SAFEGUARDING ONTARIO'S DRINKING WATER SOURCES: ESSENTIAL ELEMENTS OF SOURCE PROTECTION LEGISLATION

Submissions of the Canadian Environmental Law Association
to the Ministry of the Environment
Regarding the Proposed *Drinking Water Source Protection Act*
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EXECUTIVE SUMMARY

Ontario's proposed Drinking Water Source Protection Act is largely limited to the procedural aspects of source protection planning, and the Act fails to address critical implementation and funding issues. Accordingly, prior to its introduction for First Reading in the Ontario Legislature, the Act must be significantly revised and expanded in order to effectively protect surface water and groundwater resources that supply drinking water. Among other things, the Act must be amended to include: statement of purposes; paramountcy provisions; ministerial powers and duties; public consultation requirements; investigation and enforcement provisions; prohibitions and penalties; and other necessary statutory requirements.

PART I -- INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") regarding the proposed *Drinking Water Source Protection Act* ("DWSPA"), which was released for public comment by the Ministry of the Environment ("MOE") in June 2004.

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. 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;*
- submitting model water legislation to entrench watershed planning and water conservation in Ontario;
- commenting on the *Safe Drinking Water Act, Sustainable Water and Sewage Systems Act, 2001,* and *Nutrient Management Act,* and proposed regulations thereunder;
- commenting on various municipal land use planning reforms and amendments to the *Municipal Act*;
- convening public workshops on source water protection across Ontario;

- commenting on the MOE *White Paper on Watershed-Based Source Protection Planning*; and
- attending public meetings held by the MOE regarding source protection and water-taking initiatives.[2]

In addition, CELA has served as a member of several advisory committees established by the Ontario government to consider various aspects of source water protection, such as:

- Advisory Committee on Watershed-Based Source Protection Planning;
- Implementation Committee for Watershed-Based Source Protection;
- Nutrient Management Advisory Committee; and
- Advisory Committee to the Great Lakes Water Management Initiative.

It is against this extensive background and experience that CELA has reviewed the various provisions of the proposed DWSPA. For comparative purposes, we have also considered related documents and reports regarding source protection, including:

- *Source Water Protection Statement of Expectations* (endorsed by non-governmental organizations across Ontario);
- the Part I and II Reports of the Walkerton Inquiry;
- *Final Report: Protecting Ontario's Drinking Water – Toward a Watershed-Based Source Protection Program* (April 2003);
- *Summary Report: Consultation Sessions on the White Paper on Watershed-Based Source Protection Planning (March 1 to 23, 2004)*; and
- MOE briefing materials and related documentation.

In our view, Ontario's source water protection legislation must entrench a planning process that is open, accessible, traceable and accountable. Among other things, this means that the legislative framework must:

- clearly define roles and responsibilities of the various parties and stakeholders;
- specify timeframes and deadlines to ensure timely decision-making;
- establish clear provincial standards to direct the planning process;
- impose mandatory content requirements for terms of reference, assessment reports and source protection plans;
- ensure that source water protection plans are funded and implemented as soon as possible through all existing and new regulatory and non-regulatory tools;
- establish procedures for the interim identification and protection of vulnerable or sensitive sources of drinking water;
- impose appropriate monitoring and reporting requirements; and
- require the integration of source water protection plans within other environmental and land use planning statutes.

In our view, the proposed DWSPA addresses some – but not all – of the above-noted elements of source water protection. In summary, the proposed legislation focuses primarily on certain

[2] CELA's water-related briefs, factsheets and reports are available at: www.cela.ca.

procedural aspects of source protection planning, and it lacks provisions related to the funding and implementation of source protection planning. In some aspects, the DWSPA contains less detail than what was proposed in the MOE *White Paper*, which itself contained less detail than the 2003 Report of the Source Protection Advisory Committee.

Moreover, CELA submits that Ontario's DWSPA must be more than mere enabling legislation that confers unfettered discretion upon the Minister and/or other ministries and agencies involved in source water protection matters. In our view, all essential components of source protection planning and implementation must be reflected in the DWSPA, with further operational details to be prescribed by implementing regulations, policies and guidelines.

On this point, we note that the DWSPA attempts to defer some critically important details to regulations that have not been drafted nor made available for public review and comment to date. In the absence of such key regulations, it is difficult – if not impossible – to assess the extent to which the legislation will be effective and enforceable. Accordingly, CELA would strongly suggest that when the DWSPA is revised and introduced for First Reading in the Ontario Legislature, it would be highly instructive for the MOE to release some draft regulations at the same time so that legislators, stakeholders, and the public at large can fully understand and comment upon the overall source protection package.

At the present time, CELA commends the Ontario government for moving forward with the source protection agenda, and we have greatly valued our participation in the ongoing development of the forthcoming source protection regime. However, having carefully considered the content of the draft legislation released by the MOE, CELA submits that the proposed DWSPA falls woefully short of establishing a comprehensive framework for source protection in Ontario. Accordingly, this CELA submission makes 34 recommendations to strengthen and improve the DWSPA, as described below in Part II of this brief.

It should be noted that CELA's comments on the proposed DWSPA are preliminary in nature, and we reserve the right to make further or other submissions regarding source protection planning once we have reviewed the imminent reports of the Implementation Committee and the Technical Experts Committee. Indeed, it appears highly likely that CELA will have additional comments to make once the full text of the revised DWSPA is introduced for First Reading in the upcoming legislative session.

Nevertheless, in order to facilitate further discussion of DWSPA content and structure, CELA has appended to this brief a draft version of source protection legislation that reflects the above-noted recommendations. Again, it should be noted that the CELA draft is preliminary in nature, and that CELA draft bill is subject to change once the two provincial committees release their reports on source protection in Ontario.

PART II – CLAUSE-BY-CLAUSE REVIEW OF THE DRAFT LEGISLATION

As presently drafted, the DWSPA proposed by the MOE merely consists of 16 sections, most of which address the rudimentary mechanics of source protection planning. The purpose of this part of CELA's submissions is to comment on these 16 sections, as well as to identify additional

legislative provisions that must be incorporated in the DWSPA that will be introduced for First Reading.

Definitions

CELA has no objection to the dozen definitions currently contained within section 1 of the proposed DWSPA. We find it curious, however, that an Act aimed at watershed-based source water protection fails to define either "water" or "watershed". Given the central importance of these terms, CELA submits that the Act should define these terms in order to provide greater certainty about the scope and intent of the legislation.

For example, "water" could be defined simply as "surface water and ground water" (see section 1(1) of the *Environmental Bill of Rights* ("EBR")), or more extensively as "wells, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other water or watercourse" (see section 1(1) of the *Ontario Water Resources Act* ("OWRA")).

Similarly, "watershed" could be defined as "an area drained by a river and its tributaries" (see section 1(1) of the *Conservation Authorities Act* ("CAA")).

In addition, assuming that the Act will be expanded to contain additional provisions suggested by CELA, other stakeholders, or the provincial committees, then it will likely be necessary for section 1 to set out additional definitions of key words and phrases. For example, consideration should be given to defining terms such as "drinking-water", "hydrologically sensitive areas", "wellhead protection zone", "aquifer protection zone", "surface water intake protection zone", "mandatory measures", "voluntary measures", "cumulative impact" and "assimilative capacity", as discussed below.

CELA RECOMMENDATION #1: The Act should be amended to include definitions of "water", "watershed", and other key words and phrases arising from further amendments to the Act.

Statement of Purpose

Alarmingly, the proposed DWSPA does not contain a statement of legislative purpose to guide the interpretation and application of the Act's provisions. While it is debatable whether the DWSPA should contain a preamble, CELA strongly submits that it is imperative for the Act to contain a broad and unambiguous purpose statement (see section 2 of the EBR). In addition, the Act should include a clear endorsement of the "precautionary principle" to guide decision-making processes under the legislation. CELA further submits that the Act should expressly facilitate action to address transboundary impacts upon sources of drinking-water relied upon by Ontarians (see section 3(2) of the EPA).

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

(1) The purposes of this Act are to:

(a) promote human health by protecting the quality and quantity of current and future sources of drinking-water;
(b) facilitate ecosystem-based watershed management and ensure sustainable water uses; and
(c) integrate source protection plans with other environmental and land use decision-making processes.

(2) The purposes set out in subsection (1) include the following:

(a) undertaking an ecosystem approach to identify and protect sources of drinking-water against degradation or depletion;
(b) conserving and restoring natural resources and ecological processes that are necessary to ensure water quality or quality;
(c) identifying, prohibiting, eliminating, and mitigating water risks;
(d) preventing or reducing the discharge of contaminants into the environment that may create a water risk; and
(e) ensuring meaningful public participation in the development and implementation of source protection planning.

(3) Where water risks have been identified under this Act, the lack of full scientific certainty shall not be used as a reason to avoid or defer measures to prohibit, eliminate or mitigate such risks.

(4) No action taken under this Act is invalid by reason only that the action was taken in relation to water risks caused by activities or things outside of Ontario's borders.

Act Binds the Crown

Most of Ontario's environmental statutes expressly provide that the provincial Crown is legally bound by the legislation (see section 120 of the EBR; section 2 of the OWRA; section 4 of the *Environmental Assessment Act* ("EAA"); section 20 of the *Environmental Protection Act* ("EPA"); and section 164 of the *Safe Drinking Water Act* ("SDWA").

Inexplicably, however, the proposed DWSPA fails to provide that the Act binds the Crown. In our view, it is fundamentally important to ensure that the Crown is bound by the source protection legislation, particularly during the critical implementation stage of source protection planning. CELA therefore submits that the DWSPA must clearly specify that the Act binds the Crown.

CELA RECOMMENDATION #3: The Act should be amended to clearly specify that the Act binds the Crown.

Conflict

Most of Ontario's environmental statutes contain paramountcy clauses to help sort out operative conflicts with other legislative requirements (see section 166 of the SDWA; section 179 of the EPA; section 14 of the *Niagara Escarpment Planning and Development Act* ("NEPDA"); section 25 of the *Oak Ridges Moraine Conservation Act*; and section 71 of the *Planning Act*).

Surprisingly, however, the proposed DWSPA fails to include a paramountcy clause. In our view, this is a significant omission, particularly since the Act will inevitably affect activities undertaken or approved under numerous other statutes. Accordingly, CELA submits that the DWSPA must include a standard paramountcy clause to resolve real or perceived conflicts between the requirements of the Act and other provincial statutes.

CELA RECOMMENDATION #4: The Act should be amended to include a paramountcy clause as follows:

(1) Where a conflict appears between any provision of this Act or the regulations and any other Act or regulation in a matter related to drinking-water sources or a matter specifically dealt with under this Act or the regulations, the provision of this Act or the regulations shall prevail.

(2) Subsection (1) applies irrespective of when the other Act is enacted or the regulation is made under the other Act.

(3) Subsection (1) does not apply if the other Act referred to in subsection (1) expressly states that a provision of that Act or of a regulation under it prevails over the provisions of this Act or the regulations.

At the same time, CELA urges the Ontario government to systematically review and/or revise all environmental, land use planning and other statutes (and associated regulations, policies and guidelines) to ensure consistency with the DWPSA. Not only would this conformity exercise minimize the opportunities for inter-jurisdictional conflict, but it would also ensure that all provincial laws are integrated within a coherent and comprehesive legislative framework for source water protection.

At a minimum, the following provincial laws should be reviewed and/or revised to ensure overall consistency with the DWSPA:

- *Aggregate Resources Act;*
- *Building Code Act;*
- *Conservation Authorities Act;*
- *Conservation Land Act;*
- *Crown Forest Sustainability Act, 1994;*
- *Drainage Act;*
- *Environmental Assessment Act;*
- *Environmental Bill of Rights;*

- *Environmental Protection Act;*
- *Lakes and Rivers Improvement Act;*
- *Mining Act;*
- *Municipal Act;*
- *Niagara Escarpment Planning and Development Act;*
- *Nutrient Management Act;*
- *Oak Ridges Moraine Conservation Act, 2001;*
- *Oil, Gas and Salt Resources Act;*
- *Ontario Water Resources Act;*
- *Pesticides Act;*
- *Planning Act;*
- *Provincial Parks Act;*
- *Public Lands Act;*
- *Safe Drinking Water Act, 2002;*
- *Sustainable Water and Sewage Services Act;*
- *Technical Standards and Safety Act;*
- *Waste Diversion Act, 2002; and*
- *Waste Management Act, 1992*

The overall objective of this review/revision exercise is to:

- ensure that all provincial laws prohibit or restrict the issuance of instruments for projects or activities that create, or are likely to create, water risks as defined by the Act; and

- facilitate the implementation and funding of the Act by creating or revising various statutory powers and mechanisms under other provincial regimes (i.e. official plans, zoning by-laws, conservation easements, property tax incentives, licencing fees, registration requirements, etc.).

Ideally, this initiative should be undertaken forthwith as the DWSPA is being developed so that any consequential amendments to other statutes can be built into the Act itself. Some illustrative examples of possible consequential amendments are set out below.

CELA RECOMMENDATION #5: The Ontario government should systematically review all provincial statutes to ensure consistency with the Act, and any necessary revisions to these other statutes should be accomplished via consequential amendments specified within the Act.

Administration of Act and Minister's Powers and Duties

Section 1 of the proposed DWSPA defines "Minister" as "the Minister of the Environment". However, the DWSPA gives the Executive Council unfettered discretion to transfer the administration of the Act to another Minister. CELA cautions against the exercise of this discretion, and strongly submits that the Minister of the Environment should retain overall responsibility for the administration of the Act, as recommended by Mr. Justice O'Connor in his Part 2 Report of the Walkerton Inquiry. We further note that the 2003 Report of the Source

Protection Advisory Committee also recommended that the Ministry of the Environment serve as the lead agency for the overall administration of the source protection planning framework.

