA. If they are not, then Parts V and VI will have to be made applicable to the SDWA, as described below.

CELA's further comments about community right-to-know are set out below in relation to the general duties of owners/operators of drinking water systems under Part III of the SDWA.

**CELA RECOMMENDATION #7: The SDWA should be prescribed as a statute to which the EBR applies. In particular, the SDWA (or regulations thereunder) should provide that:**

[32] Part II Report, page 6.

**(a) proposals to amend the SDWA after its enactment, and proposals to make or amend policies or regulations under the SDWA, shall be subject to sections 15 and 16 of the EBR;**

**(b) proposals to make or amend licences, permits, approvals, variances, orders or directions under the SDWA shall be classified as Class I or II instruments subject to section 22 of the EBR;**

**(c) the public participation exception in section 32 of the EBR does not apply in relation to SDWA permits or approvals for municipal drinking water systems; and**

**(d) the Application for Review provisions of Part IV of the EBR apply to the SDWA and policies, regulations and instruments thereunder.**

## Part III – General Requirements

*(a) Lack of Source Protection/Watershed Planning*

Arguably, the most significant omission in Part III (or, indeed, the entire SDWA) is the failure to include any general provisions regarding drinking water source protection and watershed planning. Alarmingly, the concept of source protection is barely even mentioned anywhere in the SDWA. This omission stands in stark contrast to the U.S. SDWA, which has a number of important statutory requirements and regulatory Rules regarding source assessment and protection.

It is important to recall that throughout his Part I and II Reports, Commissioner O'Connor repeatedly endorsed the "multi-barrier" approach to ensure drinking water safety.[33] The first critical step of the multi-barrier approach is to find, secure and protect the best possible source(s) of drinking water.[34] Not surprisingly, the issue of source protection attracted more public support than any other aspect of drinking water safety during the Part II town hall meetings held by the Walkerton Inquiry.[35]

Accordingly, Commissioner O'Connor recommended , *inter alia*, that the *Environmental Protection Act* ("EPA") be amended so as to require the development of "Watershed Source Protection Plans".[36]

This also appears to be the preference of Minister Stockwell, who has indicated that source protection requirements will be addressed under forthcoming EPA amendments. However, Minister Stockwell went on to opine that developing source protection amendments is a "large", "difficult", and "monumental task".[37] Accordingly, the

[33] See, for example, Part II Report, pages 5-6.
[34] *Ibid.*, pages 3, 8-10.
[35] *Ibid.*
[36] *Ibid.*, page 92 (Recommendation 1) and page 410 (Recommendation 68).
[37] The Hon. Chris Stockwell, Second Reading Debate on Bill 195 (*Hansard*, October 31, 2002).

Ontario government has recently announced the creation of an advisory committee to develop a "framework" for source protection.

In addition, the Minister recently indicated that the EPA amendments regarding source protection will be in place by the spring of 2003:

> … We all want source protection. I've committed as best I can to see that a source protection bill comes into place by next spring.

With respect, CELA suggests that the Minister has overstated the difficulty of developing source protection requirements, particularly since Ontario is well-positioned to drawn upon and learn from the experiences of other jurisdictions that have already developed source protection measures.[38] Similarly, CELA submits that at this late stage, the belated creation of an advisory committee is not an adequate substitute for timely legislative action on source protection. Indeed, we are unclear why the advisory committee was not created until some 2 ½ years after the Walkerton Tragedy occurred, and many months after the release of Commissioner O'Connor's Part II Report.

On this point, it should be noted that Commissioner O'Connor envisioned that the source protection framework would be developed within 6 to 8 months of the May 2002 release of the Part II Report.[39] However, the advisory committee was not formally introduced until mid-November,[40] and the latest indication is that the source protection bill may not be ready until the spring of 2003 – over a year after the release of the Part II Report. Given the critical importance of source protection, this inexplicable delay is both unfortunate and avoidable, and we are concerned that the 6 to 8 month period following the Part II Report has been needlessly squandered without any tangible progress on source protection.

In any event, CELA has recently agreed to serve as a participant on the advisory committee, and we are hopeful that meaningful source protection requirements will be drafted and implemented as soon as possible. At the same, however, we remain highly concerned that the SDWA (and other legislation) is proceeding apace without proper source protection requirements in place. On this point, we note that we can find no recommendation from Commissioner O'Connor that suggests that the EPA amendments should only be developed after the SDWA has been enacted. Nevertheless, the Minister appears to have elected to proceed first with the SDWA, and then proceed afterwards with source protection amendments to the EPA in a somewhat vague timeframe.

In light of the timing for this awkward, "two-track" approach, we are concerned that there will be incomplete legislative linkages between the SDWA and the as-yet undeveloped source protection requirements under the EPA. In our view, this legislative disconnect

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[38] CELA, *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act* (May 2001), Vol. II, pages 132-34.
[39] Part II Report, page 104.
[40] News Release, "Eves Government Establishes Advisory Committee to Guide Framework for Protecting Drinking Water At Source" (November 15, 2002).

can only serve to perpetuate the legislative confusion and fragmentation that Commissioner O'Connor's recommendations (in their entirely) were intended to avoid. Moreover, since the SDWA is intended to be the centrepiece of Ontario's drinking water "safety net", there can be little doubt that source protection must be fully integrated with the SDWA. In short, source protection should not be treated as an afterthought; instead, source protection must be regarded as an integral component of the SDWA regime.

This is not only the view of CELA -- it is the opinion expressed by various non-governmental organizations (eg. Ducks Unlimited Canada, Federation of Ontario Naturalists, Conservation Ontario, Nature Conservancy of Canada, and Soil and Water Conservation Society). In July 2002, for example, these groups submitted a joint letter to Premier Eves to highlight the relationship between source protection and drinking water safety, and to offer their assistance in developing source protection measures for Ontario:

> We are encouraged by your commitment to implement the recommendations outlined in the Walkerton Reports…We are anxious to work with the government and other stakeholders to identify appropriate strategies, develop the necessary plans, and where feasible, assist in the implementation phase.
>
> The O'Connor reports raised a number of important elements that we believe must be addressed. In addition, there are areas where we can offer assistance to the government. They include:
>
> - Our organizations have a particular interest in source protection and watershed planning. Collectively, we have considerable expertise in these areas and we want to work with the government to work on the existing strengths and partnerships that exist…
>
> - Planning must extend beyond existing sources, to ensure that future sources of water are identified and protected. This entails a broader view of the adjoining watersheds, and related groundwater systems in Ontario, and the initiatives that are undertaken at that level.[41]

In September 2002, these same groups submitted another joint letter to Minister Stockwell to lament the lack of progress regarding source protection and the SDWA:

> We are concerned, however, that source protection and watershed planning are not acknowledged in the proposed components of a *Safe Drinking Water Act*. We believe this is essential.
>
> It is critical that Ontario's water policy and planning system be coherent and consistent, and rest upon the first barrier of source protection. Accordingly, the source protection planning framework should be under development, with a view

[41] NGO joint letter to Premier Eves (July 29, 2002), page 1.

> to ensuring that all of the legislation and regulations currently under consideration are appropriately linked to and based upon source protection.[42]

Similarly, in its previous comments on the MOE's SDWA discussion paper, CELA recommended the integration of the SDWA with the EPA amendments regarding source protection.[43] Unfortunately, it appears that this recommendation has not been acted upon to date by the Ontario government.

Accordingly, it is again necessary for CELA to recommend integration of the SDWA and the EPA amendments regarding source protection. In particular, CELA recommends that the EPA amendments themselves must be fast-tracked and attached as "Complementary Amendments" under Part XIII of the SDWA.[44] At the same time, we recognize that comprehensive source protection measures may also require consequential amendments to other provincial statutes (eg. the *Planning Act* and the *Conservation Authorities Act*) in order to facilitate proper implementation of the "Watershed Source Protection Plans" developed and approved under the EPA.

If this recommendation means that the timetable for amending and passing the SDWA has to be adjusted, then CELA submits that such adjustments are clearly justifiable and entirely consistent with the public interest. However, CELA is also confident that this should not unduly delay the passage of the SDWA since all parties and stakeholders appear to strongly agree on the overwhelming need for source protection in Ontario. After all, CELA and Ontarians have been literally waiting for decades for the enactment of the SDWA, and waiting a few more months (but no later than the spring of 2003) will be worthwhile if it means that source protection requirements will be properly integrated within the SDWA.

**CELA RECOMMENDATION #8: The EPA amendments (and other necessary statutory amendments) regarding source protection/watershed planning should be fast-tracked and subsequently attached to Part XIII of the SDWA as "Complementary Amendments".**

*(b) Potable Water*

CELA supports the stipulation in section 10 of the SDWA that whenever the term "potable water" appears in provincial laws, regulations, statutory instruments or municipal by-laws, it shall be deemed to impose a requirement that the water meet prescribed drinking water quality standards.

However, it is unclear what section 10 of the SDWA means in the context of section 20 of the *Health Protection and Promotion Act*, which provides that:

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[42] NGO joint letter to Minister Stockwell (September 25, 2002), page 1.
[43] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 5, Recommendation 2.
[44] At the present time, Part XIII of the SDWA only contains a single amendment to the *Health Protection and Promotion Act*.

Every person who owns a residential building shall provide,

(a) potable water…

for the residents of the residential building.

Does section 10 of the SDWA mean that homeowners, landlords or grouphome operators must take steps to ensure that residents' drinking water meets SDWA requirements; if so, how is this statutory obligation to be fulfilled (eg. by testing and/or treating tapwater supplied by municipalities? by hooking up rural residents to municipal drinking water systems?)?

CELA makes no specific recommendation in this matter, but invites the Ontario Legislature to carefully consider this issue to ensure that the deeming provisions in section 10 do not cause any unintended consequences under other statutes.

*(c)Duties of Owners and Operating Authorities*

Sections 15 to 19 of the SDWA impose a number of important duties and responsibilities upon the owners of municipal and non-municipal drinking water systems, and upon "operating authorities" that are responsible for running drinking water systems on behalf of the owners. Section 20 of the SDWA goes on to create a general prohibition against causing or permitting "things" to enter a drinking water system if they could result in a drinking water health hazard, contravention of a prescribed standard, or interference with the normal operation of the system.

While these provisions are generally supportable, CELA has a number of drafting recommendations that would strengthen and improve these provisions.

(i) Operational Duties

We note that section 11(1) of the SDWA proposes to impose certain operational duties upon the "owner" of a drinking water system, as well as upon the "operating authority" where such an authority has been established. However, it is unclear to us whether the word "and" that prefaces the reference to the "operating authority" is intended to be read in its conjunctive or disjunctive sense.

If read disjunctively, this would appear to create a situation where the owner would be relieved of its section 11(1) duties by the mere existence of an operating authority. In our view, it is far more preferable to read "and" in its conjunctive sense so that the section 11(1) duties are imposed jointly upon the owner and operating authority. This would be analogous to the joint duties imposed upon the "owner" and "controller" of spilled pollutants pursuant to Part X of the EPA.[45]

[45] Such as the duties to report and clean up spills, and the civil liability to pay compensation for loss and damage arising from a spill: see sections 92, 93 and 99 of the EPA.

In CELA's view, imposing the section 11(1) duties jointly would significantly enhance accountability and create a greater likelihood that there will be compliance by at least one of the actors (eg. the owner and/or operating authority). Accordingly, to ensure that "and" is interpreted conjunctively by the courts, CELA recommends that section 11 be amended to clarify that the section 11(1) duties are binding and enforceable against an "owner" even where an "operating authority" has been created to run the drinking water system. Alternatively, the SDWA should be amended to provide that the "owner" is liable to conviction under section 11(1) whether or not the "operating authority" has been prosecuted or convicted.[46]

While we generally support the operational duties described in paragraphs 1 to 5 of section 11(1), there appear to be several significant omissions in these paragraphs. For example, paragraph 1 specifies that delivered water must meet "prescribed drinking water quality standards", but makes no reference to compliance with prescribed "treatment" requirements. In our view, this omission could tempt some drinking water suppliers to minimize (or even ignore) treatment requirements on the grounds that the raw water supply is sufficiently clean and safe.[47] Moreover, this focus on delivered water rather than treatment appears to be inconsistent with the current Drinking Water Protection Regulation, which specifies that no water should even enter the distribution system or plumbing unless it has been treated by chlorination or equivalent treatment.[48]

Similarly, paragraph 4 of section 11(1) of the SDWA refers to "sampling, testing and monitoring" requirements, but makes no reference to "reporting" requirements (eg. reporting adverse test results, consumer reporting, etc.). Moreover, no reference is made in section 11(1) to periodically assessing and reporting upon the quality and quantity of the raw water supply. In our view, these and other omissions can be easily rectified by simple amendments to the operational duties outlined in section 11(1).

(ii) Out-of-Province Laboratories

CELA notes that subsections 11(2) to (7) of the SDWA proposes to restrict (but not prohibit) the use of non-licenced, "out-of-province" laboratories for the purposes of drinking water testing services. To our knowledge, the MOE's discussion paper on the proposed components of the SDWA made no reference to the possibility that non-licenced, non-Ontario laboratories could be used for testing Ontario drinking water. Similarly, we are unaware of any compelling legal or policy reason to permit non-licenced, non-Ontario laboratories to perform critically important testing services.

It is our view that allowing the use of non-licenced, non-Ontario laboratories would be inconsistent with Recommendations 41 to 43 of the Part II Walkerton Report, which

[46] This is analogous to the "reasonable care" duties imposed upon corporate officers and directors, which are enforceable regardless of whether the corporation is charged or convicted: see section 194 of the EPA.
[47] Indeed, it appears that a misplaced belief in the safety of Walkerton's water supply led the operators to undertake a series of unsafe treatment practices prior to the Walkerton Tragedy.
[48] O.Reg. 459/00, section 5(3).

clearly advocated use of accredited and licenced laboratories. Furthermore, CELA submits that Ontario residency must be a condition precedent for laboratories to become accredited and licenced under the SDWA. As a matter of law, accreditation/licencing requirements prescribed under the SDWA cannot have extra-territorial effect, and as a practical matter, it may be exceedingly difficult to prosecute non-Ontario laboratories for non-compliance with testing or reporting requirements under the SDWA.

