CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

Publication No. 442

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Ms. Anna Kime, Manager
Water Policy Branch
Ministry of the Environment
135 St. Clair Avenue West, 6th Floor
Toronto, Ontario
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Dear Ms. Kime:

RE: PROPOSED AMENDMENTS TO O.REG. 73/94
EBR REGISTRY NO. RA03E0012

These are the written comments of the Canadian Environmental Law Association ("CELA") in relation to the proposed amendments to O.Reg. 73/94 (EBR General Regulation).

These comments are being provided to you in accordance with the above-noted EBR Registry Notice in relation to this proposal.

As you know, CELA has played an extensive role in the development and implementation of the *Environmental Bill of Rights* ("EBR") in Ontario. We have also participated extensively in the development of the *Safe Drinking Water Act* ("SDWA") and the *Sustainable Water and Sewage Systems Act* ("SWSSA"). Accordingly, we have carefully reviewed the proposed amendments to O.Reg. 73/94, and we have concluded that the amendments are seriously deficient, as described below.

At the outset, we wish to be clear that CELA does not object to the minor "housekeeping" amendments that are being proposed (eg. updating names of ministries or legislation already caught by the EBR). However, CELA strongly objects to the Ministry's proposal to only prescribe regulation-making under the SDWA and SWSSA for the purposes of Part II of the EBR. In our view, this proposed EBR coverage is far too narrow in scope, and we strongly submit that the SDWA and SWSSA must be subject to the full range of EBR requirements.

In fact, CELA has been consistently advocating broad EBR coverage of Ontario's new drinking water regime. For example, CELA's initial brief on the MOE's *Proposed Components of a Safe Drinking Water Act* specifically recommended that "the SDWA (and regulations thereunder) should be prescribed as being fully subject to all Parts of the EBR, including Part V (application for investigation) and Part VI (right to sue)."[1]

[1] CELA, *Comments re Proposed Components of the Safe Drinking Water Act* (Sept. 2002), Recommendation 5.

Similarly, CELA's detailed brief on the SDWA recommended full EBR coverage:

> The SDWA should be prescribed as a statute to which the EBR applies. In particular, the SDWA (or regulations thereunder) should provide that:
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> (a) proposals to make or 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 to the SDWA and policies, regulations and instruments thereunder.[2]

Most recently, CELA's brief on the proposed SDWA drinking water regulation again recommended that "O.Reg. 73/94 and O.Reg. 681/94 [prescribed instruments] should be amended forthwith to ensure that the SDWA and regulations thereunder are fully subject to the EBR."[3]

Despite such recommendations, we have received no response from the MOE as to its intentions regarding EBR coverage of drinking water legislation. It was not until the proposed amendments to O.Reg. 73/94 were released a few weeks ago that CELA, other stakeholders, and the public at large learned, for the first time, that the EBR was only going to catch regulation-making under the SDWA and SWSSA.

On this point, it should be noted that the Regulatory Impact Statement ("RIS") on the EBR Registry Notice for the proposed amendments merely describes the fact that EBR is only going to apply to regulation-making process under the SDWA and SWSSA. In other words, the RIS provides no legal or policy grounds to explain why SDWA instruments will not be caught by the EBR's requirements regarding public notice/comment or third-party appeals (Part II). Similarly, the RIS fails to provide any legal or policy grounds explaining why the SDWA will not be caught by the EBR requirements regarding applications for investigation (Part V), or right to sue (Part VI). For this reason alone, the RIS (and the EBR Notice itself) must be regarded as deficient.

More importantly, in the absence of any compelling reasons for the limited EBR coverage, CELA submits that the MOE's proposal is wholly unjustified and unacceptable. Indeed, this limited EBR coverage can only be regarded as a roll-back in the sense that it reduces the EBR coverage that applied to previous legal regime for protecting drinking water (e.g. the OWRA). In

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[2] CELA, *Submissions to the Standing Committee on General Government re the Safe Drinking Water Act* (Nov. 2002), Recommendation 7.
[3] CELA, *Submissions to the MOE re Proposed Drinking Water Regulations under the SDWA* (March 2003), Recommendation 2.

our view, while there is good reason to move from the OWRA to the specialized SDWA, there is no justification or need to reduce the scope of EBR coverage in the context of drinking water. To the contrary, there are a number of policy and practical reasons why full EBR coverage should be maintained if not enhanced in relation to Ontario's new drinking water regime.

First, the EBR is an important law of general application in Ontario, and a number of significant environmental statutes are already subject to general EBR requirements. In this sense, the SDWA and SWSSA are conspicuous in their absence from key components of O.Reg. 73/94 (e.g. section 9 [application for investigation], section 10 [prescribed regulations], or section 11 [prescribed instruments]).

