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

March 26, 2010

BY EMAIL

Debbie Scanlon
Senior Drinking Water Program Advisor
Source Protection Programs Branch
Ministry of the Environment
2 St. Clair Avenue West, Floor 8
Toronto, Ontario
M4V 1L5

Dear Ms. Scanlon:

RE: PROPOSED AMENDMENTS TO O.REG.287/07 (SOURCE PROTECTION PLANS) – EBR REGISTRY NO. 010-8766

These are the comments of the Canadian Environmental Law Association ("CELA") with respect to the proposed amendments to O.Reg.287/87 in relation to Source Protection Plans ("SPPs"). These comments are being provided to you pursuant to the above-noted EBR Registry notice.

Please be advised that CELA's submissions have been endorsed by the following groups and organizations: Environmental Defence, the Canadian Association of Physicians for the Environment, the Canadian Institute for Environmental Law and Policy, Concerned Walkerton Citizens, Ecojustice, Federation of Ontario Cottagers' Associations, Friends of East Lake, Friends of Rural Communities and the Environment, the Ontario Headwaters Institute, Protect Our Water and Environmental Resources, Sierra Club Ontario, Toward Balance Support Network, and the Mississippi Valley Field Naturalists.

PART I - OVERVIEW

1. Background

CELA is a non-profit, public-interest group established in 1970 to use existing laws to protect the environment and advocate environmental law reform. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental protection and resource management matters.

Since its inception, CELA has advocated the timely development of effective laws, regulations and policies to protect water resources within Ontario and across Canada. Among other things, CELA represented the Concerned Walkerton Citizens at the Walkerton Inquiry, and was actively involved in the development of the *Safe Drinking Water Act, 2002* ("SDWA"), the *Clean Water Act, 2006* ("CWA"), and regulations, policies and guidelines thereunder.

2. Context for the Draft Regulation

The draft regulation proposes to amend an existing regulation (O.Reg.287/07) in order to establish consultation and content requirements for the forthcoming SPPs which will be developed under the CWA by Source Protection Committees ("SPCs") across Ontario.

Under the CWA, each SPC must prepare and submit an SPP to the Minister for review and approval. Prior to approving an SPP, it is open to the Minister to refer the matter to a hearing officer. It is anticipated that SPCs will be submitting their proposed SPPs to the MOE in 2012.

In essence, the forthcoming SPPs will set out policies intended to address drinking water threats which have been identified and evaluated in the Assessment Reports currently being undertaken by SPCs. From a procedural perspective, the SPPs must be developed in accordance with the approved Terms of Reference, and will generally involve an open and consultative process: see sections 22(15) and 23 of the CWA.

The minimum content requirements for SPPs are set out in section 22 of the CWA. Among other things, this section specifies various matters which must be included in the SPP (i.e., policies for mitigating/monitoring activities that are or would be significant drinking water threats), or which may be included in the SPP (i.e., policies regarding incentive programs, education/outreach programs, activities that are or would be moderate/low drinking water threats, etc.).

Subsections 22(2) and 6 of the CWA also require the SPPs to address "any other matter prescribed by regulation." Thus, the purpose of the draft regulation is to specify the additional mandatory and optional matters to be addressed in SPPs.

3. Summary of CELA Recommendations

For the reasons outlined below, CELA's overall position is that the draft regulation's proposed SPP consultation requirements are generally sound and closely resemble the process used for the preparation and submission of Terms of Reference and Assessment Reports under the CWA. Accordingly, except in relation to early notification proposals, this CELA brief does not make any specific recommendations in relation to the consultation provisions of the draft regulation.

However, it is CELA's position that many of the draft regulation's SPP content and implementation proposals require further reconsideration and/or revision by the MOE. In particular, CELA makes the following recommendations in relation to the draft regulation:

CELA RECOMMENDATION #1: The draft regulation should be amended to ensure that SPCs have residual discretion to develop policies on non-prescribed matters that, in the opinion of the SPCs, are relevant to protecting existing and future sources of drinking water.

CELA RECOMMENDATION #2: The draft regulation should be reviewed and revised to remove all unnecessary constraints on the local development of SPP policies that are aimed at achieving the stated purpose of the CWA (i.e., protection of existing and future sources of drinking water).

CELA RECOMMENDATION #3: The MOE should review and revise the proposed list of prescribed instruments to ensure that it properly captures all licences, permits, approvals and orders which are available in relation to activities or conditions which may degrade or deplete groundwater or surface water. If amendments to the CWA are required in order to prescribe instruments issued by provincially created public bodies in Ontario, then such statutory amendments should be processed as expeditiously as possible.

CELA RECOMMENDATION #4: Subsections 19(1) and (2) of the draft regulation should be amended to expand or particularize the types of information that must be contained within the early notices provided to municipal clerks and band chiefs.