For these reasons, CELA submits that subsections 11(2) to (7) of the SDWA should be deleted, and further submits that the SDWA should specify that "owners" and "operating authorities" shall only obtain drinking water testing services from laboratories that are duly accredited and licenced under Part VII of the Act (see below for CELA's additional recommendations regarding laboratories).

(iii) Operator Certification and Training

We support the requirement in section 12 of the SDWA that an operator of municipal or regulated non-municipal drinking water system must obtain and hold a valid operator's certificate "issued in accordance with the regulations".[49] However, because the new SDWA regulations (eg. the amended successor to O.Reg. 435/93) have not been released (even in draft form), CELA cannot comment upon the efficacy of the new requirements regarding operator certification. In addition, we note that section 12 is silent on the need for continuing education and training of operators, despite the fact that Commissioner O'Connor clearly highlighted the importance of proper training programs and courses to ensure operator competence.[50]

While training details can (and likely will) be addressed in the new regulation, CELA recommends that the SDWA itself should place a general duty on owners to ensure that their operators satisfy prescribed annual training requirements, and to keep and maintain proper records in relation to operator training. On this point, we are aware that a similar obligation exists within O.Reg. 435/93. However, given the critical importance of operator training, CELA recommends that training/record-keeping duties should be elevated to statutory prominence, as opposed to leaving this obligation buried in regulation and running the risk of non-compliance or ignorance[51].

(iv) Accredited Operating Authorities

Subject to our views below regarding accreditation, we generally support the duty in section 13 of the SDWA to ensure that an "accredited operating authority" is in charge of municipal (and regulated non-municipal) drinking water systems "at all times". Similarly, we generally support the provisions in section 14(1) that empower owners to execute agreements with operating authorities. However, we do not support the current

[49] We also support the proposed two-year phase-out of existing operator licences obtained through grand-parenting: see section 12(2) to (4) of the SDWA.
[50] Part II Report, Recommendations 59 to 64.
[51] Although operator training requirements existed in an OWRA regulation for years prior to the Walkerton Tragedy, it appears that Walkerton Public Utility Commissioners were unaware of such requirements.

wording of section 14(2), which purports to allow owners to delegate most of their statutory duties under the SDWA to operating authorities.

First, there seems to be an internal inconsistency within section 14 – subsection (1) specifies that owners "shall" enter into such agreements, while subsection (2) says that "if" owners enter such agreements, they may delegate certain SDWA duties. Thus, it is unclear whether the agreements are mandatory or optional in nature.

More importantly, we do not believe that owners should be able to, in essence, "contract out" their statutory duties under the SDWA. Indeed, there is nothing in Commissioner O'Connor's recommendations regarding operating authorities[52] that suggests that owners should be permitted to execute agreements that delegate or oust SDWA duties. Similarly, there is nothing in the MOE's SDWA discussion paper that suggested that owners would be able to opt out of SDWA duties by executing agreements with operating authorities.

Finally, as noted above, it is CELA's view that imposing duties (and liabilities) jointly upon owners and operating authorities greatly enhances the prospect of compliance with statutory requirements, and, more importantly, provides greater protection of drinking water quality.

It goes without saying that CELA has no objection to agreements that attempt to delineate managerial and/or operational responsibilities as between owners and operating authorities. However, we firmly believe that owners should remain ultimately subject to the general requirements of the SDWA. Accordingly, CELA recommends that section 14(2) of the SDWA should be deleted, and further recommends that section 14(3) should be amended so as to clarify that agreements do <u>not</u> relieve owners of their general duties under Part III of the Act.

<u>(v) Operational Plans</u>

Commissioner O'Connor clearly recognized the importance of developing proper operating plans for drinking water systems, and he specifically recommended, *inter alia*, that "the provincial government should require municipalities to have operational plans for their water systems", and that "operational plans should be approved and reviewed as part of the MOE approvals and inspections programs".[53]

In light of this peremptory language, CELA is unclear why sections 15 and 16 of the SDWA are so ambiguous about when – or if -- operational plans will required in Ontario. For example, section 15 states that by the "prescribed date" (which is not identified), the Director shall issue "directions", and may issue "additional directions", regarding the preparation and content of operational plans. More alarmingly, section 16 states that "if" operational plans are required, then owners and operating authorities must ensure that the plans conform with the above-noted "directions".

[52] Part II Report, Recommendations 51 to 55.
[53] Part II Report, Recommendations 56 and 57.

In our view, it would be preferable for the SDWA to simply impose a general duty upon owners and operators to develop operational plans in accordance with prescribed standards. As described below, the Minister should be under a mandatory duty to prescribe such standards within 45 days of the Act's coming into force. Moreover, the owner and operating authority should be required to comply with the operational plan once it has been reviewed and approved by the MOE. For the purposes of greater certainty, the SDWA should specify that operational plans shall address: sampling and testing; continuous monitoring; operational processes; equipment maintenance/repair; contingency plans; emergency response measures; and other prescribed matters.

(vi) Duty to Report Adverse Test Results

We note that the section 18 duty to report adverse test results is largely based upon the existing duty to report in section 8 of the Drinking Water Protection Regulation (O.Reg. 459/00). We further note that section 18(2) specifies that the report "shall be made in accordance with the regulations", which have not yet been promulgated under the SDWA.

In CELA's view, it would be appropriate for section 18 to specify that the required notice may be provided verbally to the MOE and medical officer of health, but shall be confirmed in writing forthwith by the person providing notice. In addition, upon providing the required notice, the owner and/or operating authority should be under a general duty under the SDWA to undertake resampling, corrective action, or public warnings in accordance with the regulations, and shall confirm in writing to the MOE and the medical officer of health that such measures are being undertaken.

(viii) Standard of Care

The content of the statutory standard of care entrenched in section 19 of the SDWA appears to be generally responsive to the recommendations of Commissioner O'Connor.[54]

However, we remain concerned about the SDWA's proposed application of this standard of care. In particular, section 19(2) confines the standard of care to owners/operators of municipal drinking water systems, and therefore excludes owners/operators of regulated non-municipal drinking water systems. In its submission on the MOE's SDWA discussion paper, CELA maintained that the standard of care should not be restricted to municipal drinking water systems.[55] This is particularly true since members of the public (eg. children, seniors and others who may be sensitive to waterborne disease) may consume drinking water supplied by various private or non-municipal public systems (eg. trailer parks, campgrounds, restaurants, service stations, day care centres, nursing homes, schools, and other institutional facilities that are or will be subject to O.Reg. 459/00 or O.Reg. 505/01).

[54] Part II Report, page 296, Recommendation 45.
[55] CELA, *Comments on Proposed Components of a Safe Drinking Water Act* (September 2002), page 18.

Accordingly, CELA again recommends that the section 19 standard of care should be extended to include persons who own, oversee, or exercise decision-making authority in relation to regulated non-municipal drinking water systems under the SDWA.

(ix) Prohibitions

CELA notes that the section 20 prohibition is aimed at preventing contaminants from entering "drinking water systems", which has been defined in section 2 of the SDWA as the physical waterworks and the "well or intake that serves as the source or entry point of raw water supply". Given this restrictive definition, it does not appear to be an offence to cause or permit drinking water contaminants to be deposited in the "raw water supply" itself; in other words, the offence is committed only when the contaminant actually enters the well or intake.

In our view, the "end-of-intake-pipe" focus of section 20 is not consistent with pollution prevention, the precautionary principle, the multi-barrier approach, and source protection imperatives. Accordingly, CELA submits that either the section 20 prohibition should expanded to include the "raw water supply" per se, or, in the alternative, a new prohibition must be created to protect "raw water supply" as follows:

(1) For the raw water supply for municipal and regulated non-municipal drinking water systems, the Director shall designate areas in which no person shall discharge or deposit any thing that could result in,

(a) a drinking water health hazard;
(b) a contravention of a prescribed standard; or
(c) interference with the normal operation of the system.

(2) No person shall cause or permit the discharge or deposit of any thing in areas designated by the Director under subsection (1).

(3) For the purposes of prosecuting the offence of contravening subsection (2), it is no defence that the thing did not or could not result in a drinking water health hazard because it was or became diluted when or after it entered the area designated by the Director.

(4) Subsection (2) does not apply to prohibit activities carried out under statutory authority or for the purposes of complying with a statutory requirement.

It should be noted that this prohibition is based upon the existing provisions of section 33 of the OWRA, which have not been carried forward into the SDWA, as drafted.

**CELA RECOMMENDATION #9: The SDWA should be amended to provide that:**

**(a)** **the operational duties in section 11(1) are binding and enforceable against an "owner" of a drinking water system even where an "operating authority" has been established; or alternatively, the "owner" is liable to conviction under section 11(1) whether or not the "operating authority" is prosecuted or convicted;**

**(b)** **"owners" and "operating authorities" shall comply with drinking water treatment and reporting requirements under the Act, regulations, standards and approvals, and shall assess and report upon the quality and quantity of the raw water supply;**

**(c)** **"owners" and "operating authorities" shall only obtain drinking water testing services from laboratories that are duly accredited and licenced under Part VII of the Act;**

**(d)** **"owners" shall ensure that its certified operators receive annual training in accordance with prescribed requirements, and that "owners" shall keep and maintain proper records regarding such training;**

**(e)** **delete section 14(2) of the SDWA, and amend section 14(3) to provide that agreements with "operating authorities" do not relieve "owners" of their general duties under Part III of the Act;**

**(f)** **require "owners" and "operating authorities" to develop and comply with operational plans in accordance with prescribed standards, and specify that operational plans shall address: sampling and testing; continuous monitoring; operational processes; equipment maintenance/repair; contingency plans; emergency response; and other prescribed matters;**

**(g)** **specify that where adverse test results are to be reported under section 18,**

- **the required notice may be given verbally, but shall be confirmed forthwith in writing, by the person giving notice; and**

- **the "owner" and/or "operating authority" shall undertake resampling, corrective action, or public warnings in accordance with the regulations, and shall confirm in writing to the MOE and medical officer of health that such measures are being undertaken;**

**(h) extend the section 19 standard of care to every person who owns, oversees, or exercises decision-making authority in relation to regulated non-municipal drinking water systems; and**

**(i) expand the section 20 prohibition to include "raw water supply", or, in the alternative, enact a related prohibition as follows:**

**(1) For the raw water supply for municipal and regulated non-municipal drinking water systems, the Director shall designate areas in which no person shall discharge or deposit any thing that could result in,**

**(a) a drinking water health hazard;**
**(b) a contravention of a prescribed standard; or**
**(c) interference with the normal operation of the system.**

**(2) No person shall cause or permit the discharge or deposit of any thing in any area designated by the Director under subsection (1).**

**(3) For the purposes of prosecuting the offence of contravening subsection (2), it is no defence that the thing did not or could not result in a drinking water health hazard because it was or became diluted when or after it entered the area designated by the Director.**

(4) **Subsection (2) does not apply to prohibit activities carried out under statutory authority or for the purposes of complying with a statutory requirement.**

*(d) Information to Drinking Water Consumers*

Another important matter that is not adequately addressed in the "general requirements" of Part III of the SDWA is the community "right-to-know" principle. In broad terms, this principle recognizes that members of the public:

- should be fully and regularly informed about what is in their drinking water;
- should receive prompt and adequate warnings where the drinking water may be unsafe due to upset conditions, equipment breakdowns, or the presence of contaminants detected through testing;
- should receive regular information about the drinking water supplier's operating performance and level of compliance with regulatory requirements; and
- should have full and timely access to all records, reports and documents kept or maintained by the drinking water supplier.

Unfortunately, there are no provisions in Part III of the SDWA, as drafted, that expressly impose a duty on owner/operators of drinking water systems to provide full and timely

information to consumers about drinking water issues.[56] In our view, this is a significant omission that warrants immediate correction through appropriate amendments to the SDWA.

CELA first raised the issue of community right-to-know in our submissions on the MOE's SDWA discussion paper:

> In our view, O.Reg. 459/00 only partially addresses community right-to-know (eg. quarterly reports to consumers), and there is room for considerable improvement in this area. This is particularly true if one examines community right-to-know requirements in other jurisdictions (eg. the U.S. *Safe Drinking Water Act*, as amended).
>
> Accordingly, CELA recommends that the SDWA must fully incorporate and implement all aspects of community right-to-know. At a minimum, this means that the SDWA should enhance current requirements regarding consumer reports, and require the establishment of an appropriate electronic registry that is accessible to the public free of charge.[57]

Because this recommendation has not been adequately reflected in the SDWA as drafted, it is necessary for CELA to repeat it herein and to request that the SDWA be amended accordingly. At a minimum, the SDWA should entrench the essential elements of the community right-to-know principle, and regulations may be used to flesh out any necessary implementation details.

**CELA RECOMMENDATION #10: Part III of the SDWA should be amended to include the following provisions:**

**(a) Upon request, every owner and accredited operating authority of a drinking water system shall permit any person to inspect or copy any approval, order, direction, plan, record, report, sampling results, monitoring data, and any other document required or kept under this Act or the regulations;**

**(b) Every owner and accredited operating authority of a drinking water system shall provide immediate public notice in the prescribed form and manner where,**

- **drinking water testing has detected exceedances of drinking water quality standards or indicators of adverse water quality;**

[56] Only subsections 15(4) and 16(1) of the SDWA appear to expressly address community right-to-know; however, both subsections only deal with the public disclosure of operational plans, which is to occur in accordance with an unspecified "direction" from the Director.
[57] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 6.

- **testing, treatment or distribution system equipment is malfunctioning or inoperative; or**

- **prescribed sampling, testing and analysis is not being carried out;**

**(c) Every owner and accredited operating authority of a drinking water system shall prepare comprehensive consumer confidence reports that are mailed to all persons who are served by the drinking water system, and that address the following matters:**

- **relevant source protection or watershed planning issues;**
- **any regulated contaminants and/or unregulated substances detected in raw or treated water samples;**
- **any exceedances of drinking water quality standards and any related health concerns for consumers, including vulnerable persons;**
- **actions proposed or taken to remedy or prevent exceedances of drinking water quality standards; and**
- **any other prescribed matter.**

## Part IV – Accreditation of Operating Authorities

*(a) Quality Management Standard*

Commissioner O'Connor made a number of recommendations regarding the development of a drinking water quality management standard in Ontario.[58] The essential elements of these recommendations are: (a) public consultation on the proposed standard; (b) oversight responsibility for the standard/accreditation by the MOE's Drinking Water Branch; (c) implementation of the standard on a date to be fixed by the provincial government.

