Canadian Environmental Law Association
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February 20, 2018 **BY EMAIL & REGULAR MAIL**

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Ministry of the Environment and Climate Change
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Dear Ms. Moulton:

RE: PROPOSED REGULATORY AMENDMENTS UNDER THE *SAFE DRINKING WATER ACT* AND *CLEAN WATER ACT*
ENVIRONMENTAL REGISTRY NOS. 013-1839 AND 013-1840

On behalf of the Canadian Environmental Law Association (CELA), we are writing to provide comments on proposed regulatory amendments under the *Safe Drinking Water Act* (SDWA) and *Clean Water Act* (CWA). These comments are being sent to you in accordance with the above-noted Registry notices.

In general terms, CELA is supportive of the proposed amendments since they will improve the drinking water safety net under the SDWA and CWA. However, CELA submits that these reforms should be accompanied by a clear commitment by your Ministry to ensure that the next round of source protection planning under the CWA is expanded to include certain non-municipal drinking water systems, as described below.

PART I – BACKGROUND

Both the SDWA and CWA were enacted in response to the Walkerton drinking water tragedy in 2000 in which seven persons died, and thousands of people fell ill, after bacteriological contamination of a well that supplied the town's drinking water system.

After identifying the factual, technical and institutional factors which converged to create the public health catastrophe, Mr. Justice O'Connor's *Report of the Walkerton Inquiry (Part 2)* made numerous recommendations aimed at preventing a recurrence of the Walkerton tragedy elsewhere in Ontario. Among other things, these recommendations called upon the provincial government to:

- establish a regime for developing watershed-based source protection plans "in all watersheds in Ontario" (Recommendation 1);

- set legally binding drinking water quality standards which ensure that "a reasonable and informed person would feel safe drinking the water" (Recommendations 18 and 24), and which are "based on a precautionary approach" (Recommendation 19);

- ensure that "programs relating to the safety of drinking water are adequately funded" (Recommendation 78); and

- invite Ontario First Nations to join in the watershed planning process (Recommendation 88).

To date, the Ontario government has proceeded with various measures, programs and initiatives intended to fulfill the important changes recommended by Mr. Justice O'Connor.

However, despite this commendable (if not slow-paced) progress, CELA concludes that there is a compelling need to extend and strengthen certain aspects of the current provincial regime under the SDWA and CWA. In Part II of this brief, CELA addresses the current regulatory proposals, and identifies further changes that are required to safeguard drinking water quality and quantity across the province.

PART II – CELA RESPONSE TO THE REGULATORY PROPOSALS

(a) Proposed Regulatory Changes under the SDWA (Registry No. 013-1840)

The Ministry of the Environment and Climate Change (MOECC) is proposing a new regulation under the SDWA that would generally require source protection measures to be in place before a new or expanded drinking water system is permitted to provide drinking water to Ontarians.

Although the actual text of the regulation has not been released for public review/comment, CELA understands that the overall intent of the regulation is to require wellhead protection areas or intake protection zones to be evaluated, delineated or extended for new or expanded drinking water systems. In addition, the MOECC proposal requires municipalities to pass council resolutions in support of any necessary amendments to the relevant assessment report and/or approved source protection plan under the CWA prior to the issuance of the requisite provincial approvals for the drinking water works under the SDWA.

In principle, CELA supports this common sense approach, which better synchronizes or integrates the timing of source protection measures and the MOECC's approval of new drinking water systems (or approval of new wells or intakes to be used by existing drinking water systems). We generally agree that if properly implemented in a timely manner, this proposal will likely provide an additional layer of protection for residents served by new or expanded drinking water systems.

However, the practical shortcoming of this regulatory proposal is that it only applies to municipal drinking water systems within existing source protection areas in Ontario. Therefore, this proposal will not apply to new or expanded non-municipal drinking water systems, or to municipal drinking water systems in central or northern Ontario that are not within the 38 source protection areas established under the CWA.

