SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF THE ENVIRONMENT RE: PROPOSED DRINKING WATER REGULATION UNDER THE *SAFE DRINKING WATER ACT, 2002* EBR REGISTRY NO. RA03E0001

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PART I – INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") in relation to the draft regulation proposed by the Ministry of the Environment ("MOE") under the *Safe Drinking Water Act, 2002* ("SDWA").

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.[2] 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;*[3]
- applying under the *Environmental Bill of Rights* ("EBR") for a review of the need for the SDWA in Ontario;[4]
- submitting model water legislation to entrench watershed planning and water conservation in Ontario;[5]
- 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;[6]

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[1] Counsel, Canadian Environmental Law Association.
[2] 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.
[3] These documents are available at: www.cela.ca.
[4] 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.
[5] These documents are available at: www.cela.ca.
[6] *Ibid.*

- making submissions to the MOE on the discussion paper entitled *Proposed Components of a Safe Drinking Water Act*;[7]
- appearing before the Standing Committee on General Government to make submissions on the SDWA;[8] and
- participating as a member of Ontario's advisory committee on watershed-based source protection.

It is against this extensive background and experience that CELA has reviewed the draft regulation that the MOE has proposed under the SDWA. We have also had regard for the MOE "Compendium" that has accompanied the draft regulation.[9] To guide our review of the draft regulation, CELA has also considered the relevant findings and recommendations of the Part 1 and 2 Reports of the Walkerton Inquiry.

In summary, CELA supports the provisions of the draft regulation that largely duplicate current requirements under O.Reg. 459/00 and O.Reg. 505/01. However, we have serious concerns about other aspects of the draft regulation that attempt to "streamline" current requirements. We presume that such rollbacks are being proposed by the MOE in response to complaints expressed by owners and operators of drinking water systems that are presently caught by O.Reg. 459/00 and O.Reg. 505/01.[10] Similarly, we are concerned about some aspects of the draft regulation which attempt to impose new requirements that purportedly flow from the SDWA, or that are said to be responsive to recommendations from the Walkerton Inquiry.

For example, CELA submits that the draft regulation:

- will be ineffective, in and of itself, unless it is accompanied by other important implementing regulations, especially in relation to compliance/inspection, and operator training/certification;

- fails to define "surface water", and improperly defines groundwater "under the influence of surface water";

- entrenches drinking water quality standards before their adequacy has been reviewed by the Advisory Council on Drinking Water Quality and Testing Standards (which has yet to be established);

- prescribes eight classes of municipal and non-municipal drinking water systems, but only imposes an approval requirement for one class ("Municipal – Residential");

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[7] *Ibid.*
[8] *Ibid.*
[9] MOE, *Compendium to the Proposed Drinking Water Protection Regulation – Drinking Water Systems under the Safe Drinking Water Act* (n.d.).
[10] On this point, we note that Mr. Justice O'Connor recommended that variances from O.Reg. 459/00 or his Part 2 recommendations should not be granted for economic reasons: Part 2 Report, pp.473-74.

- allows drinking water systems to apply for relief from treatment requirements for up to 10 years; and

- contains inadequate public notification and "community right-to-know" provisions.

In light of these and other concerns, it is our view that a number of sections within the draft regulation should be amended, expanded or deleted before the regulation is finalized.

CELA's general and specific comments on the draft regulation are set out below.

PART II – GENERAL COMMENTS ON THE DRAFT REGULATION

As a preliminary observation, we note that the draft regulation is structured somewhat differently from most other regulations found under Ontario's environmental laws. In particular, we note that the substantive provisions of the regulation are immediately followed by schedules that set out "checklists" and additional text to prescribe the regulatory requirements. While this format departs from the usual practice of appending detailed schedules to the end of regulations, CELA has no objection to the proposed structure of the draft regulation. In general, we find this drafting approach to be efficient and user-friendly. Therefore, CELA recommends that to the greatest possible extent, the proposed structure and format should be retained in the finalized regulation.

CELA RECOMMENDATION #1: To the greatest possible extent, the structure and format of the draft regulation (e.g. schedules that immediately follow the relevant section) should be retained in the finalized regulation.

Our second general comment relates to the need to ensure that the regulation (and, indeed, the SDWA) is fully subject to the *Environmental Bill of Rights* ("EBR"). In CELA's view, it is imperative that the new statutory regime for protecting drinking water should be covered by the EBR (especially Parts II, IV, V, VI, and VII).[11] EBR coverage would enhance provincial and local accountability for drinking water safety, and would assist in ensuring public participation in standard-setting and permit-issuing under the SDWA.

To date, however, we have received no indication from the MOE as to when – or whether – the SDWA and regulations thereunder will be subject to the EBR. Therefore, CELA

[11] For example, if the SDWA is subject to the EBR, then Ontarians could file Applications for Review under Part IV of the SDWA in relation to outdated or inadequate drinking water policies, regulations, standards, guidelines or instruments. Similarly, if SDWA approvals were subject to Part II of the EBR, then mandatory public notice, comment and appeal provisions under the EBR would be applicable to such approvals. In addition, the "whistle blower" protections in Part VII of the EBR should be applicable to the SDWA so that drinking water system workers could report non-compliance to the MOE without fear of being fired, disciplined, or demoted.

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recommends that existing regulations under the EBR should be amended as soon as possible to specify that the SDWA and regulations thereunder are caught by the EBR.