The more pressing problem, however, is that the proposed DWSPA confers few powers, and imposes few duties, upon the Minister to ensure the timely and effective implementation and funding of the new source protection regime in Ontario. On this point, we note that Ontario's environmental statutes typically empower the Minister to undertake a variety of steps, measures or programs related to the subject matter of the legislation (see section 3 of the OWRA; section 3 of the SDWA; and section 4 of the EPA). Such provisions are conspicuously absent from the proposed Act.

Accordingly, CELA suggests that the Act should be amended to provide the Minister with a broad suite of statutory powers aimed at furthering the purposes and objects of the DWSPA. At a minimum, such powers should address matters such as: research; training; education; technical and financial assistance; and administrative agreements.

CELA RECOMMENDATION #6: The Act should be amended to designate the Minister as being responsible for the administration of the Act, and should empower the Minister to undertake various steps, measures or programs in relation to source protection, as follows:

(1) The Minister shall be responsible for overseeing the quality and quantity of sources of drinking-water in Ontario and, in that capacity and for the administration of this Act and the regulations, the Minister may:

- **(a) investigate concerns and recommend standards regarding the identification, protection or restoration of sources of drinking-water;**
- **(b) conduct or fund research programs, and prepare or publish statistics relating to the identification, protection or restoration of sources of drinking-water;**
- **(c) convene or fund conferences, seminars, educational and training programs relating to the identification, protection or restoration of sources of drinking-water;**
- **(d) develop and disseminate model terms of reference, assessment reports, or source protection plans;**
- **(e) provide or fund technical advice regarding the preparation or implementation of source protection plans;**
- **(f) appoint committees to perform such advisory functions as the Minister considers advisable;**
- **(g) engage in joint discussions and initiatives with other jurisdictions and levels of government regarding the identification, protection or restoration of sources of drinking-water; and**
- **(h) perform such other functions or carry such other duties as may be assigned from time to time by the Lieutenant Governor in Council.**

(2) The Minister may in writing delegate any of his powers or duties under this Act to an employee of the Ministry specified in the delegation, other than the power to

approve a source protection plan and the power to make a regulation under this Act.

(3) The Minister may enter into agreements with such persons, entities or organizations as the Minister considers appropriate for the purposes of this Act.

Source Protection Fund

CELA hastens to add that the mere establishment of the above-noted Ministerial powers and duties under the Act does not necessarily guarantee that there will be adequate and sustainable funding from the Ministry for the development and implementation of source protection plans. On this point, we note that Mr. Justice O'Connor specifically recommended that "the provincial government should ensure that sufficient funds are available to complete the planning and adoption of source protection plans" (Recommendation 6). Similar recommendations are contained in the 2003 Report of the Source Protection Advisory Committee (Recommendations 19, 20 and 34).

To implement such recommendations, CELA strongly submits that the proposed DWSPA should be amended to impose a mandatory duty upon the Minister to establish and oversee a special-purpose account for source protection purposes. To our knowledge, this fund could be initially started with an appropriate allocation from the Consolidated Revenue Fund. However, to ensure the long-term sustainability of the fund, the Act should specify that all water-related licencing and application fees under other statutes (i.e. permits to take water under the OWRA, drinking-water system approvals under the SDWA, wastewater discharges permitted under the EPA or OWRA, etc.) shall be earmarked for the source protection fund and utilized solely for the purposes of source protection, conservation and restoration. Combined with municipal water rates and other charges or levies (such as water taking charges), CELA anticipates that such funding mechanisms should go a long way in providing resources for the ongoing implementation of source protection plans.

We further note that there are Ontario precedents for special purpose funds for environmental programs (i.e. section 85 of the *Fish and Wildlife Conservation Act, 1997*, section 20 of the NEPDA, section 6.1 of the *Aggregate Resources Act*, and Part V of the *Crown Forest Sustainability Act*). Accordingly, we see no reason why a similar account cannot be established in the context of source water protection.

CELA RECOMMENDATION #7: The Act should be amended to impose a mandatory duty upon the Minister to establish and administer a special purpose "Source Protection Fund", as follows:

(1) Within 90 days after this Act comes into force, the Minister shall establish a special purpose account, known as the "Source Protection Fund", in the Consolidated Revenue Fund.

(2) All amounts received by the Crown under this Act, and under such other Acts as may be prescribed by regulation, shall be held in the Source Protection Fund,

including all fines, fees, and proceeds from sales under this Act and other prescribed Acts, including sales of things forfeited to the Crown.

(3) Money standing to the credit of the Source Protection Fund is, for the purpose of the *Financial Administration Act,* money paid to Ontario for a special purpose.

(4) The Minister shall direct that money be paid out of the Source Protection Fund to source protection boards under this Act at a level sufficient to enable such boards to develop terms of reference, assessment reports, and source protection plans in accordance with this Act and the regulations.

(5) The Minister shall direct that money be paid out of the Source Protection Fund, in such amounts and upon such terms as the Minister considers advisable, to any person, agency, ministry, municipality, entity or organization that requests financial assistance in order to implement an approved source protection plan.

(6) The Minister shall ensure that a report is prepared annually on the operation and financial affairs of the Source Protection Fund.

(7) The Minister shall submit the report required by subsection (6) to the Lieutenant Governor in Council and shall table the report with the Speaker of the Legislative Assembly.

Source Protection Areas

In essence, subsection 2(1) of the proposed DWSPA defines "drinking-water source protection areas" as the areas currently administered by conservation authorities ("CA's") listed in the Schedule to the Act. CELA strongly supports the Act's use of the CA's territorial jurisdiction for the purposes of delineating source protection areas, and notes that this approach is consistent with the recommendations of Mr. Justice O'Connor and the 2003 Report of the Source Protection Advisory Committee.

At the present time, however, CA's primarily exist in southern and central Ontario, and generally do not exist across northern Ontario. Subsection 2(2) of the proposed DWSPA attempts to address the northern situation by simply providing that the Minister "may" establish drinking water source protection areas in parts of Ontario that lack CA's. In CELA's view, this highly discretionary approach is unacceptable, particularly since there is no guarantee that the Minister will, in fact, exercise that discretion adequately or at all.

In addition, we are greatly concerned about the paucity of detail in the Act about non-CA source protection areas. We further note that Recommendation 1 of Mr. Justice O'Connor was that "source protection plans should be required for all watersheds in Ontario", not just those under CA jurisdiction (emphasis added). Similarly, Recommendation 1 of the 2003 Report of the Source Protection Committee specified that the source protection framework should be used in all watersheds in Ontario.

Moreover, it should be recalled that for many years, a similar discretionary power to delineate "sources of public water supply" existed under section 33 of the OWRA. Unfortunately, it appears that this discretion was rarely – if ever – exercised by public officials under the OWRA. Moreover, CELA strongly submits that for residents of Ontario (i.e. private well owners) outside of CA's, the source protection regime under the Act will be the only level of protection for their surface water or ground water supplies. As a matter of fairness, and as a matter of public health and safety, these residents should not be subject to second-rate – or non-existent – source protection efforts merely because they live outside of CA jurisdiction.

Accordingly, CELA recommends that the Act should be amended to impose a mandatory duty upon the Minister (or his/her delegate) to establish drinking water source protection areas in respect of non-CA lands. Similarly, the Act should impose a firm deadline to ensure that this duty is implemented in a timely manner.

CELA RECOMMENDATION #8: The Act should be amended to impose a mandatory duty on the Minister to establish drinking water source protection areas in areas not covered by CA's within 45 days after the Act comes into force, as follows:

(1) Within 45 days after this Act comes into force, the Minister shall, by regulation, establish drinking water source protection areas in the parts of Ontario not covered by conservation authorities listed in the Schedule to this Act.

Source Protection Boards

In effect, section 3(1) (and the Schedule) of the proposed DWSPA names current CA's in delineated source protection areas as source protection boards ("SPB's") for the purposes of the Act. CELA supports this approach for CA areas, as it is consistent with the recommendations of Mr. Justice O'Connor and the 2003 Report of the Source Protection Advisory Committee.

Section 3(2) of the proposed DWSPA empowers the Minister to prescribe by regulation the person or body that shall be the SPB in non-CA areas. As noted above, CELA submits that the Act must be amended to impose a mandatory duty on the Minister to do so by an actual deadline so that there is some certainty and accountability regarding the commencement of source protection efforts in non-CA areas.

CELA RECOMMENDATION #9: The Act should be amended to impose a mandatory duty on the Minister to designate a person or body as the source protection board in non-CA areas within 45 days of the Act's coming into force, as follows:

(1) Within 45 days after this Act comes into force, the Minister shall, by regulation, designate persons or bodies as source protection boards for source protection areas in the parts of Ontario not covered by conservation authorities listed in the Schedule to this Act.

Section 3(3) of the proposed DWSPA imposes a general obligation upon non-CA SPB's to comply with public consultation requirements that may be prescribed by regulation. As

described below, CELA submits that this language is too vague and uncertain, and that it should be supplanted by much clearer statutory requirements regarding public consultation during the development of terms of reference, assessment reports, and source protection plans. Such requirements should apply equally to CA and non-CA SPB's.

Source Protection Committees

Section 4 of the proposed DWSPA requires each SPB to appoint a multi-stakeholder source protection committee ("SPC"), which is responsible for preparing the terms of reference, assessment reports and source protection plans under the Act. CELA supports the creation of the SPC, but submits that the Act should be amended to more fully flesh out the composition, functions and powers of SPC's.

For example, section 4(2) simply sets out the maximum number of SPC members (16), without further specifying the interests or perspectives that should be represented on the SPC. We note that section 4(3) provides that the SPC members shall be appointed "in accordance with the regulations", but no draft regulations have been released to date. In addition, section 4 does not specify a timeframe or deadline in which the SPC is to be established by the SPB.

Thus, the proposed DWSPA does not guarantee that the SPC will be established in a timely manner across Ontario, nor does the Act ensure that SPC composition will be reflective of the recommendations of the 2003 Report of the Source Protection Advisory Committee (i.e. 1/3 municipal representatives; 1/3 provincial, First Nations, and federal representatives; and 1/3 local public health representatives and other stakeholders). Accordingly, CELA submits that the Act should be amended to impose a clear deadline and to specify the proportional representation of the various interests and stakeholders who are entitled to be members of the SPC.

CELA RECOMMENDATION #10: The Act should be amended to specify that within 90 days after the Act comes into force, the source protection board shall appoint the members of the source protection committee as follows:

(a) one-third of the committee members shall be municipal representatives;
(b) one-third of the committee members shall be provincial, First Nations and federal representatives; and
(c) one-third of the committee members shall be representatives of local public health agencies, environmental organizations and other stakeholder interests.

If there is an administrative reason to delay the establishment of a SPC within a specific watershed, then the Minister can adequately deal with this issue on a case-by-case basis using the section 13 power to extend any prescribed timeframe under the Act.

CELA further submits that the Act should confer certain ancillary powers upon the SPC's in order to facilitate the development of the required documents and to ensure meaningful public consultation. For example, section 4 of the proposed DWSPA does not appear to enable the SPC to establish sub-committees, nor to convene working groups of non-SPC members, to assist in the development of the required documents. As "creatures of statute", SPC's have no inherent

jurisdiction, and they will be able to exercise only those powers which are specifically given to them by the Act. We further note that the 2003 Report of the Source Protection Advisory Committee expressly recommended that the SPC should be able to obtain expert input and to more fully engage the public at large in source protection efforts. Therefore, CELA recommends that the Act should be amended accordingly.

CELA RECOMMENDATION #11: The Act should be amended to provide that in the exercise of its powers and duties, the source protection committee may,

(a) obtain technical or scientific assistance related to source protection planning;
(b) establish sub-committees or working groups consisting of experts or other persons interested in, or potentially affected by, source protection planning;
(c) enter into agreements with such persons, entities or levels of government as the committee considers advisable;
(d) conduct seminars or publish educational information related to source protection planning; and
(e) perform such other functions or tasks as may be specified by the source protection board or prescribed by the regulations.

Source Protection Regions

Section 5 of the proposed DWSPA gives the Minister discretion to make regulations that consolidate source protection areas into a single source protection region, and to designate the lead SPB for the region. CELA has no objection to the establishment of source protection regions, provided that the regional consolidation is necessary to achieve the purposes of the Act and facilitates the efficient pooling of resources or sharing of expertise. In addition, the Minister should take into account any submissions made by CA's or other persons prior to making a consolidation regulation. Therefore, CELA submits that the Act should include clear criteria or factors to help structure the exercise of the Minister's discretion regarding source protection regions.

CELA RECOMMENDATION #12: The Act should be amended to provide that when deciding whether to establish or amend a source protection region, the Minister shall consider the following factors:

(a) the purposes of the Act;
(b) any comments submitted by any person, entity or conservation authority regarding the source protection region;
(c) the watershed boundaries and linkages within the source protection region; and
(d) whether consolidating source protection areas will facilitate the pooling of resources, the sharing of expertise, or otherwise ensure efficient and effective source protection planning.

Public Consultation

In CELA's view, the proposed DWSPA falls considerably short of ensuring that the source protection planning process is open, accessible, traceable, and accountable, as recommended by Mr. Justice O'Connor and the 2003 Report of the Source Protection Advisory Committee. The fundamental problem is that the draft Act contains relatively few provisions that address the need for public participation early and often throughout the entire planning process. Indeed, the dearth of clear public consultation requirements in the Act is arguably the most significant shortcoming of the proposed DWSPA.