For the reasons discussed below, CELA strongly recommends that the limited coverage of the CWA should be expanded forthwith in order to order to secure the long-term protection and sustainability of drinking water sources for all Ontarians, not just those served by municipal residential drinking water systems. If this recommendation is acted upon by the Ontario government, then it will become necessary to amend this SDWA proposal accordingly.

In addition, CELA notes that the SDWA proposal is focused on drinking water quality, and does not make it mandatory for municipalities to complete or update water quantity assessments if a new or expanded drinking water system is located in an area where surface water or groundwater resources may be vulnerable due to quantity constraints. In such cases, the Registry Notice suggests that municipalities may elect to prepare a water quantity risk assessment prior to applying for a drinking water works permit under the SDWA. CELA is unclear on the public policy rationale for this regulatory distinction between water quality and water quantity, particularly since the CWA is intended to protect drinking water sources against both degradation and depletion.

The Registry Notice also proposes that the SDWA regulation will include an "emergency exception" that would allow municipalities to make "alterations" to drinking water sources without filing the above-noted municipal resolution, provided that such alterations are necessary to alleviate the emergency or to prevent a drinking water health hazard. Without knowing the MOECC's proposed definitions of "emergency" or "alterations," CELA cannot meaningfully comment on this proposal, or on its implementation details.

(b) Proposed Regulatory Changes under the CWA (Registry No. 013-1839)

The MOECC is proposing several amendments to the general regulation (O. Reg. 287/07) under the CWA. This regulation sets out various requirements for preparing, approving and amending assessment reports and source protection plans under the CWA.

Again, CELA notes that the actual text of the proposed regulatory changes has not been released for public review/comment. However, the Registry notice indicates that, among other things, the MOECC proposes to broaden the types of minor amendments that can be made by source protection authorities without following the full amending process, such as:

- amendments which remove references to municipal drinking water systems, wells or intakes that are no longer operational or in use; and

- amendments which update words and phrases that have recently been changed in the MOECC's Tables of Drinking Water Threats.

Given the limited scope of these types of amendments, CELA has no objection to empowering source protection authorities to make such changes as may be appropriate. At the same time, CELA agrees with the Registry notice that it is conceivable that such minor amendments may, in fact, result in changes within delineated vulnerable areas. Accordingly, CELA supports the proposal that source protection authorities must notify relevant implementation bodies of such changes, and must provide the MOECC with updated vulnerable area mapping. However, CELA submits that such notification should also be provided to newly affected landowners (if any), particularly since

they may not regularly access or view the source protection authority's website for updating purposes.

The regulatory amendments under the CWA also propose the addition of "liquid hydrocarbon pipelines" as a prescribed drinking water threat under O.Reg. 287/07. The Registry notice suggests that this addition is being proposed as part of the MOECC's commitment to "continuous improvement" in protecting source water. Given the grave risk that such pipelines can pose to surface water or groundwater in spill or malfunction situations, CELA supports the inclusion of liquid hydrocarbon pipelines as a drinking water threat under the CWA.

However, if the MOECC is indeed committed to "continuous improvement," then consideration should also be given to prescribing other existing or emerging activities/conditions that may pose threats to current or future drinking water sources, such as:

- the establishment, operation or expansion of quarries;
- hydraulic fracturing (fracking);
- dry cleaning facilities;
- commercial water bottling facilities; and
- brownfield properties that have not been remediated;

More fundamentally, in order to ensure "continuous improvement" in source water protection, CELA submits that it is now time to extend the CWA planning process to other non-municipal systems, including:

- private well clusters in settlement areas approved under the *Planning Act* (e.g. rural hamlets, villages and small towns);
- designated facilities serving vulnerable persons (e.g. rural schools, children's camps, nursing homes, etc.); and
- Indigenous drinking water systems where a band council resolution has been passed to enable the community to work collaboratively with Ontario in developing source protection measures.