CELA RECOMMENDATION #2: O.Reg. 73/94 and O.Reg. 681/94 should be amended forthwith to ensure that the SDWA and regulations thereunder are fully subject to the EBR.

Our third general comment pertains to the relationship between the draft regulation and the compliance framework under the SDWA. CELA notes, for example, that timely and effective inspection, investigation and enforcement activities will be necessary to ensure compliance with the treatment, testing, sampling and reporting requirements under the regulation. CELA further notes that the SDWA expressly requires the Minister to promulgate a "compliance" regulation on or before Part VIII (Inspections) comes into force.

To date, however, we have seen no indication from the MOE as to when Part VIII will be proclaimed into force. More importantly, we have not seen a draft compliance regulation from the MOE. Because it is critically important to have the inspection framework in place in order to enforce the requirements of the new regulation, CELA therefore recommends that the MOE must expeditiously develop (and solicit public comment on) a draft compliance regulation. In addition, CELA submits that the compliance/inspection framework should be quickly and explicitly established under the SDWA so that the Ontario government can provide necessary resources to ensure proper staffing and programs in relation to drinking water safety.

CELA RECOMMENDATION #3: The MOE should immediately prepare, and solicit public comment on, the compliance regulation required by section 169(4) of the SDWA.

Our fourth general comment relates to the issue of operator training and certification under the SDWA. In CELA's view, ensuring that operators are properly trained and certified will go a long way in securing compliance with the requirements of the draft regulation. In making this point, we are also mindful of the continuing attempts by some representatives of the Ontario government (e.g. MPP Bill Murdoch) to blame the Walkerton Tragedy solely on the manager and operators of the Walkerton drinking water system. First, it must be noted that such arguments were considered and rejected by Mr. Justice O'Connor in the Part 1 Report.[12] Second, to our knowledge, the MOE has not released for public comment any draft regulations under the SDWA which update and strengthen current requirements under O.Reg. 435/93. Given the importance of operator training/certification, CELA recommends that the MOE should expeditiously prepare (and solicit public comment on) the new successor to O.Reg. 435/93.

CELA RECOMMENDATION #4: The MOE should immediately prepare, and solicit public comment on, the successor regulation to O.Reg. 435/93.

[12] Part 1 Report, pp.268-71.

As described above, CELA generally has no comments in relation to the provisions of the draft regulation that largely duplicate current requirements under O.Reg. 459/00 and O.Reg. 505/01. Therefore, the remainder of this submission will not address the following sections of the draft regulation: section 5 (minimum treatment); section 7 (weekly flushing); section 8 (operational checks, sampling and testing); section 9 (testing of samples); section 10 (reporting adverse test results); section 11 (corrective action); section 16 (record retention); section 17 (forms); and section 18 (notice to interested authorities).

PART III – SPECIFIC COMMENTS ON THE DRAFT REGULATION

(a) Definitions (Section 1)

First, we note that there are repeated references to "the Act" throughout the draft regulation, as well as references to other related statutes. For the purposes of greater certainty and clarity, CELA recommends that the phrase "the Act" should be expressly defined in section 1(1) as the SDWA.

CELA RECOMMENDATION #5: The phrase "the Act" should be expressly defined in section 1(1) of the draft regulation as the SDWA.

Second, we note that section 1(2) of the draft regulation describes eight classes of drinking water systems for the purposes of the regulation. We further understand that one defined class (e.g. "Non-Municipal – Other – Small") will not be subject to any requirements under the regulation. CELA is unclear on the rationale for describing, but not regulating, this class of drinking water system. Indeed, given the existence of variance procedures under the regulation, it is highly questionable why certain small, non-municipal drinking water systems would be defined but not regulated. If the concern is that the regulatory requirements are too onerous for small, non-municipal systems, then the appropriate response should be the issuance of time-limited variances on a case-by-case basis and/or the provision of technical and financial assistance to facilitate compliance with regulatory requirements. Accordingly, CELA recommends that the MOE should reconsider the proposed exclusion of such systems from regulatory requirements.

CELA RECOMMENDATION #6: The MOE should reconsider the proposed exclusion of "Non-Municipal – Other – Small" drinking water systems from regulatory requirements.

Third, CELA notes that section 1(3) of the draft regulation provides that drinking water systems using surface water for the raw water supply includes systems using groundwater under the influence of surface water. We further note that section 1(4) "deems" groundwater systems as being "under the influence" on the basis of various physical

characteristics. In our view, this deeming provision is problematic in theory and practice, and therefore should be revised by the MOE.

For example, paragraph 1 of section 1(4) deems a groundwater system "under the influence" if the well does not have a "watertight casing" that extends "at least 6 metres" below ground level. However, if it is unclear whether the "watertightness" needs to be verified (e.g. by using video inspection equipment) initially or on a continuing basis by the professional engineer who completes the Schedule 4-1 engineering evaluation report. Similarly, while it seems that the "6 metre" criterion would deem Well 5 at Walkerton as being "under the influence" since it only had a 5 metre casing, it would not catch the deeper Wells 6 and 7 at Walkerton, despite the fact that these wells, too, displayed indications of being "under the influence".[13] In our view, this points out the danger in relying upon simple physical measurements for "deeming" groundwater systems to be "under the influence".