CELA RECOMMENDATION #5: Subsections 19(3) and (4) of the draft regulation should be amended to expand or particularize the types of information that must be contained within the early notices provided to persons undertaking activities posing significant drinking water threats. This expanded notice should also be provided to persons who own, control or are otherwise responsible for "conditions" and drinking water "issues" which have been identified and evaluated in approved Assessment Reports. Moreover, subsection 19(4) should be amended to specify that the notice should request the provision of additional site-specific information from the notice recipient.

CELA RECOMMENDATION #6: Section 19.3(4) of the draft regulation should be deleted and replaced with provisions which enable SPCs to include objectives in the SPPs other than those set out in subsections 19.3(1) to (3), provided that such objectives are consistent with the purpose and provisions of the CWA.

CELA RECOMMENDATION #7: Section 19.15 of the draft regulation should be amended by adding a new provision indicating that an SPC's failure to cross-reference the relevant CWA provision within the SPP does not invalidate the policy in question.

CELA RECOMMENDATION #8: Section 19.17 should be amended to include new provisions which require SPCs to post their "explanatory document" on the internet, and which requires the public notice for the draft SPP to include a reference to the explanatory document.

CELA RECOMMENDATION #9: Subsections 19.4(3) and (4) should be deleted to ensure that prohibition and risk management plans are available in relation to activities subject to waste or sewage works approvals.

CELA RECOMMENDATION #10: Section 19.5 of the draft regulation should be deleted to ensure that there are no undue constraints on the SPC's ability to consider the use of prohibition in relation to existing activities.

CELA RECOMMENDATION #11: The criterion in section 19.34 of the draft regulation should be amended to read "causes or may cause" (rather than "will result or likely result"), and section 19.34(b) of the draft regulation should be deleted to ensure that the mere existence of a prescribed instrument should not block or bar the imposition of a deadline for the preparation of an interim risk management plan.

CELA RECOMMENDATION #12: Section 19.35 of the draft regulation should be amended to substitute "drinking water threat" for the phrase "adverse effects". In the alternative, the statutory definition of "adverse effects" under the EPA should be adopted by cross-reference in the draft regulation.

CELA RECOMMENDATION #13: Section 19.37 of the draft regulation should be amended to enable the risk management official to evaluate the adequacy of the prescribed instrument (or its conformity with significant drinking water policies in the SPP) in accordance with clear criteria. If the official proposes to accept the instrument as a substitute for preparing a risk management plan, the official should consult the SPC.

CELA RECOMMENDATION #14: Section 19.27 of the CWA should be amended to include provisions which require the notice of hearing to be published and/or web-posted by the hearing officer or, in the alternative, the source protection authority.

The rationale for each of these recommendations is explained below.

PART II – GENERAL COMMENTS ON THE DRAFT REGULATION

In our view, there are a number of significant questions and unresolved concerns regarding the interpretation and application of the draft regulation. While further finetuning of certain regulatory provisions by legislative counsel might address some minor matters (i.e., relocating and expanding the definition of "transport pathway" proposed in section 19.8; ensuring that hearing notices get published in local newspapers under section 19.27, etc.), there are two overarching content/implementation issues which, in our view, require reconsideration by the MOE and/or significant revisions to the draft regulation. These two general issues may be framed as follows:

(i) whether the draft regulation fully prescribes all matters that should be addressed within SPPs ; and

(ii) whether the draft regulation strikes an appropriate balance between provincial prescription, SPC autonomy, and SPP flexibility.

1. Should the Regulation Represent a "Floor" or "Ceiling"?

A critical threshold question is whether SPCs are free to address SPP matters that are not otherwise specified in the CWA or the regulations. CELA understands the MOE's position is that SPCs will only permitted to address those matters that are specifically enumerated within section 22 of the CWA and the finalized regulation. In other words, the MOE appears to be suggesting that the regulation establishes a firm "ceiling," not a minimum "floor" that all SPCs should meet but can augment where appropriate at the local level.

Assuming (without deciding) that the MOE's approach is correct, it becomes imperative to ensure that all matters relevant to source protection planning are expressly mentioned within the draft regulation. However, given that the Assessment Report process is still underway in all Source Protection Areas/Regions at the present time, CELA submits that it is difficult to predict with certainty at this time whether the draft regulation has properly delineated the outside limits of SPP content requirements.

CELA notes that the draft regulation does include a provision which enables SPPs to include some additional content, but this content is specifically limited to matters which, in the opinion of the SPC, may "assist in understanding and implementing the plan" (section 19.10), rather than policies *per se*.

Accordingly, in order to avoid precluding SPCs from fully developing policies (including "strategic action" policies under section 19.12) to address matters that are relevant to source protection at the local level, the draft regulation should be amended to ensure that SPCs have residual discretion to develop policies on non-prescribed matters that are relevant to protecting existing and future sources of drinking water.