For example, the first reference to public consultation in the proposed DWSPA is section 3(3), which provides, in essence, that designated SPB's boards for non-CA areas must comply with "consultation requirements prescribed by the regulations". First, it is unclear why SPB's in CA areas are not subject to an identical consultation requirement in section 3(1). Second, we note that the draft Act gives the Minister unfettered discretion as to when – or whether – a regulation is made to actually prescribe consultation requirements. In particular, section 16(1)(n)(iii) provides that the Minister "may" (not "shall") make a regulation relating to "consultation on proposed terms of reference, assessment reports and source protection plans". Third, even if the Minister was inclined to make such a regulation at some unspecified point in the future, there is no guarantee that the content of the consultation regulation will, in fact, ensure meaningful public involvement during all critical stages of the planning process.

The next reference in the proposed DWSPA to public consultation is in section 6(2), para.5 of the Act, which merely specifies that the terms of reference should include "a consultation plan" for the preparation of the assessment report and source protection plan. Significantly, it appears that the critically important terms of reference themselves are not subject to mandatory public notice/comment under the Act. At best, the Act merely provides that the terms of reference shall be made available to public," presumably after the terms of reference have been finalized by the SPB and Minister (see section 6(8)). Again, CELA submits that simply making the terms of reference available *ex post facto* falls woefully short of engaging the public in a meaningful manner during the crucial upfront stages of the planning process.

CELA has the same concern regarding section 7(8) of the proposed Act, which simply provides that the finalized assessment report should made available to the public "after it is approved by the Minister". We understand that that the assessment report is to be developed in accordance with the "consultation plan" described in the terms of reference. However, in the absence of any substantive direction in the Act regarding "consultation plans", and in the absence of any regulations prescribing consultation requirements, CELA cannot conclude that there will be adequate public consultation regarding the assessment report.

This concern also exists with respect to source protection plans, as section 8(11) simply specifies that the source protection plan shall be available to the public "after it is approved by the Minister". CELA is aware that section 8(5) of the draft bill requires the Minister to publish notice of the proposed source protection plan on the EBR Registry. While we support the use of the EBR Registry for this purpose, CELA submits that this posting should not constitute the first formal opportunity for the public to submit comments on the proposed plan. To the contrary, the

Act should expressly mandate public notice/comment on the proposed plan long before it lands on the Minister's desk for EBR posting and/or approval.

Finally, section 9(4) empowers the Minister (or another ministry) to draft terms of reference, assessment reports, or source protection plans where the SPB has failed or refused to do so. However, the Act fails to impose any public consultation requirements regarding Ministry-drafted documents. Again, this is unacceptable if the objective is to ensure public support or community "buy in" of source protection planning efforts in Ontario.

In summary, CELA objects to the draft bill's attempt to largely relegate public consultation to unknown regulations under the Act, or to the discretion of individual SPB's that develop "consultation plans". CELA submits that such an approach does not confer sufficient status or weight upon public consultation requirements, especially since it is far easier to amend or revoke regulations than statutes. Similarly, this approach does not ensure consistency within or between watersheds in terms of public consultation, and, more importantly, will undoubtedly undermine the credibility and effectiveness of the planning process. In our view, clear and unambiguous statutory requirements regarding public consultation must be included within the Act, which can be supplemented by further details contained within regulations under the Act.

Failure to properly consult interested persons or affected communities during the source protection planning process will likely result in a proliferation of public protests, appeals, and litigation – none of which will expedite the effective implementation and funding of source protection efforts. CELA further notes that Ontario's planning laws generally entrench public consultation requirements directly within the text of the statute (see section 5.1 of the EAA; Part II of the EBR; sections 7 and 10 of the NEPDA; and sections 17(15) and 34(12) of the *Planning Act*).

Accordingly, CELA strongly recommends that the Act should expressly entrench public notice and comment opportunities in relation to proposed terms of reference, assessment reports, and source protection plans. The overall objective is to ensure that public input is actively solicited well before the submission of the documentation from the SPB to the Minister for review and/or approval under the Act. Of course, the litmus test of any consultation program is whether the public issues or concerns are actually reflected in the documentation submitted to the Minister. In this regard, CELA submits that the drafters of the documentation should attempt to act upon or accommodate the input received from the public, and that the source protection committee's responses to public issues or concerns should be documented under the Act to ensure accountability and transparency.

CELA RECOMMENDATION #13: The Act should be amended to expressly impose public consultation requirements upon source protection committees, as follows:

(1) When preparing proposed terms of reference, assessment reports, and source protection plans under this Act, the source protection committee shall consult with such persons as may be interested in or affected by the matters under consideration by the board.

(2) Without limiting the generality of subsection (1), the source protection committee shall provide notice of proposed terms of reference, assessment reports, and source protection plans as early as practicable in the planning process through the following means:

(a) media releases or advertisements;
(b) mailings to local residents;
(c) door to door flyers;
(d) notice on the board's website and EBR registry;
(e) actual notice to community leaders, political representatives, and non-governmental organizations;
(f) any means of providing notice that would facilitate more informed public consultation; and
(g) any means of providing notice as may be prescribed by the regulations.

(3) The notice required under subsection (2) shall include the following:

(a) a brief description of the proposal;
(b) a statement of the manner by which and time within that members of the public may submit comments on the proposal;
(c) a description of where and when members of the public may review written information about the proposal;
(d) any other information that the source protection committee considers appropriate; and
(e) any other information as may be prescribed by the regulations.

(4) The notice required under subsection (2) shall be provided,

(a) at least 45 days before the source protection board decides whether to adopt and submit to the proposed terms of reference or assessment report to the Minister; and
(b) at least 90 days before the source protection board decides whether to adopt and submit the proposed source protection plan to the Minister.

(5) The source protection committee that is required to give notice under subsection (2) shall undertake one or more of the following means of obtaining public comments on the proposed terms of reference, assessment reports and source protection plans:

(a) public meetings or workshops;
(b) focus groups;
(c) open houses;
(d) mediation;
(e) any other process that would facilitate more informed public consultation on the proposal; and
(f) any other process as may be prescribed by the regulations.

(6) The source protection committee that is required to give notice under subsection (2) shall consider and, where reasonable or appropriate, address or accommodate all comments received from members of the public, and shall document the committee's response to public comments on proposed terms of reference, assessment reports, and source protection plans.

Terms of Reference

Section 6 of the proposed DWSPA requires SPC's to prepare terms of reference for the preparation of assessment reports and source protection plans under the Act. CELA supports the preparation of terms of reference as the first formal step in the planning process, provided that the SPC undertakes meaningful public consultation in respect of the terms of reference (i.e. proper notice, ample comment periods, access to information, etc.), as described above.

In general terms, CELA agrees with the Act's proposed minimum content requirements for draft terms of reference (subsections 6(2) and (3)). However, CELA notes that these content requirements do not specify that the terms of reference must include a work plan for identifying vulnerable or sensitive sources of drinking water, and for undertaking interim measures to protect such source water until such time as the source protection plan is approved. Given that at least two (or three) years may elapse before source protection plans are ready for implementation, CELA submits that the Act must require an effective process for identifying and protecting vulnerable or sensitive water sources on an interim basis.

CELA RECOMMENDATION #14: The Act should be amended to specify that the terms of reference shall include a work plan for identifying and protecting vulnerable or sensitive sources of drinking water pending the approval and implementation of the source protection plan.

In addition, CELA notes that the Act fails to specify any firm timeframes or deadlines for the preparation or approval of terms of reference, other than to vaguely indicate that these steps should be taken within the "time period prescribed by the regulations". Given the present absence of such regulations, CELA cannot conclude that terms of reference will be prepared in a timely manner. Accordingly, CELA submits that the Act should be amended to impose clear deadlines for the preparation and approval for terms of reference.

CELA RECOMMENDATION #15: The Act should be amended to impose clear deadlines for the preparation and approval of terms of reference, as follows:

(1) The source protection committee shall prepare and submit proposed terms of reference to the source protection board no later than six months after the day that the committee was appointed under this Act.

(2) The source protection board shall approve, or shall amend and approve, the proposed terms of reference within 30 days of receipt from the source protection committee.

(3) The source protection board shall submit the terms of reference to the Minister no later than 7 days after the day that the board approves the terms of reference.

(4) The Minister may make such amendments to the terms of reference as he or she considers appropriate,

(a) within 30 days after receiving the approved terms of reference from the source protection board; or
(b) at any time if there is a change in circumstances or new information concerning the preparation of an assessment report or source protection plan under this Act.

Assessment Reports

Section 7 of the proposed DWSPA generally requires the SPC to prepare an assessment report in accordance with the regulations and the terms of reference. CELA supports this requirement, provided that the SPC undertakes meaningful public consultation during the preparation of the assessment plan, as described above.

Subsection 7(2) of the Act sets out the minimum content requirements for assessment reports. While such requirements appear to be comprehensive in scope, CELA notes that there are some significant omissions from the list under the Act. For example, it appears that the assessment report does not need to map or inventory individual wells that are not part of "prescribed" classes of drinking water systems. CELA objects to this exclusion on the grounds that there are numerous private well owners in communities across Ontario who are not hooked up to or serviced by regulated drinking water systems. For these residents, the source protection regime under the Act may, in fact, be the only protection of their drinking water quality. Therefore, at the very least, assessment reports under the Act should attempt to describe the location of such wells with a view towards developing an appropriate aquifer protection zone in such areas. In addition, it is important to know whether the existing wells are currently in use or abandoned since wells can serve as contaminant pathways into aquifers.

Similarly, CELA notes that the subsection 7(2) list does not appear to require the assessment report to identify and evaluate cumulative impacts upon water quality, particularly from urban and rural non-point sources. This uncertainty is due, in part, to the fact that it is unclear whether the current definition of "water risk" catches activities or facilities that individually may not threaten water sources, but that may collectively pose a cumulative threat. Therefore, CELA recommends that the Act should specifically require assessment reports to identify and evaluate cumulative threats and assimilative capacity within the watershed.

CELA further notes that subsection 7(2), para.3 only requires a "general" assessment of water quality within the watershed. In our view, for baseline purposes (and for identifying remediation opportunities), CELA submits that the "general" assessment must include an evaluation of whether surface water within the watershed meets Provincial Water Quality Objectives, and whether groundwater currently meets Ontario Drinking Water Standards.

CELA RECOMMENDATION #16: The Act should amended to specify that assessment reports shall:

(a) map the location of all existing wells that are in use or abandoned, and aquifer protection zones, within the watershed;
(b) identify and evaluate cumulative impacts and assimilative capacity within the watershed;
(c) assess whether surface water within the watershed currently meets the Provincial Water Quality Objectives; and
(d) assess whether groundwater within the watershed currently meets the Ontario Drinking-Water Quality Standards.

In addition, CELA notes that the proposed DWSPA fails to establish clear deadlines for starting, submitting and approving assessment reports, other than to vaguely indicate that these steps should be taken within the "time period prescribed by the regulations". Given the present absence of such regulations, CELA cannot conclude that assessment reports will be prepared in a timely manner. Accordingly, CELA submits that the Act should be amended to impose clear deadlines for the preparation and approval for assessment reports.

CELA RECOMMENDATION #17: The Act should be amended to impose clear deadlines for the preparation and approval of assessment reports, as follows:

(1) The source protection committee shall prepare and submit the proposed assessment report to the source protection board no later than 12 months after the day that the terms of reference were approved under this Act.

(2) The source protection board shall approve, or shall amend and approve, the proposed assessment report within 60 days of receipt from the source protection committee.

(3) The source protection board shall submit the assessment report to the Minister no later than 7 days after the day that the board approves the assessment report.

(4) **The Minister shall approve, or shall amend and approve, the assessment report within 30 days of receipt from the source protection board.**

Source Protection Plans

Section 8 of the proposed DWSPA requires the SPC to prepare a source protection plan in accordance with the regulations and terms of reference. CELA supports this requirement, provided that the SPC undertakes meaningful public consultation during the preparation of the source protection plan, as described above.

Subsection 8(2) of the Act sets out the minimum content requirements for source protection plans. CELA submits that these requirements are clearly inadequate on their face, and are not even as detailed as the minimum content requirements for assessment reports under the Act.

Moreover, the subsection 8(2) list does not reflect the full range of matters listed in Recommendation 31 of the 2003 Report of the Source Protection Advisory Committee with respect to plan content. Accordingly, CELA strongly submits that the Act should be amended to significantly expand the core list of matters that must be included in every source protection plan in Ontario.

CELA RECOMMENDATION #18: The Act should be amended to expand the minimum content requirements for source protection plans, as follows:

(1) The source protection plan shall include:

(a) the terms of reference;
(b) the assessment report;
(c) measurable objectives, goals and targets for the plan;
(d) hydrological and hydrogeological information regarding contaminant pathways and time of travel within the watershed;
(e) maps that identify,
1. **areas of high, medium and low vulnerability and sensitive water resources;**
2. **natural features that contribute to the protection of drinking water sources;**
3. **baseline conditions and watershed characteristics;**
4. **existing and potential land uses within the watershed;**
5. **areas of significant water takings and areas experiencing low water conditions;**
6. **major point and non-point sources of contaminants and high risk land uses that pose a direct threat to drinking water sources**

(f) an implementation plan and schedule for mandatory and voluntary measures to prohibit, manage or mitigate things or activities identified as water risks within the watershed;
(g) a plan for addressing remediation or restoration opportunities;
(h) a monitoring and reporting plan;
(i) a description of how and when the plan will be reviewed and updated;
(j) a description of outstanding issues or unresolved concerns will be addressed; and
(k) such other matters as may be prescribed by the regulations.

(2) The implementation plan and schedule required under subsection (1) shall identify the persons or bodies responsible for implementing mandatory and voluntary measures set out in the source protection plan.