This problem is further reflected in paragraphs 2 to 4 of section 1(4), which attempt to "deem" groundwater systems on the basis of their physical distance to "surface water". First, the term "surface water" is not defined either in the draft regulation or in the SDWA. Thus, it is unclear whether this term catches dug ponds, intermittent watercourses, swamps, or springs (such as those near Wells 5, 6 and 7 at Walkerton), or whether this term means permanent, natural watercourses such as lakes, rivers and streams.[14] In light of this ambiguity, CELA recommends that "surface water" should be expressly defined for the purposes of section 1(4).

CELA RECOMMENDATION #7: The term "surface water" should be expressly defined for the purposes of section 1(4) of the draft regulation.

Furthermore, while the physical proximity of a well to surface water <u>might</u> raise the possibility that a well is "under the influence", there may not be any actual "influence" unless there is a demonstrable hydraulic connection between the surface water and groundwater, as indicated by the factors described below. In addition, we are unaware of the hydrogeological or scientific basis for the "deeming" distances prescribed in section 1(4) (e.g. 15, 100 and 500 metres). More importantly, mere physical proximity is not necessarily the best way to determine whether a well is "under the influence". For example, in the Part 1 Report, Mr. Justice O'Connor discussed the various indicators of surface water influence, none of which rely upon simple measurements of distance. In particular, the indicators identified by Mr. Justice O'Connor include:

- **biological indicators** in the raw groundwater (e.g. fecal bacteria, algae, aerobic sporeformers, *Giardia*, *Cryptosporidium,* and human enteric viruses);

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[13] Part 1 Report, pp.163-67. Well 6 had a 12.5 metre casing, while Well 7 had a 13.7 metre casing.

[14] It should be noted that the definition of "water" under the *Ontario Water Resources Act* includes natural, artificial, and intermittent watercourses as well as springs (which can serve as entry points for contaminants to reach groundwater).

- **physical/chemical indicators** in the raw groundwater (e.g. fluctuations in turbidity, organic nitrogen, nitrates, total organic carbon, pH, and electrical conductivity); and

- **hydrogeological indicators** (e.g. hydraulic connections, bedrock fracturing, overburden thickness/breaches, etc.).[15]

Accordingly, CELA recommends that these indicators should be added to the section 1(4) deeming provision. After all, it is likely that the engineer's report under subsection 1(5) (see below) will be largely addressing these indicators, rather than the physical distance between the well and the nearest surface water. In our view, the simplest solution may be to simply add two new paragraphs to section 1(4) which provide as follows:

> 5. A drinking water system that obtains from a well whose raw water supply contains or is characterized by one or more of the prescribed indicators of surface water influence.
>
> 6. The following factors are prescribed as indicators of surface water influence:
>
> (a) presence of fecal bacteria, algae, aerobic sporeformers, *Giardia*, *Cryptosporidium,* or human enteric viruses in the raw water supply;
>
> (b) fluctuations in turbidity, organic nitrogen, nitrates, total organic carbon, pH, and electrical conductivity in the raw water supply; or
>
> (c) presence of fractured bedrock, thin overburden, significant breaches of the overburden, or hydraulic connection between the raw water supply and any surface water.

CELA RECOMMENDATION #8: Section 1(4) of the draft regulation should be amended to include reference to biological, physical/chemical, and hydrogeological indicators of surface water influence.

CELA is also concerned about the suggestion in section 1(5) that the deeming provision in subsection (4) does not apply if there is a report from a "professional engineer, hydrologist, geologist or hydrogeologist that the raw water supply is not under the direct influence of surface water." First, we note that only the term "professional engineer" is defined in section 1 of the draft regulation, but there are no definitions of "hydrologist", "geologist", or "hydrogeologist". Thus, aside from "professional engineers", it is unclear who would be suitably qualified to offer opinions, or sign off reports, regarding surface water influence. More importantly, we are highly doubtful that most geologists or hydrologists would have sufficient expertise or training to properly conclude that groundwater is – or is not – "under the influence". Indeed, this determination seems to be largely within the domain of an experienced hydrogeologist. Therefore, CELA

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[15] Part 1 Report, pp.123-24.

recommends that the terms "geologist" and "hydrologist" should be deleted from section 1(5), and further recommends that "hydrogeologist" should be defined in section 1.

CELA RECOMMENDATION #9: The terms "geologist" and "hydrologist" should be deleted from section 1(5) of the draft regulation, and the term "hydrogeologist" should be defined in section 1 of the draft regulation.

Finally, it is unclear in the draft regulation what happens when there is legitimate disagreement over a report that claims that a well is not "under the influence" (e.g. in order to evade surface water treatment requirements). At the Walkerton Inquiry, for example, there was consensus that Well 5 was "under the influence", but there was considerable debate whether Wells 6 and 7 were vulnerable to surface water influence, and it took extensive expert evidence to sort out this matter. In light of these kinds of disputes, CELA submits that there should be rigorous MOE and public review of reports filed under section 1(5). In other words, the mere filing of a report should not automatically oust the application of section 1(4), particularly where the report contains questionable conclusions, insufficient data, or improper analysis (e.g. use of inappropriate computer modelling to determine groundwater direction, velocity, etc.). In our view, reports filed under section 1(5) should be made available for public comment, and should not be effective in ousting section 1(4) unless reviewed and accepted by the Director.