CELA RECOMMENDATION #1: The draft regulation should be amended to ensure that SPCs have residual discretion to develop policies on non-prescribed matters that, in the

opinion of the SPCs, are relevant to protecting existing and future sources of drinking water.

2. Prescription vs. Flexibility

In the MOE's consultation materials which accompany the draft regulation, it is suggested that the draft regulation is intended to facilitate local flexibility, rather than to closely regulate the local SPP policy development process. However, a careful perusal of the draft regulation reveals that the MOE is proposing to control or dictate many key aspects of SPP content in a very centralized manner, including:

- the forms and computer software to be used by SPCs (sections 19.2 and 19.16);

- the objectives which can – or cannot – be included in the SPPs (section 19.3);

- the activities which cannot be made subject to prohibition or risk management plans (section 19.4);

- the imposition of constraints on using prohibition in relation to existing activities (section 19.5);

- the inclusion of consultation summaries (section 19.9);

- the designation of persons responsible for implementing certain policies (sections 19.11 and 19.17);

- the categorization of certain policies as "strategic action policies" (section 19.12);

- the areas to which significant, moderate or low drinking water threat policies apply (section 19.14);

- the need for certain SPP policies to specifically invoke or refer to the relevant CWA section(s) before the policies are operative (section 19.16);

- the need for SPCs to produce a companion "explanatory document" to justify the policies contained in SPPs (section 19.16); and

- the preconditions to drafting policies affecting prescribed instruments, decisions under other Acts, and municipalities (sections 19.18, 19.19, 19.20);

While many of the foregoing matters should indeed be addressed within SPPs across Ontario, it begs the question of whether all of the foregoing items should necessarily be included in a regulation, or whether it is more appropriate to address some items by way of MOE guidance materials.

More fundamentally, it appears to CELA that in several aspects, the draft regulation is far more prescriptive than is warranted, and several regulatory provisions constrain – rather than facilitate – the exercise of SPC discretion to develop SPP content that satisfactorily addresses local needs and circumstances. While the MOE's preference for consistency among SPPs may be understandable, CELA submits that this preference should not outweigh or trump the paramount objective of ensuring that SPPs contain effective and locally driven policies to safeguard drinking water quality and quantity.

Accordingly, the draft regulation should be significantly amended to remove several of the above-noted constraints on SPC policy development at the local level. As described below, for example, section 19.5 (prohibition constraint) should be deleted to ensure that this tool remains freely available to SPC in relation to existing activities that are significant drinking water threats. Similarly, sections 19.4(2) and (3) should be deleted to ensure that waste disposal facilities or sewage works may be subject to prohibition or risk management plans, even if such activities may be notionally subject to certificates of approval under provincial law.

In our view, these and other constraints cannot be justified since they will likely frustrate – rather than achieve – the overall purpose of the CWA. Moreover, these constraints appear to have been incorporated into the draft regulation for ancillary reasons rather than legal considerations (i.e., to make SPPs more palatable or less objectionable to potentially affected landowners in vulnerable areas).

CELA RECOMMENDATION #2: The draft regulation should be reviewed and revised to remove all unnecessary constraints on the local development of SPP policies that are aimed at achieving the stated purpose of the CWA (i.e., protection of existing and future sources of drinking water).

PART III – SPECIFIC COMMENTS ABOUT THE DRAFT REGULATION

Aside from the general concerns outlined above, CELA has a number of specific comments on various provisions within the draft regulation, and we suggest certain amendments to the draft regulation in order to address such comments.

1. The Proposed List of Prescribed Provincial Instruments is Incomplete

Section 1.0.1 of the draft regulation lists 18 types of instruments that are prescribed for the purposes of the CWA. Significantly, only two types of EPA instruments (i.e., section 39 waste approvals and section 47.5 renewable energy approvals) and only two types of OWRA instruments (i.e., section 34 permits to take water and section 53 sewage works approvals) are found on this proposed list.

In creating this list, the MOE apparently reviewed 56 provincial statutes to determine which instruments could be applicable to the 21 activities that have been designated as drinking water threats under section 1.1 of O.Reg.287/07. However, having regard for the CWA itself, it is unclear why certain environmental approvals (i.e., program approvals under section 10 of the EPA) have been omitted from the proposed list. It is also unclear why air emission approvals

under section 9 of the EPA are wholly excluded from the prescribed list, particularly since localized emissions of certain contaminants (i.e., heavy metals) from point sources may result in aerial deposition of such substances into source water (and could conceivably be treated as a drinking water "issue" even if the industrial activity in question is not one of the 21 activities prescribed by O.Reg.287/87). It also appears that many forms of planning and land use management instruments (i.e., *Conservation Authorities Act, Niagara Escarpment Planning and Development Act, Public Lands Act,* etc.) have been omitted from the prescribed list.