In the context of these recommendations, section 21 of the SDWA proposes to create a procedural framework for the development of the quality management standard. While CELA supports the expeditious development of the standard, it is our view that there are certain aspects of section 21 that are inconsistent with Commissioner O'Connor's recommendations, and that fail to address commitments made in the MOE's SDWA discussion paper.

First, we support the mandatory duty upon the Minister under section 21(1) to approve the standard, but we remain concerned about the open-ended nature of the timeframe for doing so. In particular, CELA notes that approval of the standard is to occur within one year of section 21's coming into force. On this point, however, it should be recalled that section 168 of the SDWA purports to give the provincial government virtually unfettered discretion over when individual sections of the Act come into force. Thus, it is entirely

[58] Part II Report, Recommendations 53 to 55.

possible for the provincial government to selectively declare different sections into force at different times, which may potentially cause significant delay before the section 21(1) duty is actually triggered. Given the importance of the quality management standard for the accreditation of operating authorities, CELA recommends that the section 21(1) duty must be satisfied within 45 days of the Act's coming into force.[59]

Second, it is not clear to us whether the quality management standard is intended to take the form of a regulation, or a non-regulatory statement of managerial duties and responsibilities (eg. objectives, guidelines, code of conduct?). We note, however, that section 21(9) of the SDWA states that the *Regulations Act* does not apply to the standard, which leads us to conclude that the standard will not be framed as a regulation. If so, then CELA objects on the grounds that expressing the standard through regulation will maximize opportunities for enforcement of the standard's requirements. Accordingly, CELA recommends that the quality management standard be prescribed by regulation under the SDWA.

Third, we note that section 21(3) provides that the Minister shall place a notice on the EBR Registry that the quality management standard has been approved and is in effect. While we support this notice provision, it is far more important to ensure that there is meaningful, upfront public participation during the development of the standard. In fact, stakeholder involvement in the drafting of the standard was expressly recommended by Commissioner O'Connor:

> The Ministry of the Environment should initiate the development of a drinking water quality management standard for Ontario. Municipalities, the water industry, and other relevant stakeholders should be actively recruited to take part in the development of the standard. The water industry is recognized as an essential participant in this initiative (Recommendation 53).

Similarly, the MOE's SDWA discussion paper indicated that the Minister would be obliged to post notice of the "proposed" standard on the EBR Registry.[60] However, the SDWA, as drafted, places no such obligation on the Minister. Given the importance of the standard for accreditation purposes, it is our view that the standard must be developed with full public input. Accordingly, CELA recommends that the SDWA must be amended to provide that the Minister shall: (a) place notice of the proposed standard on the EBR Registry; (b) ensure that there is an adequate public comment period on the standard; and (c) ensure that all public comments received are considered as the standard is being finalized.

Fourth, we note that the MOE's SDWA discussion paper indicated that revisions to the approved standard may be proposed "by the accreditation body or any other person", and that before approving any revisions, the Minister shall post notice of the proposed

[59] As described below, CELA further recommends that there should be a three-month deadline for the proclamation of the Act in its entirety.
[60] MOE, *Proposed Components of a Safe Drinking Water Act* (August 2002), page 28.

revisions on the EBR Registry.[61] In our view, these are important provisions, but they have not been incorporated into the SDWA as drafted. Therefore, CELA recommends that these MOE commitments regarding revisions to the standard should be reflected in the SDWA.

Finally, CELA points out that section 21 makes no reference to the role of the Drinking Water Branch that the MOE is to establish in accordance with Commissioner O'Connor's Recommendation 69. Again, we submit that this omission in section 21 is inconsistent with Commissioner O'Connor's recommendation that the Drinking Water Branch be given the specific function of overseeing the implementation of the quality management standard (and accreditation) across Ontario:

> The Ministry of the Environment's Drinking Water Branch (see Recommendation 69) should have the responsibility for recognizing the drinking water quality management standard that will apply in Ontario and for ensuring that accreditation is properly implemented (Recommendation 54).

Therefore, CELA recommends that section 21 of the SDWA must be amended to expressly give this oversight responsibility to the Drinking Water Branch.

**CELA RECOMMENDATION #11: Section 21 of the SDWA should be amended to:**

**(a) specify that the Minister must make a regulation setting out the drinking water quality management standard within 45 days of the Act's coming into force;**

**(b) specify that the Minister shall:**

- **place notice of the proposed quality management standard on the EBR Registry;**
- **provide an adequate opportunity for public comment on the proposed standard; and**
- **ensure that all public comments received are considered as the standard is being finalized;**

**(c) provide that:**

- **revisions to the approved quality management may be proposed by the accreditation body, the Advisory Council, or any other person; and**
- **the Minister shall post notice of any proposed revisions to the standard on the EBR Registry, shall provide an adequate opportunity for public comment on the proposed revisions, and shall ensure that any public comments received are considered as the revisions are being finalized;**

[61] *Ibid.*

**(d) provide that the Drinking Water Branch shall be responsible for recognizing the quality management standard and ensuring that accreditation is properly implemented.**

*(b) Accreditation Body for Operating Authorities*

Sections 22 to 29 of the SDWA contain various provisions regarding the establishment of an accreditation body for operating authorities, the responsibilities of the accreditation body, and the content of agreements between the Minister and the accreditation body.

As noted above, CELA generally supports the requirement in section 13 of the SDWA that operating authorities be used for managing and operating drinking water systems. We also support the requirement that operating authorities must be accredited, and that the drinking water quality management standard should form part of the benchmark for accreditation.

However, the effectiveness of this accreditation requirement is highly dependent upon the expertise, resources, mandate and structure of the body used to administer the accreditation program. Unfortunately, sections 22 to 29 of the SDWA provide few details on the accreditation body to be used under Part IV, and the term "accreditation body" itself is not defined in section 2 of the SDWA. Furthermore, section 164(1) states that the Minister "may" make regulations governing accreditation bodies for operating authorities (including the powers and duties of such bodies), but otherwise provides no details respecting accreditation bodies.

In our view, these open-ended provisions give the Minister virtually unfettered discretion over which accreditation body is used for the purposes of Part IV of the SDWA. Indeed, section 22 simply empowers the Minister to establish or designate "one or more" accreditation bodies. CELA submits that this dearth of detail makes it difficult to assess the efficacy of accreditation arrangements under Part IV.

Moreover, CELA is concerned that the broad Ministerial discretion under Part IV leaves it open to the Minister to delegate accreditation responsibilities to private corporations, industry associations, or non-governmental entities (eg. analogous to the Technical Standards and Safety Association). In our view, there are serious accountability and operational issues associated with using private corporations or non-governmental entities, particularly in the context of public health and safety matters.[62]

Accordingly, CELA submits that the SDWA should be amended to require the Minister to establish (not designate) a specialized, public sector body for the purposes of implementing the accreditation program under Part IV of the Act. In particular, the SDWA should provide that the accreditation body is a Crown agency for the purposes of

[62] See, for example, M. Winfield et al., *The "New Public Management" Comes to Ontario: A Study of Ontario's Technical Standards ans Safety Association and the Impacts of Putting Public Safety into Private Hands* (CIELAP, 2000).

the *Crown Agency Act*. If so, it necessarily follows that the Crown immunity clause in section 28 should be deleted. This accreditation body should report (and be accountable) to the MOE Drinking Water Branch, and should be subject to provincial FOI legislation.[63]

In addition, the SDWA should specify that members (especially auditors) of the accreditation body shall be free from conflict of interest or apprehension of bias, and shall have the necessary technical and financial capacity to administer the accreditation program. Any administrative details regarding the accreditation body may be spelled out in an accreditation agreement or by regulation.

In our view, the above-noted approach provides far greater certainty and accountability than giving the Minister absolute discretion over the accreditation body under Part IV of the Act.

**CELA RECOMMENDATION #12: Section 28 of the SDWA should be deleted, and sections 22 and 29 of the SDWA should be amended to:**

**(a) provide that the Minister shall establish a public sector body to implement the accreditation program for operating authorities under Part IV of the Act;**

**(b) specify that the accreditation body is prescribed as a Crown agency under the *Crown Agency Act*;**

**(c) provide that the accreditation body shall report to the MOE Drinking Water Branch, and shall be prescribed as an "institution" for the purposes of the *Freedom of Information and Protection of Privacy Act*;**

**(d) ensure that persons appointed to or employed by the accreditation body are free of conflict of interest and apprehension of bias, and have the necessary technical knowledge and experience; and**

**(e) ensure that the accreditation body is adequately funded in order to carry out its duties and responsibilities under Part IV of the Act.**

## Part V – Municipal Drinking Water Systems

### *(a) Financial Plans*

In general, CELA supports the Part V requirement for the filing of a "financial plan" as part of the application process for the licencing of municipal drinking water systems (sections 30 and 40(1)(d)). In our view, this requirement is responsive to Commissioner O'Connor's recommendation that the "provincial government should not approve water

[63] The SDWA proposal to require the filing of annual reports with the Minister (section 29) is insufficient to ensure public access to information in the possession or control of the accreditation body.

systems that would not be economically viable under the regulatory regime existing at the time of the application" (Recommendation 83). We are also mindful of Commissioner O'Connor's recommendation that "as a general principle", municipalities should attempt to raise adequate revenue from local sources for drinking water systems (Recommendation 48).

However, it should be recalled that Commissioner O'Connor also recommended that for systems that are not economically viable, provincial funding and/or technical assistance should be made available to ensure the provision of safe drinking water:

> Approved systems that are not economically viable under the improved regulatory scheme should be required to explore all managerial, operational and technological options to find the most economical way of providing safe drinking water. <u>If the system is still too expensive, the provincial government should make assistance available to lower the cost per household to a predetermined level</u> (Recommendation 85, emphasis added).

In our view, it does not appear that Recommendation 85 has been addressed in the SDWA adequately or at all.

Therefore, to partially implement the funding aspect of Recommendation 85, CELA recommends that subsections 3(1)(g) and (i) of the SDWA should place a mandatory duty on the Minister to establish financial and technical assistance programs for owners and operators of drinking water systems, as described above. To further implement Recommendation 85, CELA also recommends that Part V of the SDWA should be amended to provide that where the financial plan does not comply with the Act, applicants must be required to consider all available options for economically delivering safe drinking water. After this analysis has been undertaken, then applicants should be directed to obtain provincial funding assistance to help the applicant come into conformity with the Act.

CELA's additional comments about the content of "financial plans" pursuant to the *Sustainable Water and Sewage Systems Act, 2002* are contained in CELA's submissions on Bill 175, and need not be repeated here.

**CELA RECOMMENDATION #13: Part V of the SDWA should be amended to provide that:**

**(a) where it appears that the financial plan does not comply with the requirements of this Act, the Director shall require the applicant to consider and report back upon all managerial, operational and technological options to find the most economical way of providing safe drinking water; and**

**(b) where, after considering the various options for delivering safe drinking, it appears that the amended financial plan still does not**

> **comply with the requirements of this Act, the Director shall direct the applicant to obtain provincial funding assistance under this Act.**

*(b) Approvals*

The SDWA, as drafted, contemplates two specific approvals for municipal drinking water systems: (a) the drinking water system permit (section 36); and (b) the drinking water system licence (section 40). In principle, CELA supports these approval requirements, and we believe that these requirements are generally responsive to Commissioner O'Connor's Recommendation 71.

However, CELA notes that sections 36 and 40 do not expressly require the Director to consider the vulnerability of the proposed source of drinking water. In our view, this multi-barrier consideration is of utmost importance, and it goes to the fundamental threshold question of whether the approval should be granted, refused, or issued subject to conditions. We are also concerned that unless this factor is expressly listed as a consideration, it will remain open to the MOE to issue approvals for drinking water systems with risky or problematic sources (eg. Well 5 at Walkerton). Indeed, an MOE official testified at the Walkerton Inquiry that there was nothing in the post-Walkerton regulatory regime that would prevent the issuance of an approval for Well 5.

To address this critical oversight in the SDWA, CELA recommends that Part V should be amended so as to generally prohibit the issuance of approvals where the proposed source of drinking water is vulnerable to contamination or degradation that may cause a drinking water health hazard. In our view, such a prohibition is necessary to protect public health, and emphasizes the compelling need to fast-track and integrate wellhead protection programs and, more importantly, watershed-based source protection initiatives under the Act.

**CELA RECOMMENDATION #14: Part V of the SDWA should be amended to prohibit the Director from issuing an approval for a municipal drinking water system where the proposed raw water supply is vulnerable to contamination or degradation that may cause a drinking water health hazard.**

*(c) Relief from Regulatory Requirements*

We note that section 42 of the SDWA purports to empower the Director to issue approvals that dispense with provincial requirements relating to sampling, testing, monitoring, reporting, and treating drinking water.

On this point, it should be recalled that Commissioner O'Connor recommended as follows:

> The Ministry of the Environment should establish a procedure under which owners of communal water systems may apply for a variance from provincial regulations only if a risk analysis and management plan demonstrate that safe

drinking water can be provided by means other than those laid down in regulation (Regulation 82).

In light of this language, it is CELA's view that section 42, as drafted, is not sufficiently restrictive to ensure that variances are limited to the most exceptional of cases. For example, where Commissioner O'Connor recommended "risk analysis" and a "management plan" to justify proposed variances, section 42(3)(c) merely requires an undefined "assessment" by the proponent. Accordingly, CELA recommends that section 42 be amended to more closely reflect the actual text of Commissioner O'Connor's recommendation.

Furthermore, CELA submits that where a proposed variance may be appropriate, the relief from regulatory requirements should be time-limited (but subject to renewals if necessary). In most cases, it is likely that the primary reason for the proposed variance will be economic in nature (eg. testing or treatment requirements are too expensive), but it is possible that the underlying concern may be technical in nature (eg. lack of operational expertise or knowledge). In all such cases, provided that there is no risk to public health and safety, CELA has no objection to time-limited exceptions that give proponents adequate time to secure financial or technical assistance from the provincial government or other sources. However, if variances remain open-ended or permanent, then there will be no incentive upon proponents to seek financial and technical assistance, nor any incentive for proponents to bring themselves into conformity with provincial standards that have been developed to safeguard public health

In our view, the preferable approach is to set and enforce rules that apply equally to all drinking water systems, rather than issue wholesale (and permanent) exemptions from key regulatory requirements. Where there are genuine hardship cases, it may be appropriate to issue temporary variances, but the ultimate objective should be to bring all such systems into conformity under the Act and regulations. Otherwise, Ontario will end up with a fragmented patchwork of municipal drinking water systems – those that comply with regulatory requirements, and those that do not. In our view, the potential inconsistency and unfairness of the variance mechanism can be easily addressed through an SDWA amendment that imposes strict time limits for variances (eg. effective for one year, with the option of renewal for up to another year).