CELA RECOMMENDATION #10: Section 1(5) of the draft regulation should be amended to provide that the engineer's report shall be made available for public comment, and that the engineer's report must be reviewed and accepted by the Director in order to exclude the application of section 1(4).

(b) Prescribed Water Quality Standards (Section 2)

CELA remains concerned that the current drinking water quality standards are simply being rolled over to the new SDWA regulation without reviewing their adequacy for protecting public health and safety. In fact, Mr. Justice O'Connor noted that provincial drinking water quality standards for certain chemical parameters are less stringent than those imposed for the same parameters in other jurisdictions.[16] Similarly, Mr. Justice O'Connor noted that for some parameters (e.g. viruses, *cryptosporidium parvum*, etc.), no standards have been established under O.Reg. 459/00.[17] In addition, CELA points out that of the various physical/chemical standards proposed under the draft regulation, 23 parameters only have "interim" standards.

Clearly, there is considerable unfinished work in relation to these "interim" standards, as well as an overarching need to formally review (and, where necessary, revise) all drinking water standards under the SDWA. Indeed, Mr. Justice O'Connor identified a number of drinking water contaminants that require further scrutiny within Ontario's standard setting process (e.g. nitrates, pesticides, herbicides, lead, disinfection by-products, fluoride, water treatment chemicals, endocrine-disrupting substances, and

[16] Part 2 Report, pp.165-171, and Appendix A.
[17] Part 2 Report, pp.160-64.

pharmaceuticals).[18] Accordingly, CELA submits that before current drinking water standards are entrenched under the SDWA, they should be formally (and expeditiously) reviewed in a public and thorough manner to ensure that they are sufficiently protective of public health and adequately reflect the precautionary principle endorsed by Mr. Justice O'Connor.[19]

CELA RECOMMENDATION #11: Ontario's drinking water quality standards should be formally reviewed and/or revised before they are entrenched as prescribed standards under the SDWA.

The need to review and/or revise drinking water quality standards under the SDWA necessarily raises the need to immediately establish the Advisory Council on Drinking Water Quality and Testing Standards. On this point, we note that section 4(1) of the SDWA imposes a mandatory duty on the Minister to establish the Advisory Council. However, to our knowledge, the Minister has taken no steps to create the Advisory Council or to appoint its members. In CELA's view, the Advisory Committee must be established immediately, especially since the MOE is now on the verge of finalizing the critically important drinking water quality standards under the SDWA.

At the very least, the Advisory Council should have the opportunity to review and make recommendations in relation to the "interim" standards and the above-noted drinking water contaminants flagged by Mr. Justice O'Connor as requiring closer scrutiny. Otherwise, if current standards are simply rolled over to the SDWA, CELA is concerned that such standards will remain unreviewed and unrevised for a considerable period of time. In our view, the optimum time to establish the Advisory Council, and the optimum time to review and revise drinking standards, is now, <u>before</u> the standards are entrenched under the SDWA.

CELA RECOMMENDATION #12: The Minister must immediately establish the Advisory Council on Drinking Water Quality and Testing Standards, and must direct the Advisory Council to review and make recommendations in relation to drinking water quality standards <u>before</u> they are entrenched under the SDWA.

CELA remains unclear on the rationale for the "deeming" provisions under section 2(2) of the draft regulation. In effect, this provision "deems" drinking water system owners and operators to be in compliance with the prescribed drinking water standards, even where water testing reveals exceedances of prescribed standards, as long as the proper "corrective action" is taken. For example, as long as resampling is carried out after initial testing results show the presence of total coliforms, then the owner/operator is "deemed" to be in compliance. Alarmingly, had this "deeming" provision been in place prior to the Walkerton Tragedy, then the Walkerton drinking water system would have been deemed to be in compliance since resampling was apparently carried out after microbiological contaminants were detected from time to time.

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[18] Part 2 Report, pp.165-66, and pp.174-78.
[19] Part 2 Report, p.150, Recommendation 19.

In our view, the fundamental problem with this deeming provision is that it is not limited or restricted in any fashion, and therefore could be used as a "shield" by owners/operators whose systems display chronic non-compliance with drinking water quality standards. If, for example, the owners/operators are deemed to be in compliance pursuant to section 2(2), then it would appear to be exceptionally difficult (if not impossible) to prosecute or use mandatory abatement to force chronic offenders to take remedial steps to prevent continuing problems (as occurred in Walkerton). CELA submits that it is unacceptable to pursue owners/operators only in situations where the prescribed corrective action was not undertaken. For the purposes of protecting public health, it is far preferable to require owners/operators to take proactive steps to remedy the underlying problem or to prevent operational deficiencies in the first place, as opposed to taking *ex post facto* "corrective action" (e.g. resampling, flushing mains, etc) every time there is a problem.

Therefore, if there is a need to retain the deeming provision in section 2(2), then CELA recommends that it needs to be limited either qualitatively or quantitively (e.g. the subsection does not apply to X amount of exceedances within one calendar year). In particular, section 2(2) could be qualified by a further provision stating that the deeming provision does not apply where the drinking water system does not comply with prescribed standards under Schedule 2-1 or Schedule 10-1 on three or more occasions within a calendar year. This clarification would better enable the MOE to go after chronic non-compliance by way of orders or prosecutions without running afoul of the deeming provision in section 2(2).

CELA RECOMMENDATION #13: The draft regulation should be amended to provide that the "deeming" provision in section 2(2) does not apply to chronic non-compliance with prescribed drinking water quality standards.

