PROVINCIAL POLICY STATEMENT: DRAFT POLICIES, 2004

Submissions of the Canadian Environmental Law Association to the Ministry of Municipal Affairs and Housing

EBR Registry Number PF04E0003

CELA Publication #482
ISBN # 1-897043-16-3

Prepared by

Ramani Nadarajah
Paul Muldoon
Theresa McClenaghan
Richard Lindgren

August 27, 2004

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

130 SPADINA AVENUE • SUITE 301 • TORONTO, ONTARIO • M5V 2L4
TEL: 416/960-2284 • FAX 416/960-9392 • WEB SITE: www.cela.ca

TABLE OF CONTENTS

PART I - INTRODUCTION 2
PART II - GENERAL COMMENTS 3
PART III - SPECIFIC COMMENTS 3
SECTION 2.2 - WATER 3
SECTION 2.3 - AGRICULTURE 5
Deletion of term “Predominate” 5
Focus on Potential for Agriculture 5
Need for Mapping of Specialty Crop Land 6
Lot Creation And Lot Adjustments 6
Permanent Protection for Agricultural Areas 6
SECTION 2.4 - MINERALS AND PETROLEUM 8
SECTION 2.5 - MINERAL AGGREGATES 9
Mineral aggregate extraction should require a “needs” assessment 9
Conservation 10
Rehabilitation 10
Enforcement 10
Interim Use 11
Exemption from rehabilitation 11
Wayside Pits 12
SECTION 3.1 - NATURAL HAZARDS 13
No development on Hazardous Lands or Hazardous Sites 13
Hazard Identification and Assessment 14
SECTION 3.2 HUMAN–MADE HAZARDS 14
Need for Provincial Review and Sign-off 14
SECTION 4.0 - IMPLEMENTATION AND INTERPRETATION 15
PART IV - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS 16
ENDNOTES 21

SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON THE PROVINCIAL POLICY STATEMENT: DRAFT POLICIES, 2004

PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a non-profit organization founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizen's groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. CELA also undertakes public education, community organization and law reform activities.

CELA has had a lengthy history with planning issues in Ontario. In 1990, CELA staff helped form the land use caucus of the Ontario Environment Network, which allowed over ninety citizens and environmental groups across Ontario to maintain communication links and coordinate responses to the government's consultation on land use planning issues.[i] A former CELA counsel was the Commissioner on the Commission on Planning and Development Reform in Ontario, which released its Final Report in June of 1993, entitled "*New Planning For Ontario*." [ii] CELA has undertaken research and published numerous briefs [iii]and been involved in litigation on land use planning. In addition, CELA counsel also participated in the Planning Reform Workshop held in London, Ontario on July 6, 2004 on the draft policies of the Provincial Policy Statement ("PPS").

The purpose of this brief is to respond to the draft Policies of the PPS, one of three consultation discussion papers on Planning Reform prepared by the Ministry of Municipal Affairs and Housing, with comments due by August 31, 2004.

CELA is coordinating its response on the PPS with the Pembina Institute for Appropriate Development (PIAD), the Federation of Ontario Naturalists (FON) and the Conservation Council of Ontario (CCO). CELA has reviewed PIAD comments on Section 1.0 (Building Strong Communities), FON's comments on Section 2.1 (Natural Heritage), and CCO comments on Community Design and Enhancement and supports their conclusions and recommendations.

CELA will be focusing its comments primarily on the policy for the Wise Use and Management of Resources as well as the policy for Protecting Public Health and Safety. In particular, CELA's comments will address Section 2.2 Water, Section 2.3 Agriculture, Section 2.4 Minerals and Petroleum, Section 2.5 Mineral Aggregates, Section 3.1 Natural Hazards and Section 3.2 Human-made Hazards. In addition, CELA will comment on Section 4, the policy for Implementation and Interpretation of the PPS.

In preparing this brief, CELA considered the following questions:

- whether the draft policies provide sufficient direction to effectively protect provincial interest in land-use planning;

- whether the draft polices achieve the right balance among different policy interests (such as building strong communities, protecting the environment and resources and supporting a strong economy);
- any emerging or additional planning matters that require provincial policy direction which are not included or not adequately addressed; and,
- additional comments or questions regarding the PPS policies.

