FINAL SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF THE ENVIRONMENT REGARDING THE *WHITE PAPER ON WATERSHED-BASED SOURCE PROTECTION PLANNING*

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EXECUTIVE SUMMARY

As noted by Mr. Justice O'Connor in the Walkerton Inquiry, source water protection is the necessary first step in the multi-barrier approach to ensuring drinking water safety. While CELA generally supports the proposals contained within the *White Paper on Watershed-Based Source Protection Planning* (MOE, February 2004), CELA submits that the proposed planning process requires certain revisions and greater prescriptive detail in order to effectively protect sources of drinking water. In CELA's view, Ontario's source protection legislation must entrench a planning process that is open, accessible, traceable and accountable. Accordingly, CELA makes 20 recommendations to improve and strengthen source water protection planning in Ontario.

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> In a multiple-barrier system for providing safe drinking water, the first barrier involves selecting and protecting reliable, high-quality drinking water sources… I recommend a source protection system that includes a strong planning component on an ecologically meaningful scale – that is, at the watershed level.
>
> Mr. Justice O'Connor, Part II Report of the Walkerton Inquiry (pages 8-9)

PART I - INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") regarding the *White Paper on Watershed-Based Source Protection Planning* ("White Paper"), which was released for public comment by the Ministry of the Environment ("MOE") in February 2004.

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

For the past two decades, CELA's casework and law reform activities have focused on drinking water quality and quantity issues. More recently, CELA has been involved in a number of drinking water matters, such as:

- representing the Concerned Walkerton Citizens during all phases of the Walkerton Inquiry;
- preparing various issue papers for Part II of the Walkerton Inquiry, including *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act;*
- submitting model water legislation to entrench watershed planning and water conservation in Ontario;
- commenting on the *Safe Drinking Water Act, Sustainable Water and Sewage Systems Act, 2001*, and *Nutrient Management Act*, and proposed regulations thereunder;
- commenting on various municipal land use planning reforms and amendments to the *Municipal Act*;
- convening public workshops on source water protection across Ontario; and
- attending public meetings held by the MOE regarding source protection and water-taking initiatives.[1]

[1] CELA's water-related briefs, factsheets and reports are available at: www.cela.ca.

In addition, CELA has served as a member of several advisory committees established by the Ontario government to consider various aspects of source water protection, such as:

- Advisory Committee on Watershed-Based Source Protection Planning;
- Implementation Committee for Watershed-Based Source Protection;
- Nutrient Management Advisory Committee; and
- Advisory Committee to the Great Lakes Water Management Initiative.

It is against this extensive background and experience that CELA has reviewed the various recommendations of the White Paper. For comparative purposes, we have also considered various documents and reports related to source protection, including:

- the Part I and II Reports of the Walkerton Inquiry;
- *Final Report: Protecting Ontario's Drinking Water – Toward a Watershed-Based Source Protection Program* (April 2003); and
- MOE briefing materials and related documentation.

In our view, Ontario's source water protection legislation must entrench a planning process that is open, accessible, traceable and accountable. Among other things, this means that the legislative framework must:

- clearly define roles and responsibilities of the various parties and stakeholders;
- specify timeframes and deadlines to ensure timely decision-making;
- establish clear provincial standards to direct the planning process;
- impose mandatory content requirements for source water protection plans, assessment reports, and related documentation;
- ensure that source water protection plans are implemented as soon as possible through all available regulatory and non-regulatory tools;
- establish procedures for the interim identification and protection of vulnerable or sensitive sources of drinking water;
- impose appropriate monitoring and reporting requirements; and
- require the integration of source water protection plans within other environmental and land use planning statutes.

In our view, the source protection law must be more than mere enabling legislation that confers unfettered discretion upon the Minister and/or other ministries and agencies involved in source water protection matters. All essential components of the planning process should be reflected in the source protection legislation, with further details to be prescribed by implementing regulations, policies and guidelines.

CELA generally supports the planning process described in the White Paper, but submits that the process requires certain revisions in order to become more effective, efficient, and equitable, as described below. CELA further notes that the White Paper contains less prescriptive detail than the 2003 Report of the Source Protection Advisory Committee. Therefore, to the extent that the White Paper's recommendations are vague, ambiguous or ill-defined, CELA prefers and adopts the relevant recommendations of the 2003 Report of the Source Protection Advisory Committee.

PART II - COMMENTS ON THE WHITE PAPER

CELA's submissions on the White Paper have been organized under the following headings:

1. Guiding Principles/General Provisions
2. Composition/Mandate of Planning Bodies
3. Public/Agency Consultation
4. Plan Development/Content
5. Ministerial Approval of Plans
6. Appeals
7. Water Taking Permits
8. Financing Source Protection Planning
9. Outstanding Issues

1. Guiding Principles/General Provisions

(a) Statement of Purpose

CELA submits that Ontario's source water protection legislation should state that its overall purposes are to:

(a) promote human health by protecting the quality and quantity of current and future sources of drinking water;
(b) facilitate ecosystem-based watershed management[2] and ensure sustainable water uses; and
(c) integrate source water protection plans with other environmental and land use decision-making processes;

Moreover, the legislation should further provide that these general purposes includes the following objectives:

(a) undertaking an ecosystem approach to identify and protect sources of drinking water against degradation or depletion;
(b) conserving and restoring natural resources and ecological processes that are directly or indirectly related to drinking water quality and quantity;
(c) identifying and mitigating threats to drinking water sources, and ensuring that where there are serious threats to drinking water sources, lack of full scientific certainty shall not be used as a reason for avoiding or postponing mitigation measures;
(d) reducing, preventing or eliminating the discharge of contaminants into the environment that may pose a drinking water health hazard; and
(e) ensuring meaningful public participation in the development and implementation of source water protection plans;

[2] Mr. Justice O'Connor stated: "I want to emphasize that a comprehensive approach for managing all aspects of watersheds is needed and should be adopted by the province. Source protection plans should be a subset of the broader watershed management plan" (Part II Report, page 9).