(c) Application of Act (Section 3)

Section 3(1) of the draft regulation prescribes the classes of non-municipal drinking water systems that will be regulated under the SDWA. Section 3(2) then identifies the various provisions of the SDWA that apply to such non-municipal systems. While we agree with the SDWA provisions currently listed in section 3(2), we note that this list conspicuously lacks any reference to section 12 of the SDWA (e.g. the requirement to use certified operators).

In our view, regardless of whether a system is municipal or non-municipal, it is important to ensure that the system operator is properly trained and qualified. In addition, having certified operators for non-municipal systems should increase the likelihood of compliance with the prescribed standards. Therefore, CELA recommends that section 3(2) should be amended to include a reference to section 12 of the SDWA. To the extent that different levels of expertise may be required for large and small classes of non-municipal systems, this issue can be addressed in the successor regulation to O.Reg. 435/93.

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In addition to omitting section 12 of the SDWA, we further note that the section 3(2) list excludes the following SDWA provisions:

- section 11(3) [use of non-accredited laboratories];
- sections 15 and 16 [operational plans];
- section 105 [orders of provincial officers regarding contraventions]; and
- section 119 [orders to prepare operational plans].

In our view, these sections should also be listed in section 3(2) of the draft regulation.

CELA RECOMMENDATION #14: Section 3(2) of the draft regulation should be amended to include references to sections 11(3), 12, 15, 16, 105 and 119 of the SDWA.

CELA further understands that section 3(7) of the draft regulation purports to exclude most regulatory requirements from drinking water systems that obtain all of its water from another drinking water system regulated under the SDWA. In our view, this exclusion is too broadly worded, as it would appear to exclude designated facilities (e.g. rural schools with cisterns) that receive their water via bulk deliveries from other systems. On this point, we note that Mr. Justice O'Connor recommended that bulk delivery of drinking water should be regulated by the provincial government.[20] However, to our knowledge, no such regulations have been proposed by the MOE under the SDWA.

Therefore, until such regulations are in place, section 3(7) should be amended to provide that the exclusion only applies if there is a direct physical connection between the system supplying the water and the system obtaining the water.

CELA RECOMMENDATION #15: Section 3(7) of the draft regulation should be amended to provide that its exclusion only applies where there is a direct physical connection between the system supplying the water and the system receiving the water.

(d) Approvals Status (Section 4)

Under section 4 of the draft regulation, only one class of municipal drinking water systems (e.g. "Municipal – Residential") will be required to obtain an approval under the SDWA. All other municipal and regulated non-municipal drinking water systems would not be required to obtain a SDWA approval. In our view, this attempt by the MOE to limit the approval requirement to a single class of municipal drinking water systems is both puzzling and problematic.

[20] Part 2 Report, p.483, Recommendation 87.

First, Mr. Justice O'Connor recommended that all municipal drinking water systems should be required to obtain an approval under the SDWA. In particular, Mr. Justice O'Connor recommended that the MOE should require "owners of municipal water systems to obtain an owner's licence for the operation of their waterworks".[21] In other words, he did not attempt to delineate between types of municipal drinking water systems for the purposes of approval requirements under the SDWA. Thus, the attempt in the draft regulation to limit the approval requirement to a single class of municipal system is inconsistent with Mr. Justice O'Connor's recommendation on this very issue.

Second, we are unaware of any compelling reasons for the proposed exclusion of all types of municipal drinking water systems except "Municipal – Residential" for approval purposes. In CELA's view, in the absence of any cogent legal or policy argument for the proposed exclusion, <u>all</u> municipal drinking water systems should be subject to the approval requirement under the SDWA.

Third, the attempt to exclude the approval requirement from all but one class of drinking water system overlooks the important reasons for having approvals in the first place. In CELA's view, approvals represent an extremely important and useful regulatory tool, particularly since prosecutions or orders can be used to secure compliance with approval requirements. Moreover, approvals enjoy a high degree of flexibility since terms and conditions can be imposed to address site-specific needs or conditions. In addition, terms and conditions in an approval can be easily amended to reflect changes in circumstances or new information. Accordingly, CELA submits that the proposed exclusion of the approval requirement for all but one class of drinking water system has the effect of denying the MOE (and the public) of the many legal and practical benefits of tailoring approvals for individual systems.

CELA RECOMMENDATION #16: The draft regulation should be amended to ensure that all municipal drinking water systems are subject to approval requirements under the SDWA.

In our view, the above-noted benefits of approvals also apply generally to non-municipal drinking water systems. However, section 4 of the draft regulation purports to exclude the approval requirement for all classes of non-municipal systems, such as large, privately owned communal systems serving major residential developments. CELA submits that the residents in such developments should not be treated or protected any differently than residents served by municipal systems. If an approval requirement is going to exist for the "Municipal – Residential" class, then it should also apply to "Non-Municipal – Residential" class.

More fundamentally, the proposed exclusion of the approval requirement seems to be an indirect attempt to usher in a "permit-by-rule" or "standardized approval" approach for drinking water systems other than "Municipal – Residential". In our view, it is unsatisfactory to exclude the approval requirement merely on the basis of an engineer's report certifying that system has all necessary equipment to comply with certain

[21] Part 2 Report, p.422.

regulatory requirements (see section 7 of Schedule 4-1). CELA submits that certifying compliance with generic, "one-size-fits-all" provincial standards is an inadequate substitute for carefully tailored, site-specific approvals for individual drinking water systems. For this reason, CELA recommends that the draft regulation's "deemed" revocation of OWRA approvals should be deleted, and the draft regulation should be amended to provide that all municipal and regulated non-municipal systems should be subject to appropriate approval requirements under the SDWA.

