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

February 15, 2002

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Frances Johnson, Manager
Municipal Finance Branch
777 Bay St., 13th Floor
Toronto, Ontario, M5G 2E5

Re: EBR Registry Number: AF01E0005 Type of Posting: Act
MINISTRY: MUNICIPAL AFFAIRS AND HOUSING STATUS OF POSTING: PROPOSAL
Date Proposal Loaded: 2001/12/17
Comment Period: 60 day(s)
Written submissions may be made between December 17, 2001 and February 15, 2002.

Dear Ms. Johnson:

Comments by the Canadian Environmental Law Association concerning Bill 155, "An Act respecting the cost of water and waste water services."

The Canadian Environmental Law Association ("CELA") is a public interest law group founded in 1970 for the purpose of using and improving laws to protect the environment and public health and safety. Funded as a legal aid clinic specializing in environmental law, CELA lawyers represent individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental protection and resource management matters.

Over the years, CELA has been particularly active in casework involving ground and surface water impacts both as to water quality and water quantity sustainability. Furthermore, CELA has extensive expertise in local, regional and international water policy. For example, CELA represented the Concerned Walkerton Citizens in both phases of the Walkerton Inquiry. Similarly, CELA provides summary advice to numerous members of the public who contact CELA with concerns and questions about the environmental, land use and municipal laws pertaining to ground and surface water and water works issues.

With respect to law and policy reform, CELA has submitted numerous briefs to the Ontario government on water policy issues and proposals.

These comments are provided in response to the proposed Bill 155, An Act respecting the Cost of Water and Waste Water Services".

CELA supports the idea of "full cost" pricing of water and waste water services. However, this proposed legislation defines "full cost" too narrowly – as not much more than capturing the costs of the "pipes and pumps". The Act says,

> 2. (4) "The full cost of providing the water services includes the operating costs, financing costs, renewal and replacement costs and improvement costs associated with **extracting, treating or distributing water to the public** and such other costs as may be specified by regulation." (emphasis added)

Therefore, CELA queries whether source protection and aquifer and watershed protection costs could be included. CELA also queries whether water conservation and retrofit costs could be included. It would appear that restoration and rehabilitation costs could not be included where water was already degraded.

It is also doubtful whether water quality and quantity monitoring costs (pre-extraction) could be included, as well as better post-distribution monitoring, such as for health indicators in the population (an idea that was proposed by Dr. Payment at the Walkerton Inquiry).

It would also appear that watershed management and incorporation of watershed wide planning decisions into water delivery costs would clearly be outside of the scope of this definition.

Accordingly, this Act is actually quite contrary to the approach that CELA advocated in its Model Act to Conserve Ontario Waters.

One of the consequences of legislation that actually restricts the amounts that municipalities ("regulated entities" under the Act) are permitted to charge for providing water services is that the limitation becomes an inducement and subsidy to sprawl. This has happened with the Development Charges Act which strictly limits what municipalities can charge as "development charges" even though the costs of increased development to the environment and to the community are much greater than the narrow "pipes and roads" definition in that Act.

This legislation not only proposes to require municipalities to charge for this very narrow definition of "full cost", but also will allow the government to specify in regulation "those sources of revenue that a regulated entity is, **or is not**, permitted to include in the plan **and may impose conditions or restrictions with respect to different sources of revenue**." Accordingly, municipalities that want to include the types of source protection and watershed protection costs, and other costs that I mention above, may actually find that not only are they not in the definition of full cost, they are actually expressly forbidden to charge for these costs.

The identical concerns arise with the narrow definition of the full cost of providing wastewater services. The definition states:

> 4(4) "The full cost of providing the waste water services includes the operating costs, financing costs, renewal and replacement costs and improvement costs associated with collecting, treating or discharging waste water and such other costs as may be specified by regulation."

In addition to whether the types of costs we outlined earlier could be included in the calculation of the cost of providing waste water services, we also query whether this definition could encompass such public and environmental costs as untreatable or untreated discharges to the environment, or the increased costs of waste water treatment caused by sprawl from hard surfaces and fast run-off, to name only two examples of issues that affect wastewater services.

The same concern as to limitations on permitted sources of revenue arises with respect to the legislated ability by regulation to restrict sources of revenue.

Section 13 of Bill 155 provides that the Minister may approve the contents of the regulated entities' cost recovery plans, but does not provide any indication as to what standards will be applied in approval of the plans. Furthermore, there is no purposes section in the legislation. Accordingly, the Minister may have unfettered discretion (subject to whatever is or is not in regulation) and there is no provision in this legislation that would ensure that this Act is applied in a way that would be beneficial to the environment or to the public.

In contrast, in CELA's Model Act to Conserve Ontario Waters, both a purposes section and express standards for the plans that municipalities and other entities would be required to prepare were provided. There was also provision for public input and participation into the preparation of such plans, and provisions to ensure transparent decision-making. None of these have been included in Bill 155.