CELA is particularly concerned about the proposed list's omission of virtually every type of environmental order that can be issued to address surface water or groundwater matters under the EPA (i.e., section 7 control order, section 17 order remedial order, section 18 preventative order, section 97 spills order, etc.) or the OWRA (i.e., section 32 order). In this regard, it should be noted that the MOE's discussion paper did not propose the wholesale exclusion of orders from the list prescribed under the CWA, nor did the discussion paper indicate that just a small sub-set of environmental and planning approvals would be prescribed under the CWA.

In our view, the proposed exclusion of many approvals and all orders from the prescribed list is significant for at least two reasons. First, it appears to be the MOE's preference that whenever possible, SPCs should craft policies which utilize provincial instruments (rather than the new Part IV tools such as risk management plans or prohibition) in order to avoid so-called (but undefined) "regulatory duplication." Assuming (without deciding) that this approach is sound, it will be difficult to implement in practice if many key instruments are not prescribed under the CWA.

Second, the CWA's important provisions requiring provincial instruments to conform with significant drinking water threat policies only apply to prescribed instruments. In short, if a particular approval or order is <u>not</u> prescribed, then, as a matter of law, the issuing authority does not have to ensure conformity with (or even have regard to) policies within an approved SPP when deciding whether or not to issue the non-prescribed instrument, or deciding what terms/conditions may be appropriate. In light of the broad purpose of the CWA, CELA submits that it is not in the public interest to allow provincial officials to issue instruments that are inconsistent, or directly conflict, with policies in approved SPPs.

It is CELA's understanding that the MOE developed and applied internal criteria to screen out statutory instruments which, in the MOE's view, should not be prescribed under the CWA (i.e., can the instrument be used for water protection? can terms/conditions be imposed/enforced? can the instrument address the 21 activities prescribed as drinking water threats?). In response, CELA notes that these are self-imposed considerations, and are not binding rules or statutory criteria which flow from the CWA. Accordingly, even if a particular instrument does not satisfy all of these factors, it is nevertheless open to, and incumbent upon, the MOE to prescribe the instrument if it is potentially relevant to source water protection.

Moreover, in CELA's opinion, the inclusion of commonly used environmental orders by Directors and the Minister would satisfy most or all of the factors set out in the MOE's screening filter. While CELA agrees that time-sensitive field orders issued by provincial officers under the EPA (which are generally intended to immediately address adverse effects or secure compliance

with the EPA) may not be good candidates for the CWA list, CELA does not agree with the wholesale exclusion of all other environmental orders from the list of prescribed instruments. In some instances, orders (like many approvals) can remain in effect for prolonged periods of time, are binding and enforceable, and may contain terms and conditions that are tailor-made to address site-specific concerns about off-site impacts upon groundwater or surface water. Similarly, in our view, there are additional statutory approvals under environmental, planning and land use management statutes which meet many of the MOE criteria, and which should be reconsidered for inclusion within the CWA list before it is finalized by MOE.

Accordingly, CELA submits the MOE should revisit and review the 56 statutes to develop a further and better list of prescribed instruments which actually catches all approvals and orders that may be relevant to source protection efforts at the local level across Ontario. CELA's initial suggestions for additional instruments to be prescribed under the CWA are set out in Appendix A below.

CELA is also aware that the MOE is now embarking on a new initiative intended to "modernize approvals" under MOE-administered statutes within the next 2 to 3 years (see EBR Registry No.010-9143). Under this initiative, it appears entirely possible that current approval requirements (including those currently on the proposed CWA list) may be substantially reformed, rescinded or made inapplicable to certain "low risk" activities. CELA will be making submissions to the MOE on this initiative under separate cover, but for the purposes of source water protection, CELA cautions the MOE to be mindful of unintended consequences in the CWA regime as MOE approvals are fundamentally restructured just as SPPs are being approved and implemented across Ontario.

CELA RECOMMENDATION #3: The MOE should review and revise the proposed list of prescribed instruments to ensure that it properly captures all licences, permits, approvals and orders which are available in relation to activities or conditions which may degrade or deplete groundwater or surface water. If amendments to the CWA are required in order to prescribe instruments issued by provincially created public bodies in Ontario, then such statutory amendments should be processed as expeditiously as possible.

2. Early Notification Requirements are Too Limited

Section 19 of the draft regulation imposes an obligation on all SPCs to provide early notice to various interested parties (i.e., municipal clerks, band chiefs, and persons undertaking certain activities) to indicate that the SPC is beginning to prepare the SPP. CELA supports the early notification of these parties, but submits that the proposed notice requirements are too limited in scope, and are unlikely to solicit the level of participation, and types of information, required by an SPC in order to craft an effective and efficient SPP that enjoys broad community-based support.