These important purposes and objectives should not be buried in an unenforceable preamble to the legislation. Instead, they need to be entrenched within substantive provisions that will govern the interpretation and application of the legislation. As a legislative precedent for the codification of substantive environmental principles, CELA would refer the MOE to subsections 2(1) and 2(2) of the *Environmental Bill of Rights* ("EBR").

(b) Administration of Act

As is the case with most of Ontario's environmental laws,[3] the source protection legislation should expressly state that the Minister of the Environment is responsible for the administration of the statute. Similarly, the legislation should provide the Minister with sufficiently broad powers in order to properly implement the legislative framework. Such powers should include the Ministerial ability to:

- conduct research and carry out investigations in relation to source water protection;
- convene educational conferences and develop training courses and materials regarding source water protection;
- collect, publish and disseminate information related to source water protection;
- provide technical or financial assistance to persons engaged in the development or implementation of source water protection plans; and
- enter into agreements with any person, entity or level of government regarding source water protection.

As described below, CELA further submits that the source protection legislation should impose a positive duty upon the Minister to provide sufficient funding to ensure the completion of the first round of source water protection plans.

(c) Binding the Crown

CELA submits that the source protection legislation must contain a provision that specifically binds the Crown. In our view, there is no compelling legal or policy reason why the Ontario government should be exempt from complying with the legislation, especially during the critical implementation phase. On this point, CELA notes that Ontario's environmental statutes generally contain provisions that bind the Crown.[4]

(d) Paramountcy

Similarly, the source protection legislation must include a paramountcy clause indicating that despite any other general or special Act, the source water protection legislation shall prevail in cases of conflict. Such paramountcy clauses are currently found in Ontario's environmental

[3] See, for example, section 4 of the *Environmental Protection Act;* section 3 of the *Ontario Water Resources Act; and* section 3 of the *Safe Drinking Water Act.*

[4] See, for example, section 4 of the *Environmental Assessment Act*; section 120 of the *Environmental Bill of Rights;* section 20 of the *Environmental Protection Act*; section 2 of the *Ontario Water Resources Act*; and section 164 of the *Safe Drinking Water Act.*

laws.[5] However, rather than simply relying upon a paramountcy clause to resolve conflicts on a case-by-case basis, CELA submits that the Ontario government should systematically review, and where necessary revise, its other environmental and land use planning statutes to ensure consistency with the source water protection regime.

(e) Legislative Review

CELA recommends that the source protection legislation should include a mandatory provision for a formal and public review of the legislation by a special or general committee of the Ontario Legislature. This review should be commenced no later than three years after the legislation comes into force. The purpose of the review is to examine the strengths and/or weaknesses of the legislation after three years' worth of experience, and to identify opportunities to strengthen or improve the Act. It should be noted that there are legislative precedents for periodic review of environmental laws or plans.[6]

(f) Reports by the Environmental Commissioner

Among other things, the statutory review should consider reports by the Environmental Commissioner of Ontario regarding the status and implementation of source water protection plans. In this regard, sections 57 and 58 of the *Environmental Bill of Rights* should be amended to expressly direct the Environmental Commissioner to monitor, review and report upon the status and implementation of source water protection plans across Ontario. At a minimum, the Environmental Commissioner should address source protection matters in his/her annual report to the Ontario Legislature. However, it should also be open to the Environmental Commissioner to prepare and submit special reports on source protection where necessary or appropriate.

2. Composition/Mandate of Planning Bodies

(a) Conservation Authorities

CELA generally supports the White Paper's suggestion that Conservation Authorities ("CA's") be utilized as the lead agencies for drafting source water protection plans. However, section 20 of the *Conservation Authorities Act* should be formally reviewed and revised to ensure that CA's have express legal authority and appropriate provincial direction for drafting source water protection plans within their geographic jurisdictions. Similarly, section 21 of the *Conservation Authorities Act* should be formally reviewed and revised to ensure that CA's have sufficiently broad powers in order to fully implement source water protection plans through regulatory and non-regulatory tools. CELA suggests that these legislative changes can be accomplished via consequential amendments contained within the source protection legislation.

CELA agrees with the White Paper's proposal that the source water protection legislation should designate existing CA's as being responsible for the development and implementation of source

[5] See, for example, section 179 of the *Environmental Protection Act;* section 14 of the *Niagara Escarpment Planning and Development Act;* and section 166 of the *Safe Drinking Water Act.*
[6] See, for example, section 72 of the *Canadian Environmental Assessment Act;* section 343 of the *Canadian Environmental Protection Act, 1999*; and section 17 of the *Niagara Escarpment Planning and Development Act.*

water protection plans in accordance with the Act. In areas where no CA's exist (i.e. Crown land), CELA submits that the Minister of the Environment should be empowered to designate other ministries, municipalities, agencies or entities as being responsible for developing and implementing source water protection plans. Since the Minister is ultimately responsible for approving and overseeing source water protection plans, CELA submits that it would generally be inappropriate for the MOE itself to draft (and then self-approve) source water protection plans. As described below, however, CELA acknowledges that the MOE should be empowered to prepare (or commission) a source water protection plan in situations where there has been a local failure or refusal to draft an appropriate plan within the timeframe imposed by law.

