SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE DIRECTOR, STANDARDS DEVELOPMENT BRANCH MINISTRY OF THE ENVIRONMENT REGARDING THE PROPOSED DRINKING WATER REGULATION – EBR REGISTRY NO. RA00E0014

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Prepared by
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PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purposes of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide range of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

Since its inception, CELA has been particularly active in protecting the quality and quantity of water resources in Ontario and across Canada. For example, much of CELA's casework has focused on preventing or remediating harm to surface water and groundwater – both of which can serve as sources of drinking water. Similarly, CELA has been involved in countless law reform initiatives at the provincial, federal and international levels in order to safeguard water quality and quantity.

In light of this experience, we have considered the adequacy of the proposed drinking water regulation. To our knowledge, the actual text of the proposed regulation has not been made available for public review and comment. However, according to the EBR Registry Notice, the proposed regulation is intended to achieve the following objectives:

- require accreditation for all laboratories or water treatment plants which perform tests on drinking water;

- require municipalities to notify the Ministry of the Environment (MOE) if they change the private laboratory which test their drinking water;

- review the Certificates of Approval (C of A) for all water treatment facilities at least once every three years; and

- require laboratories to immediately notify the MOE, medical officers of health, and municipal water facility operators if test results indicate unsafe drinking water quality.

[1] Counsel, Canadian Environmental Law Association.

In general, CELA supports these four requirements. CELA submits, however, that these narrowly focused requirements constitute a "band aid" solution that does not go far enough ensure safe drinking water across Ontario. In our view, merely tinkering with lab accreditation or notification procedure does not address the larger legal, policy and administrative reforms that are necessary to provide effective and enforceable protection of drinking water in Ontario, as described below.

Our more detailed comments are provided below in Part II of this submission.

PART II – CRITIQUE OF THE PROPOSED REGULATION

Our comments on the proposed regulation (and related matters) have been organized into three main categories: (1) the public notice/comment opportunity that has been provided in relation to the proposed regulation; (2) the four main requirements under the proposed regulation; and (3) the need for more extensive legislative and policy reform in relation to Ontario's water resources.

1. Public Notice/Comment on the Regulation

We note that the proposed regulation was posted on the Registry as an "exception" pursuant to section 29 of the *Environmental Bill of Rights* (EBR). Given the gravity of the Walkerton crisis, we do not question the need to promulgate the regulation in an expeditious manner. However, the problems that the regulation purports to address have been in existence for years, and it is tragic that it has taken a public health disaster to prod the Ontario government into long overdue action.

It should be further noted that our ability to comment on the proposed regulation has been impaired by the unavailability of the actual text of the regulation. The EBR Registry Notice provides an online link that allegedly provides "access to an electronic copy of the proposal and/or supporting documentation". In fact, this link provides neither the proposal nor supporting documentation. Instead, the link simply accesses the written version of speeches made by the Minister and Deputy Minister at their May 29th press conference at Queen's Park.

Accordingly, we are unable at this time to undertake a legal analysis of the actual scope or content of the proposed regulatory requirements. Thus, CELA's comments below are at a general or conceptual level, and we reserve the right to provide further comment once the regulatory language is available for public scrutiny.

2. Requirements under the Regulation

Our comments on the four requirements under the proposed regulation are as follows:

(a) Accreditation of Testing Facilities

In principle, CELA has no objection to requiring that private laboratories and water plant testing facilities be accredited by an independent agency in order to perform drinking water testing.

However, it is unclear at this point what agency the MOE is proposing to use for accreditation purposes (Canadian Standards Association? Canadian Association of Environmental and Analytical Laboratories? ISO?). Presumably this matter will be addressed through appropriate definitions in the proposed regulation.

(b) Change of Private Laboratories

The proposed regulation will require municipalities to inform the MOE when they change the private laboratory that is doing their water testing. Apparently, this provision is intended to allow the MOE to "follow up" with the new lab "to ensure that the new lab is fully aware of its role and obligations".[2] In one sense, this requirement is somewhat redundant – if a municipality can only use accredited labs for water testing, what does it matter if a municipality decides to switch from one accredited lab to another?