PART II - GENERAL COMMENTS

CELA supports the proposed requirement in Bill 26 that decisions affecting land use planning matters "shall be consistent with policy statements issued under the [Planning Act]", as opposed to the current standard, which provides that planning authorities "shall have regard to the PPS" when exercising any authority that affects a planning matter.[iv] CELA believes that the change in wording imposes a higher test and is more likely to ensure that the objectives of the PPS are considered in the land use planning decision-making process, and are ultimately adhered to.[v]

However, CELA is very concerned that many of the proposed policies of the PPS continue to be partial to those objectives that favour development over protection of natural heritage, water quality and quantity, and the environment. A notable example is section 2.5 which allows extraction of aggregates to take place without any demonstration for the need, including supply/demand analysis, notwithstanding the availability, designation or licensing for extraction, of aggregates locally or elsewhere.[vi] The wording of the provision, in effect, allows aggregate extraction to trump other PPS objectives in the event of a conflict, and ensures the primacy of resource extraction over protection of water quality and quantity, natural heritage and prime agricultural lands. CELA is of the view that such an approach fundamentally undermines the implementation of the PPS objectives, which seek to ensure protection of the natural environment and other societal needs.

In addition, key provisions of the PPS objectives should be strengthened and linked with other provincial initiatives currently underway. For example, the PPS objectives on protection of water (Section 2.2) need to be linked to the source water protection legislation, once it is it promulgated, to ensure that there is linkage between source protection planning and land use planning.

PART III - SPECIFIC COMMENTS

SECTION 2.2 - WATER

On June 23, 2004, the Ministry of Environment, (MoE) placed the draft *Drinking Water Source Protection Act*, 2004 on the Environmental Bill of Rights Registry for public notice and comments.[vii] The draft *Drinking Water Source Protection Act* proposes legislative provisions for the development of source water protection plans as

recommended by Mr. Justice Dennis O'Connor, the Commissioner of the Walkerton Inquiry, in his Part II Report. [viii]

According to the EBR posting, the provisions necessary for the implementation of source protection plans are being considered by two source protection advisory committees established by the government, the Implementation Committee and the Technical Experts Committee.[ix] The MoE expects to consider the advice of the committees as well as any comments received from the public on the proposed legislation, and to combine the planning components and implementation components into a single comprehensive source protection bill. [x] It is anticipated that the government will pass the final legislation sometime in the Fall 2004. The PPS provisions pertaining to water should then be reviewed and amended to ensure that they integrate source protection plans under the *Drinking Water Source Protection Act* with land use planning.

CELA recommends that the province should systematically review and, where necessary, revise its environmental and land use planning statutes as well as the PPS to ensure consistency with the source water protection regime. CELA also recommends that all planning authorities review and update all official plans and zoning by-laws to ensure consistency with source protection plans.

The PPS provisions on water should include a clause which explicitly states that all land use planning decisions by planning authorities shall be consistent with source protection plans and in the event of a conflict the source protection plan will prevail.

Section 2.2.2 should be amended to state that development and site alteration will not be permitted in or near sensitive surface and groundwater features such that these features and their related hydrological functions will be protected, improved or restored.

The PPS should also include a clause, which states that development or land use specified in an approved source protection plan or a source protection regulation will not be permitted in an area where such development or land use would be a water risk in the watershed. The PPS should include the same definition of "water risk" as the draft *Drinking Water Source Protection Act*, which states "water risk means an existing or anticipated activity or thing prescribed by the regulations that contributes or has the potential to contribute to;

(a) a reduction in the quality or quantity of water in a watershed, or
(b) water in a watershed failing to meet any standards prescribed by the regulations respecting the quality or quantity of water." [xi]

CELA Recommendation # 1

(i) The province should review, and where necessary, revise its environmental and land use planning statutes as well as the PPS to ensure consistency with the source water protection regime. In addition, all planning authorities should review and

update all official plans and zoning by-laws to ensure consistency with the source protection plans.

(ii) The PPS provisions on water should include a clause which explicitly states that all land use planning decisions by planning authorities shall be consistent with source protection plans and in the event of a conflict the source protection plan will prevail.

(iii) Section 2.2.2 of the PPS should be amended to state that development and site alteration will not be permitted in or near sensitive surface and groundwater features such that these features and their related hydrological functions will be protected, improved or restored.

(iv) The PPS should also include a clause which states that development or land use specified in an approved source protection plan or a source protection regulation will not be permitted in an area where such development or land use would be a water risk in the watershed.

(v) The PPS should include the same definition of "water risk" as the proposed *Drinking Water Source Protection Act*, which states, "water risk means an existing or anticipated activity or thing prescribed by the regulations that contributes or has the potential to contribute to;

> **(1) a reduction in the quality or quantity of water in a watershed, or**
>
> **(2) water in a watershed failing to meet any standards prescribed by the regulations respecting the quality or quantity of water.**

SECTION 2.3 - AGRICULTURE

Deletion of term "Predominate"

CELA has concerns with the use of the term "predominate" in section 2.3.1 as a means of assessing prime agricultural areas. CELA, therefore, recommends the word "predominate" be deleted and instead be replaced with the words "are significant", which would impose a less stringent test for assessing prime agricultural land and specialty crop lands. [xii] This amendment should also be made to the definition of prime agricultural areas in section 6.0 (Definitions).