CELA concurs with the White Paper suggestion that the Minister should be empowered to delineate, amend or merge CA boundaries (or to enter into administrative agreements with one or more CA's) to ensure that source protection planning is carried out or coordinated on an appropriate watershed basis, and to facilitate the pooling of expertise, resources, and information between CA's.

CELA recommends that the source protection legislation must impose a mandatory duty upon the Minister to provide funding to CA's (or other designated entities) at a level that is sufficient to enable these bodies to complete (and implement) their first source water protection plans. On this point, CELA notes that Mr. Justice O'Connor recommended that "the provincial government should ensure that sufficient funds are available to complete the planning and adoption of source protection plans".[7] A similar recommendation was made in the 2003 Report of the Source Protection Advisory Committee.[8] In our view, provincial funding must be provided not only for the initial drafting stage, but also during the critical implementation stage for source water protection plans. Potential sources of provincial revenue that can be directed towards source protection planning (i.e. water-taking levies, effluent charges, etc.) are discussed below.

(b) Source Protection Planning Board

CELA submits that once the appropriate CA is designated by the Minister under the legislation, the CA must be required by law to formally establish its Source Protection Planning Board ("SPPB") within a prescribed timeframe. In the normal course, the SPPB would be the CA's board of directors, and the legislation should make it mandatory for all municipalities to be represented on the CA board of directors. Of necessity, this may require a consequential amendment to the *Conservation Authorities Act*.

In CELA's view, the functions and duties of the SPPB should be specified in the legislation, and should include the following matters:

(a) reviewing and approving the work of the Source Protection Planning Committee ("SPPC");

[7] Part II Report, Recommendation 7.

[8] "Recommendation 19: The province substantially funds development of all initial watershed-based source protection plans" (2003 Report, page vii). As an example of mandatory funding required by law, see section 20 of the *Species at Risk Act*, which requires the federal Environment Minister to provide sufficient resources to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

(b) ensuring compliance with statutory and regulatory requirements regarding source water protection;
(c) submitting the source water protection plan to the Minister for approval;
(d) implementing approved plans in conjunction with other public officials;
(e) monitoring, reporting and updating the plan; and
(f) undertaking public education and outreach programs regarding source protection;

(c) Source Protection Planning Committee

CELA recommends that the CA should be required by law to establish the SPPC within a prescribed timeframe. The legislation should specify that the SPPC shall not exceed 18 persons, and shall, at a minimum, include fair and balanced representation from public health agencies, conservation groups, First Nations, federal/provincial/municipal officials, the public at large, and other interested stakeholders. The legislation should further provide that the chair of the SPPC shall be appointed by the Minister upon the recommendation of the CA.

It goes without saying that the SPPC must be adequately resourced and have access to scientific/technical expertise in order to properly review/consider the detailed reports, records and other information being generated within the planning process. This is why the above-noted provincial funding is of utmost importance and should entrenched within the legislation.

While CELA agrees with limiting the SPPC to 18 persons, it is our view that the actual size of the SPPC is secondary to the overall objective of ensuring that public input is received and acted upon in a manner that is satisfactory to all participants. In addition, the SPPC process must be manageable and result in timely decision-making. To facilitate public input, it may be desirable for the source protection legislation to empower the SPPC to establish "break out" processes (or sub-committees) that report back to the SPPC on defined issues.

CELA strongly submits that the selection process for SPPC members must be open and transparent, and must be perceived to be so by stakeholders within the watershed. One option is for the SPPB to identify sectors within the watershed that require representation, and to seek public feedback on the identified sectors. Thereafter, the SPPB could ask each sector to select its own representative, but with an agreed upon process that allows for additional nominations before the sector picks its representative.

Alternatively, the SPPB could invite applications from interested sectors and stakeholders. Applications could be reviewed by a selection committee of community leaders who will not be sitting on the SPPC. Applicants should identify the sector they wish to represent, and applications should be considered on the basis of criteria adopted by the SPPB at the outset of the selection process (or specified in the source protection legislation).

In any event, the source protection legislation shall specify the SPPC's functions and duties, which should include the following matters:

(a) preparing terms of reference for the drinking water source protection plan;
(b) coordinating the collection and analysis of technical data and mapping information;

(c) establish task-oriented sub-committees or working groups as may be required;
(d) ensuring ongoing consultation with the public and interested agencies; and
(e) preparing the draft plan with full public input and forwarding it to the SPPB for adoption.

3. Public/Agency Consultation

CELA strongly recommends that the source protection legislation should expressly require meaningful public/agency notice and comment opportunities at each significant step of the planning process (i.e. terms of reference; assessment reports; plan development; submission to the Minister for approval; appeal period, etc.). Public input will be particularly important at the critical stages of developing the source water protection plan.

In our view, the legislation should specify that notifying the public must, at a minimum, include posting timely notices on the EBR Registry, but must also include other means such as media releases, newspaper inserts or advertisements, newsletters, mailouts, and usage of the CA, municipal and/or MOE website(s), as described below.

Moreover, the legislation (and regulations) should prescribe the form and content of public notices, and the types of consultation techniques (i.e. public meetings, open houses, focus groups, workshops, etc.) that should be employed to disseminate information and to solicit public/agency input.

The legislation should also specify the comment period for each step of the planning process, depending upon its significance (i.e. 30 days for terms of reference, 90 days for the proposed plan, etc.). On this point, we note that sections 15, 16 and 22 of the EBR specify minimum public comment periods for certain proposals, and we see no reason why mandatory comment periods cannot be built into the source protection legislation.