CELA RECOMMENDATION #17: Section 4(5) of the draft regulation should be deleted, and the draft regulation should be amended to ensure that all municipal and regulated non-municipal systems are subject to appropriate approval requirements under the SDWA.

With respect to Schedule 4-1 under the draft regulation, we note that once an engineer's report is filed, there is no obligation to update the report, or to otherwise certify compliance with regulatory requirements, for another 5 years for surface water systems and 10 years for groundwater systems. In CELA's view, these timeframes are excessive, particularly since significant changes in land use can occur in timeframes considerably shorter than 5 or 10 years. For example, after the engineer's report is filed, there is no obligation to update the report for a decade, even if intensive livestock operations or other industrial activities are established near the raw water supply in the meantime. Therefore, if the engineer's report is going to be retained under the draft regulation, then CELA recommends that the reporting timeframes should be significantly reduced (e.g. 3 years for surface water systems and 5 years for groundwater systems) to ensure that the report remains valid and accurate.

CELA RECOMMENDATION #18: The draft regulation should be amended to significantly reduce the reporting timeframes for engineers' reports under Schedule 4-1.

In the further alternative, if engineers' reports are going to serve as the basis for excluding some or most approval requirements under the SDWA, then the content requirements for the reports should be significantly expanded to ensure that all relevant matters are considered by the engineer. For example, in completing the report, the engineer should certify that he/she has: conducted site visits; examined all sampling results for the preceding 24 months; reviewed all relevant hydrogeological reports; inspected monitoring, maintenance, repair and operating logs for the preceding 24 months; considered current or future threats to the raw water supply; and other prescribed matters. In our view, merely requiring the engineer report to certify that all necessary equipment is on hand does not go nearly far enough to ensure that the drinking water system is designed, constructed and operated in a manner that protects public health and safety.

CELA RECOMMENDATION #19: The draft regulation should significantly expand the content requirements for the engineer's report under Schedule 4-1.

(e) Relief from Treatment Requirements (Section 6)

In principle, CELA has no objection to allowing temporary relief from treatment requirements, particularly since Mr. Justice O'Connor specifically recommended the creation of variance procedures under the SDWA.[22] However, it is our view that draft regulation's provisions regarding the application for relief should be considerably tightened up. In particular, CELA submits that the draft regulation should describe not only the content for the application, but should also specify the approval criteria to be considered by the Director when deciding to accept or reject the variance application. For example, the draft regulation should provide that the proposed variance shall not be approved unless the Director is of the opinion that granting the variance is consistent with the purpose of the SDWA and will not result in a drinking water health hazard. The draft regulation should also expressly empower the Director to impose any necessary terms and conditions if a variance is granted.

CELA RECOMMENDATION #20: Section 6 of the draft regulation should be amended to provide that a proposed variance shall not be granted unless the Director opines that granting the variance is consistent with the purpose of the SDWA and will not result in a drinking water health hazard. Section 6 of the draft regulation should further empower the Director to issue appropriate terms and conditions when granting a variance.

We further note that the draft regulation purports to allow variances that last up to a decade (e.g. 5 years plus the 5 year renewal option). In CELA's view, this extensive period of time is far too long, particularly since significant changes in local circumstances can occur in much shorter timeframes, as described above. Therefore, CELA submits that the maximum term for a variance from treatment requirements should not exceed three years. To best protect public health and safety, non-compliant systems should not be given a decade-long exemption from treatment requirements. Instead, the objective should be to either phase out non-compliant systems, or ensure that they are upgraded as soon as possible to meet current treatment requirements.

CELA RECOMMENDATION #21: Section 6 of the draft regulation should be amended to specify that the maximum term for relief from treatment requirements shall not exceed three years in total.

(f) Warning Notices and Elections (Sections 12 and 13)

Section 12 of the draft regulation requires drinking water system owners to post a warning notice "in a prominent location" when prescribed microbiological testing is not being carried out, or when an adverse test result is reportable (e.g. microbiological indicator of adverse water quality) and the prescribed "corrective action" is not carried out, or consists of boiling water or ceasing water use.

[22] Part 2 Report, pp.473-74, Recommendation 82.

In our view, this public notice obligation is too narrowly prescribed. First, unlike section 13 and Schedule 13-1 of the draft regulation, section 12 contains no detailed requirements regarding the wording, size, design or placement of warning notice. Second, and more importantly, section 12 seems to contemplate the actual "posting" of a sign or notice at a single physical location (e.g. billboard? telephone pole? entrance to City Hall?). For most large municipal and non-municipal systems serving major residential developments, the posting of notices at a handful of locations (even if "prominent") will not provide timely or effective warnings to drinking water consumers. This is especially true for vulnerable consumers (e.g. young, old or immunosuppressed persons) who require prompt warnings about drinking water problems, particularly where there is a drinking water health hazard.