Nevertheless, we have no objection to this provision since public outreach and educational activities by MOE staff may be helpful. At the same time, however, we must question how frequent and how detailed these "follow up" efforts will likely be in light of the MOE's extensive staff losses and budget cutbacks. As recent events have demonstrated, merely mailing copies of the *Ontario Drinking Water Objectives* (or copies of the proposed regulation) may not necessarily ensure that labs or municipalities fully understand their legal obligations. Accordingly, we would suggest that MOE undertake meaningful "follow up" efforts (i.e. seminars, workshops, site visits, toll-free drinking water "hot line", etc.) to explain the interpretation and application of the new requirements.

(c) Review of Existing Approvals

The proposed regulation commits to the "review" of all C of A's "at least once every three years". CELA supports the concept of periodic review of water treatment C of A's, particularly since such review may (in theory) identify opportunities to strengthen the terms and conditions within C of A's which have no express expiry date.

In reality, however, it seems unlikely that an internal MOE review of C of A's drafted by the MOE itself will necessarily result in any significant changes to these existing approvals. Moreover, since C of A's tend to contain a number of standardized provisions, it is unclear what an MOE review of its own "boilerplate" language will really achieve in terms of strengthening drinking water protection.

In addition, a number of important questions arise with respect to the implementation of the periodic reviews. First, who will be undertaking the review – MOE field staff? Water Resources Branch staff? Legal Services Branch? External peer reviewers?

Second, what is the intended nature or scope of the reviews? Are the reviews intended to result in changes to the C of A's, such amendments requiring best available technology? Are the reviews going to include operational audits or assessments of the treatment facility's compliance

[2] "Notes for Remarks", The. Hon. Dan Newman (May 29, 2000).

with its C of A? If the review identifies a need for remediation or upgraded equipment, will there be provincial funds available?
Third, are the results of the reviews going to be made public? Will members of the public be notified that a review is underway, or will they be solicited to provide input into the review process? If so, in what manner or format?

Unless these and other implementation questions are answered, it is difficult to comment further on the efficacy of the proposed periodic review.

(d) Notification regarding Test Results

The MOE has opined that the existing *Ontario Drinking Water Objectives* (ODWO) places an "onus" on private laboratories to report unsatisfactory test results to the MOE.[3] In our view, there is a significant difference between an "onus" and a legal "duty" to report test results. As a matter of law, the ODWO (or other MOE guidance documents or policies) are not enforceable against, or binding upon, private laboratories performing drinking water tests.

Under the proposed regulation, testing labs will be required to notify the MOE, medical officers of health, and municipalities of unsatisfactory water test results. In principle, CELA supports this attempt to entrench a notification requirement in law. We note that a similar duty already exists under the *Health Protection and Promotion Act*, which specifies that operators of health care labs must notify medical officers of health if they find a "reportable disease", which is defined as including E. coli infection.[4] Thus, CELA supports the proposed regulation's attempt to establish a specific notification duty in relation to drinking water.

However, there are a number of unaddressed issues and unresolved questions regarding the proposed notification requirement. For example, with respect to the timing of notice, when is the notification duty actually triggered? As soon as a routine test result indicates a problem? When subsequent testing or re-testing confirms a problem? What is the timeframe for providing the required notice – "immediately" or "as soon as reasonably possible"?

Where unsafe drinking water is suspected, time is clearly of the essence. In our view, the notice requirement must be triggered as early as possible so that the public is warned and corrective actions are undertaken without delay. Accordingly, the proposed regulation must, at a minimum, clearly define what the reportable event is, and what notification timeframe is required. In addition, the regulation should clearly describe who gets notice, and should describe the content requirements for such notice. Prescribing the use of a standardized notification form under the regulation will help to ensure consistency and certainty in the reporting process.

