

Provincial Policy Statement Five-Year Review

Response by the Canadian Environmental Law Association to the Request by the Ministry of Municipal Affairs and Housing for Public Comments

Environmental Bill of Rights Registry Number PF01E0002



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October 12, 2001

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October 12, 2001

Ken Petersen, Senior Planner
Provincial Planning and Environmental Services Branch
Ministry of Municipal Affairs and Housing
777 Bay Street, 14th Floor
Toronto, Ontario
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Dear Mr. Petersen,

Re: Provincial Policy Statement Five-Year Review (EBR Registry No. PF01E0002)

We write to provide comments with respect to the above-noted *Environmental Bill of Rights* (EBR) posting.

Introduction

The Canadian Environmental Law Association (CELA), founded in 1970, is a non-profit public interest organization specializing in environmental law and policy. CELA's involvement in legal representation and law reform activities with respect to land use planning matters extends back more than 20 years in Ontario.

Background and Historical Context

Many times during our 30 year history, our law reform priorities have been determined by our case work as well as the many additional requests for legal representation that we do not have the resources to accommodate. During those times when we have been faced with a large increase in requests for legal representation in the same area of law, it becomes clear that law reform is the long term solution that is most in the public interest. Nowhere was this conclusion clearer to our organization than during the late 1980s and early 1990s in the area of land use planning law.

CELA joined the many calls for land use planning reform that resulted in the establishment in 1991 of the Commission on Planning and Development Reform in Ontario, chaired by John Sewell. CELA participated in good faith in the two years of work undertaken by that Commission and for the year and a half of additional consultation that culminated in a revised planning system for Ontario. That revised

system resulted from one of the most extensive consultations we have ever seen in any area of the law.

With the change in government in Ontario in 1995, a program of environmental deregulation occurred that was unprecedented in its breadth and scope. We have documented, as have others, that the Ontario government systematically weakened the rules for environmental protection across the board to suit the special interests of resource extraction industries, waste management enterprises, polluters, and land developers. Very large program and budget cuts occurred as well to many areas of either direct or indirect relevance to environmental protection including the elimination of provincial involvement in the funding of public transit coupled with a multi-billion dollar program of increased road construction.

The law and policy reforms of the previous government in the area of land use planning had only just been promulgated; they were never tested and they were the first to go within the environmental deregulation agenda. Under the revised *Planning Act* (as amended by Bill 20 in early 1996) and the Provincial Policy Statement, the latter being the subject of this current review, there has been a worsening of environmental effects stemming from these amendments to land use planning law and policy. Since 1996, Ontario has experienced widespread increases in urban sprawl, traffic congestion and smog alerts.

Also since 1996, the long-known and well-documented fact that urban sprawl unnecessarily wastes billions of public dollars in both hard and soft infrastructure costs (roads, highways, sewers, water lines, police, fire, ambulance, and other community services) has not affected the pattern of land use planning in southern Ontario to any significant degree.

There is well-documented evidence that the respiratory problems attributable to automobile emissions are contributing to a higher death rate and greater respiratory health problems among Ontario residents than would otherwise occur. Childhood asthma rates have continued at alarmingly high levels and evidence exists of a causal, albeit complex, relationship to increased volumes of traffic. The Ontario Medical Association has documented the substantial financial burden on the health care system caused by air pollution – cars being the major contributors.

Land use planning conflicts over natural heritage protection have continued and intensified. As well, the removal of land use policy requirements for affordable housing has contributed to and worsened the high levels of poverty in Ontario.

Finally, throughout the Walkerton Inquiry, the role of land use planning came up repeatedly as the Commissioner sought evidence as to the specific and systemic causes of the tragic events in that community. CELA provided legal representation to Concerned Walkerton Citizens and for the past year and a half has been deeply involved throughout all aspects of that Inquiry.

It is in this historical context that we respond to this five-year review of the Provincial Policy Statement.

General Comments

Unfortunately, time and resources limit our ability to provide a detailed review of the Provincial Policy Statement. Within these constraints and flowing from our involvement in the Walkerton Inquiry, we have chosen to focus our submission on issues of water quality, quantity and source protection within the land use planning system – as discussed further below.