It should also be noted that the draft regulation's public notice provisions pale in comparison to those found under the U.S. SDWA. In particular, the Public Notification Rule (65 FR 25982) establishes a three-tiered system of public notification: (a) Tier 1 requires public notice (via media outlets) within 24 hours where there is potential for human health to be immediately impacted; (b) Tier 2 requires public notice as soon as possible where there are contaminant exceedances or improper treatment, but no immediate impact on human health; and (c) Tier 3 requires public notice annually where there is failure to follow a drinking water standard that does not have an impact on human health (e.g. inadequate sampling). These public notification requirements are additional to the annual "consumer confidence reports" under the U.S. SDWA (see below).

Accordingly, CELA recommends that where public warnings are required under section 12, system owners should not only post warning notices, but should also disseminate them to drinking water consumers through appropriate means (e.g. personal delivery, media advisories on radio/television/newspapers, website posting, etc.) within 24 hours.

CELA RECOMMENDATION #22: Section 12 of the draft regulation should be amended to require drinking water system owners to not only "post" warning notices, but also to disseminate such notices to drinking water consumers through appropriate means within 24 hours.

Section 13 of the draft regulation permits certain non-municipal systems to post warning notices if prescribed treatment and testing requirements are not being followed. However, this option is generally not available where such systems are required by law to provide potable water. In CELA's view, section 13 should include a further provision that the warning notice shall not be removed unless there is full compliance with prescribed treatment and testing requirements.

CELA RECOMMENDATION #23: Section 13 of the draft regulation should be amended to provide that the warning notice shall not be removed by the owner unless and until the drinking water system complies with prescribed treatment and testing requirements.

(g) Information and Annual Reports (Sections 14 and 15)

Section 14 of the draft regulation prescribes the types of information to be made available for public inspection during normal business hours, while section 15 sets out the content requirements for annual reports that are to be filed with the Director by the drinking water system owner. Significantly, the draft regulation purports to delete the current obligation upon owners under O.Reg. 459/00 to file (and make publicly available) quarterly reports.

In CELA's view, these sparse provisions do not adequately implement the "community right-to-know" principle. On this point, we note that Mr. Justice O'Connor clearly identified the importance of transparency and public access to information in the context of drinking water safety.[23] In fact, Mr. Justice O'Connor endorsed the concept of "consumer confidence reports" that are routinely sent to consumers under the auspices of the U.S. SDWA:

> In regard to customer reports, water providers should report perhaps twice a year in bill-stuffer form. More detailed information should be available to any member of the public on the supplier's Web site or at its premises…
>
> Although the current Ontario Regulation 459/00 does not require summary reporting directly to the consumer, such reporting has become accepted practice in the United States. Many U.S. water providers devote more time and attention than is required by regulation to assuring their customers that their water does not just barely meet the quality standards but exceeds them by increasing margins.
>
> It should be understood that the purpose of such reports is to provide consumers with comprehensible summary information, not to limit their access, or that of interested non-governmental organizations, to the raw data and reports that are on file at the MOE.[24]

In contrast to the advanced "community right-to-know" practices in the United States, Ontario's draft regulation still does not require summary reporting (e.g. consumer confidence reports) directly to users of drinking water systems regulated under the SDWA. Instead, system owners in Ontario are only obliged to inform consumers where they can access relevant information. In our view, this rudimentary arrangement does not constitute appropriate or comprehensive reporting to the public, and at best, it will mean that only a small subset of consumers will actually access information about drinking water safety. Moreover, the proposed approach still improperly places the onus on drinking water consumers to initiate steps to hunt/gather basic information that they should receive directly from the system owner. Clearly, the annual reports under section 15 are not the provincial equivalent to consumer confidence reports found south of the border.

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[23] Part 2 Report, p.469.

[24] Part Report, pp.261-62 (footnotes omitted).

On this point, it should be noted that the Consumer Confidence Report Rule (40 CFR, Part 141, Subpart O) under the U.S. SDWA requires all community water systems[25] to not only prepare but also distribute annual water quality reports to consumers regarding water sources, detected contaminants, compliance levels, and educational information. These reports are typically mailed to consumers, although larger systems (serving 100,000 persons or more) may also post their report on the internet. The purpose of this Rule is to improve public health protection through the provision of key information to allow drinking water consumers to make informed choices about potential health risks arising from the quality, treatment and management of the drinking water supply. In particular, community water systems in the U.S. must include the following minimum information in the consumer confidence reports:

- the lake, river, aquifer or other source of the drinking water;
- a brief summary of the susceptibility to contamination of the local drinking water source, based on source water assessments currently underway;
- how to get a copy of the water system's complete source water assessment;
- the level (or range of levels) of any contaminant found in local drinking water, as well as EPA's health-based standard (maximum contaminant level) for comparison;
- the likely source of that contaminant in the local drinking water supply;
- the potential health effects of any contaminant detected in violation of an EPA health standard, and an accounting of the system's actions to restore safe drinking water;
- the water system's compliance with other drinking water rules;
- an educational statement for vulnerable populations about avoiding *Cryptosporidium*;
- educational information on nitrate, arsenic or lead in areas where these contaminants are detected above 50% of EPA's standard; and
- phone numbers of additional sources of information, including the water system and EPA's Safe Drinking Water Hotline.[26]

Having regard for the U.S. SDWA precedent, CELA strongly recommends that section 15 of the draft regulation should be amended to impose a duty on drinking water system owners to prepare and submit consumer confidence reports to all users served by the system. At a minimum, this amendment should prescribe details respecting the content,

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[25] Systems with 15 or more connections serving 25 or more persons.