However, merely requiring notification does not necessarily ensure that corrective measures will be undertaken to address suspected or confirmed water quality problems. Accordingly, CELA submits that the duty to notify should be accompanied by a duty to act; that is, once notification has been provided by the water testing facility, the owner and operator should be legally required to warn the public and to take all necessary measures to actually address the water quality

[3] "Notes for Remark", Deputy Minister S.K. Lal (May 29, 2000).
[4] See section 29 of the *Health Protection and Promotion Act* and O.Reg.559/91 as amended.

problem (i.e. by repairing or replacing malfunctioning equipment, improving the treatment process, or taking steps to secure water wells against off-site sources of contamination).
CELA submits that the following language[5] could be used to delineate the notification requirements under the drinking water regulation:

(a) In this section,

"accredited facility" means a private or public laboratory, or a municipal water treatment plant that has been accredited to perform testing of drinking water in Ontario.

"drinking water" means water intended for human consumption that is produced, stored, supplied or distributed by water works approved under the *Ontario Water Resources Act*; and

"unsafe water quality" means drinking water that exceeds one or more health-related parameters prescribed under the *Ontario Drinking Water Objectives*, as amended.

(b) Every person who tests drinking water in an accredited facility shall forthwith notify the following persons that his or her test results indicate unsafe water quality,

(i) the MOE Regional Director;

(ii) the local MOE District Officer;

(iii) the local medical officer of health; and

(iv) the owner and operator of the water works.

(c) The duty imposed by subsection (b) comes into force immediately when the person knows or ought to have known that his or her test results indicate unsafe water quality.

(d) The person required by subsection (b) to give notice shall give such additional information as may be required by the Regional Director, the local MOE District Officer, the local medical officer of health, and the owner and operator of the water works.

(e) The notice required by subsection (b) shall be in the prescribed form, and shall include:

(i) particulars of the test results which indicate unsafe water quality;

[5] See sections 92-93 of the *Environmental Protection Act*.

(ii) a description of any further testing which will be undertaken.

(f) Upon receipt of the notice required by subsection (b), the owner and operator of the water works shall forthwith,

(i) provide immediate and effective public notice that test results indicate unsafe water quality;

(ii) provide immediate and effective public information on how consumers can avoid or limit their exposure to unsafe water quality; and

(iii) do everything practicable to prevent, eliminate or ameliorate the conditions or circumstances, which may be causing unsafe water quality.

3. Looking Ahead: The Agenda for Reform

As described above, CELA submits that the proposed drinking water regulation is, at best, an interim measure which only addresses short-term needs, such ensuring accreditation of testing facilities and clarifying notification requirements. As such, the regulation should be viewed as a stepping stone to more substantive drinking water reform in Ontario.

If the Ontario government intends to ensure effective and enforceable protection of drinking water, then the government must commit to a sweeping overhaul of the existing legislative and policy framework. At a minimum, this agenda for reform should be developed in an open, consultative manner, and should include the following elements:

(a) Safe Drinking Water Act

At the present time, there is no Ontario law specifically designed to safeguard the province's drinking water, particularly at the point of consumption. Instead, we have a complex, confusing and often inconsistent array of laws, regulations, policies, guidelines, and objectives related to water quality.

The *Ontario Water Resources Act* (OWRA), for example, is a general water management statute that dates back to the 1950's. To date, the OWRA has been primarily used to regulate water-taking activities and to establish an approvals process for water works and sewage works. No enforceable drinking water standards have been promulgated under the OWRA, although the Act clearly contemplates regulations, which prescribe "standards for quality of potable and other water supplies".[6] Moreover, the OWRA's main prohibition[7] simply prohibits the discharge of materials that may impair "water" (defined as surface water or groundwater), and does not specifically protect drinking water at the point of public consumption. Although the Director is empowered under the OWRA to declare areas of public water supply[8] (and to safeguard such

[6] *Ontario Water Resources Act*, R.S.O. 1990, c.O.40, s.75.
[7] *Ibid.*, s.30(1).
[8] *Ibid.*, s.33.

areas from "swimming" or "bathing"), it appears that this power is entirely discretionary and infrequently exercised. For these and other reasons, there can be little doubt that the current OWRA is insufficient to meet the challenges of protecting drinking water in the 21st century.