**CELA RECOMMENDATION #15: Section 42 of the SDWA should be amended to provide that where a person applies for a variance from regulatory requirements,**

**(a) the applicant must prepare and submit a comprehensive risk analysis and management plan;**

**(b) if the risk analysis and management plan are acceptable, the Director may issue the variance, with or without conditions, for a term not exceeding one year; and**

**(c) any variance granted under this section may be renewed for a further term not exceeding one year.**

*(d) Transfer of Municipal Drinking Water Systems*

CELA notes that section 47 purports to regulate (but not prohibit) the transfer of ownership of municipal drinking water systems. Under this section, it would be open to a municipality to transfer complete ownership of its drinking water system to a private company, subject only to the agreement required by section 47(a) and the deeming provisions of section 47(b).

However, it should be noted that there is nothing in the Walkerton Inquiry Reports that suggests that the SDWA should encourage or facilitate the transfer of ownership of municipal drinking water systems. To the contrary, Commissioner O'Connor found as follows:

> Although municipalities are permitted to sell their systems, there was no suggestion during the Inquiry that any municipalities are even considering doing so. Moreover, nothing I heard during the Inquiry led me to make any recommendations about the ownership of municipal systems in order to address water safety issues. The recommendations in this area are therefore premised on continued municipal ownership.[64]

Accordingly, CELA submits that ownership of municipal drinking water systems must remain in public hands. On this issue, CELA has co-authored a comprehensive comparison of public vs. private ownership (including public-private partnerships), and concluded that public ownership has clear advantages in terms of meeting the essential elements of drinking water safety:

- security of supply;
- ensuring quality;
- environmental protection;
- public accountability and involvement; and
- full and fair pricing.[65]

While it may be open to municipalities to consider various management or operational options for their systems (eg. contract with the Ontario Clean Water Agency), it is our view that the SDWA should prohibit municipalities from transferring ownership of municipal drinking water systems to non-municipal corporations. This would allow municipalities to consolidate their drinking water systems with those of other municipalities (eg. adjoining or upper tier municipalities), but also ensures that ownership stays in public hands at all material times.

[64] Part II Report, page 11.
[65] See CELA, CUPE and OPSEU, *Water Services in Ontario: For the Public, By the Public* (June 2001).

**CELA RECOMMENDATION #16: Section 47 of the SDWA should be amended to provide that despite any other provision in any special or general Act, no municipality shall transfer ownership of a municipal drinking water system to a non-municipal corporation.**

## Part VI – Regulated Non-Municipal Drinking Water Systems

*(a) Application to Non-Municipal Drinking Water Systems*

In general terms, CELA strongly recommends that the key requirements of the SDWA be extended to non-municipal drinking water systems as soon as possible. As drafted, however, the SDWA requirements will initially apply only to municipal drinking water systems, and it may be well in excess of five more years before SDWA requirements are fully extended to non-municipal drinking water systems.

On this issue, we note that under section 165(1) of the Act, the Minister "may" make regulations regarding non-municipal drinking water systems that come into force "on or after the fifth anniversary that Part VI comes into force". Given that the Cabinet has complete discretion under 168(2) of the Act as to when – or if – Part VI comes into force, the current legislative arrangement for non-municipal systems appears to be a sure-fire recipe for delay or inaction.

In our submissions on the MOE's SDWA discussion paper, CELA objected to the minimum five-year phase-in for non-municipal systems:

> In our view, there is no compelling justification for maintaining this distinction between municipal and non-municipal systems for up to five more year's following the Act's coming into force. Accordingly, CELA recommends that the SDWA should provide that the requirements for operation plans and accredited operating agencies apply equally to municipal and non-municipal drinking water systems.[66]

Unfortunately, it appears necessary for CELA to repeat this recommendation. It is our view that the expeditious extension of SDWA requirements to non-municipal drinking water systems is entirely consistent with Commissioner O'Connor's recommendations regarding smaller and non-municipal systems:

> Ontario Regulation 459/00 should apply to any system that provides drinking water to more than a prescribed number of private residences (Recommendation 81).
>
> The application of Ontario Regulation 505/01 should be broadened to include all owners of water systems that serve the public for a commercial or institutional purpose and do not come within the requirements of Ontario Regulation 459/00 (Recommendation 85).

[66] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 16.

As a matter of public policy, it would be highly undesirable to permit the emergence of a two-tiered drinking water regime in Ontario – larger, municipal systems that comply with all regulatory requirements under the SDWA, and smaller, non-municipal systems that do not. In our view, SDWA requirements should be applied equally to municipal and non-municipal systems (subject only to the temporary variance procedures and financial and technical assistance provisions of the Act). Therefore, the SDWA should be amended to provide that within 45 days of the Act's coming into force, the Minister shall make a regulation prescribing non-municipal systems, and imposing standards and requirements upon such systems that are equivalent to those imposed upon municipal systems under this Act.

**CELA RECOMMENDATION # 17: The SDWA should be amended to provide that within 45 days of the Act's coming into force, the Minister shall make a regulation that**:

**(a) prescribes which non-municipal drinking water systems are subject to the Act; and**

**(b) imposes upon these systems drinking water requirements and standards that are equivalent to those imposed upon municipal drinking water systems under the Act.**

*(b) Approval Factors*

CELA supports the proposal under Part VI of the SDWA that regulated non-municipal sources should be required to obtain an approval under the Act.

However, it appears that sections 52 and 53 of the SDWA contain no substantive criteria to guide the MOE's approvals process (aside from proposed "fragmentation" of a drinking water system: see subsection 52(3)). In our view, these sections should explicitly set out the factors that the Director shall consider in deciding whether to approve (with or without conditions) non-municipal drinking water systems. Among other things, CELA recommends that these factors should include: purpose of the Act; plans, reports and other documents submitted by the applicant; public and agency comments; financial viability; and vulnerability of the proposed source of drinking water. In our view, spelling out these factors in the SDWA will result in greater accountability in the decision-making process, and will help ensure conformity with Commissioner O'Connor's recommendations (particularly those in relation to financial viability).

**CELA RECOMMENDATION #18: Sections 52 and 53 of the SDWA should be amended to provide when considering an application for approval of a regulated non-municipal drinking water system, the Director shall consider:**

**(a) the purpose of this Act;**
**(b) plans, reports and other documents submitted by the applicant;**
**(c) comments received from other agencies or the public;**

**(d) financial viability of the proposed system; and**
**(e) vulnerability of the proposed source of drinking water.**

*(c) Relief from Regulatory Requirements*

We note that section 56 of the SDWA purports to empower the Director to issue approvals that dispense with provincial requirements relating to sampling, testing, monitoring, reporting, and treating drinking water. On this point, we restate our above-noted concerns about similar provisions for municipal drinking water systems, and CELA recommends that variances for non-municipal systems should be time-limited in nature.

In CELA's view, the preferable approach is to set and enforce rules that apply equally to all non-municipal drinking water systems, rather than issue wholesale (and permanent) exemptions from key regulatory requirements. Where there are genuine hardship cases, it may be appropriate to issue temporary variances, but the ultimate objective should be to bring all such systems into conformity under the Act and regulations. Otherwise, Ontario will end up with a fragmented patchwork of non-municipal drinking water systems – those that comply with regulatory requirements, and those that do not. In our view, the potential inconsistency and unfairness of the variance mechanism can be easily addressed through an SDWA amendment that imposes strict time limits for variances (eg. effective for one year, with the option of renewal for up to another year).

**CELA RECOMMENDATION #19: Section 56 of the SDWA should be amended to provide that where a person applies for a variance from regulatory requirements,**

**(a) the applicant must prepare and submit a comprehensive risk analysis and management plan;**

**(b) if the risk analysis and management plan are acceptable, the Director may issue the variance, with or without conditions, for a term not exceeding one year; and**

**(c) any variance granted under this section may be renewed for a further term not exceeding one year.**

**Part VII – Drinking Water Testing**

*(a) Accreditation of Laboratories*

CELA's principal comment regarding laboratory accreditation is that the effectiveness of sections 60 to 67, as drafted, greatly depend upon the structure and operation of the accreditation body established or designated by the Minister under Part VII.

For the reasons outlined above in relation to the accreditation body for operating authorities, CELA is concerned that the open-ended provisions of sections 60 to 67 give the Minister virtually unfettered discretion over which accreditation body is used for the

purposes of Part VII of the SDWA. Indeed, section 60 contemplates the establishment or designation of "one or more" accreditation bodies. CELA submits that this dearth of detail makes it difficult to assess the efficacy of accreditation arrangements under Part VII.

Moreover, CELA is concerned that the broad Ministerial discretion under Part VII leaves it open to the Minister to delegate accreditation responsibilities to private corporations, industry associations, or non-governmental entities (eg. analogous to the Technical Standards and Safety Association). As described above, it is our view that there are serious accountability and operational issues associated with using private corporations or non-governmental entities, particularly in the context of public health and safety matters.

Accordingly, CELA submits that the SDWA should be amended to require the Minister to establish (not designate) a specialized, public sector body for the purposes of implementing the accreditation program under Part VII of the Act. In particular, the SDWA should provide that the accreditation body is a Crown agency for the purposes of the *Crown Agency Act*. If so, it necessarily follows that the Crown immunity clause in section 66 should be deleted. This accreditation body should report (and be accountable) to the MOE Drinking Water Branch, and should be subject to provincial FOI legislation.[67]

In addition, the SDWA should specify that members (especially auditors) of the accreditation body shall be free from conflict of interest or apprehension of bias, and shall have the necessary technical and financial capacity to administer the accreditation program. Any administrative details regarding the accreditation body may be spelled out in an accreditation agreement or by regulation.

In our view, the above-noted approach provides far greater certainty and accountability than giving the Minister absolute discretion over the accreditation body under Part VII of the Act.

**CELA RECOMMENDATION #20: Section 66 of the SDWA should be deleted, and sections 60 and 67 of the SDWA should be amended to:**

**(a) provide that the Minister shall establish a public sector body to implement the accreditation program for operating authorities under Part VII of the Act;**

**(b) specify that the accreditation body is prescribed as a Crown agency under the *Crown Agency Act*;**

[67] The SDWA proposal to require the filing of annual reports with the Minister (section 67) is insufficient to ensure public access to information in the possession or control of the accreditation body.

**(c) provide that the accreditation body shall be prescribed as an "institution" for the purposes of the *Freedom of Information and Protection of Privacy Act*;**

**(d) ensure that persons appointed to or employed by the accreditation body are free of conflict of interest and apprehension of bias, and have the necessary technical knowledge and experience; and**

**(e) ensure that the accreditation body is adequately funded in order to carry out its duties and responsibilities under Part VII of the Act**

*(b) Licencing*

As noted above, CELA recommends that subsections 11(2) to (7) of the SDWA should be deleted, thereby requiring persons to use only drinking water testing laboratories that are duly accredited and licenced in Ontario. It therefore follows that section 70 (which purports to allow the Director to licence non-accredited laboratories) should be deleted. In our view, if there is a need for using a non-accredited laboratory for drinking water tests, then such exigencies may be addressed through temporary directions to licensees from the Director pursuant to section 72 of the SDWA.

**CELA RECOMMENDATION #21: Section 70 of the SDWA should be deleted.**

**Part VIII – Inspections**

As drafted, Part VIII of the SDWA contains straightforward inspection provisions, most of which can be in other environmental statutes in Ontario (eg. Part XV of the EPA). Therefore, CELA has no objections to these provisions per se, and we make no recommendations with respect to the legislative drafting of Part VIII, except as described below. Similarly, CELA suggests that it would be more appropriate to create and empower the "Chief Inspector" under Part VIII (rather than under Part II) of the SDWA, but again, we make no specific recommendation in relation to this issue.

*(a) Regulations for Inspection, Compliance and Enforcement*

The various inspection powers available under Part VIII will have to be exercised in accordance with Commissioner O'Connor's recommendations regarding inspections, compliance and enforcement. For example, Commissioner O'Connor specifically recommended as follows:

> Inspectors should be required to have the same or higher qualifications as the operators of the systems they inspect and should receive special training in inspections (Recommendation 73).
>
> The Ministry of the Environment should increase its commitment to the use of mandatory abatement (Recommendation 74).

> The Ministry of the Environment should increase its commitment to strict enforcement of all regulations and provisions related to the safety of drinking water (Recommendation 75).

Despite such recommendations, subsection 164(3) of the SDWA simply indicates that the Minister "may" make regulations in respect of: inspector qualification/training; inspection frequency; procedures where inspections detect "deficiencies"; and "additional duties" of the Chief Inspector. Therefore, at the present time, it cannot be concluded that Commissioner O'Connor's recommendations regarding inspections have been fully addressed by the SDWA as drafted. In our view, section 164(3) merely lists inspection-related matters that "may" be addressed by regulations at some unspecified date in the future. At most, this creates the possibility that such matters might be addressed some day, but does not guarantee that the necessary reforms will occur adequately or at all. Indeed, we question why the Ontario government would relegate these important matters to regulation when there is nothing in Commissioner O'Connor's recommendations that endorses regulation as the mechanism for implementing inspection reform.

CELA's concerns about inspection matters are not alleviated by subsection 164(4) of the SDWA, which states that the Minister "shall" make a regulation regarding "the Ministry's functions in relation to compliance with and the enforcement of this Act and the regulations". First, it should be noted that this duty is tied to an ambiguous timeframe (eg. "on or before the day Part VIII comes into force, or as soon as reasonably practicable afterwards"). Given that section 168(2) of the SDWA purports to give the Cabinet unfettered discretion when (or if) Part VIII comes into force (see below), it cannot be confidently predicted when (or if) the compliance/enforcement regulation may be made or come into force. More importantly, it cannot be confidently predicted that the regulation (if made) will adequately address Commissioner O'Connor's recommendations. This is particularly true since key aspects of these recommendations – such as strict enforcement and increased use of mandatory abatement – are not even mentioned in either subsection 164(3) or (4).