To ensure that CELA's broader concerns are addressed in detail elsewhere, we have worked with the Federation of Ontario Naturalists (FON) in the preparation of their submission. **CELA fully endorses the submissions of the Federation of Ontario Naturalists in this review of the Provincial Policy Statement.** Some general points, discussed in more detail in the FON submission, are reiterated here.

- Ontario's system of land use planning review and approvals is an inherently development-driven process. In this context, the Provincial Policy Statement should be written and structured in a manner that can effectively respond to and shape development. This policy response should express the provincial or public interest, or interests, with those interests broadly and comprehensively defined. Instead, the Provincial Policy Statement is written and structured in a manner that champions development by placing it at the top of a planning hierarchy. A system that is, by definition, development-driven does not require a Provincial Policy Statement as its cheerleader.
- While the Provincial Policy Statement does not give expressed priority to development over other policy interests, such as natural heritage or water quality, the primacy of development decisions arises from the order in which the policies are stated. This ordering of policy implies a priority for development. This implication can become reality when municipalities and the Ontario Municipal Board structure their decision making in the same order as issues are listed in the Provincial Policy Statement. This situation arose for CELA's clients in a hearing addressing the City of London's Official Plan Amendment for the Middlesex lands. The hearing was structured to consider matters in the same order as they are listed in the Provincial Policy Statement. Early decisions were made before evidence was even heard on issues listed later in the Provincial Policy Statement. Hence, urban growth boundaries were set before any of the environmental evidence was reached.
- The health and environmental well-being of the citizens of Ontario is not well served by the narrow expression or interpretation of provincial interests.

- This expression of concern about the development bias in the Provincial Policy Statement (and the *Planning Act*, as discussed further below) is in no way an expression of opposition to all development. Rather, we are dismayed by the lack of a provincial interest in the Provincial Policy Statement that supports and requires good urban design. The policies must embrace the notions of “smart growth” that are being increasingly applied in other jurisdictions, and which were a significant component of the Comprehensive Set of Policy Statements (developed during three years of consultation by the previous Ontario government but never implemented). We are further dismayed, as discussed in much greater detail in the FON submission, by the recent announcements by the Province of Ontario which have adopted the words (“smart growth”) alone but not the reality.
- Beyond the content and interpretation of the Provincial Policy Statement, two other aspects of the *Planning Act* (as revised in 1996) support and complement the development-friendliness of the Provincial Policy Statement. First is the notion of “one-window” approvals. Ostensibly an efficiency measure, the “one-window” approach occurs in the context of greatly reduced and/or eliminated provincial review and comment. Unfortunately, the efficiency obtained is simply swifter approvals due to the near-total removal of thoughtful and qualified review of applications in light of provincial interests. Local councils, particularly in smaller municipalities, and the public no longer have access to or knowledge of provincial level comment and specialized expertise, particularly on matters of environmental protection. Nor do they have the resources to pay for it. Second, the *Planning Act* amendments regarding as-of-right appeals and extremely tight timelines for decision-making are another set of efficiency measures that serve the interests of developers often to the exclusion of the broader or different interests of the public.
- For over fifteen years concerns have been raised across Ontario about the weakness of the “have regard to” language in Section 3 of the *Planning Act*. During the consultations of the early 1990s, this matter was the subject of nearly four years of debate and analysis. That effort resulted in the compromise language of “shall be consistent with” to provide continued flexibility for policy implementation but greater clarity that provincial policy could not be ignored. It is CELA’s view that the *Planning Act* requires amendment to reinstate the “shall be consistent with” language in Section 3 and further, that the Provincial Policy Statement requires clarification and strengthening to ensure the paramountcy of drinking water source protection, as discussed further below.
- We are not aware of any collection or analysis of empirical data to be able to assess the implementation of the Provincial Policy Statement with any degree of rigour or certainty. This lack of monitoring exists with respect to implementation at all stages of the planning process, including if or when, planning decisions end up being made by the Ontario Municipal Board. Although such data collection and analysis is a complex task, it is a requirement noted within the “Interpretation/Implementation” section of the Provincial Policy Statement flowing from the more general

requirement in the *Planning Act* itself for periodic (five years) review of the Provincial Policy Statement. The lack of any comprehensive monitoring program prompts the conclusion that the results of this review of the Provincial Policy Statement should be considered preliminary at best. The results of this review can provide useful guidance towards ongoing efforts to determine where and how the implementation of the Provincial Policy Statement can be objectively assessed. The final report of the Walkerton Inquiry is also germane to this review and any changes to the Provincial Policy Statement should await release of that report - as discussed further below.