For example, subsections 19(1) and (2) only require the SPC to simply notify municipal clerks and band chiefs that the SPP process is getting underway. In CELA's view, it would be helpful if such notice requirements were expanded to require SPCs to provide additional information, such as: (i) description of the nature and purpose of the SPP; (ii) description of the various

opportunities for these parties to participate in the policy development process (especially if they are not already represented on the SPC); (iv) summary of the main findings of the Assessment Report that may pertain to the municipality or band reserve in question; (v) description of the key milestones and anticipated timeframes for the preparation, review and approval of the SPP; and (vi) any other matter deemed relevant by the SPC.

CELA RECOMMENDATION #4: Subsections 19(1) and (2) of the draft regulation should be amended to expand or particularize the types of information that must be contained within the early notices provided to municipal clerks and band chiefs.

The above-noted concerns also apply to the notice requirements proposed under subsections 19(3) and (4) of the draft regulation, which essentially: (i) put persons on notice that the SPC believes they are undertaking activities which are or may be significant drinking water threats; and (ii) request these person to provide the SPC with a copy of any prescribed instruments that "regulate" the activities in question. As discussed above, this notification requirement should be expanded to require the provision of additional information about the SPP process, and to invite the person to participate in the policy development process.

Secondly, it is unclear to CELA why this early notification requirement is limited to persons undertaking "activities", particularly when the definition of "drinking water threat" under the CWA also includes "conditions" that may adversely affect water quality or quantity. In our view, the notice required under subsection 19(3) should be provided to persons who own or control "conditions" that are or may be significant drinking water threats. Similarly, notice should be provided to persons responsible for drinking water "issues" which have been identified and evaluated by the SPC in approved Assessment Reports.

Thirdly, CELA submits that the notice should not only request that the person provide the SPC with a copy of his/her prescribed instrument (if any), but should also request site-specific information which may be of considerable interest to the SPC. For example, aside from providing the instrument itself to the SPC, the notice should request the person to submit other site-specific information, where available, that may be relevant to the SPC's deliberations, such as: (i) nature/size of activities/operations (i.e., production capacity, livestock units, etc.); (ii) technical design/engineering matters (i.e., types of water pollution controls, spills containment structures, etc.); (iii) quality/quantity of water-related emissions or discharges; (iv) site plans/drawings, operating/contingency plans, or financial assurance; and (v) any other risk management measures (or best management practices) being undertaken by the person in relation to the activity in order to protect groundwater or surface water.

In our view, the provision of additional detailed information to the SPC will likely be far more useful for the policy development process than simply requesting a photocopy of an instrument (assuming an instrument even exists). It goes without saying, however, that the notice should clearly indicate that any such information provided by the person to the SPC is strictly protected by provincial FOI legislation, and will not be publicly disclosed or disseminated by the SPC.

CELA RECOMMENDATION #5: Subsections 19(3) and (4) of the draft regulation should be amended to expand or particularize the types of information that must be contained

within the early notices provided to persons undertaking activities posing significant drinking water threats. This expanded notice should also be provided to persons who own, control or are otherwise responsible for "conditions" and drinking water "issues" which have been identified and evaluated in approved Assessment Reports. Moreover, subsection 19(4) should be amended to specify that the notice should request the provision of additional site-specific information from the notice recipient.

3. Constraining SPP Objectives is Undesirable

Section 19.3 of the draft regulation proposes that only three objectives are permissible in an SPP: (i) protection of existing/future sources of drinking water; (ii) mitigation/cessation of significant drinking water threats from activities or conditions; and (iii) achievement of Great Lakes targets (if any). Subsection 19.3(4) goes on to provide that no other objectives shall be contained in an SPP.

In CELA's view, if SPPs are truly intended to be locally driven documents that are responsive to communities' needs and circumstances, then it is unnecessary and potentially counterproductive to constrain SPP objectives in this manner. If, after the receipt of input from local stakeholders, the SPC determines that other, or more specific or quantifiable, source water objectives are desirable (i.e., mitigation/cessation of moderate threats; enhanced public awareness or encouragement of stewardship activities; obtaining a % reduction in combined sewer overflows within specified IPZs by a specified dates, etc.), then the SPC should be free to frame such goals or desired outcomes as "objectives" within the SPP. Indeed, the articulation of such objectives (or series of tiered objectives) are consistent with the purpose and inherently precautionary nature of the CWA, and will assist in post-approval monitoring and reporting of the effectiveness of the SPP.

If the MOE's concern is that non-drinking water objectives (i.e., landowner compensation) might be included in some draft SPPs, then the obvious remedy is for the MOE to immediately advise SPCs that such objectives are not approvable on the grounds that they are not consistent with the purpose and provisions of the CWA (i.e., sections 1 and 98(6)).

CELA RECOMMENDATION #6: Section 19.3(4) of the draft regulation should be deleted and replaced with provisions which enable SPCs to include objectives in the SPPs other than those set out in subsections 19.3(1) to (3), provided that such objectives are consistent with the purpose and provisions of the CWA.