It should be noted that CELA expressed the foregoing concerns in our previous submissions on the MOE's SDWA discussion paper:

> First of all, to the greatest extent possible, the framework for the compliance/enforcement regime should be articulated in the SDWA, not in subordinate regulations that may not be enacted for a considerable period of time. Second, this legislative framework and regulatory regime should incorporate all of the essential elements of the reforms suggested by Commissioner O'Connor (eg. frequency of inspections, investigation procedures, protocols for followup action regarding deficiencies, etc.).[68]

In light of these concerns, CELA's submission on the MOE's discussion paper recommended that the SDWA itself should "provide a comprehensive framework for

[68] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 19.

compliance, inspections and investigations in relation to drinking water", and that the SDWA should "incorporate all of Commissioner O'Connor's suggested reforms in relation to compliance, inspections and investigations". Similarly, CELA recommended that the SDWA should specify the "triggers" for mandatory abatement action under the Act".[69] Unfortunately, it appears necessary for CELA to repeat these recommendations since they have not been reflected in the SDWA as drafted.

Arguably, the only provision in Part VIII that even remotely addresses the CELA recommendations is section 99, which provides that if an inspection detects a "prescribed deficiency", then another inspection must occur within one year. However, this provision relies upon an as-yet unpassed regulation to prescribe "deficiencies". Moreover, section 99 merely requires one inspection to be followed up by yet another inspection, rather than by mandatory abatement measures that actually require correction of the deficiency. Accordingly, section 99 invites comparison to the chronology of MOE inspections of the Walkerton waterworks, in that the MOE's routine inspections over the years repeatedly detected serious operational deficiencies, but mandatory abatement was not utilized to actually correct these problems. Aside from increasing inspection frequency (eg. from three years to one year), it appears that section 99 of the SDWA would not make any material difference in this chronology insofar as mandatory abatement is concerned.

For these reasons, CELA strongly recommends that the SDWA must be extensively amended to properly implement Commissioner O'Connor's recommendations regarding inspection, compliance and enforcement. As noted above, for example, CELA recommends that the Chief Inspector should be required to immediately develop a compliance/enforcement manual that incorporates the essential elements of Commissioner O'Connor's recommendations in the Part I and II Reports regarding inspections, compliance and enforcement. If necessary, the implementation details may be spelled out in regulations to be passed with 45 days of the Act's coming into force, as described below.

Furthermore, CELA recommends that section 99 of the SDWA needs to be amended to require mandatory abatement to follow up on serious operational deficiencies detected during inspections. In our view, such amendments are consistent with Commissioner O'Connor's findings that the MOE's failure to pursue mandatory abatement (despite many "red flags" raised by MOE inspections) helped cause or contribute to the Walkerton Tragedy.[70]

In particular, CELA recommends that where an inspection detects a serious operational deficiency, then the SDWA should require the Director or provincial officer to issue an order under Part IX within 30 days of the inspection in order to require immediate correction of the identified deficiency. In our view, such a provision will go a long way in terminating the endless exchange of non-enforceable correspondence between the MOE and the regulated community, such as the numerous letters that passed between the MOE and Walkerton PUC prior to the Walkerton Tragedy.

[69] *Ibid.*, page 20.
[70] Part I Report, pages 328 to 331.

On this point, it should be noted that CELA made this specific recommendation in our submissions on the MOE's SDWA discussion paper as follows:

> For example, "triggers" for mandatory action (eg. failing to chlorinate properly, failing to monitor/report properly, etc.) should be spelled out in the SDWA so there can be no uncertainty within the MOE or among the regulated community as to when formal Orders will be issued and enforced (as opposed to mere warning, notices or correspondence).[71]

Unfortunately, this recommendation was not addressed in the SDWA as drafted, which makes it necessary for CELA to repeat the recommendation herein.

While the above-noted amendments are proposed in the context of Part VIII of the SDWA, it should be noted that many of them could also fit under Part IX. Ultimately, it matters little to CELA where the amendments go, as long as they are incorporated into the SDWA.

**CELA RECOMMENDATION #22: Section 99 of the SDWA should be amended by adding the following provisions:**

**(a) Where an inspection, or a followup inspection under this section, identifies a serious operational deficiency that may cause a drinking water health hazard, the Director or provincial officer shall issue an order under Part IX within thirty days of the inspection in order to require immediate correction of the deficiency.**

**(b) For the purposes of this section, "serious operational deficiency" means,**

- **failure to treat drinking water in accordance with this Act or the regulations;**
- **failure to undertake drinking water sampling or testing in accordance with this Act and the regulation;**
- **failure to install or maintain continuous monitoring and alarm equipment in accordance with the Act or the regulation; and**
- **any other prescribed act or omission.**

*(b) Public Requirement for MOE Inspection*

Despite the existence of Part V of the EBR (Applications for Investigation), Commissioner O'Connor recommended that the MOE develop a specific procedure for Ontarians to require investigations of suspected drinking water offences:

[71] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 19.

> The Ministry of Environment should initiate a process whereby the public can require the Investigations and Enforcement Branch ("IEB") to investigate alleged violations of drinking water provisions.[72]

In response to this recommendation, section 164(4) of the SDWA merely directs the Minister to make a regulation (by some unspecified future date) that, *inter alia*, describes "procedures to be followed to respond to a request from the public for the investigation of an alleged offence under this Act."

In our view, this vague direction in section 164(4) is inadequate on its face and, more importantly, is clearly inconsistent with Commissioner O'Connor's recommendation. First, section 164(4) makes no reference to the IEB, which was specifically mentioned in Recommendation 76. Second, Commissioner O'Connor recommended that citizens be empowered to require (not just "request") investigations. Third, it should be pointed out that Commissioner O'Connor did not specify that the recommendation should be implemented by regulation. In our view, for the purposes of greater certainty and accountability, the essential elements of investigation procedure should be established in the SDWA itself, and any necessary implementation details (eg. prescribed forms) should be addressed by regulations.

In our submissions on the MOE's SDWA discussion paper, CELA raised the foregoing concerns about the MOE's apparent failure to fully implement Commissioner O'Connor's recommendation on this issue. Unfortunately, it appears necessary to restate CELA's concerns and to again recommend the inclusion of an inspection procedure that can be triggered by citizens under the SDWA.

In our view, this inspection procedure should be framed in the SDWA as follows:

(1) Any person may require the Investigation and Enforcement Branch to investigate an alleged offence under this Act or regulations.

(2) The requirement for an investigation under subsection (1) shall be in writing and shall include:

- (a) description of the alleged offence;
- (b) identity of the alleged offender, if known;
- (c) summary of evidence supporting the allegation; and
- (d) any other relevant material or documents.

(3) The requirement for an investigation under subsection (1) may be filed with the Investigation and Enforcement Branch, or with any local, district or regional Ministry office, which shall forthwith forward the requirement to the Investigation and Enforcement Branch.

[72] Part II Report, Recommendation 76.

(4) Upon receipt of the requirement for an investigation under subsection (1), the Investigation and Enforcement Branch shall:

(a) investigate all matters related to the alleged offence;
(b) complete the investigation within 120 days, or as soon as practicable after that date; and
(c) report the outcome of the investigation to the person who filed the requirement under subsection (1).

(5) Despite subsection (4), the Investigation and Enforcement Branch may refuse to investigate where:

(a) the requirement filed under subsection (1) is clearly frivolous and vexatious; and
(b) the Branch provides written notice of its refusal to investigate, with reasons, to the person who filed the requirement under subsection (1).

(6) The Minister may make regulations prescribing forms or any other matter or requirement under this section.

It should be noted that the above-noted provisions are loosely based upon Part V of the EBR, but have been condensed and revised to be responsive to Commissioner O'Connor's recommendation.

**CELA RECOMMENDATION #23: The SDWA should be amended to include a public inspection procedure as follows:**

**(1) Any person may require the Investigation and Enforcement Branch to investigate an alleged offence under this Act or regulations.**

**(2) The requirement for an investigation under subsection (1) shall be in writing and shall include:**

- **description of the alleged offence;**
- **identity of the alleged offender, if known;**
- **summary of evidence supporting the allegation; and**
- **any other relevant material or documents**.

**(3) The requirement for an investigation under subsection (1) may be filed with the Investigation and Enforcement Branch, or with any local, district or regional Ministry office, which shall forthwith forward the requirement to the Investigation and Enforcement Branch.**

**(4) Upon receipt of the requirement for an investigation under subsection (1), the Investigation and Enforcement Branch shall:**

**(a) investigate all matters related to the alleged offence;**
**(b) complete the investigation within 120 days, or as soon as practicable after that date; and**
**(c) report the outcome of the investigation to the person who filed the requirement under subsection (1).**

**(5) Despite subsection (4), the Investigation and Enforcement Branch may refuse to investigate where:**

**(a) the requirement filed under subsection (1) is clearly frivolous and vexatious; and**
**(b) the Branch provides written notice of its refusal to investigate, with reasons, to the person who filed the requirement under subsection (1).**

**(6) The Minister may make regulations prescribing forms or any other matter related to requirements for investigation under subsection (1)**.

**Part IX – Compliance and Enforcement**

As noted above, CELA has a number of concerns and recommendations regarding the inspection, compliance and enforcement provisions of the SDWA as drafted. Most of these concerns and recommendations have been outlined above in the context of the Chief Inspector (section 7) and Part VIII (Inspections), and need not be repeated here. Instead, the focus of this portion of the CELA brief is to make further recommendations regarding compliance/enforcement issues that have not yet been discussed herein.

Generally, Part IX of the SDWA includes the power to issue administrative orders that are analogous to orders that are available under Ontario's existing environmental laws (eg. EPA and OWRA). Accordingly, CELA has no objection to these provisions, except as described below.

*(a) Lack of Citizen Suit Provisions*

We note that section 116 of the SDWA empowers the Minister to seek injunctive relief in respect of contraventions under the Act, regulations, orders or instruments.

While CELA does not object in principle to section 116, we note that this provision does not entitle private citizens to go to the civil courts to enjoin contraventions under the Act. Thus, if the Minister refuses to go to court under section 116, it would appear that persons served by non-compliant drinking water systems would have no standing under the Act to seek appropriate injunctive relief as against the owners/operators. In our view, this is a significant omission that must be addressed by an amendment to the SDWA so as to allow citizens to enforce the Act in the civil courts. After all, where the owner/operator of a drinking water system fails or refuses to comply with the Act, it is

the local citizenry – not the Minister – who may be personally affected by the non-compliance. For this reason alone, it would be fair and reasonable to allow citizen access to the civil courts to enforce the SDWA.

This "citizen suit" provision should not be confused with a statutory cause of action to enforce a substantive right to safe drinking water. On this point, it should be recalled that Commissioner O'Connor, in considering the fundamental purpose of the Act, declined to recommend the creation of a new cause of action to enforce a public right to safe drinking water. As noted above, we take no issue with this recommendation, but we submit that there is nothing in the Walkerton Inquiry Reports that would prevent the Ontario Legislature from including a citizen's suit provision in the SDWA.

Indeed, to the extent that Commissioner O'Connor recognized the need for timely and effective enforcement, it is our view that a citizen's suit provision is entirely consistent with the spirit and intent of Commissioner O'Connor's recommendations. Among other things, a citizen suit provision would serve as an important supplement to governmental enforcement efforts, particularly since the MOE staff cannot be everywhere at once.[73] In addition, allowing citizens to go to the civil courts may help preserve limited governmental resources, and may allow these public resources to be utilized or reallocated for non-litigious purposes.

On this point, it should be pointed that the U.S. SDWA (like most other federal environmental laws in the U.S.) has long contained a citizen suit provision as follows:

> Any person may commence a civil action on his own behalf,
>
> (1) against any other person (including (A) the United States and (B) any other government instrumentality or agency…) who is alleged to be in violation of any requirement prescribed by or under this subchapter;
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this subchapter that is not discretionary with the Administrator…

The track record for citizen suits under U.S. SDWA and other federal laws can be fairly summarized as follows:

- citizen suits have resulted in a higher level of enforcement activity;
- citizen suits act as a deterrent to unlawful conduct, and helps enhance accountability;
- citizen suits often result in settlement negotiations outside the court system;
- citizen suits preempt the need to utilize scarce governmental resources;
- citizen suits help keep government regulators in a neutral or arm's length relationship with the regulated industry; and

[73] In fact, it was a private caller (not a government official) who first notified the MOE's Spills Action Centre about the unfolding Walkerton Tragedy in May 2000.

- citizen suits have not been used frivolously due to the high cost of litigation and other procedural safeguards.

It should be further noted that Ms. Churley's Bill 3 included a broad judicial review clause in respect of Ministerial duties and powers under the Act (section 10).

For the foregoing reasons, CELA submits that citizen suits would be an important adjunct to governmental enforcement of the SDWA. Accordingly, CELA recommends that section 116 of the SDWA should be amended so as to create means for citizens to pursue civil enforcement of the Act. This can be simply accomplished by tacking on the phrase "or any other person" at the end of the current sentence in section 116. In the alternative, the SDWA (and the regulations and instruments thereunder) should be prescribed as being subject to Part V (Application for Investigation) and Part VI (Right to Sue) of the EBR. In addition, the SDWA should confer a broad public right to seek judicial review of the Minister's non-exercise or non-performance of duties and powers under the Act.

**CELA RECOMMENDATION #24: The SDWA should provide as follows:**

**(a) Section 116 of the SDWA should be amended by adding the words "or any other person" after the word "Minister", or in the alternative, the SDWA (and regulations and instruments thereunder) should be prescribed as being subject to Parts V and VI of the EBR; and**

**(b) any person may apply for judicial review of the Minister's exercise or non-exercise of any power, or performance or non-performance of any duty, imposed or conferred under this Act, whether or not the person is directly affected or has suffered special damages.**

**<u>Part X – Appeals</u>**

In our view, Part X of the SDWA largely replicates appeal rights and procedures found in other environmental statutes in Ontario (eg. Part XIII of the EPA). Therefore, CELA has no major comments or recommendations regarding the provisions of Part X of the SDWA.

As noted above, however, it is our view that most of the statutory orders and approvals under the SDWA should be prescribed as Class I or II "instruments" for the purposes of Part II of the EBR. This would ensure that, at a minimum, notice of proposed SDWA orders and approvals will be posted on the EBR for public review/comment purposes, and that other important EBR mechanisms (eg. application for review, third-party appeal, etc.) will be available in relation to these instruments.