For example, in CELA's Model Act, a purposes section includes, inter alia, that the purposes of the Act are to "ensure that the principles of sustainable development are applied to the use of water"; "ensure that the precautionary principle is applied to the protection, conservation, restoration and enhancement of water", and to "protect the natural functions of the ecosystem." These purposes along with the others set out in CELA's Model Act should be included.

CELA's Model Act also expressly stated what the duties of the Government and each minister are *vis a vis* that model legislation, for example, including the duty to "protect the public trust in water for the benefit of present and future generations." Express duties should be provided in Bill 155 to guide any discretion provided in the Bill.

In CELA's Model Act, there is among other things, the requirement to develop water conservation plans. However, the requirement to prepare such a plan is required by the model Act to follow a public assessment of the water use in the relevant area, and then to proceed by way of a public consultation process and to meet goals and objectives expressly stated in the legislation, such as:

(a) efficient water use;
(b) protection of water as a valuable resource;
(c) reduction in per capita consumption; . . .

(i) reduction in water usage from industrial, commercial, institutional, and residential customer classes compared to 1999 levels of 25 per cent by the year 2010; . . .
(Section 11(7) of CELA's Model Act).

In contrast, Bill 155 contains no requirements that its limited approach to "full cost recovery" would promote efficient water use; reduce consumption; protect water for the future; enhance source protection; or better protect public health.

In addition, approval of a report or a plan under the Act will likely have important fiscal and other implications for drinking water consumers serviced by a regulated entity. There should be public notice and comment opportunity, for example via the Environmental Bill of Rights registry, prior to Ministerial approval of reports or plans.

Section 23 of the Bill is a "Delegation" clause, and is far too broad – it would empower the Minister of Municipal Affairs and Housing to delegate "any of his or her powers or duties under this Act. . . .to any person or entity". Again, there is no statement as to the purposes of such delegation, no limitation on the delegation power and no provision as to the type of entity to which the powers may be delegated. Anything from an industry association to a private entity to an agency could be envisaged. The government should clearly state in the legislation its intention as to whom it will be delegating the powers under the Act; if there is no present intention, this section should be deleted.

The Bill does not require the Minister to aggregate, summarize or report upon trends or statistics found in the numerous full cost reports or plans to be submitted by the individual regulated entities. Without provincial level monitoring and reporting, there will be no overview of the state of the water system across Ontario. The bill should require the Minister to periodically report to the Legislature (for example by way of a State of the Water Report) every five years. Furthermore, the approved plans and reports should be accessible to the public via a water database or registry.

The Canadian Environmental Law Association consultants, C. N. Watson and Associates, made submissions to the Walkerton Inquiry based on their extensive experience in the field advising governments on financing of their water and wastewater systems. Based on this experience, there are distinct advantages to municipalities retaining the management and financing of their water and wastewater systems. Certainly, retaining direct control of their systems allows for more public scrutiny and consultation. Municipal finance advantages include their ability to borrow at reduced rates, collect development charges and receive GST breaks. The study concluded that even small municipalities could keep water affordable while replacing infrastructure if they plan for the long term utilising lifecycle costing.

The broad powers that the Bill gives to the Province to intervene in municipal financing of systems could lead to public private partnership arrangements being imposed on municipalities. Recent experience has shown that private sector water operators have very little stability because they are subject to the volatility of the marketplace and take-over bids. This raises concerns for

the public that is counting on the Walkerton Inquiry Phase Two reforms to give them stable, safe and secure water systems.

Finally, the "Minister" defined by Bill 155 is the Minister of Municipal Affairs and Housing or such other member of the Executive Council as may be assigned the administration of this Act. The responsibility for legislation governing the provision of water and waste water services should be assigned to the Minister of the Environment to ensure public provincial oversight over waterworks and to ensure accountability of the system.

In conclusion, Bill 155 is an approach that would fly completely against the recommendations of almost ALL of the parties to the Walkerton Inquiry, which universally called for an integrated water policy in Ontario.

By taking one small piece of the water policy puzzle and proposing an enactment in isolation, the Act has a very high probability that it will do more harm than good to public health and environmental protection in Ontario.

CELA expects and hopes that when Justice O'Connor's recommendations are made this spring from Part II of the Walkerton Inquiry, he will strenuously recommend an integrated approach to water policy in Ontario. For the province to propose Bill 155 without awaiting Justice O'Connor's recommendations is irresponsible and short-sighted, especially given the unprecedented wealth of information provided to the Commission by virtually every segment of Ontario with expertise and perspective on water policy.

CELA recommends that Bill 155 be abandoned and that an integrated water protection Bill be introduced as soon as possible after the final reports of the Walkerton Inquiry are released. In addition to the contents of those reports, CELA advocates the provisions of CELA's Model Act to Conserve Ontario Waters and the components of a Safe Drinking Water Act as outlined in CELA's major paper for the Inquiry, *Tragedy on Tap*. CELA agrees that Ontario's water policy should include "full cost pricing" for delivery of water and waste water services, but that this should be in the context of specified goals, with a much more inclusive, environmentally rational definition of the components of "full costs".

All of which is submitted by the

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Per:
Theresa McClenaghan, Counsel
Richard Lindgren, Counsel
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Encl. CELA Model Water Bill and Annotation