4. Cross-Referencing the CWA in the SPP

Section 19.15 of the draft regulation essentially stipulates that before certain policies in an SPP can become operative, they must contain cross-references to the relevant sections of the CWA itself. While CELA appreciates that such a requirement will promote traceability, accountability and enforceability, we are concerned that an SPC may, through inadvertence, neglect to include a specific CWA section in relation to a particular policy. In such cases, this minor oversight should not vitiate the policy or render it unenforceable. Accordingly, CELA submits that section

19.15 should be amended by including a new clause indicating that an SPC's failure to comply with subsections 19.15(1) to (4) does not invalidate the policy in question.

CELA RECOMMENDATION #7: Section 19.15 of the draft regulation should be amended by adding a new provision indicating that an SPC's failure to cross-reference the relevant CWA provision within the SPP does not invalidate the policy in question.

5. The Explanatory Document should be Web-Posted

Section 19.16 requires the SPC to prepare an "explanatory document" that, among other things, justifies policy decisions and summarizes public input received by the SPC. CELA supports this proposal, but suggests that it may make more practical sense to include this as an appendix in the SPP, rather than a separate, stand-alone document. If the MOE insists on making this a separate document, then CELA recommends that, for the purposes of efficiency and accessibility, this document should posted on the SPC's website, rather than forcing members of the public to "request" copies of this document. In addition, the public notice that accompanies the publication of the draft SPP should include a reference to the availability of the explanatory document.

CELA RECOMMENDATION #8: Section 19.17 should be amended to include new provisions which require SPCs to post their "explanatory document" on the internet, and which requires the public notice for the draft SPP to include a reference to the explanatory document.

6. Part IV Tools under the CWA are Unduly Constrained by the Regulation

Various sections of the draft regulation set out provisions intended to govern the availability and implementation of the new tools available under the CWA. CELA submits that several of these provisions are problematic, and should be reconsidered and/or revised by the MOE.

For example, section 19.4(1) of the draft regulation proposes that the 21 activities prescribed by O.Reg.287/07 as potential drinking threats may be subject to prohibition or risk management plans (including risk management plans). While CELA generally supports this proposal, we strongly object to the subsequent suggestion in subsections 19.4(2) and (3) that activities covered by waste and sewage approvals should be automatically exempt from prohibition and risk management plans.

In our view, there is no public interest justification for such sweeping sectoral exemptions, particularly in light of: (i) the MOE's problematic track record in amending and enforcing these approvals in a timely and effective manner; and (ii) the fact that waste facilities and sewage works have individually and cumulatively impacted groundwater and surface water more frequently, or to a greater extent, than some of the other 21 drinking water threats. In short, CELA strongly submits that these sectors do not warrant a "free pass" from the prohibition and risk management plan provisions that apply to all other prescribed drinking threats. Accordingly, subsections 19.4(2) and (3) of the draft regulation should be deleted.

CELA RECOMMENDATION #9: Subsections 19.4(3) and (4) should be deleted to ensure that prohibition and risk management plans are available in relation to activities subject to waste or sewage works approvals.

Section 19.5 of the draft regulation proposes that SPCs may not utilize prohibition (section 57 of the CWA) in relation to existing activities, unless the SPC opines that the existing activity must be prohibited in order to ensure that it ceases to be a significant drinking water threat. In our view, the prohibition tool should be freely available for use by SPCs without this additional constraint. Indeed, CELA submits that only the statutory constraint in section 57(2) of the CWA (i.e., 180 day delay in the effective date of prohibition) should apply to this potentially important tool.

Moreover, by generally prohibiting SPCs from using this tool for existing activities, but then carving out a limited exception (i.e., where the SPC can justify prohibition rather than using other tools), the MOE has all but guaranteed that if prohibition is even attempted by an SPC, the affected landowner will immediately seek a public hearing under the CWA (or perhaps judicial review) to second-guess the SPC on matters within its specialized mandate. Moreover, we are unclear why this Part IV tool – and no others – have been subjected to this needless constraint. Accordingly, CELA strongly submits that section 19.5 should be deleted.

CELA RECOMMENDATION #10: Section 19.5 of the draft regulation should be deleted to ensure that there are no undue constraints on the SPC's ability to consider the use of prohibition in relation to existing activities.

Section 19.34 empowers a risk management official to issue a notice requiring the preparation of an interim risk management by a specified deadline. However, this notice cannot be provided in relation to activities that are notionally regulated by a prescribed instrument. For the reasons described below, the constraint in section 19.34(b) on the applicability of interim risk management plans should be deleted. In addition, in accordance with the precautionary principle, the criterion specified in section 19.34 as the trigger for the interim risk management plan should be changed from "will result or is likely to result" to "causes or <u>may</u> cause" a drinking water health hazard.