## Part XI – Offences

Part XI of the SDWA generally includes offence and penalty provisions that already exist in Ontario's environmental statutes (eg. Part XVII of the EPA). Accordingly, CELA has no comments or recommendations regarding Part XI, except as described below.

*(a) List of Offences*

We note that section 136 of the SDWA attempts to list various offences under the Act. First, it must be pointed out that if CELA's suggested amendments to the SDWA are adopted, then it will be necessary to review and revise the section 136 list of offences.

Second, we are unclear why the opening sentence of section 136(1) is qualified by the phrase "if the person is required under this Act to comply with the provision". It seems to us that this phrase is somewhat redundant because in prosecutions under the listed provisions, the courts will necessarily have to determine whether the defendant was, in law and/or fact, a person who was obliged to comply with the provision in question. Entrenching this very question in section 136 itself seems unnecessary and can be fairly characterized as surplusage, but CELA makes no specific recommendation in relation to this phrase.

Third, there appears to be a number of curious omissions in the section 136 list. For example, CELA notes that the "standard of care" provision (section 19) is not listed under section 136, but we presume that this is because subsection 19(3) makes contravening the standard of care a separate offence.

The rationale for other omissions from the section 136 list is less clear. For example, section 23(1) of the SDWA imposes a statutory duty on the accreditation body for operating authorities to "exercise and perform its powers and duties in accordance with the requirements under this Act and its accreditation agreement". Given the importance of accreditation, it appears to us that this statutory obligation is highly significant, and yet section 23(1) has been excluded from the section 136 list of offences. In our view, this omission should be corrected by a corresponding amendment to section 136.

Similarly, we note that a number of other key sections under the SDWA have been excluded from the section 136 list of offences. These sections include:

- section 26 (duty on auditor to report violations);
- section 29 (duty on accreditation body to file annual reports);
- section 33, para. 3 (duty on "owners" to cease operations if no licence application is filed);
- section 47 (duty on municipalities to execute transfer agreements);
- section 61 (duty on accreditation body for testing to comply with Act);
- section 64 (duty on testing auditor to report violations);
- section 67 (duty on testing accreditation body to file annual reports);

- section 71(3), para. 3 and 4 (duty on testing licensee to take all reasonable steps to ensure compliance, and to not sub-contract with unlicenced laboratories);
- section 105(2) (duty to cease operations upon service of Director's order regarding imminent health hazards);
- section 106(5) and (6) (duty to comply with notice of emergency response);
- section 109(7), (11) and (12) (duty to comply with notice of appoint of interim operating authority); and
- section 110(4) and (14) (duty to comply with order to provide service).

In our view, the foregoing sections should be added to the section 136 list of offences under the SDWA.

**CELA RECOMMENDATION #25: The list of offences in section 136 of the SDWA should amended to include reference to the following sections of the Act:**

**(a) section 23(1);**
**(b) section 26;**
**(c) section 29;**
**(d) section 33, para. 3;**
**(e) section 47;**
**(f) section 61;**
**(g) section 64;**
**(h) section 67;**
**(i) section 71(3), para. 3 and 4;**
**(j) section 105(2);**
**(k) section 106(5) and (6);**
**(l) section 109(7), (11), (12); and**
**(m) section 110(4) and (14).**

*(b) Minimum Fines*

We have reviewed the various fines that have been proposed in sections 137 to 139 of the SDWA in relation to offences by individuals and corporations. In our view, the maximum fines that have been proposed under the SDWA are generally consistent with penalty provisions found in other environmental statutes in Ontario.

Our concern, however, is that courts rarely, if ever, impose the maximum fines permitted by law, presumably on the basis that the worst punishment should be reserved for the worse offenders. More often than not, fines for environmental offences have tended to stay in the lower range of the possible fine structure, and there have been instances where environmental convictions have resulted in one dollar fines.[74]

CELA recognizes that judicial discretion is required to ensure that the sentence is proportionate to the offence. At the same time, however, CELA submits that in the context of human health and safety, there is a strong public policy basis for creating

[74] *R. v. Cyanamid Canada Inc.* (1981), 11 CELR 31 (Ont. Prov. Ct).

minimum fines for the most serious offences. In our view, minimum fines prescribed by statute do not eliminate judicial discretion; instead, minimum fines help structure the exercise of judicial discretion by specifying the starting point for sentencing considerations. Moreover, minimum fines prescribed by law may also have a deterrent effect, insofar as potential offenders should know that if they are caught and convicted, the least punishment they can expect is a hefty minimum fine. However, in cases where the minimum fine might impose undue hardship, section 59(2) of the *Provincial Offences Act* provides some limited discretion to relieve against minimum penalties.

The concept of minimum fines is not new, and, in fact, there are various statutes at both the federal[75] and provincial[76] level which specify minimum fines for certain offences. For example, to protect public safety on roads and highways, Ontario's *Highway Traffic Act* prescribes a fine of not less than $2,000 and not more than $5,000 if a wheel becomes detached from a commercial vehicle.

In our view, minimum fines are especially appropriate in the context of drinking water safety, particularly since the consequences of non-compliance under the SDWA can be fatal, and may adversely affect many more people than detached truck tires. Accordingly, CELA submits that the SDWA should be amended so as to set minimum fines for the most serious offences under the Act. In particular, CELA is recommending that the SDWA should include minimum fines for first, second, third and subsequent offences under sections 138 and 139 of the Act. On this point, it should be noted that section 8(3.1) Ontario's *Retail Business Holidays Act* establishes a similar sliding scale of minimum fines for successive offences.

**CELA RECOMMENDATION #26: The SDWA should be amended to impose minimum fines for the following offences:**

**(a) Section 138 is amended by adding a new subsection (4): "The minimum fine for offences under this section is $5,000 for a first offence, $10,000 for a second offence, and $20,000 for a third or subsequent offence"; and**

**(b) Section 139 is amended by adding a new subsection (4): "The minimum fine for offences under this section is $10,000 for a first offence, $20,000 for a second offence, and $40,000 for a third or subsequent offence".**

[75] See, for example, the federal *Income Tax Act* (sections 238-39); *Excise Act* (sections 91, 93, 94, 97, 98); *Canada Shipping Act* (section 404(3)); and *Contraventions Act* (section 8(5)).
[76] See, for example, the provincial *Income Tax Act* (section 42(2)); *Liquor Licence Act* (section 61(6) and (7)); *Highway Traffic Act* (sections 84.2, 99, 125, and 214); and *Fairness is a Two Way Street Act (Construction Labour Mobility)* (section 24(10)).

## Part XII – Miscellaneous

For the most part, the "miscellaneous" provisions of Part XII of the SDWA contain standard legislative clauses (eg. service of documents, protection from personal liability, official documents as evidence, Act binds the Crown, paramountcy clause, etc.). Therefore, CELA has no major concerns or recommendations in relation to most provisions within Part XII, except as described below.

*(a) Regulations*

Sections 163 and 164 of the SDWA attempt to give the Ontario Cabinet and the Minister wide-ranging authority to make regulations on virtually all aspects of drinking water safety (except source protection).

However, CELA submits that using the permissive word "may" in sections 163 and 164 confers far too much discretion upon Cabinet and the Minister to make (or not make) regulations regarding critically important drinking water matters. On this point, it should be recalled that for many years, the provincial Cabinet enjoyed similar discretion under the OWRA (section 75(1)(i)) to make regulations in relation to "standards of quality for potable and other water supplies". However, the Cabinet declined to exercise this discretion, which left Ontario's drinking water "standards" in the form of non-enforceable objectives and guidelines. This regulatory inertia remained unchanged until the Walkerton Tragedy prompted the long overdue passage of the Drinking Water Protection Regulation (O.Reg. 459/00). In our view, this illustrates the danger of leaving regulation-making to the absolute discretion of provincial officials, and underscores the undesirability of waiting for catastrophic events to occur before regulations are made.

Thus, instead of entrenching regulatory discretion, the SDWA should be amended to impose a positive duty upon the Minister to set, maintain, and where necessary, revise drinking water regulations in order to protect public health and safety. In our view, this mandatory approach is particularly appropriate since most of the detailed drinking water requirements under the SDWA will be found in regulations rather than the Act itself.

It is our understanding that existing drinking water regulations under the OWRA (eg. O.Reg. 435/93, O.Reg. 459/00, and O.Reg. 505/01) will be adopted under the SDWA once they have been reviewed for conformity with Commissioner O'Connor's recommendations. While this approach offers a good starting point for regulations under the SDWA, it must be noted that there is nothing in the proposed SDWA that would prevent the Minister (or Cabinet) from rolling back these regulations in the future, or from transforming some regulatory requirements back into non-enforceable objectives, guidelines, manuals or guidance documents. It may be argued that roll-backs are unlikely due to the current political sensitivity of drinking water protection in Ontario. As a matter of law, however, there is no legal barrier in the SDWA, as drafted, that would prevent roll-backs or other undesirable changes to the regulatory framework.

In our view, this scenario clearly underscores the somewhat tenuous nature of environmental regulations, particularly since regulations may be amended or even repealed at the stroke of a pen with little or no public input.[77] Indeed, Ontario's Environmental Commissioner has documented many instances where environmentally significant regulations were amended or repealed with little or no opportunity for public review and comment.[78] Thus, regulatory roll-backs (or de-regulation or "self-regulation" initiatives) are very real and omnipresent threats, and have already materialized in relation to regulations under the EPA and OWRA.[79]

Significantly, Bill 3 attempted to address the issue of regulatory discretion by adopting the Ontario Drinking Water Objectives ("ODWO") as an "interim regulation", and then requiring the passage of a new regulation to replace the ODWO regulation within one year of the Act's coming into force.[80] Bill 3 also required the Minister to undertake annual public reviews of drinking water regulations to evaluate their adequacy in protecting human health (section 18(4)).

Similarly, in our submissions on the MOE's SDWA discussion paper, CELA objected to the discretionary nature of the proposed regulation-making under the Act:

> With respect to the development of new regulations under the SDWA, we are concerned that the proposed SDWA appears to leave standard-setting to the complete discretion of the Minister and Cabinet. At the same time, the proposed SDWA does not appear to include any specific direction or criteria to guide the standard-setting process. Accordingly, CELA submits that the SDWA must impose a positive duty on the Minister to set, maintain and revise drinking water standards in order to protect the health and safety of all Ontarians, including those who may be particularly vulnerable to waterborne illness or disease.[81]

Unfortunately, CELA's recommendation was not reflected in sections 163 and 164 of the SDWA, as drafted. Therefore, it is again necessary for CELA to recommend that the SDWA entrench a positive duty to set, maintain and revise regulations to protect human health and safety. Indeed, we are unclear why the Ontario government would resist this recommendation since the SDWA, as drafted, already includes some individual sections that require regulatory action by the Minister within a specified timeframe (eg. section 21, section 164(4), etc.).

In CELA's view, a mandatory Ministerial duty to make drinking water regulations does not necessarily have to include secondary matters such as prescribed forms or fees under

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[77] In fact, the Drinking Water Protection Regulation itself was promulgated with negligible public notice and comment opportunities: see CELA, *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act* (May 2001), Vol. II, page 99.
[78] These examples are described in virtually every Annual Report tabled by Ontario's Environmental Commissioner to date.
[79] For example, CELA, *Responding to the Roll-Backs: Comments on Responsive Environmental Protection* (October 1996), and numerous other CELA briefs on provincial regulatory "reforms": see www.cela.ca.
[80] Bill 3, subsections 18(3) and (4).
[81] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 13.

the SDWA. These and related administrative matters may be left to the residual discretion of Cabinet. However, CELA recommends that, at a minimum, the Minister must be statutorily obliged to make, maintain and, where necessary, revise regulations in relation to the following core elements of the multi-barrier approach:

- source protection standards to protect raw water supplies;
- standards for treatment, testing, and monitoring of drinking water;
- drinking water quality standards;
- standards for the construction, operation and maintenance of drinking water systems;
- standards for notification, resampling, corrective action and public warnings where adverse test results are obtained;
- emergency response standards;
- quality management standards for drinking water systems;
- standards for operator qualification, certification and training; and
- requirements for MOE inspections, compliance and enforcement activities under the Act.

In terms of the timeframe for making drinking water regulations, CELA notes that Part XII of the SDWA, as drafted, only imposes deadlines for two specific types of regulation: (a) investigation/enforcement matters (section 164(4));[82] and (b) non-municipal drinking water systems (section 165).[83] This would appear to leave the timing for the passage of all other regulations to the absolute discretion of the Minister and the Cabinet. In our view, given the urgency of drinking water protection, it is unacceptable to leave the development of the above-noted multi-barrier standards to the whims of provincial officials, or to the vagaries of the Cabinet decision-making process. Accordingly, CELA recommends that the SDWA must stipulate that the above-noted multi-barrier standards must be made by the Minister within 45 days of the Act's coming into force.

We further note that the regulation-making authority in Part XII of the SDWA makes no reference to the precautionary principle. This omission appears to conflict directly with Commissioner O'Connor's Recommendation 19, which provides as follows:

> Standards setting should be based on a precautionary approach, particularly with respect to contaminants whose effects on human health are unknown.[84]

In our submissions on the MOE's SDWA discussion paper, CELA pointed out this apparent omission, and recommended that the precautionary principle should be

[82] This section provides that the regulation "shall" be made "on or before the day Part VIII comes into force, or as soon as reasonably practicable afterwards".
[83] This section provides that the Minister "may" make such regulations "come into force on or after the fifth anniversary of the day Part VI comes into force".
[84] Part II Report, page 21. Similarly, Commissioner O'Connor's Recommendation 18 provides that "in setting drinking water quality standards are met, a reasonable and informed person would feel safe in drinking the water". Again, it appears that this regulatory objective has not been reflected in Part XII of the SDWA, as drafted.

entrenched as a mandatory consideration in the regulatory process.[85] For the purposes of the SDWA, the precautionary principle could be defined as follows:

> In making, reviewing or revising regulations under this Act, the lack of full scientific certainty shall not be used as a reason to delay or reject standards that will, or are likely to, mitigate or prevent drinking water health hazards.