Similarly, the current EPA is of questionable value for the purposes of directly protecting drinking water, although water is included within the EPA's definition of "environment". For example, the MOE has used the EPA to regulate certain water-related matters, such as ice fishing huts and wastewater discharges from boats, but the MOE has not passed drinking water regulations under the EPA. Similarly, the EPA's main anti-pollution prohibition[9] does not specifically address drinking water quality. Therefore, the current EPA, like the OWRA, is inadequate for protecting Ontario's drinking water at the point of consumption. At best, the OWRA and EPA are laws of general application which have not been specifically tailored or used to directly safeguard drinking water at the point of consumption.

Over the years, the OWRA and EPA have been supplemented by numerous MOE policies, guidelines, and objectives, such as the ODWO and *Water Management: Policies, Guidelines, Provincial Water Quality Objectives (PWQO) of the MOE*. First, it must be noted that unlike laws or regulations, these various guidance documents are not enforceable *per se*. Thus, when the MOE's *Water Management* policy "encourages" controls on urban and agricultural drainage to prevent water quality degradation,[10] this statement of policy may be well-intentioned but it carries no legal weight whatsoever. Secondly, it is questionable whether the numerical contaminant criteria set under the ODWO and PQWO remain sufficiently protective of human health (especially children's health[11]), particularly in light of the cumulative or synergistic effect of many contaminants. Unfortunately, since the present Ontario government terminated the Advisory Committee on Environmental Standards (ACES) in 1995, there appears to be no public forum in which the adequacy of these standards can be systematically reviewed and revised.

In short, CELA submits that Ontario's current regulatory regime is inadequate to protect the quality of Ontario's drinking water, as has been demonstrated by recent events. Accordingly, CELA strongly recommends that the provincial government immediately enact a *Safe Drinking Water Act* (SDWA).

The concept of a SDWA is not new. For example, the United States enacted safe drinking water legislation over 25 years ago.[12] Administered by the Environmental Protection Agency, this law is intended to ensure that public water systems meet national standards which protect consumers from the harmful effects of drinking water contaminants (i.e. microbes, radionuclides, and organic and inorganic chemicals). Among other things, this legislation:

- authorizes the Agency to set enforceable health standards for contaminants in drinking water;

- requires public notification of water systems' violations of these standards;

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[9] *Environmental Protection Act*, R.S.O. 1990, c.E.19, s.14 (1).
[10] *Water Management* (MOE, 1994), p.13.
[11] *Environmental Standard Setting and Children's Health* (CELA/Ontario College of Family Physicians, 2000).
[12] Safe Drinking Water Act, 1974.

- requires annual reports to drinking water customers on contaminants found in drinking water;

- protects groundwater used as a source of drinking water;

- establishes a funding mechanism for water system upgrades; and

- requires an assessment of the vulnerability of drinking water sources to contamination.[13]

In Ontario, CELA and other groups have advocated the passage of a SDWA since the early 1980's.[14] Similarly, a private member's bill to establish a SDWA was introduced in the Ontario Legislature in 1989.[15] More recently, CELA pushed for legislative protection of drinking water during the debate on Bill 107, the *Water and Sewage Services Improvement Act, 1997.*[16] However, the present Ontario government refused, without reasons, to entrench such protection within Bill 107 or any other statute.

CELA submits that SDWA is long overdue in Ontario, and further submits that the provincial government must immediately enact the SDWA which, at a minimum, contains the following elements:

- entrench a clear public right to clean and safe drinking water;

- impose a mandatory duty on the Minister of the Environment to establish legally enforceable limits on drinking contaminants which may adversely affect human health;

- require drinking water suppliers to sample, monitor and report upon the quality of drinking water;

- ensure full public access to test results and reports required under the law;

- ensure that water collection, treatment, storage and distribution systems are properly maintained, repaired or upgraded to meet drinking water standards;

- impose a mandatory duty on drinking water suppliers (and/or their laboratories) to immediately notify consumers, MOE officials, and medical officers of health whenever there are operational problems, water testing delays or difficulties, or test results indicating violations of drinking water standards;