CELA RECOMMENDATION #11: The criterion in section 19.34 of the draft regulation should be amended to read "causes or may cause" (rather than "will result or likely result"), and section 19.34(b) of the draft regulation should be deleted to ensure that the mere existence of a prescribed instrument should not block or bar the imposition of a deadline for the preparation of an interim risk management plan.

Section 19.35 of the draft regulation provides that a risk management plan may contain "requirements dealing with the remediation of adverse effects caused by the activity." It is unclear why this provision relates to "adverse effects" rather than "drinking water threat," as defined by the CWA. If the term "adverse effects" is to be retained (since it appears in subsection 109(5) of the CWA but is undefined under the Act), then the draft regulation should be amended to adopt the statutory definition of "adverse effects" under the EPA.

CELA RECOMMENDATION #12: Section 19.35 of the draft regulation should be amended to substitute "drinking water threat" for the phrase "adverse effects". In the alternative, the statutory definition of "adverse effects" under the EPA should be adopted by cross-reference in the draft regulation.

Section 19.37 of the draft regulation proposes that risk management plans are not available where a person provides "official written notice" that the activity in question is governed by a prescribed instrument containing water-related conditions, and that the conditions conform to significant threat policies in the approved SPP. This proposed constraint is unsupportable in principle and in practice.

First, the mere existence of a prescribed instrument does not necessarily guarantee that water quality/quantity will not be impacted by the activity, and there is no guarantee that the prescribed instrument has been (or will be) adequately amended in a timely manner to maximize source protection effectiveness.

Second, the "official written notice" by the instrument-holder appears to be solely determinative of the issue, especially since the risk management official appears unable under the draft regulation to question the opinion of the instrument-holder, to scrutinize the adequacy of the instrument, or to supplement the instrument by way of a risk management plan.

Third, upon receipt of the "official written notice," there seems to be no direct mechanism to facilitate review/comment by the SPC or interested members of the public as to the adequacy of the prescribed instrument.

Fourth, where the instrument-holder has received and responded to the notice required under subsections 19(3) and (4), and where the instrument-issuing authority has received and responded to notice under section 19.18, it is conceivable that the SPC may nevertheless find the existing instrument deficient for source water protection purposes. In such cases, the SPC should be permitted to elect to use a risk management plan (rather than rely upon instrument amendments) in order to address source protection concerns.

For the foregoing reasons, CELA submits that section 19.37 should be substantially amended to ensure that the risk management official is empowered to scrutinize the adequacy of the instrument (or its alleged conformity with SPP policies) in accordance with clearly articulated criteria in the regulation. Where the risk management official intends to accept an instrument as a substitute for the risk management plan envisioned by the SPC, then the risk management official should be compelled to consult with the SPC.

CELA RECOMMENDATION #13: Section 19.37 of the draft regulation should be amended to enable the risk management official to evaluate the adequacy of the prescribed instrument (or its conformity with significant drinking water policies in the SPP) in accordance with clear criteria. If the official proposes to accept the instrument as a substitute for preparing a risk management plan, the official should consult the SPC.

7. Notices of Hearings under the CWA should be Published and Web-Posted

Section 19.27 of the draft regulation requires that when a hearing officer has been appointed under section 28 to conduct a hearing about a proposed SPP, he/she shall serve the notice of hearing upon certain named persons by prescribed means. Given that the subject-matter of the hearing potentially affects a number of private and public interests other than those listed in subsection 19.27(2), CELA submits that the draft regulation should be amended to ensure that the hearing officer (or, alternatively, the source protection authority upon receipt of notice) causes the notice to be published in a newspaper of general circulation in the area(s) affected by the matter(s) referred to the hearing. We also suggest that the hearing notice should also be web-posted by the hearing officer and/or source protection authority.

CELA RECOMMENDATION #14: Section 19.27 of the CWA should be amended to include provisions which require the notice of hearing to be published and/or web-posted by the hearing officer or, in the alternative, the source protection authority.

*****

In closing, CELA appreciates this opportunity to provide comments on the proposed SPP amendments to O.Reg.287/07, and we trust that our recommendations will be considered as the regulatory amendments are finalized.

Please feel free to contact the undersigned if you have any questions or comments about CELA's comments and recommendations regarding this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

Christopher Waffle
Source Protection Campaigner

CELA Publication #718

APPENDIX A

PROPOSED LIST OF ADDITIONAL INSTRUMENTS WHICH SHOULD BE PRESCRIBED UNDER THE CWA

[Note: The following list of prescribed instruments is not intended to be exhaustive. Instead, this list is intended to provide illustrative examples of additional instruments which should be prescribed by section 1.0.1 of the draft regulation. It should be further noted that many of the instruments listed below are already prescribed as environmentally significant approvals/orders by O.Reg.681/94 under the *Environmental Bill of Rights*.]