In our experience, good public participation typically translates into good environmental planning. Meaningful public participation and credible source water protection plans will occur where:

people who have an interest in participating feel that they were able to participate to their satisfaction;
people feel that their input was heard and reflected in the final result;
(a) people understand the final result and how it was achieved;
(b) people have timely access to all information and points of view being considered in the process;
(c) people have access to peer review of technical studies;
(d) barriers to participation are eliminated by appropriate timing of meetings, provision of funding to facilitate participation, etc.;
(e) accurate records of proceedings (and public input) are prepared and circulated/available;
(f) both web-based and paper options for following or engaging the process are available;
(g) people clearly understand the process and the end-product, as well as time lines; and
(h) time lines and promised processes are met, and plain language explanations of technical matters are provided at key points.

For source water protection planning to succeed, all sectors must be involved in the process, and they must understand and accept the plan. In our view, the best way to get broad participation and acceptance is to ensure that people understand the implications of the final product. Accordingly, a variety of outreach approaches (i.e. media, community groups, educators and public meetings) will be needed to explain the process and the product.

CELA submits that there should be opportunities for self-identification for involvement, as well as mechanisms for targeted or invited participation to ensure that all relevant interests are represented within the planning process. Ideally, all water users, planners, decision-makers, and persons whose actions affect water resources should be included at the various levels and stages of plan development. Moreover, the public consultation aspect of the planning process must seek to avoid or overcome traditional barriers to public participation, such as: over-extended community groups; perception that public input will not matter; fears that process is "hi-jacked" by strong interests or experts; or failure to integrate technical investigations with community education efforts.

For CELA, the bottom line is that the source water protection planning process must ensure that: (i) the resulting plan meets provincial watershed source protection planning standards; (ii) the plan can and will be implemented; (iii) the communities within the watershed "own" the plan and are committed to it; and (iv) the participants accept the result even if some issues were not resolved as they may have recommended.

4. Plan Development/Content

(a) Terms of Reference

The source protection legislation should clearly specify that the first step of the planning process is the development of terms of reference by the SPPC. The legislation should further provide that once approved by the Minister, the terms of reference shall govern the development of the source water protection plan.[9] However, the Minister should be empowered to amend or vary approved terms of reference in light of changed circumstances, new information, or technological developments.

CELA recommends that the source protection legislation (and regulations) should prescribe the form and content of the terms of reference, which, at a minimum, should include:

(a) workplan to identify and mitigate immediate threats to sources of drinking water;
(b) timeframe and technical requirements for preparing the source water assessment and drafting the source water protection plan;
(c) the proposed public notice/comment program and dispute resolution process;
(d) procedural requirements regarding the establishment of sub-committees or working groups; and

[9] Analogous provisions exist in relation to Terms of Reference in the environmental assessment process: see section 6 of the *Environmental Assessment Act.*

(e) key decision milestones, and the criteria to be used when evaluating options, assessing risks, and making decisions in the source water protection planning process.

In addition, the legislation shall require meaningful public notice/comment opportunities on the proposed terms of reference prior to their submission to the SPPB for adoption. The public should also be entitled to make submissions to the Minister prior to his/her decision to approve (or amend and approve) the terms of reference. There should be no appeal rights in relation to the terms of reference.

(b) Assessment Report

CELA submits that the source protection legislation should clearly specify that the second step of the planning process is the preparation and submission of a watershed-specific assessment report, which is developed by the SPPC in accordance with the approved terms of reference (including public consultation requirements).

Moreover, the legislation (and regulations) should prescribe the form and content of the assessment report, which, at a minimum, should address all matters described in Recommendation 31 of the Final Report of the Source Protection Advisory Committee. Such matters include (but are not limited to):

(a) mapping/hydrogeological information on current/future sources of drinking water;
(b) water use/demand analysis;
(c) water quality data for surface water and groundwater;
(d) inventory of "high risk" facilities/activities (including significant takings) that are or may be sources of drinking water contamination or depletion;
(e) evaluation of the vulnerability of drinking water sources to degradation or depletion; and
(f) description of regulatory and non-regulatory tools to address threats to source water (i.e. restricting land use/development within wellhead protection zones or surface water intake zones, etc.).

The legislation should specify that upon completion, the draft assessment report should be forwarded by the SPPC to the SPPB for review and adoption (subject to public notice/comment). Once adopted, the assessment report should be sent by the SPPB to the Minister for review and approval, and the public should be entitled to make submissions to the Minister prior to his/her decision on the assessment report.

CELA recommends that the legislation should require the SPPBs of CA's to submit their initial assessment reports to the Minister no later than two years after the legislation comes into force. The Minister should be empowered to approve (or amend and approve) the assessment report, and to extend this two-year timeframe where necessary or appropriate. There should be no appeal rights in relation to the assessment report.

CELA further recommends that the legislation should impose an ongoing duty upon the SPPB to periodically review and update the approved assessment report (i.e. at least once every five years) to ensure that it remains current and reliable.

(c) Source Water Protection Plan

In our view, the legislation should require the SPPB to ensure that the source water protection plan is completed within the timeframe prescribed by the approved terms of reference. The Minister should be empowered to amend the terms of reference to extend this deadline if warranted.

Where the SPPB fails or refuses to complete the plan by the prescribed deadline, CELA submits that the legislation should empower the Minister to either: (a) go to the civil courts to seek injunctive relief to address the non-compliance; or (b) draft the plan itself, order the SPPB to implement the plan, and issue a cost-recovery order to recoup MOE costs incurred in drafting the plan.