- Despite the lack of empirical data, there are general indicators and anecdotal information about deteriorating environmental quality related to land use planning, as noted in general terms above.

Water Quality and Quantity - Source Protection

The Provincial Policy Statement of 1997 constituted a substantial re-write and simplification of the Comprehensive Set of Policy Statements that had resulted from the extended period of province-wide consultations noted above. The Provincial Policy Statement contains most of the same policy content as had been in the Comprehensive Set of Policy Statements. However, the Provincial Policy Statement and a series of amendments to the *Planning Act*, tends to give priority to development, as noted.

Compared to the Comprehensive Set of Policy Statements, the Provincial Policy Statement also greatly simplifies and weakens the specific policy measures and related definitions of terms for environmental protection. Guidance from the Province on implementation of the Provincial Policy Statement is dispersed throughout an assortment of guidance documents that are rarely tied directly to the Policy Statement. Nor are provincial staff resources available throughout the planning process to the degree that is necessary to ensure policy implementation. These many revisions to the earlier set of policies, definitions, implementation guidance and availability of provincial staff and resources were particularly dramatic in the area of water quality and quantity.

In the absence of comprehensive data or performance indicators to measure the effectiveness of any of the policies, including those for water quality and quantity, the balance of our remarks includes a review of the numerous points throughout the Walkerton Inquiry where land use planning matters arose with respect to the issue of source protection for drinking water.

Among the many complex areas of evidence that were the subject of the Inquiry proceedings, additional expert advice and extensive public submissions, the matter of source protection for drinking water sources arose consistently.

The two parts of the Inquiry addressed the causes (in Part 1) and the solutions (in Part 2) of the tragedy.

Attached as Appendix A to this submission is the Summary of Findings prepared by CELA on behalf of the Concerned Walkerton Citizens. This document summarizes CELA's final arguments concerning the findings of Parts 1A and 1B of the Inquiry. It can be gleaned from this summary that issues of groundwater and aquifer location, movement, withdrawals, contamination, protection and surrounding or overlying land use were central to the overall investigation. As noted on page 5 of CELA's summary of findings, source protection is the first of at least five essential components of a system that needs to provide "multi-barrier protection of drinking water."

Phase 1A of the Inquiry sought evidence of the physical causes of the May, 2000 events in Walkerton that left seven people dead and over 2000 ill. The Inquiry heard evidence about the procedures surrounding the decision to approve the construction and use of a shallow well - number five - the well that appears to have been the source of the water contamination. From the Ministry of Environment engineer involved during that approval process (the well was constructed in 1978), the Inquiry heard evidence on November 8, 2000,¹ that surrounding land use was a concern for the ministry, specifically because of the potential for agricultural contamination of the water supply to the well. In discussions about the approval of the well, the Ministry was given to believe that the Town of Walkerton Public Utilities Commission would contact the landowner and offer to purchase the land so that agricultural operations could be discontinued. The Inquiry also heard evidence that it was not a condition of approval for the well that the Town buy the land nor has it been common practice since that time for the Ministry to include such measures as a condition of approval. It is fair to say that there is nothing in the *Planning Act* or the Provincial Policy Statement that would serve to ensure that such precautions occur. The Inquiry also heard from the landowner in question who stated that he was never approached by the Public Utilities Commission to purchase the land. It seems clear from the evidence presented to the Inquiry that manure spread on this land in April, 2000 was the primary source of the contamination.

Part 1B of the Inquiry addressed the causes, if any, of government policy on the events in Walkerton. Again, the Inquiry addressed a wide range of issues including an in-depth review of the many issues related to source protection. Concerning the intersection of agriculture and land use, the Inquiry heard evidence about groundwater protection policies, or the lack thereof, at the provincial and local level. For example, the Inquiry heard evidence about the multi-year series of reports by the Environmental Commissioner for Ontario and the Provincial Auditor documenting the delay and inaction by the Province in developing a multi-Ministry groundwater protection strategy.