Finally, as described above, CELA recommends that the regulation-making process under the SDWA should be open, accessible and transparent, and should therefore be made subject to the public participation requirements of Part II of the EBR.

**CELA RECOMMENDATION #27: The SDWA should be amended to:**

(a) **provide that the Minister shall make, maintain, and, where necessary, revise regulations to establish drinking water standards that protect public health and safety;**

**(b) require the Minister to make regulations in relation to the following matters within 45 days of the Act's coming into force:**

- **source protection standards to protect raw water supplies;**
- **standards for treatment, testing, and monitoring of drinking water;**
- **drinking water quality standards;**
- **standards for the construction, operation and maintenance of drinking water systems;**
- **standards for notification, resampling, corrective action and public warnings where adverse test results are obtained;**
- **emergency response standards;**
- **quality management standards for drinking water systems; and**
- **standards for operator qualification, certification and training**;
- **requirements for MOE inspection, compliance and enforcement activities under the Act**; **and**

(c) **provide that when regulations are being made, reviewed or revised under the Act, the lack of full scientific certainty shall not be used as a reason for delaying or rejecting standards that will, or are likely to, mitigate or prevent drinking water health hazards.**

*(b) Statutory Review*

As described above, CELA believes that the SDWA should contain a built-in review clause that would allow the Ontario government, stakeholders and the public at large to systematically review the efficacy of the Act five years after proclamation. After all, the

[85] CELA, *Comments on the Proposed Components of the Safe Drinking Water Act* (September 2002), page 13, Recommendation 8(c).

SDWA is being assembled for the first time in Ontario, and it will be important to evaluate how well the Act is working and whether further legislative finetuning is warranted. In particular, CELA envisions a statutory review mechanism similar to those found in the *Canadian Environmental Assessment Act* (section 72) and *Canadian Environmental Protection, 1999* (section 343), rather than a "sunset clause" such as the one that enabled the Ontario government to allow the *Intervenor Funding Project Act* to expire.

It may be argued that the Minister could cause an internal (or external) review of the SDWA at any time, but CELA prefers a statutory review obligation to ensure that the formal review actually occurs, and to ensure that the review is open, accessible and transparent. This review mechanism should be included with Part XII of the SDWA, and should provide as follows:

(1) Five years after the coming into force of this Act, the Minister shall undertake a comprehensive and public review of the provisions and administration of this Act.

(2) The Minister shall, within one year of completing the review under subsection (1), submit a report on the review to the Legislative Assembly, including a description of any changes to the Act or its administration that the Minister may recommend.

(3) The review and report requirements imposed by this section may be delegated by the Minister to a committee of the Legislative Assembly designated or established for that purpose.

This latter provision is intended to allow the Minister to delegate the public review/report function to a standing committee (eg. the Standing Committee on General Government), or an *ad hoc* committee specially created for this SDWA review/report function.

**CELA RECOMMENDATION #28: The SDWA should be amended to include a statutory review mechanism as follows:**

**(1) Five years after the coming into force of this Act, the Minister shall undertake a comprehensive and public review of the provisions and administration of this Act.**

**(2) The Minister shall, within one year of completing the review under subsection (1), submit a report on the review to the Legislative Assembly, including a description of any changes to the Act or its administration that the Minister may recommend.**

**(3) The review and report requirements imposed by this section may be delegated by the Minister to a committee of the Legislative Assembly designated or established for that purpose.**

**Part XIII – Complementary Amendments**

At the present time, Part XIII of the SDWA contains only a single amendment to the *Health Protection and Promotion Act*. For the record, it should be noted that CELA supports this amendment.

As described above, however, CELA strongly recommends that all statutory amendments required to implement source protection/watershed planning (eg. changes to the EPA, *Conservation Authorities Act*, *Planning Act*, etc.) should be included within Part XIII of the SDWA. In our view, the source protection/watershed planning framework now being developed by the advisory committee must be allowed to "catch up" with the SDWA. Moreover, integrating the resultant statutory changes within the SDWA itself offers the best opportunity for legislative linkages between the SDWA and source protection/watershed planning. CELA firmly believes that the overall effectiveness of the SDWA will be fundamentally undermined if the SDWA proceeds without incorporating the necessary amendments regarding source protection/watershed planning.

Accordingly, CELA strongly recommends that source protection/watershed planning amendments should be fast-tracked, and that passage of the SDWA should be temporarily delayed to allow these amendments to be incorporated directly into the Act (see CELA Recommendation #8 above).

**Part XIV – Commencement and Short Title**

CELA notes that section 168(2) of the SDWA purports to give the provincial government virtually unfettered discretion over when (or if) the various sections of the Act come into force.

To ensure that all provisions of the SDWA actually come into force in a timely and coordinated manner, CELA recommends that section 168 must be amended to impose an outside deadline for proclamation of the Act in its entirety. Otherwise, CELA greatly fears that proclamation of all SDWA provisions may be delayed for prolonged periods of the time, perhaps on the grounds that implementing regulations are not yet finalized.

To avoid this potential foot-dragging (and to prevent selective or piecemeal proclamation of individual sections or Parts), CELA recommends that section 168 must fix an overall deadline for the Act's coming into force. In particular, we are suggesting a three-month deadline, which should provide ample time (and incentive) for various implementation measures to be developed. Where there may be a need for some additional phase-in time for certain sections (eg. the section 21 quality management standard), this can be addressed in the provisions themselves by setting tight time limits (eg. 45 days) that start ticking upon proclamation of the Act.

**CELA RECOMMENDATION #29: Section 168(2) of the SDWA should be deleted, and section 168(1) should be amended as follows:**

> **This Act comes into force on a day by proclamation of the Lieutenant Governor, or three months after the day that this Act receives Royal Assent, whichever is the earliest.**

## D. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

Representatives of the Ontario government have repeatedly claimed that Bill 195, as drafted, will prevent the recurrence of another Walkerton Tragedy, and that Bill 195 represents the "toughest" drinking water legislation in the world. In our respectful view, however, neither of these claims are supportable on the evidence or in theory, as described above.

Accordingly, if the Ontario government truly intends to enact a "tough" SDWA that will prevent another Walkerton Tragedy, then the government must either initiate or support the numerous amendments recommended throughout this brief. In particular, CELA's recommendations are as follows:

**CELA RECOMMENDATION #1: The SDWA should be amended to include a preamble as follows:**

> **The people of Ontario have the right to safe drinking water;**
>
> **Safe drinking water is a basic human entitlement and essential for the protection of human health;**
>
> **Effective protection of drinking water requires a multi-barrier approach that includes assessing and protecting sources of drinking water;**
>
> **The public has the right to participate in decision-making and standard-setting in relation to drinking water and its sources;**
>
> **The public has the right to information about drinking water and its sources, and to prompt notification where there are violations of regulatory requirements for protection of drinking water and its sources;**
>
> **The process for identifying and regulating current and future drinking water contaminants must be open, transparent, based upon the precautionary principle, and aimed at protecting public health;**
>
> **Since protecting drinking water and its sources may exceed the technical and financial capability of smaller municipal and non-municipal drinking water systems, the Government of Ontario has the responsibility to provide**

**assistance to ensure that such systems comply with regulatory requirements; and**

**The Government of Ontario has the primary responsibility to prevent a recurrence of the Walkerton Tragedy, and has committed to the full implementation of all recommendations in the Reports of the Walkerton Inquiry.**

**CELA RECOMMENDATION #2: The SDWA should be amended to include the following statement of purpose:**

**1(1) The purposes of this Act are,**

**(a) to recognize that persons in Ontario expect, and have the right to receive, safe drinking water;**

**(b) to protect and enhance the quality of drinking water and its sources in Ontario; and**

**(c) to protect human health by protecting drinking water and its sources in Ontario through a multi-barrier approach.**

**(2) In order to fulfill the purposes of subsection (1), this Act provides,**

**(a) means to ensure that persons in Ontario have safe drinking water;**

**(b) increased public access to information about drinking water and its sources;**

**(c) enhanced public participation in decision-making and standard-setting in relation to drinking water and its sources;**

**(d) means to ensure that drinking water standards are set, reviewed, revised and enforced in order to protect public health;**

**(e) funding and technical assistance programs for smaller municipal and non-municipal drinking water systems; and**

**(f) increased accountability of the Government of Ontario for protecting drinking water and its sources.**

**CELA RECOMMENDATION #3: The SDWA's definition section should be amended as follows: "raw water supply" means water outside a drinking water system that is a source of water for the system, and includes a well, lake, river, spring, stream, reservoir, artificial watercourse, groundwater, or other water or watercourse.**

**CELA RECOMMENDATION #4: The SDWA should be amended to:**

**(a) use the word "shall" in section 3(1) so as to impose a mandatory duty on the Minister to undertake the various activities, programs and research listed therein;**

**(b) expand the section 3(1) list of the Minister's drinking water duties to include:**

- **developing a comprehensive, "source to tap" Drinking Water Policy for Ontario as soon as practicable;**

- **within 45 days of the Act's coming into force, establishing and adequately funding the Drinking Water Branch within the Ministry for overseeing drinking water treatment and distribution systems;**

- **within 45 days of the Act's coming into force, establishing and adequately funding the Watershed Management Branch within the Ministry for overseeing watershed-based source protection plans and watershed management plans;**

- **conducting annual public reviews of the adequacy of drinking water standards to protect public health;**

- **conducting five-year public reviews of the effectiveness of the SDWA in protecting public health;**

- **researching and developing measures for the protection of sources of drinking water; and**

- **researching and developing water conservation measures;**

**(c) expand the list of prescribed content requirements for the Minister's annual reports to include:**

- **the work of the Advisory Council established under section 4 (including information posted by the Advisory Committee on the EBR Registry);**

- **the findings and recommendations arising out of the public annual review of the adequacy of drinking water standards;**

- **the findings and recommendations arising out of five-year annual review of the SDWA; and**

- **summaries of financial assistance provided by the Government of Ontario to owners/operators of municipal and non-municipal drinking water systems;**

**(d) specify that:**

- **the annual report for a calendar year shall be tabled by the Minister on or before April 1 of the following calendar year; and**

- **the first annual report shall be tabled by the Minister on or before April 1, 2004, and shall cover the period that begins on the day that this Act comes into force and ends on December 31, 2003.**

**CELA RECOMMENDATION #5: The SDWA should be amended to provide that:**

**(a) the Minister shall establish the Advisory Council and appoint its members (including the Chair and Vice-Chair) within 45 days of the Act's coming into force;**

**(b) the Advisory Council shall consist of not fewer than seven and not more than twelve members, who shall not be part of the public service of Ontario;**

**(c) members of the Advisory Council shall be persons who are unbiased, free of conflict of interest, and have knowledge or experience in drinking water matters;**

**(d) the mandate of the Advisory Council shall be to:**

- **generally assist the Minister in carrying out the duties imposed by section 3 of the Act;**

- **review and report upon the adequacy of current drinking water standards, and to recommend revisions thereto as may be necessary to protect public health;**

- **identify, evaluate and make recommendations in relation to new or emerging drinking water contaminants;**

- **review and comment upon the annual reports tabled by the Minister under section 3(4) of the Act;**

- **undertake and disseminate research into drinking water treatment, drinking water testing, source protection measures, or the diagnosis, treatment and prevention of health effects caused by drinking water contaminants;**

- **consider any matter affecting drinking water or its sources that the Minister refers to the Advisory Council or that the Advisory Council decides to consider on its own initiative; and**

- **address such matters as may be prescribed by regulation;**

**(e) the Minister shall provide the Advisory Council with sufficient professional, technical, secretarial, clerical resources, and any other facilities or supplies, that are necessary for the Advisory Council to carry out its mandate under the Act.**

**CELA RECOMMENDATION #6: The SDWA should be amended to:**

**(a) require the Minister to provide adequate funding, staffing and other resources to enable the Chief Inspector carry out the duties imposed by section 7;**

**(b) require the Chief Inspector to develop a new compliance/enforcement manual that specifies that the Ministry shall:**

- **ensure that inspectors have the same or higher qualifications as the operators of the drinking water systems they inspect;**

- **ensure that inspectors shall receive special training;**

- **increase the use of mandatory abatement;**

- **strictly enforce all regulations and provisions related to the safety of drinking water;**

- **the inspection program shall consist of announced and unannounced inspections to be undertaken at least annually for each drinking water system;**

- **inspectors shall review all relevant MOE records (eg. approvals, orders, consultants' reports, etc.) prior to the annual inspection of a drinking water system;**

- **the checklist of mandatory inspection items should include: review of the system's operating, training and maintenance records; water testing results, especially exceedances of prescribed standards; sampling of raw and treated water; state of monitoring, alarms, treatment, and distribution equipment; and other prescribed matters;**

- **copies of inspection reports shall be retained on file at the local MOE office and the Approvals Branch, and shall be provided to the owner/operators of the drinking water system, the medical officer of health, and the public upon request; and**

- **there shall be strict adherence to the prescribed timelines for the preparation and delivery of inspection reports, responses by owners/operators, and the submission of interim status reports regarding remedial action;**

**in accordance with this Act and the regulations.**

**(c) require the Chief Inspector to undertake public consultation on the new compliance/enforcement manual prior to its finalization, and to approve and implement the manual within 45 days of the Act's coming into force.**

**CELA RECOMMENDATION #7: The SDWA should be prescribed as a statute to which the EBR applies. In particular, the SDWA (or regulations thereunder) should provide that:**

**(a) proposals to amend the SDWA after its enactment, and proposals to make or amend policies or regulations under the SDWA, shall be subject to sections 15 and 16 of the EBR;**

**(b) proposals to make or amend licences, permits, approvals, variances, orders or directions under the SDWA shall be classified as Class I or II instruments subject to section 22 of the EBR;**

**(c) the public participation exception in section 32 of the EBR does not apply in relation to SDWA permits or approvals for municipal drinking water systems; and**

**(d) the Application for Review provisions of Part IV of the EBR apply to the SDWA and policies, regulations and instruments thereunder.**

**CELA RECOMMENDATION #8: The EPA amendments (and other necessary statutory amendments) regarding source protection/watershed planning should be fast-tracked and subsequently attached to Part XIII of the SDWA as "Complementary Amendments".**

**CELA RECOMMENDATION #9: The SDWA should be amended to provide that:**

**(a) the operational duties in section 11(1) are binding and enforceable against an "owner" of a drinking water system even where an "operating authority" has been established; or alternatively, the**