In addition, the legislation (and regulations) should prescribe the form and content of source water protection plans, which, at a minimum, should address the following matters:

(a) goals, objectives and targets of the plan;
(b) technical information such as: water budget, land use/natural heritage maps, hydrogeological modelling, inventory of significant water-takings, listing of point/non-point sources of drinking water contaminants, etc.;
(c) ranking of threats to drinking water sources, especially in vulnerable or sensitive areas;
(d) timing and content of mitigation measures to address immediate and long-term threats to sources of drinking water;
(e) timing and content of remedial measures to restore water quality or quantity;
(f) summary of concerns/issues raised by the public/agencies, and a written response thereto;
(g) monitoring/reporting plan, including benchmarks or indicators for assessing the effectiveness of the plan; and
(h) schedule and process for reviewing, updating and renewing the plan.

We note that the White Paper properly suggests that annual progress reports should be filed in relation to source water protection plans. CELA concurs with this proposal, but submits that there should be an ongoing obligation to monitor and report upon not just plan development, but also the actual implementation of the plan.

The legislation should specify that upon completion, the draft source water protection plan should be forwarded by the SPPC to the SPPB for review and adoption (subject to public notice/comment). Once adopted, the plan should be submitted to the Minister for review and approval. To ensure appropriate public notice/comment, the legislation should specifically require the SPPC to hold timely, well-advertised public meetings to review and discuss initial (and successive) drafts of the source water protection plan before it is formally forwarded to the SPPB for review/adoption.

In addition, the legislation should specify that the term of plan approval shall not exceed ten years. The legislation should also require the SPPB to formally review/revise the plan (with full

public input), and to re-submit the updated plan for approval by the Minister prior to the expiry of the previous plan.

5. Ministerial Approval of Plan

CELA submits that the legislation should empower the Minister to approve (or amend and approve) the source water protection plan, in whole or in part, with or without terms and conditions. When deciding whether to approve the plan (or whether to impose terms and conditions), the legislation should require the Minister to consider: the purposes of the Act; the approved terms of reference; the approved assessment report; and comments received from the public/agencies. Prior to the Minister's decision, notice of the proposed plan should be posted on the EBR Registry for a minimum of 90 days.

6. Appeals

CELA recommends that the legislation should enable any interested person to appeal the Minister's decision (in whole or in part) to the Environmental Review Tribunal (ERT). "Interest" means that the person is directly affected by the plan, or submitted comments during the development of the plan.

In our view, the appeal period should be 20 days from the date of the Minister's decision. The legislation should specify that the grounds for the appeal are that the plan:

(a) fundamentally fails to conform with the Act or regulations;
(b) was prepared in contravention of the approved terms of reference (including public consultation requirements); or
(c) inadequately addresses the threats or risks to source water described in the approved assessment report;

The legislation should specify that the matter before the ERT is a hearing de novo, and the ERT should be empowered to make any order that the Minister could have made in relation to the proposed plan. The parties in the ERT hearing are the appellant, the Minister, the SPPB, and any other person permitted by the ERT to intervene in the proceeding. The ERT should be empowered to award costs, and should be authorized to dispose of the appeal without a hearing in exceptional circumstances (i.e. undue delay by appellant, failure to comply with ERT directions, appeal fails to address the grounds permitted by the Act, etc.).

The legislation should also create a limited right of appeal from the ERT decision to the Divisional Court on questions of law, and to the Ontario Cabinet on matters other than questions of law. This distinction between court appeals and Cabinet appeals already exists in Ontario's environmental laws,[10] and should be replicated within the source protection legislation.

[10] See, for example, section 34 of the *Environmental Protection Act*; and section 9 of the *Ontario Water Resources Act.*

7. Water Taking Permits

CELA strongly recommends that there must be an explicit legislative linkage between source water protection planning and the MOE's permit to take water ("PTTW") program. In our view, source water protection plans should be the "engine" that drives or governs the PTTW program, and decisions to issue PTTWs must be consistent with such plans. The MOE should also integrate the PTTW program with the source water protection plan regime so that there is a single lead agency which is responsible for ensuring that water use in the Province of Ontario is carried out sustainably.

CELA further submits that source water protection plans should also include pre-determined "triggers" or indicators of drought/low water conditions in a watershed or sub-watershed that warrant mitigative or remedial measures by MOE (i.e. amendment or revocation of PTTWs). In addition, to safeguard against over-allocation of surface water resources, source protection plans should establish minimum flows/levels beyond which there will be no further water allocation via PTTWs. The minimum flow requirement should take into account normal seasonal variations in flows and should be incorporated into terms and conditions of PTTWs. PTTWs should also include monitoring requirements to ensure that minimum flow requirements are recorded and maintained. If monitoring results indicate that minimum flow requirements are being exceeded, the PTTW should require that the taking be decreased or stopped.

In addition, the MOE should prepare/consider water budgets for all watersheds and sub-watersheds, and all consumptive and non-consumptive uses in a watershed or sub-watershed should be identified. MOE decisions regarding PTTWs must consider the direct, indirect, and cumulative impacts of proposed takings in the context of other removals of water (i.e. consumption, evaporation, transportation, etc.) within the watershed.

CELA submits that source water protection plans should include a comprehensive water allocation plan for the watershed or sub-watershed, which must be subject to a periodic review and revision. It should also include information about current and planned uses of water in the watershed or sub-watershed as well as estimates of future capacity of uses within the watershed or sub-watershed.