- establish stringent prohibitions and penalties, and permit citizen enforcement of the law to ensure compliance;

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[13] "Drinking Water: Past, Present and Future", US EPA (Feb. 2000).
[14] T. Vigod and A. Wordsworth, "Water Fit to Drink? The Need for a *Safe Drinking Water Act* in Canada" (1982), 11 C.E.L.R. 80; and G. Patterson, "Is Our Water Safe to Drink? Do We Need a *Safe Drinking Water Act*?" (CELA, 1985).
[15] Bill 25 (Ruth Grier).
[16] R. Lindgren and S. Miller, "Ontario's Water Resources: The Need for Public Interest Regulation" (CELA, 1997).

- allow individuals to sue violators of the law or drinking water standards, or to sue the Minister for failing to perform his/her duties under the law; and

- require drinking water suppliers to assess the vulnerability of drinking water sources to contamination.

(b) Restoration of MOE Funding, Staff and Programs

Since 1995, the Ontario government has slashed the budget of the MOE by almost half (45%). Over the same timeframe, the number of MOE employees has decreased from approximately 2,500 to 1,500 persons.

Among other things, these massive cutbacks have severely reduced the number of MOE staff who had been working on surface water, groundwater and drinking water issues. In 1995, for example, some 113 persons worked for the MOE on water matters; this year, only 48 staff work on water matters. Over the same timeframe, the number of people assigned to groundwater and hydrology decreased from 28 to 15. In addition, four of five provincial testing laboratories were closed in 1996.

There can be little doubt that these and other initiatives have undermined the MOE's institutional ability to safeguard Ontario's drinking water. This point has been raised repeatedly by the former Environmental Commissioner of Ontario in virtually every annual report since 1996. Reports by the Provincial Auditor have also raised concerns about the province's environmental track record in recent years.

To remedy these concerns, CELA submits that the starting point must be the immediate restoration of the MOE budget to its pre-1995 level, and the re-hiring of all water-related staff lost by the MOE since 1995. In addition, CELA urges the full restoration of funding programs for key water-related initiatives, such as:

- Municipal Assistance Program (i.e. funding to assist municipalities regarding water/sewage infrastructure);

- Great Lakes clean up program (i.e. Remedial Action Plans);

- Training programs for water treatment staff;

- "Green Communities" Program; and

- Clean Up Rural Beaches (CURB) Program.

CELA also recommends the re-establishment of ACES to assist in the review of the adequacy of the ODWO and PWQO, as described above. CELA further recommends the re-establishment of the Environmental Compensation Corporation, which had provided invaluable assistance to

victims of environmental spills (including municipalities and individuals) prior to its dissolution by the present Ontario government in 1997.

Similarly, CELA recommends the reversal of the Ontario government's decision to download septic tank responsibilities from MOE staff to municipal staff (i.e. building inspectors) pursuant to Bill 107 and related changes. Bill 107 also imposed a number of changes upon the Ontario Clean Water Agency (OWCA), such as transferring OWCA assets (i.e. water treatment plants) to municipalities, and opening the door to privatization of municipal water services. Even OCWA itself was identified as a candidate for privatization by a government task force, which openly questioned the need for a provincially owned water/sewage agency[17]. In CELA's view, the need for OWCA has been amply demonstrated by the Walkerton tragedy, particularly since OWCA staff were immediately brought in to assume supervision and management of Walkerton's water treatment facility. At a minimum, these events surely reveal that OCWA should no longer be considered as a privatization candidate to be auctioned off to the highest private bidder.

In short, CELA submits that the province must re-create (and enhance) the environmental "safety net" that has been systematically dismantled since 1995. Otherwise, Ontario's drinking water will continue to be at risk due to the downsizing, downloading and de-regulation that has been carried out by the Ontario government in recent years.

(c) Other Legislative Amendments and Policy Changes

As described above, Ontario's current regulatory regime does not adequately protect drinking water at the point of consumption. To address this problem, CELA recommends the passage of the SDWA and the restoration of MOE budgets, staff, and programs related to water quality and quantity.