Aggregate Resources Act

- section 16(2) (amendment of site plans)
- section 37 (amendment of aggregate permit)
- section 68 (granting relief from regulatory requirements)

Conservation Authorities Act

- section 23 (Minister's order re flood control/water control structures)
- section 28 (regulatory approvals re development, wetlands interference, alteration of shorelines/watercourses)

Crown Forest Sustainability Act

- section 9 (approval of forest management plan)
- section 11 (amendment of forest management plan)
- section 26 (sustainable forest licence)
- section 27 (forest harvest licence)
- section 34 (amendment of forest resource licence)
- section 44 (Minister's approval of forest harvesting)
- section 54 (licence for forest resource processing facility)

Drainage Act

- section 5 (municipal decision to proceed with drainage works on petition)
- section 58 (by-law authorizing construction of drainage works)

- section 83 (by-law authorizing deposits/discharges into drainage works)

Environmental Assessment Act

- section 9 (Minister's approval of individual EA application)
- sections 9.1 and 9.2 (ERT approval of individual EA application or related matter)

Environmental Protection Act

- section 7 (control order)
- section 9 (air approval)
- section 10 (program approval)
- section 17 (remedial order)
- section 18 (preventative order)
- section 31 (emergency waste approval)
- section 43 (waste removal order)
- section 44 (waste site/system conformity order)
- section 46 (Minister's approval of use of former disposal sites)
- section 94 (Minister's directions re spills)
- section 97 (Minister's spills order)
- section 168.6 (certificate of property use)

Fish and Wildlife Conservation Act

- section 47 (aquaculture licence)

Greenbelt Act

- section 12 (amendments to Greenbelt Plan)
- section 16 (Minister's zoning order)

Lakes and Rivers Improvement Act

- section 17 (Minister's order re dams)
- section 17.1 (Minister's order re unapproved activities)
- section 22(2) (Minister's order regulating use of lake, river or dam)
- section 23 (Minister's order regulating water levels)
- section 23.1 (approval of management plan)
- section 36 (removal of deposited/discharged substances from watercourses)

Mining Act

- section 35 (Minister's order re withdrawing/reopening lands)
- section 39 (Minister's award of surface rights)
- section 41(4) (reinstatement of licence of occupation)
- section 84 (lease of surface rights)
- section 92(5) (approval to cut trees)
- section 100 (oil/gas exploration licence)
- section 101 (oil/gas/salt production leases)
- section 101.1 (lease for underground hydrocarbon storage)
- section 139.2 (approval to rehabilitate mine hazard)
- section 140(4) (Director's acceptance of closure plan)
- section 143 (amendments to closure plan)
- section 147 (order re mining hazard closure plan)
- section 148(order/directions re mine hazard rehabilitation)
- section 149.1 (acceptance of surrender of mining claim)
- section 153.2(3) (compliance order re mine hazard)

- section 175 (order re water rights/easements)
- section 176(3) (approval of unpatented mining claims)

Niagara Escarpment Planning and Development Act

- section 10 (amendments to Niagara Escarpment Plan)
- section 24 (development permit)

Nutrient Management Act

- section 29 (preventative order)
- section 30 (compliance order)

Oak Ridges Moraine Conservation Act

- section 9(8) (Minister's order to amend official plan/by-law)
- section 10(8) (Minister's order re amendments to official plan/by-law)
- section 12 (amendments to Oak Ridges Moraine Conservation Plan)

Oil, Gas and Salt Resources Act

- section 7.0.1 (order to plug/decommission wells/facilities)
- section 10 (licence for oil/gas well)
- section 11 (permit to inject substances into geological formation)

Ontario Planning and Development Act

- section 4(7) (approval of development plan)
- section 11 (amendments to development plan)
- section 17 (Minister's zoning order)

Ontario Water Resources Act

- section 31 (order re sewage discharge)
- section 32 (order re measures to alleviate water impairment)

- section 34(7) (order re flowing/leaking well)
- section 53(3) (order re sewage works)
- section 61 (directions re sewage works)
- section 74(2) (order re public water/sewage works)
- section 91 (directions re commercial/industrial sewage works)
- section 92 (order re sewage discharges into sewage works)

Pesticides Act

- section 28 (control order)
- section 30 (remediation order)

Public Lands Act

- section 12 (zoning plans)
- section 13 (work permits re public lands/shore lands)
- section 18 (conditions re land use)

Safe Drinking Water Act

- section 36 (approval of drinking water system)
- section 108 (Minister's order re imminent drinking water health hazard)
- section 109 (Director's order re imminent drinking water health hazard)

Technical Standards and Safety Act

- section 6 (authorizations)
- section 14 (safety order)
- section 31 (Director's order)
- section 33 (Minister's orders)