(3) The implementation plan and schedule required under subsection (1) shall include mandatory measures to prohibit the following things and activities in areas of high vulnerability:

(a) new or expanded waste management systems or waste disposal sites ;
(b) new or expanded underground fuel storage tanks;
(c) new or expanded facilities for chemical production or storage;

(d) new or expanded major industrial, commercial, insitutional or residential development;
(e) new or expanded septic systems or sewage works;
(f) new or expanded intensive livestock operations;
(g) applications of biosolids, septage and manure;
(h) new or expanded water takings;
(i) other high risk land uses or activities as identified in the assessment report;
(j) such further matters as may be prescribed by regulation.

(4) The implementation plan and schedule required under subsection (1) shall include mandatory measures to manage or mitigate the following things and activities in areas of high and medium vulnerability:

(a) existing land uses or activities that pose a water risk;
(b) re-development of brownfield sites; and
(c) such further matters as may be prescribed by the regulations.

(5) The implementation plan and schedule required under subsection (1) shall include mandatory and voluntary measures to address existing land uses and activities within areas of low vulnerability.

(6) Nothing in this Act prevents a source protection plan from containing mandatory measures in relation to things and activities that have not been identified in this Act or prescribed in the regulations as requiring mandatory measures.

Subsection 8(7)(a) of the proposed DWSPA purports to empower the Minister to reject or exclude mandatory measures "that are not authorized by the regulations". CELA strongly submits that this subsection should be deleted since it should always be open to the SPC to develop mandatory measures that go beyond the minimum provincial "floor", and that are tailored to meet local needs or site-specific issues as identified in the assessment report.

CELA RECOMMENDATION #19: The Act should be amended by deleting subsection 8(7)(a).

In addition, CELA notes that the proposed DWSPA fails to establish clear deadlines for starting, submitting and approving source protection plans, other than to vaguely indicate that these steps should be taken within the "time period prescribed by the regulations". Given the present absence of such regulations, CELA cannot conclude that source protection plans will be prepared in a timely manner. Accordingly, CELA submits that the Act should be amended to impose clear deadlines for the preparation and approval for source protection plans.

CELA RECOMMENDATION #20: The Act should be amended to impose clear deadlines for the preparation and approval of source protection plans, as follows:

(1) The source protection committee shall prepare and submit the proposed source protection plan to the source protection board no later than 2 years after the day that the assessment report was approved under this Act.

(2) The source protection board shall approve, or shall amend and approve, the proposed source protection plan within 90 days of receipt from the source protection committee.

(3) The source protection board shall submit the source protection plan to the Minister no later than 7 days after the day that the board approves the source protection plan.

(4) The Minister shall approve, or shall amend and approve, the source protection plan within 60 days of receipt from the source protection board.

Failure to Prepare

Section 9 of the proposed DWSPA empowers the Minister to issue binding orders where SPB's fail or refuse to submit terms of reference, assessment reports, or source protection plans by the prescribed deadline. This section also empowers the Minister to draft the required documentation if necessary, and to require re-payment of any funding previously provided to the SPB. CELA anticipates that the need for such orders will not arise frequently (particularly since the Minister is also empowered to extend deadlines), but submits that the Act should contain these provisions if an SPB is unwilling to perform its duties under the Act.

However, to ensure the enforceability of any cost recovery orders under section 9, CELA submits that the Act should be amended to provide that the order can be filed in court (and generate interest) like a civil judgment for execution purposes (see section 153 of the EPA). In addition, CELA suggests that the Act should expressly provide that there is no right of appeal against an order requiring repayment of funding under the Act.

CELA RECOMMENDATION #21: The Act should be amended to ensure the enforceability of cost recovery orders issued by the Minister, as follows:

(1) An order requiring a source protection board to repay funding under this Act may be filed with a local registrar of the Superior Court of Justice and enforced as if it were an order of the court.

(2) Section 129 of the *Courts of Justice Act* applies in respect of an order requiring a source protection board to repay funding under this Act, and for that purpose, the date of filing the order shall be deemed to be the date of the order.

(3) No appeal lies to the Environmental Review Tribunal in respect of an order requiring a source protection board to repay funding under this Act.

Appeals

Section 10 of the proposed DWSPA confers a limited right of appeal against the Minister's approval of a source protection plan. CELA generally agrees with most of the suggested appeal provisions, but suggests that certain housekeeping amendments are necessary to more precisely entrench the appeal right and to make it more consistent with appeal rights found in Ontario's other environmental statutes.

In addition, CELA does not agree that a plan should be struck down, in whole or in part, merely because it includes provisions setting out mandatory measures that are not authorized by the regulations. As discussed above, CELA submits that the mandatory measures prescribed by regulation should constitute the minimum "floor", and that source protection boards should be free to impose such further or other mandatory measures as may be appropriate or necessary to address local issues or concerns within the watershed.

CELA RECOMMENDATION #22: The Act should be amended to more fully entrench an appeal right, as follows:

(1) The notice of appeal shall,

(a) identify the specific part of the approved source protection plan to which the notice applies, if the notice does not apply to the entire plan;
(b) set out the grounds for the appeal;
(c) be served upon the Minister and the source protection board;
(d) be filed, accompanied by the prescribed fee, with the Tribunal within 15 days after the day that the Minister gives notice of the approval on the EBR Registry.

(2) At the Tribunal hearing, the person who filed the appeal is not entitled to appeal any part of the approved source protection plan, or to rely upon any ground, that is not set out in the notice of appeal, except with leave by the Tribunal.

(3) After holding a hearing, the Tribunal shall not allow the appeal nor grant any relief unless Tribunal finds that the approved source protection plan,

(a) fundamentally fails to comply with this Act or the regulations;
(b) was prepared in contravention of the terms of reference, including the public consultation requirements; or
(c) inadequately addresses water risks identified in the assessment report.

(4) The filing of the notice of appeal does not stay the operation of the approved source protection plan, or any part of the plan, unless otherwise ordered by the Tribunal upon application by the person who filed the notice.

(5) The person filing the notice of appeal, the Minister, the source protection board, and any other person specified by the Tribunal are parties to the hearing.

(6) Despite the *Statutory Powers Procedure Act* and subsection (3), the Tribunal may, on its own motion or on motion by any party, dismiss all or any part of an appeal without holding a hearing if the Tribunal is of the opinion that,

(a) the notice of appeal does not disclose any grounds upon which the Tribunal could allow the appeal or grant any relief under this Act;
(b) the appeal is not made in good faith, is frivolous or vexatious, or is made only for the purpose of delay;
(c) the appellant did not pay the prescribed fee for filing the notice of appeal; or
(d) the appellant did not comply with directions from the Tribunal, or did not respond to requests by the Tribunal for further information within the time specified by the Tribunal.

(7) Any party to the hearing may appeal the decision of the Tribunal on a question of law to the Divisional Court in accordance with the rules of court.

(8) Any party to the hearing may appeal the decision of the Tribunal on any matter other than a question of law to the Lieutenant Governor in Council, or such ministers of the Crown as may be designated by the Lieutenant Governor in Council, within 30 days of the Tribunal's decision.

(9) In an appeal under subsection (7), the Lieutenant Governor in Council, or the designated ministers, may,

(a) confirm, alter or revoke the decision of the Tribunal;
(b) substitute his, her or their decision for the decision of the Tribunal; or
(c) require the Tribunal to hold a new hearing respecting all or part of the source protection plan under appeal.

(10) Where a decision of the Tribunal is appealed to the Divisional Court or to the Lieutenant Governor in Council, the Divisional Court or the Lieutenant Governor in Council may,

(a) stay the operation of the Tribunal's decision; or
(b) set aside a stay ordered by the Tribunal under subsection (4).

Annual Reports

Section 11 of the proposed DWSPA requires the SPB to file annual progress reports with the Minister, who, in turn, is required to summarize such reports in the Minister's annual report required under section 3(4) of the SDWA. CELA supports this reporting obligation, but submits that the current provisions in the draft Act are too minimalist to ensure full and timely reporting

by SPB's and the Minister. We further note that section 3(4) of the SDWA has not yet been proclaimed in force.

CELA submits that the Act should more fully prescribe the minimum content and publication requirements for such reports, which can be supplemented by further details prescribed by the regulations (see page 31 of the 2003 Report of the Source Protection Advisory Committee). More specifically, the monitoring regulations should ensure that the annual reports include the "outcome measures" (i.e. water quality and quantity indicators) described in the 2003 Report of the Source Protection Advisory Committee (pages 46-47).

In addition, the Act should require SPBs to file their annual reports with the Environmental Commissioner, who will then be in a better position to review and comment upon the success (or lack thereof) in implementing approved source protection plans across Ontario. As discussed below, CELA submits that sections 57 and 58 of the EBR should be amended by the Act to impose an express duty upon the Environmental Commissioner to review and comment upon source protection matters in the Commissioner's Annual Reports to the Legislature.

CELA RECOMMENDATION #23: The Act should be amended to expand and enhance annual reporting obligations upon the source protection board and Minister, as follows:

(1) The annual progress report shall include,

(a) information on the quality and quantity of the source water within the watershed, including the water budget;
(b) a description of water risks identified within the watershed;
(c) a summary of all surface water and groundwater monitoring programs undertaken by or for the board;
(d) an identification and discussion of any regulated drinking water contaminants detected in the source water in the watershed;
(e) an assessment of the effectiveness of the mandatory and voluntary measures contained within the source protection plan;
(f) discussion of any non-compliance with mandatory measures contained within the source protection plans, and steps taken to address such non-compliance;
(g) discussion of potential changes to the source protection plan to address new or emerging threats to the source water in the watershed;
(h) directions for contacting the board for further information; and
(i) any other matter as may be prescribed by the regulations.

(2) The source protection board shall ensure that the annual progress report is available to the public after it is submitted to the Minister, and shall,

(a) post the annual progress report on the board's website;
(b) submit a copy of the annual progress report to the Environmental Commissioner;
(c) provide copies of the annual report free of charge upon request by any person; and

(d) ensure that all records, data, or documents discussed or summarized in the annual progress report are posted electronically on the board's website, and available for public inspection in the board offices during regular business hours.

(3) The annual progress report for a calendar year shall be submitted by the source protection board to the Minister and the Environmental Commissioner on or before April 1 of the following calendar year.

(4) The Minister shall include a summary of all annual progress reports submitted under this Act in the annual report prepared by the Minister under section 3(4) of the *Safe Drinking Water Act.*

(5) The summary required under subsection (4) shall include:

(a) an overview of the status of source protection plan implementation and monitoring programs across Ontario;
(b) a description of provincial activities undertaken in support of source protection plan implementation and monitoring;
(c) issue identification and trend analysis respecting source protection plan implementation and monitoring; and
(d) any other matter as may be prescribed by the regulations.

Plan Review and Revisions

Section 12 of the proposed DWSPA contemplates amendments to approved source protection plans only where the Minister has made relevant regulatory changes, or where the SPC or SPB opine that the plan does not adequately protect "prescribed"classes of drinking water systems. In CELA's view, these grounds for amendment are far too narrow and discretionary.

In particular, CELA submits that it is imperative for the Act to automatically require periodic (i.e. 5 year) reviews of approved plans to ensure that they are continuously improved to reflect best management practices, new science, research, or plan implementation results. The overall goal is to ensure that the plans remain sufficiently protective of all sources of drinking water (not just those serving prescribed communal systems). In this regard, we note that the 2003 Report of the Source Protection Advisory Committee clearly endorsed periodic review and updating of source protection plans. CELA further notes that other Ontario statutes require five-year reviews of environmental plans or land use policies to ensure that they remain valid and effective (see section 17 of the NEPDA and sections 3(10) and 26 of the *Planning Act*).

Accordingly, CELA recommends that the proposed DWSPA should specify that the review process shall be initiated by the SPC every five years, and that the review process (including any plan amendments resulting therefrom) are subject to meaningful public consultation and Ministerial approval.

CELA RECOMMENDATION #24: The Act should be amended to impose a duty on source protection committees to publicly review and, where appropriate, revise approved source protection plans, as follows:

(1) The source protection committee shall, at least every five years from the date that the source protection plan is approved by the Minister, ensure that a public review of the plan is undertaken for the purpose of determining the need for a revision of the plan.

(2) Where the source protection committee determines under subsection (1) that there is a need to revise the plan, the committee shall immediately prepare proposed revisions, and the provisions of this Act regarding public consultation and the preparation and approval of source protection plans apply with necessary modifications to such revisions.

(3) Despite subsection (1), the Minister may, at any time, direct the source protection committee to undertake a review of the approved source plan, and when so directed, the committee shall cause the review to be undertaken forthwith.

Offences and Penalties

The proposed DWSPA does not contain any prohibitions to ensure compliance with the procedural and substantive components of the Act or regulations. This omission stands in contrast to other planning statutes in Ontario that include prohibitions to give "teeth" to the underlying planning instruments (see section 67 of the *Planning Act*; section 24 of the *Oak Ridges Moraine Conservation Act*; section 24 of the NEPDA; and section 38 of the EAA).

Accordingly, CELA submits that the Act should be amended to create offences and impose penalties aimed at ensuring full and timely compliance with the requirements of the DWSPA, regulations, and approved source protection plans. It should be noted that the recommendation below is modelled on provisions that already exist within environmental legislation.

It should be further noted that these enforcement-related recommendations may need to be revisited once the two source protection committees have released their reports in the fall of 2004.

CELA RECOMMENDATION #25: The Act should be amended to create offences and impose penalties in order to ensure compliance with the Act, regulations, and approved source protection plans, as follows:

(1) Every person who contravenes this Act or the regulations is guilty of an offence.