These reforms, however, will accomplish little unless there is also a systematic review and revision of other existing legislative provisions, which are at odds with enhancing drinking water protection. For example, in the wake of the Walkerton tragedy, there has been renewed concern about the environmental and human health impacts arising from intensive farming operations. However, there have been long-standing exemptions of agricultural operations from general pollution laws in Ontario.[18] Similarly, in 1998, the present Ontario government enacted the *Farming and Food Production Protection Act w*hich, among other things, exempts "normal farm practices" from municipal by-laws and nuisance lawsuits from aggrieved neighbours. Clearly, if there is to be a reasonable balance between the private "right to farm" and the public right to clean water, then these legislative exemptions must be revisited by the Ontario Legislature as soon as possible.

In addition, it makes little sense to enhance protection of drinking water quality without also protecting water quantity. In short, Ontario must undertake legislative and policy reform to protect sources of drinking water against degradation and depletion, particularly in light of

[17] Government Task Force on Agencies, Boards and Commissions, *Report on Operational Agencies* (Jan. 1997), at p.9.

[18] For example, the EPA's main anti-pollution prohibition does not apply to "adverse effects" from "animal wastes disposed of in accordance with normal farming practices": EPA, R.S.O. 1990, c.E.19, s.14 (2).

drought conditions experienced in many parts of Ontario in recent years.[19] The link between drinking water quality and quantity has been recognized by the U.S. Environmental Protection Agency:

> Tap water must be conserved and its sources protected in order to lessen the negative impacts that trends in increasing population, urbanization and development may have on the future availability and quality of drinking water.[20]

To address water quantity concerns, CELA is currently finalizing a model water resources bill, which entrenches water conservation principles into law. Upon completion, CELA will submit this bill to the Ontario Legislature in order to trigger long overdue legislative reform to protect water quantity.

However, legislative reform must be accompanied by policy reform within all Ministries whose mandates may directly or indirectly affect Ontario's water resources. In particular, many Ministries – such as the MOE, Ministry of Natural Resources, and Ministry of Municipal Affairs and Housing -- have wide-ranging policies, guidelines and objectives concerning waste management, aggregate production, land use and development, and other environmentally significant undertakings which can affect water resources. In CELA's view, all water-related Ministry policies must be rigorously reviewed and revised to ensure that they are consistent with the overarching provincial goal of protecting water quality and quantity.

This proposed policy reform must emphasize pollution prevention, ecosystem management, and the precautionary principle, and it must reflect the following fundamental water principles:

- all life depends upon a reliable source of clean water;

- Ontario must ensure adequate quantities of water to support a variety of ecological and economic functions, the highest of which is the life-supporting function of water;

- Ontario's water must be protected, conserved and used wisely by giving priority to uses which are more important and sustainable over the long-term term.[21]

PART III - CONCLUSIONS

CELA submits that the Walkerton tragedy should serve as the catalyst for a sweeping overhaul of Ontario's existing drinking water regime.

In general, the four requirements proposed by the MOE's drinking water regulation are unobjectionable and they should be implemented forthwith. However, this new regulation, in and of itself, does little to address the widespread flaws in the current regulatory framework for

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[19] P. Muldoon and P. McCulloch, "A Sustainable Water Strategy for Ontario" (CELA, 1999).
[20] "Drinking Water: Past, Present and Future", US EPA (Feb. 2000).
[21] P. Muldoon and P. McCulloch, *supra*.

protecting drinking water. Unless accompanied by more extensive reform, the proposed regulation will be little more than a “band aid” solution.

Among other things, Ontario’s broader reform agenda must include:

- immediate passage of safe drinking water legislation;

- restoration of MOE budgets, staff and programs; and

- review and revision of all Ontario laws and policies, which affect water quality and quantity.

In our view, only an open, public and systematic review of the regulatory framework will result in the development and implementation of drinking water measures designed to prevent the recurrence of the Walkerton tragedy in Ontario.

June 6, 2000

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