In the post-Walkerton era, CELA concludes that sources serving municipal drinking water systems are now better protected by the province's adoption of the "multiple-barrier" approach. However, the MOECC's proposed regulatory amendments under the SDWA and CWA only serve to further tighten up the already high level of protection enjoyed by consumers of water supplied by municipal drinking water systems. Conversely, these regulatory proposals do nothing to safeguard countless other Ontarians who are not served by municipal drinking water systems.

In our view, the Ontario government's continuing refusal to bring non-municipal systems under the CWA is contrary to the Walkerton recommendations outlined above in Part I of this brief. This provincial intransigence is also contrary to the reasonable expectations of many stakeholders (including Chairs and members of source protection committees) who understood from previous MOECC representations that while the initial focus under the CWA would be on municipal systems, source protection measures would be developed for non-municipal systems in due course.

In our previous correspondence[1] to the MOECC, CELA has outlined the public interest reasons why non-municipal systems can and should be brought under the CWA for source protection planning purposes. We have since met with provincial officials to discuss this issue, but it appears to us that MOECC continues to rely on its mistaken claim that extending CWA coverage is not necessary because drinking water sources used by non-municipal systems can be adequately protected by municipal planning instruments (e.g. official plans, zoning by-laws, etc.) under the *Planning Act*.

In our opinion, there is no merit to the MOECC argument on this point. First, if the MOECC position is correct in law, then there would have been no need to create new mandatory tools for source protection plans under the CWA. Second, it is not legally mandatory for municipalities to use their land use planning powers to implement source protection measures for non-municipal systems. To the contrary, the exercise of municipal planning powers remains highly discretionary, and is now subject to even less oversight and accountability due to the regressive reforms contained within Bill 139.

CELA further submits that the unjustifiable exclusion of non-municipal systems under the CWA is compounded by the well-known deficiencies within Regulation 903 (Water Wells) under the *Ontario Water Resources Act*. In short, this regulation sets out provincial standards for establishing, maintaining and decommissioning wells used for water supply purposes. However, in response to an Application for Review filed by CELA years ago, the MOECC acknowledged that it was in the public interest to review Regulation 903. Nevertheless, aside from some minor housekeeping proposals, no substantive improvements in the regulation have been developed to date. Thus, CELA concludes that Regulation 903 remains an inadequate barrier for the purposes of protecting public health and the environment.

We further note that the 2014 report of the provincial Auditor General correctly found that:

> Private wells or intakes that serve one residence are currently excluded from source protection planning. An estimated 1.6 million people in Ontario rely on private wells for their drinking water supply. For them, protecting source water is the only line of defence. In 2013, over a third of the water samples from private wells tested positive for bacteria including E. coli. If private wells were held to the same safety standard used for public drinking water systems, water from these wells that tested positive for bacteria would be considered unsafe to drink.[2]

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[1] See, for example, CELA's letter to the Minister dated January 12, 2017: http://www.cela.ca/enhance-drinking-water-protection.

[2] 2014 Report of the Auditor General of Ontario, page 411.

This 2014 report also highlighted the importance of source protection in the context of private wells:

> Many people in Ontario, especially in rural areas, are not connected to municipal drinking water systems and use wells to draw their drinking water directly from underground aquifers. For these people, protecting source water is the only barrier of protection against contaminated drinking water.[3]

Accordingly, the Auditor General made the following recommendation:

> To strengthen source water protection, the Ministry of the Environment and Climate Change should consider the feasibility of requiring source protection plans to identify and address threats to sources of water that supply private wells and intakes…[4]

However, almost four years after this important recommendation was made, it appears to CELA that it has not been acted upon by the Ontario government.

In CELA's view, the ongoing provincial failure to extend source water protection to non-municipal drinking water systems is unconscionable, and it creates significant and continuing risks which could conceivably be just as serious as the Walkerton tragedy.