Second, we are unaware of any principle or reason why one of Ontario's most important environmental statutes – the SDWA – should remain largely exempt from EBR coverage. The fact that the SDWA (unlike some other laws subject to the EBR) is specifically designed to protect public health and safety is a factor that militates in favour of full – not restrictive – EBR coverage.

Third, it should recalled that one of the fundamental purposes of the EBR is to ensure meaningful public participation in relation to environmental permits, approvals, licences, certificates and other instruments. Public participation was also strongly endorsed by Mr. Justice O'Connor as an important component of the drinking water protection regime. However, because the proposed amendments to O.Reg. 73/94 have not been accompanied by proposed changes to O.Reg. 681/94 [prescribed instruments], we are unable to determine whether – or to what extent – approvals, licences, orders, or variances under the SDWA (or plans and reports approved under the SWSSA) will be prescribed as instruments for the purposes of the EBR. In our view, it is clearly necessary to prescribe such matters as "instruments" subject to section 22 of the EBR to ensure that there are appropriate public review/comment opportunities (and third-party appeal rights) before the MOE issues or approves such instruments.

Fourth, it should be further noted that another fundamental purpose of the EBR is to enhance legal accountability for non-compliance with environmental laws, regulations and instruments. Thus, it is necessary to prescribe the SDWA and SWSSA (and regulations and instruments thereunder) as being subject to EBR requirements for investigation and right to sue. Indeed, given the sweeping MOE budget and staff cuts documented by Mr. Justice O'Connor at the Walkerton Inquiry, it is our view that citizen enforcement of drinking water requirements should be facilitated – not eliminated -- under the EBR. After all, it was a private person – not an MOE inspector – who first brought the unfolding Walkerton tragedy to the attention of provincial officials. In CELA's view, this situation underscores the desirability of ensuring that there are effective means for citizen enforcement of drinking water requirements.

On this point, we note that Mr. Justice O'Connor specifically recommended that the MOE "should initiate a process whereby the public can require the Investigations and Enforcement Branch to investigate alleged violations of drinking water provisions" (Part 2 Report, Recommendation 76). We are aware that the SDWA attempts to address this recommendation by empowering the Minister to pass a "compliance" regulation that sets out "procedures to be followed to respond to a request from the public for investigation of an alleged offence under this

Act" (SDWA, section 168(4), para.2). However, the SDWA does not prescribe a firm deadline for the promulgation of this regulation, and no draft compliance regulations have been released to date. Moreover, this SDWA section appears to contemplate that the public can merely "request" – not "require" – investigations, and the section makes no reference to the Investigations and Enforcement Branch, contrary to the above-noted recommendation of Mr. Justice O'Connor. Thus, at the present time, it is impossible to determine when or if there will be a compliance regulation that effectively implements Recommendation 76 of the Part 2 Report. Therefore, as an interim step, the SDWA should be fully subject to the requirements of Part V of the EBR, at least until the MOE promulgates an appropriate compliance regulation under the SDWA. In our view, it is both necessary and desirable to avoid a situation where the SDWA is proclaimed in force, but the compliance regulation is not in place and the SDWA has not been prescribed under section 9 of O.Reg. 73/94.

Similarly, it should be recalled that Mr. Justice O'Connor declined to recommend the creation of a new statutory cause of action within the SDWA, primarily on the grounds that the existing legal framework (including Part VI of the EBR) already provided adequate remedies for aggrieved citizens. Therefore, CELA submits that it would now be inconsistent with Mr. Justice O'Connor's findings to roll-back the EBR so that it will not provide a right to sue under Part VI where there is non-compliance under the SDWA that may affect "public resources" (e.g. surface water or groundwater) that serve as drinking water sources.

For the foregoing reasons, CELA makes the following recommendations about the proposed amendments:

1. O.Reg. 73/94 should be amended to ensure that both the SDWA and SWSSA are fully subject to Parts IV, V, VI and VII of the EBR.

2. Section 4 of O.Reg. 73/94 (and O.Reg. 681/94) should be amended to ensure that all instruments under the SDWA and SWSSA are prescribed as either Class I, II or III instruments for the purposes of Part II of the EBR.

3. Section 9 of O.Reg. 73/94 should be amended to specifically list the SDWA and SWSSA as statutes to which Part V of the EBR applies.

We trust that CELA's recommendations will be taken into account as the proposed amendments to O.Reg. 73/94 are being finalized.

Please contact the undersigned if you have any questions or comments about this matter.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Mr. Gord Miller, Environmental Commissioner