**"owner" is liable to conviction under section 11(1) whether or not the "operating authority" is prosecuted or convicted;**

**(b)** **"owners" and "operating authorities" shall comply with drinking water treatment and reporting requirements under the Act, regulations, standards and approvals, and shall assess and report upon the quality and quantity of the raw water supply;**

**(c)** **"owners" and "operating authorities" shall only obtain drinking water testing services from laboratories that are duly accredited and licenced under Part VII of the Act;**

**(d)** **"owners" shall ensure that its certified operators receive annual training in accordance with prescribed requirements, and that "owners" shall keep and maintain proper records regarding such training;**

**(e)** **delete section 14(2) of the SDWA, and amend section 14(3) to provide that agreements with "operating authorities" do not relieve "owners" of their general duties under Part III of the Act;**

**(f)** **require "owners" and "operating authorities" to develop and comply with operational plans in accordance with prescribed standards, and specify that operational plans shall address: sampling and testing; continuous monitoring; operational processes; equipment maintenance/repair; contingency plans; emergency response; and other prescribed matters;**

**(g)** **specify that where adverse test results are to be reported under section 18,**

- **the required notice may be given verbally, but shall be confirmed forthwith in writing, by the person giving notice; and**

- **the "owner" and/or "operating authority" shall undertake resampling, corrective action, or public warnings in accordance with the regulations, and shall confirm in writing to the MOE and medical officer of health that such measures are being undertaken;**

**(h)** **extend the section 19 standard of care to every person who owns, oversees, or exercises decision-making authority in relation to regulated non-municipal drinking water systems; and**

**(i)** **expand the section 20 prohibition to include "raw water supply", or, in the alternative, enact a related prohibition as follows:**

**(1) For the raw water supply for municipal and regulated non-municipal drinking water systems, the Director shall designate areas in which no person shall discharge or deposit any thing that could result in,**

**(a) a drinking water health hazard;**
**(b) a contravention of a prescribed standard; or**
**(c) interference with the normal operation of the system.**

**(2) No person shall cause or permit the discharge or deposit of any thing in any area designated by the Director under subsection (1).**

**(3) For the purposes of prosecuting the offence of contravening subsection (2), it is no defence that the thing did not or could not result in a drinking water health hazard because it was or became diluted when or after it entered the area designated by the Director.**

(4) **Subsection (2) does not apply to prohibit activities carried out under statutory authority or for the purposes of complying with a statutory requirement.**

**CELA RECOMMENDATION #10: Part III of the SDWA should be amended to include the following provisions:**

**(a) Upon request, every owner and accredited operating authority of a drinking water system shall permit any person to inspect or copy any approval, order, direction, plan, record, report, sampling results, monitoring data, and any other document required or kept under this Act or the regulations;**

**(b) Every owner and accredited operating authority of a drinking water system shall provide immediate public notice in the prescribed form and manner where,**

- **drinking water testing has detected exceedances of drinking water quality standards or indicators of adverse water quality;**

- **testing, treatment or distribution system equipment is malfunctioning or inoperative; or**

- **prescribed sampling, testing and analysis is not being carried out;**

**(c) Every owner and accredited operating authority of a drinking water system shall prepare comprehensive consumer confidence reports that are mailed to all persons who are served by the drinking water system, and that address the following matters:**

- **relevant source protection or watershed planning issues;**
- **any regulated contaminants and/or unregulated substances detected in raw or treated water samples;**
- **any exceedances of drinking water quality standards and any related health concerns for consumers, including vulnerable persons;**
- **actions proposed or taken to remedy or prevent exceedances of drinking water quality standards; and**
- **any other prescribed matter.**

**CELA RECOMMENDATION #11: Section 21 of the SDWA should be amended to:**

**(a) specify that the Minister must make a regulation setting out the drinking water quality management standard within 45 days of the Act's coming into force;**

**(b) specify that the Minister shall:**

- **place notice of the proposed quality management standard on the EBR Registry;**
- **provide an adequate opportunity for public comment on the proposed standard; and**
- **ensure that all public comments received are considered as the standard is being finalized;**

**(c) provide that:**

- **revisions to the approved quality management may be proposed by the accreditation body, the Advisory Council, or any other person; and**
- **the Minister shall post notice of any proposed revisions to the standard on the EBR Registry, shall provide an adequate opportunity for public comment on the proposed revisions, and shall ensure that any public comments received are considered as the revisions are being finalized;**

**(d) provide that the Drinking Water Branch shall be responsible for recognizing the quality management standard and ensuring that accreditation is properly implemented.**

**CELA RECOMMENDATION #12: Section 28 of the SDWA should be deleted, and sections 22 and 29 of the SDWA should be amended to:**

**(a) provide that the Minister shall establish a public sector body to implement the accreditation program for operating authorities under Part IV of the Act;**

**(b) specify that the accreditation body is prescribed as a Crown agency under the *Crown Agency Act*;**

**(c) provide that the accreditation body shall report to the MOE Drinking Water Branch, and shall be prescribed as an "institution" for the purposes of the *Freedom of Information and Protection of Privacy Act*;**

**(d) ensure that persons appointed to or employed by the accreditation body are free of conflict of interest and apprehension of bias, and have the necessary technical knowledge and experience; and**

**(e) ensure that the accreditation body is adequately funded in order to carry out its duties and responsibilities under Part IV of the Act.**

**CELA RECOMMENDATION #13: Part V of the SDWA should be amended to provide that:**

**(a) where it appears that the financial plan does not comply with the requirements of this Act, the Director shall require the applicant to consider and report back upon all managerial, operational and technological options to find the most economical way of providing safe drinking water; and**

**(b) where, after considering the various options for delivering safe drinking, it appears that the amended financial plan still does not comply with the requirements of this Act, the Director shall direct the applicant to obtain provincial funding assistance under this Act.**

**CELA RECOMMENDATION #14: Part V of the SDWA should be amended to prohibit the Director from issuing an approval for a municipal drinking water system where the proposed raw water supply is vulnerable to contamination or degradation that may cause a drinking water health hazard.**

**CELA RECOMMENDATION #15: Section 42 of the SDWA should be amended to provide that where a person applies for a variance from regulatory requirements,**

**(a) the applicant must prepare and submit a comprehensive risk analysis and management plan;**

**(b) if the risk analysis and management plan are acceptable, the Director may issue the variance, with or without conditions, for a term not exceeding one year; and**

**(c) any variance granted under this section may be renewed for a further term not exceeding one year.**

**CELA RECOMMENDATION #16: Section 47 of the SDWA should be amended to provide that despite any other provision in any special or general Act, no municipality shall transfer ownership of a municipal drinking water system to a non-municipal corporation.**

**CELA RECOMMENDATION # 17: The SDWA should be amended to provide that within 45 days of the Act's coming into force, the Minister shall make a regulation that**:

(a) **prescribes which non-municipal drinking water systems are subject to the Act; and**

(b) **imposes upon these systems drinking water requirements and standards that are equivalent to those imposed upon municipal drinking water systems under the Act.**

**CELA RECOMMENDATION #18: Sections 52 and 53 of the SDWA should be amended to provide when considering an application for approval of a regulated non-municipal drinking water system, the Director shall consider:**

**(a) the purpose of this Act;**
**(b) plans, reports and other documents submitted by the applicant;**
**(c) comments received from other agencies or the public;**
**(d) financial viability of the proposed system; and**
**(e) vulnerability of the proposed source of drinking water.**

**CELA RECOMMENDATION #19: Section 56 of the SDWA should be amended to provide that where a person applies for a variance from regulatory requirements,**

**(a) the applicant must prepare and submit a comprehensive risk analysis and management plan;**

**(b) if the risk analysis and management plan are acceptable, the Director may issue the variance, with or without conditions, for a term not exceeding one year; and**

**(c) any variance granted under this section may be renewed for a further term not exceeding one year.**

**CELA RECOMMENDATION #20: Section 66 of the SDWA should be deleted, and sections 60 and 67 of the SDWA should be amended to:**

(a) **provide that the Minister shall establish a public sector body to implement the accreditation program for operating authorities under Part VII of the Act;**

**(b) specify that the accreditation body is prescribed as a Crown agency under the *Crown Agency Act*;**

**(c) provide that the accreditation body shall be prescribed as an "institution" for the purposes of the *Freedom of Information and Protection of Privacy Act*;**

**(d) ensure that persons appointed to or employed by the accreditation body are free of conflict of interest and apprehension of bias, and have the necessary technical knowledge and experience; and**

**(e) ensure that the accreditation body is adequately funded in order to carry out its duties and responsibilities under Part VII of the Act.**

**CELA RECOMMENDATION #21: Section 70 of the SDWA should be deleted.**

**CELA RECOMMENDATION #22: Section 99 of the SDWA should be amended by adding the following provisions:**

**(a) Where an inspection, or a followup inspection under this section, identifies a serious operational deficiency that may cause a drinking water health hazard, the Director or provincial officer shall issue an order under Part IX within thirty days of the inspection in order to require immediate correction of the deficiency.**

**(b) For the purposes of this section, "serious operational deficiency" means,**

- **failure to treat drinking water in accordance with this Act or the regulations;**
- **failure to undertake drinking water sampling or testing in accordance with this Act and the regulation;**
- **failure to install or maintain continuous monitoring and alarm equipment in accordance with the Act or the regulation; and**
- **any other prescribed act or omission.**

**CELA RECOMMENDATION #23: The SDWA should be amended to include a public inspection procedure as follows:**

**(1) Any person may require the Investigation and Enforcement Branch to investigate an alleged offence under this Act or regulations.**

**(2) The requirement for an investigation under subsection (1) shall be in writing and shall include:**

- **description of the alleged offence;**
- **identity of the alleged offender, if known;**
- **summary of evidence supporting the allegation; and**
- **any other relevant material or documents**.

**(3) The requirement for an investigation under subsection (1) may be filed with the Investigation and Enforcement Branch, or with any local, district or regional Ministry office, which shall forthwith forward the requirement to the Investigation and Enforcement Branch.**

**(4) Upon receipt of the requirement for an investigation under subsection (1), the Investigation and Enforcement Branch shall:**

**(a) investigate all matters related to the alleged offence;**
**(b) complete the investigation within 120 days, or as soon as practicable after that date; and**
**(c) report the outcome of the investigation to the person who filed the requirement under subsection (1).**

**(5) Despite subsection (4), the Investigation and Enforcement Branch may refuse to investigate where:**

**(a) the requirement filed under subsection (1) is clearly frivolous and vexatious; and**
**(b) the Branch provides written notice of its refusal to investigate, with reasons, to the person who filed the requirement under subsection (1).**

**(6) The Minister may make regulations prescribing forms or any other matter related to requirements for investigation under subsection (1)**.

**CELA RECOMMENDATION #24: The SDWA should provide as follows:**

(a) **Section 116 of the SDWA should be amended by adding the words "or any other person" after the word "Minister", or in the alternative, the SDWA (and regulations and instruments thereunder) should be prescribed as being subject to Parts V and VI of the EBR; and**

**(b) any person may apply for judicial review of the Minister's exercise or non-exercise of any power, or performance or non-performance of any duty, imposed or conferred under this Act, whether or not the person is directly affected or has suffered special damages.**

**CELA RECOMMENDATION #25: The list of offences in section 136 of the SDWA should amended to include reference to the following sections of the Act:**

**(a) section 23(1);**
**(b) section 26;**
**(c) section 29;**
**(d) section 33, para. 3;**
**(e) section 47;**
**(f) section 61;**
**(g) section 64;**
**(h) section 67;**
**(i) section 71(3), para. 3 and 4;**
**(j) section 105(2);**
**(k) section 106(5) and (6);**
**(l) section 109(7), (11), (12); and**
**(m) section 110(4) and (14).**

**CELA RECOMMENDATION #26: The SDWA should be amended to impose minimum fines for the following offences:**

**(a) Section 138 is amended by adding a new subsection (4): "The minimum fine for offences under this section is $5,000 for a first offence, $10,000 for a second offence, and $20,000 for a third or subsequent offence"; and**

**(b) Section 139 is amended by adding a new subsection (4): "The minimum fine for offences under this section is $10,000 for a first offence, $20,000 for a second offence, and $40,000 for a third or subsequent offence".**

**CELA RECOMMENDATION #27: The SDWA should be amended to:**

**(a) provide that the Minister shall make, maintain, and, where necessary, revise regulations to establish drinking water standards that protect public health and safety;**

**(b) require the Minister to make regulations in relation to the following matters within 45 days of the Act's coming into force:**

- **source protection standards to protect raw water supplies;**
- **standards for treatment, testing, and monitoring of drinking water;**
- **drinking water quality standards;**
- **standards for the construction, operation and maintenance of drinking water systems;**
- **standards for notification, resampling, corrective action and public warnings where adverse test results are obtained;**
- **emergency response standards;**
- **quality management standards for drinking water systems; and**
- **standards for operator qualification, certification and training**;
- **requirements for MOE inspection, compliance and enforcement activities under the Act**; **and**

**(c) provide that when regulations are being made, reviewed or revised under the Act, the lack of full scientific certainty shall not be used as a reason for delaying or rejecting standards that will, or are likely to, mitigate or prevent drinking water health hazards.**

**CELA RECOMMENDATION #28: The SDWA should be amended to include a statutory review mechanism as follows:**

**(1) Five years after the coming into force of this Act, the Minister shall undertake a comprehensive and public review of the provisions and administration of this Act.**

**(2) The Minister shall, within one year of completing the review under subsection (1), submit a report on the review to the Legislative Assembly, including a description of any changes to the Act or its administration that the Minister may recommend.**

**(3) The review and report requirements imposed by this section may be delegated by the Minister to a committee of the Legislative Assembly designated or established for that purpose.**

**CELA RECOMMENDATION #29: Section 168(2) of the SDWA should be deleted, and section 168(1) should be amended as follows:**

**This Act comes into force on a day by proclamation of the Lieutenant Governor, or three months after the day that this Act receives Royal Assent, whichever is the earliest.**

In conclusion, CELA submits that the legacy of the Walkerton Tragedy should be the enactment of effective and enforceable drinking water legislation in Ontario. In our view, the Ontario government has a historic opportunity during the current parliamentary process to significantly improve and strengthen the SDWA in order to achieve this legacy.

November 27, 2002

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Richard D. Lindgren
Counsel