(2) Every person who contravenes a prohibition or restriction contained in a source protection plan approved under this Act is guilty of an offence.

(3) Every person who fails to comply with an order made under this Act is guilty of an offence.

(4) An individual who is guilty of an offence under subsections (1), (2) or (3) is liable, on conviction,

- **(a) in the case of a first conviction, a fine of not more than $50,000 for each day or part of a day on which the offence occurs or continues; and**
- **(b) in the case of a subsequent conviction, to a fine of not more than $100,000 for each day or part of a day on which the offence occurs or continues.**

(5) A corporation that is guilty of an offence described in subsections (1), (2) or (3) is liable, on conviction,

- **(a) in the case of a first conviction, a fine of not more than $100,000 for each day or part of a day on which the offence occurs or continues; and**
- **(b) in the case of a subsequent conviction, a fine of not more than $200,000 for each day or part of a day on which the offence occurs or continues.**

(6) If a corporation commits an offence under subsections (1), (2) or (3), a director, officer, employee or agent of the corporation who directed, authorized, assented to, acquiesced in or failed to take all reasonable care to prevent the commission of the offence, or who participated in the commission of the offence, is guilty of an offence under subsections (1), (2) or (3), whether the corporation has been prosecuted for the offence or not.

(7) The court that convicts a person under subsections (1), (2) or (3) may, on its own initiative or on motion of counsel for the prosecutor, make one or more of the following orders:

- **(a) an order prohibiting the continuation or repetition of the offence by the person;**
- **(b) an order imposing requirements that the court considers appropriate the prevent similar unlawful conduct or to contribute to the person's rehabilitation; or**

- **(c) an order requiring the person, within the period and upon terms specified in the order, to,**

    1. **comply with the Act, regulations, approved source protection plan or order;**
    2. **take specified actions to prevent, decrease or eliminate water risks that have been caused, or may be caused, by the commission of the offence;**
    3. **restore or rehabilitate any source of drinking-water that has been, or may be, degraded or depleted by the commission of the offence;**

4. **pay to the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken or caused to be taken on behalf of the Minister as a result of the commission of the offence;**
5. **pay to the Minister an amount of money the court considers appropriate for the purpose of promoting the identification, protection or restoration of sources of drinking-water; or**
6. **publish, in any manner the court considers appropriate, the facts relating to the commission of the offence.**

(8) Subsection (7) is in addition to any other remedy or penalty provided by law.

(9) A proceeding under subsections (1), (2) or (3) shall not be commenced more than two years after the day on which the offence was alleged to have been committed.

In addition, to maximize the effectiveness and enforceability of approved source protection plans, the Act should expressly prohibit the issuance of any statutory instruments (or provincial or municipal funding) that contravene approved plans or that would otherwise result in a water risk as defined by the Act. On this point, we note that legislative precedents for such a prohibition exist in Ontario's environmental laws (see section 13 of the NEPDA; section 7 of the *Oak Ridges Moraine Conservation Act*; and section 12.2 of the EAA).

In addition, to ensure that existing instruments conform with approved source protection plans, the Act should impose a mandatory duty on provincial officials to review and/or revise (or revoke) instruments currently in existence.

CELA RECOMMENDATION #26: The Act should be amended to prohibit the issuance of statutory instruments, or the provision of public funding, for developments, undertakings, or activities that contravene an approved source protection plan or that otherwise create water risks, as follows:

(1) In this section,

"instrument" means any document of legal effect issued under an Act or regulation, and includes a permit, licence, approval, by-law, authorization, direction or order issued under an Act or regulation; and

"issuing authority" means the person, agency, ministry, or municipality that has issued or granted an instrument.

(2) Despite any other general or special Act, no person, agency, ministry, municipality, board, tribunal or commission shall issue or amend an instrument for a project, development, undertaking or activity that,

(a) contravenes a prohibition or restriction contained in a source protection plan approved under this Act; or

(b) causes, or may cause, a water risk.

(3) No agency, ministry, municipality, board, tribunal or commission shall give or approve a loan, grant, subsidy or guarantee for a project, development, undertaking or activity that,

(a) contravenes a prohibition or restriction contained in a source protection plan approved under this Act; or
(b) causes, or may cause, a water risk.

(4) No agency, ministry, municipality, local board, tribunal or commission shall undertake any public project, development, undertaking or activity that,

(a) contravenes a prohibition or restriction contained in a source protection plan approved under this Act; or
(b) causes, or may cause, a water risk.

(5) Within three years after the date that this Act comes into force, every instrument shall be reviewed and, where necessary, revised or revoked by the issuing authority to ensure that the instrument conforms with the approved source protection plan.

Injunctions

The proposed DWSPA does not contain any provisions that empower the Minister (or any other person) to go to the civil courts to seek injunctive relief to enjoin contraventions of the Act, regulations, orders, or approved source protection plans. In this regard, we note that environmental statutes typically empower Ministers to seek such relief (see section 28 of the EAA; section 183 of the EPA; section 95 of the OWRA; section 120 of the SDWA; section 41 of the *Fisheries Act;* and section 311 of the *Canadian Environmental Protection Act, 1999*). We further note that the EBR has also recognized the utility of allowing residents to go to court to seek injunctive relief in respect of statutory contraventions (see sections 84 and 93 of the EBR).

Accordingly, CELA submits that the Act should be amended to ensure that injunctive relief may be sought by the Minister or any other person to enjoin contraventions under the Act, regulations, orders or source protection plans.

CELA RECOMMENDATION #27: The Act should be amended to permit the Minister or any other person to seek injunctions in respect of contraventions of the Act, regulations, orders, or approved source protection plans, as follows:

(1) Where any provision of this Act or the regulations, or of an order made or source protection plan approved under this Act, is contravened, in addition to any other remedy or penalty imposed by law, such contravention may be restrained by action at the instance of the Minister or any other person resident in Ontario.

(2) In an action under subsection (1), the court may issue a temporary or permanent injunction ordering any person named in the action to,

(a) refrain any act or thing that it appears to the court may constitute or be directed towards a contravention of this Act or the regulations, or a contravention of an order made or source protection plan approved under this Act; or
(b) do any act or thing that it appears to the court may prevent a contravention of this Act or the regulations, or a contravention of an order made or source protection plan approved under this Act.

(3) No injunction may be issued in an action under subsection (1) except where 24 hours notice is given to the person named in the action, unless the court considers that the urgency of the situation is such that service of notice is not in the public interest.

(4) Where a plaintiff obtains an interlocutory injunction in an action under subsection (1), the court shall not require the plaintiff to provide an undertaking to pay damages in an amount greater than $500.

Extension of Time

Section 13 of the proposed DWSPA confers discretion upon the Minister to grant extensions of time for doing things required under the Act. While CELA has no objection in principle to granting time extensions where necessary or appropriate, CELA submits that this discretion must be utilized sparingly and judiciously by the Minister to ensure that the Act is implemented in a timely manner across Ontario.

Accordingly, CELA submits that section 13 should specify some criteria or factors to be taken into account by the Minister when deciding whether or not grant time extensions. In our view, the Minister should not grant sweeping "across the board" time extensions; instead, the Minister should carefully consider each request for a time extension on a case-by-case basis, and should only grant extensions where there has been public notice/comment on the proposed extension to ensure that the request is *bona fide* and necessary to achieve the purposes of the Act.

In addition, CELA submits that this extension power should be slightly re-worded so as to expressly give the Minister authority to specify new deadlines or to impose further terms regarding the time extension. We further submit that the Act should impose an outside limit (i.e. one year) on the duration of time extensions granted by the Minister.

CELA RECOMMENDATION #28: The Act should be amended to tighten up the Minister's authority to grant time extensions, as follows:

(1) The Minister may, in writing, extend the time for doing anything under this Act or regulations, before or after the time for doing the thing has expired.

(2) The Minister shall not grant a time extension under subsection (1) unless:

(a) the person requesting the time extension has applied in writing to the Minister for the extension and has provided reasons in support of the request;
(b) the person requesting the time extension has provided public notice and comment opportunities in relation to the proposed extension; and
(c) the Minister is satisfied that a time extension is in the public interest and is necessary in order to achieve the purposes of this Act.

(3) In granting a time extension under subsection (1), the Minister may specify such further deadlines or impose such terms as the Minister considers advisable.

(4) Despite subsection (3), the Minister shall not grant a time extension under subsection (1) for a term that that exceeds one year.

Delegation

Section 14 of the proposed DWSPA generally empowers the Minister to delegate his/her powers and duties to Ministry employees. CELA has no objection in principle to this delegation power, but submits that the Ministerial power to approve source protection plans should not be delegated to Ministry employees. In our view, this is an extremely important power that should remain vested in the Minister in order to enhance accountability and to ensure overall general consistency in plan approvals. CELA further suggests that the delegation power should be re-located within the DWSPA to the administrative provisions that create the powers and duties under the Act, as discussed above.

Power of Entry

Section 15 of the proposed DWPSA empowers representatives of SPBs to enter private property for specific source protection purposes. CELA has no objection to such provisions, and notes that they are analogous to other statutory provisions that confer similar entry powers upon provincial or municipal officials in order to protect public health or the environment (see section 41 of the *Health Protection and Promotion Act*; section 49 of the *Planning Act*; section 12 of the *Building Code Act*; sections 137 and 428 of the *Municipal Act, 2001*; section 28 of the NEPDA; section 13 of the *Nutrient Management Act*; sections 95 and 156 of the EPA; section 15 of the OWRA; and section 81 of the SDWA). We further note that staff of CA's are already empowered to enter property and to enforce regulations under the CAA in relation to fill, construction and alteration to waterways (see section 28(20) of the CAA). Thus, section 15 of the proposed DWSPA is generally consistent with current provincial legislation.

However, if faced with obstruction during a visit to private property, the SPB representative should be empowered to request police assistance if necessary to carry out his/her duties under the Act (see section 25 of the OWRA).

CELA RECOMMENDATION #29: The Act should be amended to empower an SPB employee or agent to request police assistance in order to collect source protection

information or to ascertain the presence of a water risk on, in or under property, as follows:

(1) A person who enters upon property under this Act may take such steps or issue such directions as may be required to accomplish the purpose of the entry, and may, if obstructed in so doing, call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required.

(2) Where a request for police assistance is made under subsection (1), it is the duty of every member of a police force to render such assistance forthwith.

Investigation and Enforcement

The proposed DWSPA does not contain any provisions that empower provincial officers to undertake inspection and enforcement activities to ensure compliance with the Act. As noted above, CELA recommends that the Act must contain specific offence and penalty provisions to address contraventions of the Act, regulations, orders and approved source protection plans. If so, then it will be necessary to expand the Act to include not only information-gathering powers by the SPBs (see section 15 of the DWSPA), but also provincial inspection and enforcement powers that are typically contained within Ontario's environmental statutes (see Parts VIII and IX of the SDWA; Parts IV to VI of the *Nutrient Management Act*; sections 15 to 25 of the OWRA; Part IV of the EAA; and Part XV of the EPA).

At a minimum, these provincial powers should address: inspections by provincial officers; searches of vehicles or vessels; power to administer other Acts; entry to dwellings; identification of provincial officers; seizure, detention or removal of things; use of force or investigative devices; and mandatory orders.

CELA RECOMMENDATION #30: The Act should be amended to include inspection and enforcement powers that provincial officers possess under Ontario's other environmental laws.

Regulations

Section 16 of the proposed DWSPA confers wide-ranging discretion upon the Minister to promulgate regulations in relation to various source protection matters. It appears to CELA that the proposed topics listed in section 16 are sufficiently broad to address most matters that should be prescribed by regulation. However, if the draft Bill is expanded and enhanced prior to First Reading as recommended by CELA and other stakeholders, then it will be necessary to revisit the section 16 list to ensure it captures matters arising from the new provisions.

The fundamental difficulty that CELA has with the current wording of section 16 is that it simply states that the Minister "may" (not "shall") pass regulations in relation to the listed topics. Given that many important details are going to be left to the regulations, CELA submits that it is imperative for the Act to impose a mandatory duty on the Minister to make certain regulations

within a specified timeframe. In our view, secondary or less critical matters can be left to the discretion of the Minister (or, alternatively, of the Lieutenant Governor in Council), but the key implementation details – such as source protection plan content and public consultation requirements – cannot be left to the inherent uncertainty of the regulation-making process.

In this regard, we note that the SDWA imposed a positive duty on the Minister to make certain regulations or standards by deadlines prescribed by law (see sections 21 and 168(4) of the SDWA). Accordingly, we see no reason why the proposed DWSPA cannot impose similar duties upon the Minister. Indeed, if the Minister is serious about implementing source protection planning in a timely manner, then there should be no objection to including peremptory language and clear deadlines in the proposed DWSPA with respect to certain regulations.

CELA RECOMMENDATION #31: The Act should be amended to impose a mandatory duty upon the Minister to make regulations within 6 months of the Act's coming into force in relation to the following matters:

(a) establishing, defining or revising the boundaries of source protection areas or regions;
(b) designating a person or body as a source protection board for areas or regions not under the jurisdiction of a conservation authority;
(c) governing the preparation, content and approval of terms of reference, assessment reports, and source protection plans, including regulations that specify timeframes or deadlines; and
(d) describing the scope, nature and content of public consultation programs undertaken in relation to terms of reference, assessment reports, and source protection plans.

Review of Act

The proposed DWSPA does not contain any provisions that require a formal public review of the Act in a few years' time. Given that the Act represents Ontario's first significant attempt at source protection planning, CELA submits that it is appropriate for legislators, stakeholders and the public at large to formally review the Act every five years. Such a review would ensure that the Act remains current and effective, and it would facilitate changes that may be necessary to address material changes in circumstances or new information in relation to source protection planning.