Focus on Potential for Agriculture

CELA also recommends that the definition of the prime agricultural areas in section 6.0 (Definition) should include a clause which states that identification of prime agricultural

lands will focus on identifying lands with "potential" for agriculture and not just those already in production.

CELA also recommends that the definition of specialty crop areas in Section 6.0 (Definition) be defined as areas where specialty crops may be grown as opposed to “predominantly grown”. The present wording of the definition of specialty crop areas could be interpreted as only including lands which are currently in production, as opposed to whether the lands in question will support specialty crops. CELA is concerned that the latter approach would significantly shrink the land base for specialty crop areas in the province.

Need for Mapping of Specialty Crop Land

The mapping of specialty crop land is a significant step if these lands are to be protected in perpetuity from increasing development pressures in Ontario, particularly in the Niagara Fruit and Grape Belt, which has been identified for protection in the Niagara Regional Policy Plan.[xiii] The province should make it a priority to work in conjunction with municipalities and experts to map and/or re-map specialty cropland with the potential to expand the mapping of specialty cropland based on microclimate and soil quality. Any review of mapping of specialty croplands should be undertaken with a view to expanding these areas, rather than contracting them.

Lot Creation And Lot Adjustments

CELA supports Section 2.3.4.1 which seeks to discourage lot creation on agricultural land. However, CELA recommends that the lot size should not be the only determinant in assessing whether lot creation should be permitted. In prime agricultural areas, severances should not be granted simply because an existing lot is not sufficiently large enough for agricultural production. Consideration should be given to whether the farm parcels can be rented or sold to nearby farms. The risk of focusing exclusively on lot size, is that it can lead to further fragmentation of the agricultural land base.

CELA supports the proposal to keep any new lot to a minimum size but also recommends that section 2.3.4.1 include a clause requiring that any newly created lots be located on the most unproductive areas of the farm.

Permanent Protection for Agricultural Areas

CELA also recommends the deletion of section 2.3.5, which permits the redesignation of prime agricultural areas for urban expansion and extraction of mineral resources. The provincial government's recent discussion paper entitled "*Places To Grow*" which provides a growth plan for the Greater Golden Horseshoe notes that less than 12 percent

of the province is suitable for agriculture and only five percent of Canada's total land base is considered prime agricultural land."[xiv]

It is CELA's position, that to protect Ontario's shrinking agricultural land base, these areas must be given *permanent* protection. Agricultural lands are a finite resource, and prime agricultural lands such as those in the Greater Golden Horseshoe are both rare, and considered to be the best in the world.[xv] These lands will be subject to continuing development pressures, and anything less than permanent protection will erode the provincial government's ability to protect these lands for long-term agricultural uses. Therefore, CELA recommends that the permanent protection afforded to specialty croplands from urban expansion be extended to prime agricultural lands. CELA also recommends a clause be added which prevents mineral extraction in prime agricultural areas.

CELA Recommendation # 2

(i) Section 2.3. 1 should be delete the word "predominate" and instead replace it with the words "are significant", which would impose a less stringent test for assessing prime agricultural land and specialty crop lands. This amendment should also be made to the definition of prime agricultural areas in section 6.0 (Definitions).

(ii) The definition of the prime agricultural areas in section 6.0 should include a clause which states that identification of prime agricultural lands will focus on identifying lands with "potential" for agriculture and not just those already in production.

(iii) The definition of specialty crop areas in Section 6.0 should be defined as areas where "specialty crops may be grown" as opposed to "predominantly grown."

(iv) A new section should be added after section 2.3.2 stating that the province will make it a priority to work in conjunction with municipalities and experts to map and/or re-map specialty cropland with the potential to expand the mapping of specialty cropland based on microclimate and soil quality. The new section should also explicitly state that any review of mapping of specialty croplands should be undertaken with a view to expanding these areas, rather than contracting them.

(v) Section 2.3.4.1 should include a clause, which states that lot size will not be the only determinant in assessing whether lot creation should be permitted. Rather, consideration will be given to whether the farm parcels can be rented or sold to nearby farms.

(vi) Section 2.3.4.1 should include a clause requiring that any newly created lots be located on the most unproductive areas of the farm.

(vii) Section 2.3.5 which permits the redesignation of prime agricultural areas for urban expansion and extraction of mineral resources, should be deleted.

SECTION 2.4 - MINERALS AND PETROLEUM

Section 2.4.2.2 provides protection for areas with known mineral deposits or known petroleum resources as well as areas adjacent to these lands. Development or activities in these lands is only permitted where the resource use would not be feasible or the proposed land uses or development serves greater long term public interest, and issues of public health and safety and environmental impact are addressed.

The wording poses some difficulty, and has the potential to create conflicts where there are competing uses for the land base. These provisions, as well as the provision on mineral aggregates (see discussion in Section 2.5 Mineral Aggregates below), are weighted strongly in favour of resource extraction over other PPS objectives, which seek to ensure protection of the environment. Moreover, the PPS fails to provide any guidance on how the different criteria set out in section 2.4.2.2 will be resolved, in event of a conflict.