On this point, we note that section 3 of Ontario Regulation 285/99 states that a Director who is considering an application for a PTTW may consider "existing and planned livestock uses of water, existing and planned municipal water supply and sewage disposal uses of water, existing and planned agricultural uses of water, and existing and planned domestic uses of water." However, the MOE does not currently have a database which would allow the Director to readily access information about current and planned uses.

Accordingly, CELA submits that the MOE should develop and maintain a database on existing and planned uses in a watershed or sub-watershed so that the Director can take into consideration the factors set out in section 3 of Regulation 285/99 when considering an application for a PTTW. The database should also be readily accessible to other government ministries and public agencies that will be reviewing applications for PTTWs, as described below.

CELA strongly recommends that applications for PTTWs should be subject to meaningful public notice/comment (including proposed terms/conditions on the PTTW), and actual notice should be provided to CA's, municipalities, and all persons interested in, or potentially affected by, the proposed taking. PTTWs should be issued only after MOE has considered public/agency input, and has determined that the proposed taking will not adversely affect current and planned management/uses of water within a watershed (i.e. for fish/wildlife, tourism or farming purposes). The MOE should make the application for a PTTW, as well as all supporting documents (including experts' reports), available to the public at the initial stage of the application process.

CELA understands that proposed amendments to Regulation 285/99 contemplate that in certain instances, the Director can require the proponent to undertake broader public consultation beyond simply providing notice. If these amendments are adopted, the MOE should prepare a guidance manual for proponents on how to undertake meaningful public consultations. Where an application will be contentious (e.g. a large-scale taking, or a taking near an ecologically significant area), proponents should be required to submit a stakeholder consultation plan for approval by MOE outlining how they intend to undertake public consultation.

In our view, the PTTW process should be structured to ensure more rigorous scrutiny of proposed takings that: (i) remove water from the watershed (i.e. water bottling); (ii) facilitate evaporative losses (i.e. summer irrigation); or (iii) divert/move significant amounts of water within the watershed (i.e. deep aquifer withdrawals that ultimately return/move some water to surface watercourses). Therefore, it may be appropriate for the PTTW program to distinguish between types of permit applications (i.e. on the basis of type/volume/nature of taking, characteristics of local area/watershed, existence of other current/planned takings in the vicinity, etc.). Thus, an application to simply take/impound water could be subject to less rigorous review than a large-scale export proposal.

Similarly, CELA submits that proposed takings in or near wellhead protection zone or surface water intake zones (or vulnerable/sensitive areas as delineated by the SPPC) should also be subject to a higher level of regulatory scrutiny and control. In addition, water takings in vulnerable/sensitive areas should be considered as a "threat" for the purposes of identifying hazards to source water and developing interim/permanent measures to address such hazards.

CELA recommends that all holders of PTTWs should be required to adopt plans for water conservation, the details of which should be included as terms and conditions in the permit (i.e. provisions requiring the permit holder to engage qualified consultants to prepare/submit water audits which make facility-specific recommendations for water conservation/efficiency). All applicants for PTTWs should provide detailed information as to their use/need for water, and no permits should be issued unless a scientific/technical assessment (i.e. seasonal and multi-year data) demonstrates that the proposed taking is a sustainable use.

In addition, the MOE should prepare and distribute to its staff an updated policy/procedures manual that, at a minimum: (i) clearly explains the permitting process; (ii) describes public/agency consultation requirements; (iii) identifies documentary requirements/evaluation

criteria; and (iv) provides guidance on how the ecosystem approach/precautionary principle are be applied in the permitting process.

Similarly, the MOE should establish and maintain a publicly accessible web site that posts and updates information about water takings, including, at a minimum: (i) the source of the taking (i.e. groundwater or surface water); (ii) the location of the taking; (iii) whether the taking is consumptive or non-consumptive; (iv) the amount of taking, including the hours of taking and the maximum taking per day; (v) the purpose of the taking (communal water, irrigation, etc.); (vi) the applicant's need for the taking and the planned use of the taking; (vii) the water budget in the watershed or sub-watershed; (viii) cumulative takings in the watershed or sub-watershed; and (ix) the permit expiry or cancellation date.

CELA further submits that the *Ontario Water Resources Act* should be amended to empower the Director to impose a water-taking prohibitions for prescribed timeframes in areas designated as ecologically sensitive or facing serious water quantity/quality issues. In addition, the Act should establish explicit goals/targets for water conservation/efficiency (i.e. reduce per capita use of water in Ontario by 30% within 5 years), which should be reflected in PTTW decision-making.

CELA strongly recommends that the MOE should immediately halt the issuance of "phased" or "grand-fathered" PTTWs. In our view, no PTTW's should be issued where the proposed taking conflicts with an approved source water protection plan, or interferes with existing municipal or domestic takings. Similarly, the MOE should amend and/or revoke PTTWs that currently authorize permit holders to take more water than they actually use.

In addition, CELA submits that PTTWs should have fixed terms and clear expiry dates (i.e. annual renewals not to exceed maximum of five years). PTTWs should be revocable (without damages) where: (i) the taking interferes with other water uses; (ii) the taking impairs ecosystem function; or (iii) water shortages/drought conditions exist in the area of the taking. PTTWs should contain conditions that define when drought/low water conditions exist (i.e. upon notice by the Director), and that require appropriate response by the permit holder (i.e. decrease/stop the water taking until further notice by MOE).

When implementing the PTTW program, the MOE must ensure a high level of protection of ecosystem function/processes (i.e. specified range of temperature for water discharges, specified range of base flow for surface water streams, protection of optimum conditions needed to sustain aquatic and water-dependent species, etc.).