Coincident with Part 1B and into the Part 2 exercise of seeking detailed input on solutions to the problems identified and their future prevention, the Walkerton Inquiry specifically commissioned over 30 research papers. The Inquiry received another 100 submissions from those with standing in the Inquiry and nearly 60 public submissions. Part 2 also included public meetings, held in communities across the Province. The

¹ Transcripts of the Walkerton Inquiry and all written submissions are online at www.walkertoninquiry.com

need for and detailed proposals to ensure source protection, including via land use planning measures, came up repeatedly in these written submissions and public meetings. Of particular importance to the water quality and quantity policies in the Provincial Policy Statement is a large report entitled *The Case for Groundwater Protection in Ontario*.² This report resulted from a two-day workshop and further research and analysis by the leading experts in Canada on groundwater science and policy issues.

CELA undertook two large research efforts during the Inquiry that include components of direct relevance to provincial strategies for land use planning to achieve drinking water source protection. First, CELA developed a model bill entitled “An Act to Conserve Ontario Waters” that addressed the full range of water quality and water quantity issues requiring sustainable management in Ontario and for which legislative protection is long overdue. The model bill and an accompanying commentary are attached to this submission as appendix B. Of particular relevance to the Provincial Policy Statement is the need, expressed in legislative detail in the model bill, for the protection of water quality and quantity to be given paramountcy over other policy matters.

Second, CELA was commissioned by the Inquiry to develop a detailed submission on the legislative provisions necessary to include in a Safe Drinking Water Act. *Tragedy on Tap: Why Ontario Needs A Safe Drinking Water Act*, an overview in Volume 1 and the full report in Volume II, are also appended to this submission as Appendix C. Again, the case is made in detail for an integrated strategy to achieve drinking water protection. Central to this approach is the paramountcy of water quality protection in the land use planning process. Further, this report provides a review of source protection legislation in other jurisdictions including some that integrate source protection into land use planning decisions.

The Inquiry also heard evidence during Part 1B from the Ministry of Agriculture, Food and Rural Affairs on historical practices and new proposals with respect to the provincial role in nutrient management strategies. As the Inquiry proceeded, the Ministry of Agriculture, Food and Rural Affairs proposed legislation concerning nutrient management. CELA undertook a review of this proposed law and made a series of detailed recommendations. However, it was CELA’s overarching submission that the bill should not continue in the legislative process until the Walkerton Inquiry report is released to the public. CELA’s submission on Bill 81, The Nutrient Management Act, 2001, is attached to this submission as Appendix D. The provisions of this bill could be relevant to changes in the Provincial Policy Statement and both will be the subject of the final report and recommendations of the Walkerton Inquiry. Further, evidence given by government witnesses from the Ministries of Agriculture, Food and Rural Affairs, and Municipal Affairs and Housing, stated that it is the Province’s view that no policy area

² Available at: http://www.walkertoninquiry.com/part2info/publicsubmissions/pdf/08ps_frind.pdf

within the Provincial Policy Statement takes primacy over any other when policy matters conflict during decision making.

It is CELA's submission that source protection of water quality and quantity should be given paramountcy over other policy objectives in the Provincial Policy Statement. Further, this land use planning policy approach needs to be one aspect of an integrated, inter-ministerial coordination of efforts to ensure the protection of public health and the environment. This lack of coordination and its tragic implications was revealed in sharp relief under the magnifying lens that has been the Walkerton Inquiry.

In conclusion, we offer this submission as a means of using the limited time and resources at our disposal to draw upon CELA's long history of public interest defence of land use planning reform and particularly our recent experience with the Walkerton Inquiry and its far-reaching implications.

Yours truly,

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Encl.: Appendices A-D

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- B** MODEL BILL, AN ACT TO CONSERVE ONTARIO WATERS

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- C** TRAGEDY ON TAP: WHY ONTARIO NEEDS A *SAFE DRINKING WATER ACT*
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DSUBMISSION BY CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO
THE
ONTARIO MINISTRY OF AGRICULTURE, FOOD AND RURAL AFFAIRS
RE: THE *NUTRIENT MANAGEMENT ACT*, 2001
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(www.cela.ca/land&EA/407NMABill_81.pdf)