In particular, the objective of this mandatory review is to examine the experience to date under the Act, to consider the annual reports filed under the Act, to identify the strengths and/or weaknesses of the Act, and to pursue opportunities to enhance or strengthen the legislation. On this point, CELA notes that it has become increasingly common for environmental laws to include built-in review mechanisms (see section 343 of the *Canadian Environmental Protection Act, 1999* and section 72 of the *Canadian Environmental Assessment Act*).

CELA RECOMMENDATION #32: The Act should be amended to include a built-in review mechanism, as follows:

(1) Every five years after the coming into force of this Act, the administration of this Act shall be referred by the Minister to such committee of the Legislative Assembly as may be designated or established for such purpose.

(2) The committee designated or established under subsection (1) shall, as soon as practicable, undertake a comprehensive public review of the provisions and operation of this Act, and shall table its report, including any recommended changes to this Act or its administration, with the Speaker of the Legislative Assembly within one year after the completion of the review.

Consequential Amendments, Transition and Coming into Force

As described above, CELA submits that the Ontario government must review and, where necessary, revise numerous provincial statutes to ensure that they are consistent with the source protection regime, and to ensure that they confer new or expanded powers upon public officials to implement and fund source protection efforts. This review/revision exercise should be undertaken forthwith so that any consequential amendments to other statutes can be directly incorporated within the DWSPA as it proceeds through the legislative process.

Given the sheer volume and complexity of this exercise, it is beyond the scope of this brief to identify in detail all of the other statutory amendments that are necessary to ensure conformity with the DWSPA. Moreover, CELA anticipates that the forthcoming reports of two provincial source protection committees will include recommendations regarding other legislative reforms. Accordingly, CELA is content to await the delivery of these two reports before commenting on the form and content of these additional legislative reforms.

Nevertheless, for the purposes of facilitating discussion on this important matter, CELA offers the following illustrative examples of the types of legislative amendments that could be considered by the Ontario government:

(a) Conservation Authorities

Possible legislative reforms include:

- amending section 20 of the CAA to specifically require CA's to undertake programs to further the protection of drinking water sources;

- amending section 21 of the CAA to empower CA's to undertake works or projects, or to aquire or use lands, for the protection of drinking water sources;

- amending section 28(1) of the CAA to empower CA's to make and enforce regulations related to protection of drinking water sources; and

- amending section 28(10) of the CAA to ensure that CA regulations can limit or affect domestic, livestock or municipal uses of water in accordance with an approved source protection plan.

(b) Municipalities

Possible legislative reforms include:

- amending section 16 of the *Planning Act* to expressly include drinking water source protection as a mandatory item to be included in official plans;

- amending section 26 of the *Planning Act* to ensure that within one year of the approval of a source protection plan, official plans (and implementing by-laws) shall be reviewed and revised in order to conform with the content of the source protection plan. Section 26 should also be amended to ensure that the five-year reviews of official plans consider the need for further revisions to ensure ongoing conformity with the DWSPA, regulations and approved source protection plans;

- amending section 34 of the *Planning Act* to expressly empower municipalities to pass by-laws that prohibit or restrict land uses and structural development to protect drinking water sources;

- amending section 11 of the *Municipal Act* to include drinking water source protection as a "sphere" within municipal jurisdiction; and

- amending Part III of the *Municipal Act* to expressly empower municipalities to pass by-laws imposing disclosure requirements, licencing/registration obligations, and contingency planning duties upon high risk land uses or activities within areas of high and medium vulnerability.

(c) Provincial Government

Possible legislative amendments include:

- amending section 7 and 23 of the *Aggregate Resources Act* to prohibit the Minister from issuing or renewing a licence or permit that does not conform with the DWSPA, regulations or approved source protection plans;

- amending sections 27, 66, and 73 of the *Aggregate Resources Act* to ensure that municipal by-laws can prohibit or regulate the establishment or operation of a pit or quarry in accordance with an approved source protection plan;

- amending section 1 of the *Conservation Land Act* to include in the definition of "conservation lands" areas that are held or managed for drinking water source protection purposes, and amending section 3 to facilitate the creation and transfer of conservation easements for drinking water source protection purposes;

- amending section 9 and Part III of the *Crown Forest Sustainability Act* to prohibit the Minister from approving forest management plans, and from issuing forest resource licences, that do not conform to the DWSPA, regulations or approved source protection plans;

- amending sections 2, 3 and 4 of the *Drainage Act* to prohibit the construction, operation or expansion of drainage works that do not conform with the DWSPA, regulations or approved source protection plan;

- amending Parts II and III of the EAA to explicitly require consideration of drinking water source protection during individual and Class EA processes, and to prohibit the issuance of EAA approvals or exemptions that do not conform with the DWSPA, regulation or approved source protection plans;

- amending sections 6(2), 13(2), 14(2), and 15(2) of the EPA to delete agricultural exemptions regarding the disposal of animal wastes;

- amending section 27 of the EPA to prohibit the Director from issuing or renewing certificates of approval for waste management systems or waste disposal sites within areas of high vulnerability;

- amending section 168.12(2) of the EPA to ensure that municipalities do not incur liability merely because they take action on brownfield sites to address threats to drinking water sources;

- amending section 14 of the *Lakes and Rivers Improvement Act* to prohibit the Minister from approving a dam that does not conform with the DWSPA, regulations or approved source protection plans;

- amending section 36 of the *Lakes and Rivers Improvement Act* to prohibit the deposit or discharge of substances into lakes or rivers under circumstances that contravene the DWSPA, regulations or approved source protection plans;

- amending Parts IV, V and VII of the *Mining Act* to prohibit the Minister from issuing or renewing licences, leases or approvals for oil/gas operations or mining operations that do not conform with the DWSPA, regulations or approved source protection plans;

- amending section 4 of the *Pesticides Act* to prohibit the discharge of a pesticide into the environment that causes, or is likely to cause, impairment of a drinking water source;

- amending section 34(3) of the OWRA to prohibit the Director from issuing or renewing permits to take water in areas of high vulnerability;

- amending sections 52 and 53 of the OWRA to prohibit the Director from issuing or renewing approvals for water works or sewage works that do not conform with the DWSPA, regulations or approved source protection plans;

- amending section 89.6 of the OWRA to ensure that municipalities do not incur liability merely because they take action on brownfield sites to address threats to drinking water sources;

- amending sections 57 and 58 of the EBR to require the Environmental Commissioner to review and report upon the status and implementation of source protection plans;

- amending section 61 of the EBR to specify that the grounds for an Application for Review include inconsistency or conflict between an Act, policy, regulation or instrument and the requirements of the DWSPA, regulations or source protection plan;

- amending Part II of the *Nutrient Management Act* to specify that nutrient management standards, strategies and plans shall conform with the DWSPA, regulations and approved source protection plans;

- amending section 61 of the *Nutrient Management Act* to specify that municipal by-laws are not superseded where the subject-matter of the by-law implements an approved source protection plan;

- amending sections 10 and 11 of the *Oil, Gas and Salt Resources Act* to prohibit the issuance of licences or permits that do not conform with the DWSPA, regulations or approved source protection plans;

- amending section 2 of the *Planning Act* to list drinking water source protection as a matter of provincial interest;

- amending section 47 of the *Planning Act* to expressly empower the Minister to make a zoning order intended to protect drinking water sources;

- amending section 51 of the *Planning Act* to prohibit the approval of plans of subdivision that do not conform with the DWSPA, regulations, or approved source protection plans;

- amending Part I of the *Public Lands Act* to empower the Minister to undertake source protection planning for public lands if designated as a source protection board under the DWSPA;

- amending section 27 of the *Public Lands Act* to prohibit the deposit of any thing or substance on public lands under circumstances that contravene the DWSPA, regulations or approved source protection plans; and

- amending Part V of the *Public Lands Act* to prohibit the Minister from constructing or operating dams on public lands that do not conform with the DWSPA, regulations, or approved source protection plans.

It should be recalled that the foregoing list is not intended to be an exhaustive compilation of necessary statutory reforms that must accompany the DWSPA. Instead, this list is simply a collection of illustrative examples to assist the Ontario government in identifying the breadth and scope of amendments that may be necessary to fully implement source protection plans across southern and northern Ontario.

It should be further noted that several of the foregoing examples include new constraints on the ability of public officials to issue instruments for certain projects, undertakings or activities. This raises the question of what should happen to applications that have been filed – but not decided – by the time that the DWPSA has been passed and proclaimed in force. In CELA's view, the general principle should be that unless the project, undertaking or activity has received final approval to proceed, it is automatically subject to the new rules and standards under the DWPSA. Even where final approval to proceed has already been granted, CELA submits that the Ontario government must systematically review and, and where necessary, revise (or revoke) existing instruments to ensure compliance with the DWSPA, regulations and source protection plans, as described above. In CELA's view, this provincial review/revision of existing instruments should be completed within three years.

CELA RECOMMENDATION #33: The Act should be amended to include transitional provisions, as follows:

(1) Every statutory power of decision that is exercised by a municipal council, local board, planning authority, agency, board, commission or tribunal under prescribed Acts shall conform with this Act, regulations, and approved source protection plans.

(2) Subsection (1) applies with respect to applications, matters or proceedings commenced on or after this Act comes into force.

(3) Subsection (1) applies to applications, matters or proceedings commenced before this Act comes into force if a decision has not been made before that date in respect of the application, matter or proceeding.

(4) For the purposes of subsection (3), a decision shall be deemed to be made,

- **(a) in the case of an instrument, on the day that the approval authority, or appellate body, decided to approve or uphold the issuance of the instrument;**
- **(b) in the case of an amendment to an official plan or zoning by-law, on the day that the approval authority, or the Ontario Municipal Board, decided to approve or uphold the amendment; and**
- **(c) in all other cases, on such days as may be prescribed by regulation.**

(5) In subsection (1), "statutory power of decision" has the same meaning as the *Judicial Review Procedure Act.*

Finally, CELA notes that section 17 of the proposed DWSPA simply provides that the Act "comes into force on a day to be named by the Lieutenant Governor". In effect, this broad wording confers complete discretion as to when – or whether – the Act will actually be in force. Given the urgency of source protection planning, there is, to our knowledge, no legal or policy reason that justifies delaying the proclamation of the Act to some unknown date in the near (or far) future. Indeed, given the considerable delay that has occurred with respect to proclaiming other recent environmental statutes (i.e. the *Sustainable Water and Sewage Services Act*), CELA derives no comfort from governmental assurances that the proposed DWSPA will experience speedy passage and proclamation.

In CELA's view, it would be far more preferable for the Act to specify that it comes into force on the day that it receives Royal Assent. Among other things, this approach would certainly provide an impetus for the Ministry to prepare the key regulations as soon as possible in order to expedite the development and implementation of source protection plans. Alternatively, the Act could specify that it comes into force within three months of receiving Royal Assent. In any event, it is important to ensure that the proclamation of the Act is not unduly delayed for political or other reasons.

CELA RECOMMENDATION # 34: The Act should be amended to specify that it comes into force on the day that it receives Royal Assent, or, alternatively, that it comes into force within three months after the day that it receives Royal Assent.

PART III -- CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA concludes that the proposed DWPSA is an important step in the right direction, but submits the Act needs to be substantially expanded to more fully address critical implementation and funding issues.

In particular, subject to the forthcoming recommendations from the two source protection committees, CELA makes the following recommendations in relation to the proposed DWSPA.

CELA RECOMMENDATION #1: The Act should be amended to include definitions of "water", "watershed", and other key words and phrases arising from further amendments to the Act.

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

(1) The purposes of this Act are to:

(a) promote human health by protecting the quality and quantity of current and future sources of drinking-water;
(b) facilitate ecosystem-based watershed management and ensure sustainable water uses; and
(c) integrate source protection plans with other environmental and land use decision-making processes.

(2) The purposes set out in subsection (1) include the following:

(a) undertaking an ecosystem approach to identify and protect sources of drinking-water against degradation or depletion;
(b) conserving and restoring natural resources and ecological processes that are necessary to ensure water quality or quality;
(c) identifying, prohibiting, eliminating, and mitigating water risks;
(d) preventing or reducing the discharge of contaminants into the environment that may create a water risk; and
(e) ensuring meaningful public participation in the development and implementation of source protection planning.

(3) Where water risks have been identified under this Act, the lack of full scientific certainty shall not be used as a reason to avoid or defer measures to prohibit, eliminate or mitigate such risks.

(4) No action taken under this Act is invalid by reason only that the action was taken in relation to water risks caused by activities or things outside of Ontario's borders.

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CELA RECOMMENDATION #3: The Act should be amended to clearly specify that the Act binds the Crown.

CELA RECOMMENDATION #4: The Act should be amended to include a paramountcy clause as follows:

(1) Where a conflict appears between any provision of this Act or the regulations and any other Act or regulation in a matter related to drinking-water sources or a matter specifically dealt with under this Act or the regulations, the provision of this Act or the regulations shall prevail.

(2) Subsection (1) applies irrespective of when the other Act is enacted or the regulation is made under the other Act.

(3) Subsection (1) does not apply if the other Act referred to in subsection (1) expressly states that a provision of that Act or of a regulation under it prevails over the provisions of this Act or the regulations.

CELA RECOMMENDATION #5: The Ontario government should systematically review all provincial statutes to ensure consistency with the Act, and any necessary revisions to these other statutes should be accomplished via consequential amendments specified within the Act.