For accountability and planning purposes, CELA submits that the MOE must impose PTTW terms/conditions that require permit holders to provide data to the province in a standardized model or format in order to quantify actual takings by location/ day/month/year. "Guesstimates" of water taking quantities are not acceptable – proponents must collect/report actual usage. The province should accumulate/track this data by sector, and should store such data in a publicly accessible (internet) data base, together with a layer of analysis. This will require greater resources for provincial data collection/analysis. The new monitoring/reporting requirements in the PPTW program should be phased in forthwith, with immediate emphasis upon

sectors/proponents that take/remove water from vulnerable/sensitive areas, or areas experiencing drought/low water conditions;

CELA recommends that the new PTTW rules/restrictions should apply to all sectors, and that the *Ontario Water Resources Act* should be amended to specify that PTTW requirements apply to large-scale domestic takings and takings by intensive livestock operations.

Moreover, the new PTTW regime must be consistent with Annex 2001 (i.e. no adverse impact, return flow to be close to site of taking, resource improvement to be undertaken in prescribed circumstances, and monitoring/analysis of cumulative impacts). There should be a strong statutory prohibition against diverting water from one watershed to another. Where appropriate, aquifer recharge should be required rather than discharge to surface water.

8. Financing Source Protection Planning

It is self-evident that there are several categories of costs that will arise in source water protection planning. For example, there are the costs of developing the plans themselves. As recommended in the Final Report of the Source Protection Advisory Committee, the province should fund the first round of source water protection plans.

After the initial plan development, there will be ongoing planning costs (i.e. implementation of the plan, monitoring of the plan's effectiveness, and revising the plan if required). These ongoing planning and implementation costs should have sustainable, long-term funding that the responsible parties can predict and rely upon with a high degree of certainty.

CELA submits that funding for source protection could be derived, in part, from the beneficiaries of source protection planning. On this point, we note that "user pay" principles are included in *Sustainable Water and Sewage Systems Act*, which was amended to include source protection costs. This means that some costs can be recovered through municipal rates and other funding instruments for water and sewer systems.

Another significant aspect of "user pay" involves water takers, who currently do not pay for the actual water taken under PTTWs. A nominal levy per litre of water taken could help finance source water planning and implementation, including capital works for managing or protecting water resources.

CELA further submits that source protection funding could also be derived, in part, from activities that may affect water resources. For example, the "polluter pay" principle was noted by Justice O'Connor as a potential basis for funding source protection planning.[11] Among other things, this could take the form of levies on certificates of approval for emissions to water, provided that such levies are directed to source protection planning and implementation.

In any event, the above-noted source protection costs must not be subject to the vagaries and uncertainties of the annual provincial budget exercise. Many new and innovative funding

[11] Part II Report, page 116.

mechanisms have been utilized in other jurisdictions, and these initiatives should be carefully reviewed for possible finetuning and adoption in Ontario.

In summary, CELA advocates use of levies on water takings and all other available municipal and provincial tools to ensure that robust planning and thorough implementation will occur across Ontario. With respect to the agricultural sector, CELA notes that while some capital expenditures may ultimately be passed on to consumers in food prices, many other capital works on farms should be covered from other source protection revenues. Clearly, Ontarians cannot continue to insist on both cheap food and environmental protection without looking at how we pay for both.

9. Outstanding Issues

(a) Level of Protection

CELA submits that for vulnerable areas or sensitive water resources, ground water should be protected at a level that meets Ontario's current drinking water quality standards, and surface water should be protected at a level that meets the Provincial Water Quality Objectives.

CELA further submits that threat assessment exercises and risk management decisions (i.e. what will be done to protect water resources from the threats) must be reasonably consistent across the province.

(b) Ensuring Consistent Decision-Making

CELA strongly recommends that the drinking water source protection framework must specify which statutory decisions shall be consistent with source protection plans. Health protection should be the main criterion for determining which decisions must be consistent with source protection plans.

On this point, CELA submits that Mr. Justice O'Connor's list of statutory decisions relevant to source protection should be used as the starting point for identifying provincial and municipal decisions that must be consistent with source protection plans (i.e. land use planning decisions, certificates of approval for emissions to air or water, approvals for biosolids application to land, water taking permits, etc.).[12]

CELA further submits that prescribing decisions that shall be consistent with source protection plans will have to consider the matrix of risk management strategies that the framework outlined (i.e. most protective municipal/provincial decisions are required for new uses in the most vulnerable areas, and for existing uses in the most vulnerable areas).

(c) Need for Municipal Notice/Involvement

CELA notes that there is ongoing concern among municipalities regarding inadequate notice and involvement in provincial decision-making that affects lands and resources within municipal

[12] Part II Report, pages 112 to 115.

boundaries (i.e. contaminant emissions, water takings, biosolids applications, etc.). CELA is also aware that municipalities may acquire new notice/comment opportunities (i.e. the proposed new water taking regulation).

In any event, CELA submits that source protection plans will require explicit status in municipal land use plans, and even govern some aspects of those plans. In addition, CELA submits that all provincial decision-making must respect the source protection plans that are developed by communities and approved by the MOE.

(d) First Nations

CELA strongly recommends that First Nations must be provided meaningful opportunities to influence source water protection decisions within the entire watershed (including adjoining municipalities). At the same time, CELA submits that the resource issues/constraints facing First Nations must be resolved in order to facilitate their participation in source water protection planning.