[26] "Consumer Confidence Reports: Final Rule" (August 1998), EPA 816-F-98-007.

timing, and distribution of consumer confidence reports to Ontario residents. For example, the amended section 15 should specify that the consumer confidence report shall, *inter alia*, address the following matters:

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

CELA RECOMMENDATION #24: Section 15 of the draft regulation should be amended to require drinking water system owners to prepare and send periodic "consumer confidence reports" to all users served by the system.

PART IV – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

CELA has no comments or concerns about aspects of the draft regulation that largely duplicate existing regulatory requirements. However, CELA is greatly concerned that other aspects of the draft regulation attempt to rollback or "streamline" current regulatory requirements. Similarly, CELA is concerned about provisions of the draft regulation that purport to impose "new" requirements that the MOE claims are responsive to the SDWA and/or the recommendations of Mr. Justice O'Connor.

For the foregoing reasons, CELA recommends that the draft regulation should be substantially amended before it is finalized and proclaimed into force under the SDWA. Other regulatory reform will also be necessary to make the draft regulation effective and enforceable. In particular, CELA makes the following recommendations:

CELA RECOMMENDATION #1: To the greatest possible extent, the structure and format of the draft regulation (e.g. schedules that immediately follow the relevant section) should be retained in the finalized regulation.

CELA RECOMMENDATION #2: O.Reg. 73/94 and O.Reg. 681/94 should be amended forthwith to ensure that the SDWA and regulations thereunder are fully subject to the EBR.

CELA RECOMMENDATION #3: The MOE should immediately prepare, and solicit public comment on, the compliance regulation required by section 169(4) of the SDWA.

CELA RECOMMENDATION #4: The MOE should immediately prepare, and solicit public comment on, the successor regulation to O.Reg. 435/93.

CELA RECOMMENDATION #5: The phrase "the Act" should be expressly defined in section 1(1) of the draft regulation as the SDWA.

CELA RECOMMENDATION #6: The MOE should reconsider the proposed exclusion of "Non-Municipal – Other – Small" drinking water systems from regulatory requirements.

CELA RECOMMENDATION #7: The term "surface water" should be expressly defined for the purposes of section 1(4) of the draft regulation.

CELA RECOMMENDATION #8: Section 1(4) of the draft regulation should be amended to include reference to biological, physical/chemical, and hydrogeological indicators of surface water influence.

CELA RECOMMENDATION #9: The terms "geologist" and "hydrologist" should be deleted from section 1(5) of the draft regulation, and the term "hydrogeologist" should be defined in section 1 of the draft regulation.

CELA RECOMMENDATION #10: Section 1(5) of the draft regulation should be amended to provide that the engineer's report shall be made available for public comment, and that the engineer's report must be reviewed and accepted by the Director in order to exclude the application of section 1(4).

CELA RECOMMENDATION #11: Ontario's drinking water quality standards should be formally reviewed and/or revised before they are entrenched as prescribed standards under the SDWA.

CELA RECOMMENDATION #12: The Minister must immediately establish the Advisory Council on Drinking Water Quality and Testing Standards, and must direct the Advisory Council to review and make recommendations in relation to drinking water quality standards <u>before</u> they are entrenched under the SDWA.

CELA RECOMMENDATION #13: The draft regulation should be amended to provide that the "deeming" provision in section 2(2) does not apply to chronic non-compliance with prescribed drinking water quality standards.

CELA RECOMMENDATION #14: Section 3(2) of the draft regulation should be amended to include references to sections 11(3), 12, 15, 16, 105 and 119 of the SDWA.

CELA RECOMMENDATION #15: Section 3(7) of the draft regulation should be amended to provide that its exclusion only applies where there is a direct physical

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connection between the system supplying the water and the system receiving the water.

CELA RECOMMENDATION #16: The draft regulation should be amended to ensure that all municipal drinking water systems are subject to approval requirements under the SDWA.

CELA RECOMMENDATION #17: Section 4(5) of the draft regulation should be deleted, and the draft regulation should be amended to ensure that all municipal and regulated non-municipal systems are subject to appropriate approval requirements under the SDWA.

CELA RECOMMENDATION #18: The draft regulation should be amended to significantly reduce the reporting timeframes for engineers' reports under Schedule 4-1.

CELA RECOMMENDATION #19: The draft regulation should significantly expand the content requirements for the engineer's report under Schedule 4-1.

CELA RECOMMENDATION #20: Section 6 of the draft regulation should be amended to provide that a proposed variance shall not be granted unless the Director opines that granting the variance is consistent with the purpose of the SDWA and will not result in a drinking water health hazard. Section 6 of the draft regulation should further empower the Director to issue appropriate terms and conditions when granting a variance.

CELA RECOMMENDATION #21: Section 6 of the draft regulation should be amended to specify that the maximum term for relief from treatment requirements shall not exceed three years in total.

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CELA RECOMMENDATION #23: Section 13 of the draft regulation should be amended to provide that the warning notice shall not be removed by the owner unless and until the drinking water system complies with prescribed treatment and testing requirements.

CELA RECOMMENDATION #24: Section 15 of the draft regulation should be amended to require drinking water system owners to prepare and send periodic "consumer confidence reports" to all users served by the system.