CELA RECOMMENDATION #6: The Act should be amended to designate the Minister as being responsible for the administration of the Act, and should empower the Minister to undertake various steps, measures or programs in relation to source protection, as follows:

(1) The Minister shall be responsible for overseeing the quality and quantity of sources of drinking-water in Ontario and, in that capacity and for the administration of this Act and the regulations, the Minister may:

(a) investigate concerns and recommend standards regarding the identification, protection or restoration of sources of drinking-water;
(b) conduct or fund research programs, and prepare or publish statistics relating to the identification, protection or restoration of sources of drinking-water;
(c) convene or fund conferences, seminars, educational and training programs relating to the identification, protection or restoration of sources of drinking-water;
(d) develop and disseminate model terms of reference, assessment reports, or source protection plans;
(e) provide or fund technical advice regarding the preparation or implementation of source protection plans;
(f) appoint committees to perform such advisory functions as the Minister considers advisable;
(g) engage in joint discussions and initiatives with other jurisdictions and levels of government regarding the identification, protection or restoration of sources of drinking-water; and
(h) perform such other functions or carry such other duties as may be assigned from time to time by the Lieutenant Governor in Council.

(2) The Minister may in writing delegate any of his powers or duties under this Act to an employee of the Ministry specified in the delegation, other than the power to approve a source protection plan and the power to make a regulation under this Act.

(3) The Minister may enter into agreements with such persons, entities or organizations as the Minister considers appropriate for the purposes of this Act.

CELA RECOMMENDATION #7: The Act should be amended to impose a mandatory duty upon the Minister to establish and administer a special purpose "Source Protection Fund", as follows:

(1) Within 90 days after this Act comes into force, the Minister shall establish a special purpose account, known as the "Source Protection Fund", in the Consolidated Revenue Fund.

(2) All amounts received by the Crown under this Act, and under such other Acts as may be prescribed by regulation, shall be held in the Source Protection Fund, including all fines, fees, and proceeds from sales under this Act and other prescribed Acts, including sales of things forfeited to the Crown.

(3) Money standing to the credit of the Source Protection Fund is, for the purpose of the *Financial Administration Act,* money paid to Ontario for a special purpose.

(4) The Minister shall direct that money be paid out of the Source Protection Fund to source protection boards under this Act at a level sufficient to enable such boards to develop terms of reference, assessment reports, and source protection plans in accordance with this Act and the regulations.

(5) The Minister shall direct that money be paid out of the Source Protection Fund, in such amounts and upon such terms as the Minister considers advisable, to any person, agency, ministry, municipality, entity or organization that requests financial assistance in order to implement an approved source protection plan.

(6) The Minister shall ensure that a report is prepared annually on the operation and financial affairs of the Source Protection Fund.

(7) The Minister shall submit the report required by subsection (6) to the Lieutenant Governor in Council and shall table the report with the Speaker of the Legislative Assembly.

CELA RECOMMENDATION #8: The Act should be amended to impose a mandatory duty on the Minister to establish drinking water source protection areas in areas not covered by CA's within 45 days after the Act comes into force, as follows:

(1) Within 45 days after this Act comes into force, the Minister shall, by regulation, establish drinking water source protection areas in the parts of Ontario not covered by conservation authorities listed in the Schedule to this Act.

CELA RECOMMENDATION #9: The Act should be amended to impose a mandatory duty on the Minister to designate a person or body as the source protection board in non-CA areas within 45 days of the Act's coming into force, as follows:

(1) Within 45 days after this Act comes into force, the Minister shall, by regulation, designate persons or bodies as source protection boards for source protection areas

in the parts of Ontario not covered by conservation authorities listed in the Schedule to this Act.

CELA RECOMMENDATION #10: The Act should be amended to specify that within 90 days after the Act comes into force, the source protection board shall appoint the members of the source protection committee as follows:

(a) one-third of the committee members shall be municipal representatives;
(b) one-third of the committee members shall be provincial, First Nations and federal representatives; and
(c) one-third of the committee members shall be representatives of local public health agencies, environmental organizations and other stakeholder interests.

CELA RECOMMENDATION #11: The Act should be amended to provide that in the exercise of its powers and duties, the source protection committee may,

(a) obtain technical or scientific assistance related to source protection planning;
(b) establish sub-committees or working groups consisting of experts or other persons interested in, or potentially affected by, source protection planning;
(c) enter into agreements with such persons, entities or levels of government as the committee considers advisable;
(d) conduct seminars or publish educational information related to source protection planning; and
(e) perform such other functions or tasks as may be specified by the source protection board or prescribed by the regulations.

CELA RECOMMENDATION #12: The Act should be amended to provide that when deciding whether to establish or amend a source protection region, the Minister shall consider the following factors:

(a) the purposes of the Act;
(b) any comments submitted by any person, entity or conservation authority regarding the source protection region;
(c) the watershed boundaries and linkages within the source protection region; and
(d) whether consolidating source protection areas will facilitate the pooling of resources, the sharing of expertise, or otherwise ensure efficient and effective source protection planning.

CELA RECOMMENDATION #13: The Act should be amended to expressly impose public consultation requirements upon source protection committees, as follows:

(1) When preparing proposed terms of reference, assessment reports, and source protection plans under this Act, the source protection committee shall consult with such persons as may be interested in or affected by the matters under consideration by the board.

(2) Without limiting the generality of subsection (1), the source protection committee shall provide notice of proposed terms of reference, assessment reports, and source protection plans as early as practicable in the planning process through the following means:

(a) media releases or advertisements;
(b) mailings to local residents;
(c) door to door flyers;
(d) notice on the board's website and EBR registry;
(e) actual notice to community leaders, political representatives, and non-governmental organizations;
(f) any means of providing notice that would facilitate more informed public consultation; and
(g) any means of providing notice as may be prescribed by the regulations.

(3) The notice required under subsection (2) shall include the following:

(a) a brief description of the proposal;
(b) a statement of the manner by which and time within that members of the public may submit comments on the proposal;
(c) a description of where and when members of the public may review written information about the proposal;
(d) any other information that the source protection committee considers appropriate; and
(e) any other information as may be prescribed by the regulations.

(4) The notice required under subsection (2) shall be provided,

(a) at least 45 days before the source protection board decides whether to adopt and submit to the proposed terms of reference or assessment report to the Minister; and
(b) at least 90 days before the source protection board decides whether to adopt and submit the proposed source protection plan to the Minister.

(5) The source protection committee that is required to give notice under subsection (2) shall undertake one or more of the following means of obtaining public comments on the proposed terms of reference, assessment reports and source protection plans:

(a) public meetings or workshops;
(b) focus groups;
(c) open houses;

(d) mediation;
(e) any other process that would facilitate more informed public consultation on the proposal; and
(f) any other process as may be prescribed by the regulations.

(6) The source protection committee that is required to give notice under subsection (2) shall consider and, where reasonable or appropriate, address or accommodate all comments received from members of the public, and shall document the committee's response to public comments on proposed terms of reference, assessment reports, and source protection plans.

CELA RECOMMENDATION #14: The Act should be amended to specify that the terms of reference shall include a work plan for identifying and protecting vulnerable or sensitive sources of drinking water pending the approval and implementation of the source protection plan.

CELA RECOMMENDATION #15: The Act should be amended to impose clear deadlines for the preparation and approval of terms of reference, as follows:

(1) The source protection committee shall prepare and submit proposed terms of reference to the source protection board no later than six months after the day that the committee was appointed under this Act.

(2) The source protection board shall approve, or shall amend and approve, the proposed terms of reference within 30 days of receipt from the source protection committee.

(3) The source protection board shall submit the terms of reference to the Minister no later than 7 days after the day that the board approves the terms of reference.

(4) The Minister may make such amendments to the terms of reference as he or she considers appropriate,

(a) within 30 days after receiving the approved terms of reference from the source protection board; or
(b) at any time if there is a change in circumstances or new information concerning the preparation of an assessment report or source protection plan under this Act.

CELA RECOMMENDATION #16: The Act should amended to specify that assessment reports shall:

(a) map the location of all existing wells that are in use or abandoned, and aquifer protection zones, within the watershed;
(b) identify and evaluate cumulative impacts and assimilative capacity within the watershed;
(c) assess whether surface water within the watershed currently meets the Provincial Water Quality Objectives; and
(d) assess whether groundwater within the watershed currently meets the Ontario Drinking-Water Quality Standards.

CELA RECOMMENDATION #17: The Act should be amended to impose clear deadlines for the preparation and approval of assessment reports, as follows:

(1) The source protection committee shall prepare and submit the proposed assessment report to the source protection board no later than 12 months after the day that the terms of reference were approved under this Act.

(2) The source protection board shall approve, or shall amend and approve, the proposed assessment report within 60 days of receipt from the source protection committee.

(3) The source protection board shall submit the assessment report to the Minister no later than 7 days after the day that the board approves the assessment report.

(4) The Minister shall approve, or shall amend and approve, the assessment report within 30 days of receipt from the source protection board.

CELA RECOMMENDATION #18: The Act should be amended to expand the minimum content requirements for source protection plans, as follows:

(1) The source protection plan shall include:

(a) the terms of reference;
(b) the assessment report;
(c) measurable objectives, goals and targets for the plan;
(d) hydrological and hydrogeological information regarding contaminant pathways and time of travel within the watershed;
(e) maps that identify,
1. areas of high, medium and low vulnerability and sensitive water resources;
2. natural features that contribute to the protection of drinking water sources;
3. baseline conditions and watershed characteristics;
4. existing and potential land uses within the watershed;
5. areas of significant water takings and areas experiencing low water conditions;

6. **major point and non-point sources of contaminants and high risk land uses that pose a direct threat to drinking water sources**

(f) an implementation plan and schedule for mandatory and voluntary measures to prohibit, manage or mitigate things or activities identified as water risks within the watershed;

(g) a plan for addressing remediation or restoration opportunities;

(h) a monitoring and reporting plan;

(i) a description of how and when the plan will be reviewed and updated;

(j) a description of outstanding issues or unresolved concerns will be addressed; and

(k) such other matters as may be prescribed by the regulations.

(2) The implementation plan and schedule required under subsection (1) shall identify the persons or bodies responsible for implementing mandatory and voluntary measures set out in the source protection plan.

(3) The implementation plan and schedule required under subsection (1) shall include mandatory measures to prohibit the following things and activities in areas of high vulnerability:

(a) new or expanded waste management systems or waste disposal sites ;

(b) new or expanded underground fuel storage tanks;

(c) new or expanded facilities for chemical production or storage;

(d) new or expanded major industrial, commercial, insitutional or residential development;

(e) new or expanded septic systems or sewage works;

(f) new or expanded intensive livestock operations;

(g) applications of biosolids, septage and manure;

(h) new or expanded water takings;

(i) other high risk land uses or activities as identified in the assessment report;

(j) such further matters as may be prescribed by regulation.

(4) The implementation plan and schedule required under subsection (1) shall include mandatory measures to manage or mitigate the following things and activities in areas of high and medium vulnerability:

(a) existing land uses or activities that pose a water risk;

(b) re-development of brownfield sites; and

(c) such further matters as may be prescribed by the regulations.

(5) The implementation plan and schedule required under subsection (1) shall include mandatory and voluntary measures to address existing land uses and activities within areas of low vulnerability.

(6) Nothing in this Act prevents a source protection plan from containing mandatory measures in relation to things and activities that have not been identified in this Act or prescribed in the regulations as requiring mandatory measures.

CELA RECOMMENDATION #19: The Act should be amended by deleting subsection 8(7)(a).

CELA RECOMMENDATION #20: The Act should be amended to impose clear deadlines for the preparation and approval of source protection plans, as follows:

(1) The source protection committee shall prepare and submit the proposed source protection plan to the source protection board no later than 2 years after the day that the assessment report was approved under this Act.

(2) The source protection board shall approve, or shall amend and approve, the proposed source protection plan within 90 days of receipt from the source protection committee.

(3) The source protection board shall submit the source protection plan to the Minister no later than 7 days after the day that the board approves the source protection plan.

(4) The Minister shall approve, or shall amend and approve, the source protection plan within 60 days of receipt from the source protection board.

CELA RECOMMENDATION #21: The Act should be amended to ensure the enforceability of cost recovery orders issued by the Minister, as follows:

(1) An order requiring a source protection board to repay funding under this Act may be filed with a local registrar of the Superior Court of Justice and enforced as if it were an order of the court.

(2) Section 129 of the *Courts of Justice Act* applies in respect of an order requiring a source protection board to repay funding under this Act, and for that purpose, the date of filing the order shall be deemed to be the date of the order.

(3) No appeal lies to the Environmental Review Tribunal in respect of an order requiring a source protection board to repay funding under this Act.

CELA RECOMMENDATION #22: The Act should be amended to more fully entrench an appeal right, as follows:

(1) The notice of appeal shall,

(a) identify the specific part of the approved source protection plan to which the notice applies, if the notice does not apply to the entire plan;
(b) set out the grounds for the appeal;
(c) be served upon the Minister and the source protection board; and
(d) be filed, accompanied by the prescribed fee, with the Tribunal within 15 days after the day that the Minister gives notice of the approval on the EBR Registry.

(2) At the Tribunal hearing, the person who filed the appeal is not entitled to appeal any part of the approved source protection plan, or to rely upon any ground, that is not set out in the notice of appeal, except with leave by the Tribunal.

(3) After holding a hearing, the Tribunal shall not allow the appeal nor grant any relief unless Tribunal finds that the approved source protection plan,

(a) fundamentally fails to comply with this Act or the regulations;
(b) was prepared in contravention of the terms of reference, including the public consultation requirements; or
(c) inadequately addresses water risks identified in the assessment report.

(4) The filing of the notice of appeal does not stay the operation of the approved source protection plan, or any part of the plan, unless otherwise ordered by the Tribunal upon application by the person who filed the notice.