PART III – CONCLUSION AND SUMMARY OF RECOMMENDATIONS

As noted by the Walkerton Inquiry and the Source Protection Advisory Committee, Ontarians want and need watershed-based source water protection across the province. Therefore, CELA urges the Ontario government to move expeditiously beyond the White Paper stage and introduce source water protection legislation as soon as possible. In addition, the Ontario government must ensure that all public authorities involved in the source water protection regime (i.e. MOE, OMAFRA, CA's, municipalities, etc.) are adequately funded to develop, review and implement source water protection plans.

In our view, Mr. Justice O'Connor's 22 recommendations on source water protection were among the most fundamental of all of the recommendations arising from the Walkerton Inquiry. In a multi-barrier approach for ensuring drinking water safety, source protection is the first (and arguably most important) measure to be undertaken. Therefore, we look forward to the timely and effective implementation of all of the Walkerton Inquiry recommendations relating to source water protection.

CELA commends the White Paper's commitment to "developing a comprehensive source water protection framework, and to taking steps to better protect the sustainability of Ontario's water resources" (page 1). However, it remains to be seen whether that laudable commitment will be adequately reflected in the source protection legislation to be introduced in the Ontario Legislature. Accordingly, CELA looks forward to continuing to work with the Ontario government and other stakeholders to ensure that the legislation satisfactorily addresses the issues and recommendations contained within these submissions.

With respect to the White Paper's proposals, CELA's specific recommendations are as follows:

1. The source protection legislation must contain a broad statement of legislative purpose aimed at protecting human health, facilitating ecosystem-based watershed management, and

integrating source water protection with other environmental and land use decision-making processes.

2. The source protection legislation should be administered by the Minister of the Environment, who must be given sufficient statutory powers and tools to ensure the timely development and effective implementation of Source Water Protection Plans.

3. The source water protection legislation must bind the Crown, and must contain a paramountcy clause indicating that the legislation prevails over other special or general Acts in cases of conflict.

4. The source water protection legislation must provide for a mandatory public review of the legislation no later than three years after the legislation comes into force.

5. Existing conservation authorities ("CA's") should be utilized as the lead agencies (either individually or jointly) for drafting Source Water Protection Plans; however, the Minister should be empowered to designate other lead agencies in areas where CA's do not exist.

6. The source protection legislation should impose a mandatory duty on the Minister to provide sufficient funding to CA's (or other designated agencies) to enable them to draft and implement Source Water Protection Plans.

7. CA's should be required by law to establish Source Protection Planning Boards, which shall be primarily responsible for ensuring that Source Water Protection Plans are developed and implemented in accordance with provincial requirements and standards.

8. CA's should be required by law to establish multi-stakeholder Source Protection Planning Committees, which shall be primarily responsible for collecting data, consulting with the public, and preparing the documentation prescribed by the source protection legislation.

9. The source water protection legislation must expressly require meaningful public/agency participation at each significant step of the planning process, and, among other things, the legislation shall provide for the use of: EBR Registry notices; media releases; mailouts; newsletters; public meetings, open houses, workshops, and other appropriate consultation tools.

10. The source protection legislation should specify that the first step of the planning process is the preparation and approval of Terms of Reference that, among other things, describe the components and milestones of the forthcoming planning process. The Terms of Reference should also set out the workplan for identifying and providing interim protection of vulnerable or sensitive sources of drinking water.

11. The source protection legislation should specify that the second step of the planning process is the preparation and approval of an Assessment Report that, among other things, contains hydrogeological data, water use/demand information, inventory of "high risk" activities,

evaluation of source water vulnerability to degradation/depletion, and description of regulatory and non-regulatory tools to address actual or potential threats.

12. The source protection legislation should specify that the third step of the planning process is the preparation and approval of a Source Water Protection Plan that, among other things, contains goals and objectives, technical/hydrogeological information (i.e. water budget), measures to mitigate threats or to restore drinking water sources, monitoring/reporting program, and procedural requirements for renewing and updating the plan.

13. The Minister should be empowered to approve (or amend and approve) Source Water Protection Plans, with or without conditions. There should be a limited right of appeal for "interested" persons to appeal the Minister's decision, in whole or in part, to the Environmental Review Tribunal.

14. There must be an express legislative linkage between the source protection legislation and the permit to take water ("PTTW") regime under the *Ontario Water Resources Act*. The PTTW regime must be amended in several key respects (i.e. data collection, public consultation, water conservation/efficiency, monitoring/reporting, documentary requirements, and procedural steps) to ensure consistency with approved Source Water Protection Plans and Annex 2001.

15. Source water protection planning and implementation should be financed via various levies and charges based upon "user pay" and "polluter pay" principles (i.e. water rates, water-taking levies and effluent charges) to ensure sustainable funding for source protection programs.

16. The source water protection legislation must ensure that for vulnerable or sensitive sources, groundwater should be protected at a level that meets current drinking water quality standards, and surface water should be protected at a level that meets the Provincial Water Quality Objectives.

17. The source water protection legislation must ensure that threat assessment and risk management decisions are reasonably consistent across the province.

18. The source protection legislation should specify which statutory approvals under other legislation (i.e. land use planning decisions, certificates of approval for air/water emissions, approvals for land application of biosolids) shall be consistent with approved Source Water Protection Plans.

19. The source protection legislation must ensure that there is adequate notice to, and involvement of, municipalities in circumstances where provincial decision-making may affect lands or resources related to source water protection within municipalities.

20. The source protection legislation must ensure that First Nations have meaningful opportunities to participate in source water protection decisions within the entire watershed (including adjoining municipalities).