This is particularly true in relation to the many Indigenous communities throughout the province are plagued by drinking water quality issues and attendant public health risks. For example, a recent survey of five Ontario-based First Nations (located in northern, central and southern Ontario) found various contaminants, such as coliform, *E. coli*, trihalomethanes and other substances, in the communities' drinking water.[5]

This 2016 report also highlighted the need for better protection of the groundwater and surface water sources being used by First Nations drinking water systems, particularly where these sources are being impacted by off-reserve activities under provincial or municipal jurisdiction:

> The quality of source water has a direct impact on drinking water. While water treatment is designed to make source water safe to drink, heavily contaminated source water can make water treatment more difficult and expensive. Ontario has more First Nations water systems that rely on surface water and "groundwater under the direct influence of surface water" (GUDI) than any other province - meaning water quality is directly related to watershed and source water conditions.
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> For the most part, source water protection falls under provincial law in Canada, because the watershed extends outside the reserve. This makes it legally and logistically difficult for First Nations to engage on the issue. In practice, First Nations cannot effectively carry out their culturally-understood obligation to protect water - either on or off reserve... In many cases, the lakes, rivers, and streams that contribute to the source water for these

[3] *Ibid*, page 413.
[4] *Ibid*, Recommendation 5, page 425.
[5] Human Rights Watch, *Make It Safe: Canada's Obligation to End the First Nations Water Crisis* (2016), page 9.

> communities have deteriorated because of pollutants from industries, and growing municipalities.[6]

Aside from the on-reserve drinking water systems, the report further notes that private wells in First Nations communities are also at risk:

> Households dependent on private wells or wastewater systems on reserves are in an even more precarious situation than those served by public water systems. There is no dedicated government funding to upgrade, operate, maintain, or monitor these systems. Nearly one in five households on reserves in Ontario use these private wells... For the most part, First Nations and these individual households are left to fend for themselves.[7]

On this latter point, CELA notes it was possible under the CWA for First Nations' drinking water systems to be "elevated" by band council resolution for inclusion within source protection plans. However, it is our understanding that only three such systems in Ontario have been specifically included to date.[8]

While First Nations representatives have served as members of some Source Protection Committees, it appears that the vast majority of First Nations drinking water systems in Ontario remain outside of the CWA coverage. In our view, such omissions are unfortunate, particularly in light of Mr. Justice O'Connor's finding that "the water provided to many Metis and non-status Indian communities and to First Nation reserves is some of the poorest quality water in the province."[9]

In these circumstances, the Ontario government should enhance its efforts to engage with and assist Indigenous communities across the province, in accordance with Recommendation 88 of the Walkerton Inquiry. Among other things, this means that where requested, Ontario should be prepared to provide adequate technical and financial assistance to Indigenous communities that wish to develop, utilize, or "opt-in" to the various source water protection tools available under the CWA.

In summary, CELA submits that it is inequitable that only some residents of Ontario are benefitting from the province's source protection legislation, while the level of effort by Ontario to ensure source water protection as the first barrier to protect Indigenous and non-municipal drinking water systems is severely lacking.

PART III - CONCLUSIONS

For the foregoing reasons, CELA concludes that while significant progress has been made to implement the "multi-barrier" approach recommended by Mr. Justice O'Connor, Ontario still has some unfinished business in relation to source water protection.

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[6] *Ibid*, page 17.
[7] *Ibid.*
[8] Chippewas of Kettle and Stony Point First Nation; Six Nations of the Grand River; and Chippewas of Rama First Nation: see O.Reg.287/07, section 12.1.
[9] *Report of the Walkerton Inquiry (Part 2)*, page 486.

Now that the first round of source water protection has been completed, CELA submits that the Ontario government should draw some "lessons learned" in the source water protection program to date, and apply them during the next round of source protection planning. During this forthcoming round, it is incumbent upon the province to expand the CWA regime to include various types of non-municipal drinking water systems.

We trust that this recommendation will be duly considered and acted upon by the Ontario government. We would be pleased to meet with you or your staff to further discuss these necessary improvements to Ontario's drinking water regime.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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cc. The Hon. Chris Ballard, Minister of the Environment and Climate Change
Dr. Dianne Saxe, Environmental Commissioner of Ontario