(5) The person filing the notice of appeal, the Minister, the source protection board, and any other person specified by the Tribunal are parties to the hearing.

(6) Despite the *Statutory Powers Procedure Act* and subsection (3), the Tribunal may, on its own motion or on motion by any party, dismiss all or any part of an appeal without holding a hearing if the Tribunal is of the opinion that,

(a) the notice of appeal does not disclose any grounds upon which the Tribunal could allow the appeal or grant any relief under this Act;
(b) the appeal is not made in good faith, is frivolous or vexatious, or is made only for the purpose of delay;
(c) the appellant did not pay the prescribed fee for filing the notice of appeal; or
(d) the appellant did not comply with directions from the Tribunal, or did not respond to requests by the Tribunal for further information within the time specified by the Tribunal.

(7) Any party to the hearing may appeal the decision of the Tribunal on a question of law to the Divisional Court in accordance with the rules of court.

(8) Any party to the hearing may appeal the decision of the Tribunal on any matter other than a question of law to the Lieutenant Governor in Council, or such

ministers of the Crown as may be designated by the Lieutenant Governor in Council, within 30 days of the Tribunal's decision.

(9) In an appeal under subsection (7), the Lieutenant Governor in Council, or the designated ministers, may,

(a) confirm, alter or revoke the decision of the Tribunal;
(b) substitute his, her or their decision for the decision of the Tribunal; or
(c) require the Tribunal to hold a new hearing respecting all or part of the source protection plan under appeal.

(10) Where a decision of the Tribunal is appealed to the Divisional Court or to the Lieutenant Governor in Council, the Divisional Court or the Lieutenant Governor in Council may,

(a) stay the operation of the Tribunal's decision; or
(b) set aside a stay ordered by the Tribunal under subsection (4).

CELA RECOMMENDATION #23: The Act should be amended to expand and enhance annual reporting obligations upon the source protection board and Minister, as follows:

(1) The annual progress report shall include,

(a) information on the quality and quantity of the source water within the watershed, including the water budget;
(b) a description of water risks identified within the watershed;
(c) a summary of all surface water and groundwater monitoring programs undertaken by or for the board;
(d) an identification and discussion of any regulated drinking water contaminants detected in the source water in the watershed;
(e) an assessment of the effectiveness of the mandatory and voluntary measures contained within the source protection plan;
(f) discussion of any non-compliance with mandatory measures contained within the source protection plans, and steps taken to address such non-compliance;
(g) discussion of potential changes to the source protection plan to address new or emerging threats to the source water in the watershed;
(h) directions for contacting the board for further information; and
(i) any other matter as may be prescribed by the regulations.

(2) The source protection board shall ensure that the annual progress report is available to the public after it is submitted to the Minister, and shall,

(a) post the annual progress report on the board's website;
(b) submit a copy of the annual progress report to the Environmental Commissioner;

(c) provide copies of the annual report free of charge upon request by any person; and

(d) ensure that all records, data, or documents discussed or summarized in the annual progress report are posted electronically on the board's website, and available for public inspection in the board offices during regular business hours.

(3) The annual progress report for a calendar year shall be submitted by the source protection board to the Minister and the Environmental Commissioner on or before April 1 of the following calendar year.

(4) The Minister shall include a summary of all annual progress reports submitted under this Act in the annual report prepared by the Minister under section 3(4) of the *Safe Drinking Water Act*.

(5) The summary required under subsection (4) shall include:

(a) an overview of the status of source protection plan implementation and monitoring programs across Ontario;

(b) a description of provincial activities undertaken in support of source protection plan implementation and monitoring;

(c) issue identification and trend analysis respecting source protection plan implementation and monitoring; and

(d) any other matter as may be prescribed by the regulations.

CELA RECOMMENDATION #24: The Act should be amended to impose a duty on source protection committees to publicly review and, where appropriate, revise approved source protection plans, as follows:

(1) The source protection committee shall, at least every five years from the date that the source protection plan is approved by the Minister, ensure that a public review of the plan is undertaken for the purpose of determining the need for a revision of the plan.

(2) Where the source protection committee determines under subsection (1) that there is a need to revise the plan, the committee shall immediately prepare proposed revisions, and the provisions of this Act regarding public consultation and the preparation and approval of source protection plans apply with necessary modifications to such revisions.

(3) Despite subsection (1), the Minister may, at any time, direct the source protection committee to undertake a review of the approved source plan, and when so directed, the committee shall cause the review to be undertaken forthwith.

CELA RECOMMENDATION #25: The Act should be amended to create offences and impose penalties in order to ensure compliance with the Act, regulations, and approved source protection plans, as follows:

(1) Every person who contravenes this Act or the regulations is guilty of an offence.

(2) Every person who contravenes a prohibition or restriction contained in a source protection plan approved under this Act is guilty of an offence.

(3) Every person who fails to comply with an order made under this Act is guilty of an offence.

(4) An individual who is guilty of an offence under subsections (1), (2) or (3) is liable, on conviction,

(a) in the case of a first conviction, a fine of not more than $50,000 for each day or part of a day on which the offence occurs or continues; and
(b) in the case of a subsequent conviction, to a fine of not more than $100,000 for each day or part of a day on which the offence occurs or continues.

(5) A corporation that is guilty of an offence described in subsections (1), (2) or (3) is liable, on conviction,

(a) in the case of a first conviction, a fine of not more than $100,000 for each day or part of a day on which the offence occurs or continues; and
(b) in the case of a subsequent conviction, a fine of not more than $200,000 for each day or part of a day on which the offence occurs or continues.

(6) If a corporation commits an offence under subsections (1), (2) or (3), a director, officer, employee or agent of the corporation who directed, authorized, assented to, acquiesced in or failed to take all reasonable care to prevent the commission of the offence, or who participated in the commission of the offence, is guilty of an offence under subsections (1), (2) or (3), whether the corporation has been prosecuted for the offence or not.

(7) The court that convicts a person under subsections (1), (2) or (3) may, on its own initiative or on motion of counsel for the prosecutor, make one or more of the following orders:

(a) an order prohibiting the continuation or repetition of the offence by the person;
(b) an order imposing requirements that the court considers appropriate the prevent similar unlawful conduct or to contribute to the person's rehabilitation; or

(c) an order requiring the person, within the period and upon terms specified in the order, to,

1. **comply with the Act, regulations, approved source protection plan or order;**
2. **take specified actions to prevent, decrease or eliminate water risks that have been caused, or may be caused, by the commission of the offence;**
3. **restore or rehabilitate any source of drinking-water that has been, or may be, degraded or depleted by the commission of the offence;**
4. **pay to the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken or caused to be taken on behalf of the Minister as a result of the commission of the offence;**
5. **pay to the Minister an amount of money the court considers appropriate for the purpose of promoting the identification, protection or restoration of sources of drinking-water; or**
6. **publish, in any manner the court considers appropriate, the facts relating to the commission of the offence.**

(8) Subsection (7) is in addition to any other remedy or penalty provided by law.

(9) A proceeding under subsections (1), (2) or (3) shall not be commenced more than two years after the day on which the offence was alleged to have been committed.

CELA RECOMMENDATION #26: The Act should be amended to prohibit the issuance of statutory instruments, or the provision of public funding, for developments, undertakings, or activities that contravene an approved source protection plan or that otherwise create water risks, as follows:

(1) In this section,

"instrument" means any document of legal effect issued under an Act or regulation, and includes a permit, licence, approval, by-law, authorization, direction or order issued under an Act or regulation; and

"issuing authority" means the person, agency, ministry, or municipality that has issued or granted an instrument.

(2) Despite any other general or special Act, no person, agency, ministry, municipality, board, tribunal or commission shall issue or amend an instrument for a project, development, undertaking or activity that,

(a) contravenes a prohibition or restriction contained in a source protection plan approved under this Act; or
(b) causes, or may cause, a water risk.

(3) No agency, ministry, municipality, board, tribunal or commission shall give or approve a loan, grant, subsidy or guarantee for a project, development, undertaking or activity that,

(a) contravenes a prohibition or restriction contained in a source protection plan approved under this Act; or
(b) causes, or may cause, a water risk.

(4) No agency, ministry, municipality, local board, tribunal or commission shall undertake any public project, development, undertaking or activity that,

(a) contravenes a prohibition or restriction contained in a source protection plan approved under this Act; or
(b) causes, or may cause, a water risk.

(5) Within three years after the date that this Act comes into force, every instrument shall be reviewed and, where necessary, revised or revoked by the issuing authority to ensure that the instrument conforms with the approved source protection plan.

CELA RECOMMENDATION #27: The Act should be amended to permit the Minister or any other person to seek injunctions in respect of contraventions of the Act, regulations, orders, or approved source protection plans, as follows:

(1) Where any provision of this Act or the regulations, or of an order made or source protection plan approved under this Act, is contravened, in addition to any other remedy or penalty imposed by law, such contravention may be restrained by action at the instance of the Minister or any other person resident in Ontario.

(2) In an action under subsection (1), the court may issue a temporary or permanent injunction ordering any person named in the action to,

(a) refrain any act or thing that it appears to the court may constitute or be directed towards a contravention of this Act or the regulations, or a contravention of an order made or source protection plan approved under this Act; or
(b) do any act or thing that it appears to the court may prevent a contravention of this Act or the regulations, or a contravention of an order made or source protection plan approved under this Act.

(3) No injunction may be issued in an action under subsection (1) except where 24 hours notice is given to the person named in the action, unless the court considers that the urgency of the situation is such that service of notice is not in the public interest.

(4) Where a plaintiff obtains an interlocutory injunction in an action under subsection (1), the court shall not require the plaintiff to provide an undertaking to pay damages in an amount greater than $500.

CELA RECOMMENDATION #28: The Act should be amended to tighten up the Minister's authority to grant time extensions, as follows:

(1) The Minister may, in writing, extend the time for doing anything under this Act or regulations, before or after the time for doing the thing has expired.

(2) The Minister shall not grant a time extension under subsection (1) unless:

(a) the person requesting the time extension has applied in writing to the Minister for the extension and has provided reasons in support of the request;
(b) the person requesting the time extension has provided public notice and comment opportunities in relation to the proposed extension; and
(c) the Minister is satisfied that a time extension is in the public interest and is necessary in order to achieve the purposes of this Act.

(3) In granting a time extension under subsection (1), the Minister may specify such further deadlines or impose such terms as the Minister considers advisable.

(4) Despite subsection (3), the Minister shall not grant a time extension under subsection (1) for a term that that exceeds one year.

CELA RECOMMENDATION #29: The Act should be amended to empower an SPB employee or agent to request police assistance in order to collect source protection information or to ascertain the presence of a water risk on, in or under property, as follows:

(1) A person who enters upon property under this Act may take such steps or issue such directions as may be required to accomplish the purpose of the entry, and may, if obstructed in so doing, call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required.

(2) Where a request for police assistance is made under subsection (1), it is the duty of every member of a police force to render such assistance forthwith.

CELA RECOMMENDATION #30: The Act should be amended to include inspection and enforcement powers that provincial officers possess under Ontario's other environmental laws.

CELA RECOMMENDATION #31: The Act should be amended to impose a mandatory duty upon the Minister to make regulations within 6 months of the Act's coming into force in relation to the following matters:

(a) establishing, defining or revising the boundaries of source protection areas or regions;
(b) designating a person or body as a source protection board for areas or regions not under the jurisdiction of a conservation authority;
(c) governing the preparation, content and approval of terms of reference, assessment reports, and source protection plans, including regulations that specify timeframes or deadlines; and
(d) describing the scope, nature and content of public consultation programs undertaken in relation to terms of reference, assessment reports, and source protection plans.

CELA RECOMMENDATION #32: The Act should be amended to include a built-in review mechanism, as follows:

(1) Every five years after the coming into force of this Act, the administration of this Act shall be referred by the Minister to such committee of the Legislative Assembly as may be designated or established for such purpose.

(2) The committee designated or established under subsection (1) shall, as soon as practicable, undertake a comprehensive public review of the provisions and operation of this Act, and shall table its report, including any recommended changes to this Act or its administration, with the Speaker of the Legislative Assembly within one year after the completion of the review.

CELA RECOMMENDATION #33: The Act should be amended to include transitional provisions, as follows:

(1) Every statutory power of decision that is exercised by a municipal council, local board, planning authority, agency, board, commission or tribunal under prescribed Acts shall conform with this Act, regulations, and approved source protection plans.

(2) Subsection (1) applies with respect to applications, matters or proceedings commenced on or after this Act comes into force.

(3) Subsection (1) applies to applications, matters or proceedings commenced before this Act comes into force if a decision has not been made before that date in respect of the application, matter or proceeding.

(4) For the purposes of subsection (3), a decision shall be deemed to be made,

(a) in the case of an instrument, on the day that the approval authority, or appellate body, decided to approve or uphold the issuance of the instrument;
(b) in the case of an amendment to an official plan or zoning by-law, on the day that the approval authority, or the Ontario Municipal Board, decided to approve or uphold the amendment; and
(c) in all other cases, on such days as may be prescribed by regulation.

(5) In subsection (1), "statutory power of decision" has the same meaning as the *Judicial Review Procedure Act.*

CELA RECOMMENDATION # 34: The Act should be amended to specify that it comes into force on the day that it receives Royal Assent, or, alternatively, that it comes into force within three months after the day that it receives Royal Assent.

To facilitate further discussion on the scope, structure and content of the revised Act, CELA has appended to this brief a draft bill that reflects the foregoing recommendations.

In closing, CELA welcomes this opportunity to make submissions on the proposed DWSPA, and we look forward to making further comments on the development, implementation and funding of source protection legislation in Ontario.