CELA, recommends that the Ministry of Municipal Affairs and Housing (MMAH) develop specific criteria to assess whether to forego an undeveloped mineral deposit for another competing use, and under what circumstances an existing land use ought to take priority over resource extraction. This should include community involvement and an analysis of the economic, social and environmental benefits that will accrue from the proposed land uses and development, in comparison to the proposed resources use.

Section 2.4.3.1 requires rehabilitation to accommodate subsequent land uses after extraction and other activities have ceased. CELA recommends that the rehabilitation also be compatible with the surrounding uses and the long-term planning objectives of the community.

CELA Recommendation # 3

(i) MMAH should develop specific criteria to assess whether to forego an undeveloped mineral deposit for another competing use and under what circumstances an existing land use ought to take priority over resource extraction. This should include community involvement and an analysis of the economic, social and environmental benefits that will result from the proposed land use and development, in comparison to the proposed resources use.

(ii) Section 2.4.3.1 requires rehabilitation to accommodate subsequent land uses after extraction and other activities have ceased. The clause should be re-worded to reflect the principle that rehabilitation should also be compatible with the surrounding uses and the long-term planning objectives of the community.

SECTION 2.5 - MINERAL AGGREGATES

Mineral aggregate extraction should require a "needs" assessment

CELA is extremely concerned that the provisions on mineral aggregates are overwhelmingly weighted in favor of aggregate extraction at the expense of other provincial statements that seek to protect the environment. The exemption from having to demonstrate the "need" for mineral aggregate extraction including supply/demand analysis means that aggregate extraction effectively trumps other uses. CELA is of the view that the scope and breadth of this exemption is unwarranted. We note that this provision is also at odds with the Provincial Government's report on the Growth Plan for the Greater Golden Horseshoe, which recommends the "… need to establish a balance between mineral resource extraction and the protection of natural heritage features and functions."[xvi]

A review of aggregate policy in Ontario, which included an examination of over 140 Ontario Municipal Board hearings over a twenty-five year period, concluded that the "municipal and local interest's concern for environmental impacts of aggregate mining were subsumed by the policy focus of the provincial government, which based its justification of the support for policy on the protection of aggregates resources and supplying the demand market." [xvii] This approach has resulted in serious land use conflicts, causing destruction of ecologically significant areas. The magnitude of this problem was highlighted in a text entitled "*Environment on Trial*" which notes that, in the past:

> pits and quarries have been licensed in areas that will destroy features of significant natural, historical, architectural or archaeological interest. Extractive activities were allowed on lands intended for incorporation into a provincial park; in an area of Pelee Island believed to be habitat for several endangered species of flora and fauna; and on the only occurrence of the Oriskany Formation in Canada, which is the site of the only dry oak-hickory forest on sandstone in Ontario and the habitat of at least 22 rare plant species as well as the threatened black rat snake.[xviii]

The FON's submission on the PPS Five Year Review in 2001 noted that the section in the PPS on mineral aggregates failed to "give municipalities enough ability to balance aggregate extraction with other competing priorities or to decide to phase aggregate extraction over time. [xix] FON had recommended that the "need" for aggregate should be justified by the applicant, just as the need to expand urban boundaries onto prime agricultural lands must be justified.[xx] The implementation of these recommendations would have marked a significant first step towards achieving a balance in the PPS between aggregate extraction and protecting and preserving other competing land uses. Unfortunately, none of FONs' recommendations regarding mineral aggregates were incorporated in either the previous five-year review of the PPS, or the current draft of the PPS.

The experience in Ontario clearly indicates that aggregate extraction is an environmentally intrusive land use which has the potential to cause long term adverse impacts on natural heritage and state of the province's water resources. It is essential, therefore, that applicants demonstrate the "need" for aggregate extraction, including demand/supply analysis prior to receiving regulatory approval to undertake extraction. In addition, before permitting aggregate resource extraction, planning authorities should consider the availability of mineral aggregate resources both locally and outside the municipality. In addressing the "need" for a pit or quarry, applicants should be required to justify the need in a "particular location". [xxi]

Conservation

Section 2.5.2.3 requires conservation of mineral aggregate resources, which will be promoted by making the provision for the recovery of these resources, wherever feasible. CELA supports this recommendation, but recommends that the province should develop quantifiable methods to promote conservation and require each applicant to provide a conservation plan, subject to approval by the Ministry of Natural Resources (MNR), documenting how conservation will be achieved. In addition, CELA also recommends that the province set clear targets for achieving conservation, (e.g. seek up to 40% recovery of mineral aggregate by 2006).

Rehabilitation

Section 2.5.3.1 requires progressive and final rehabilitation to accommodate subsequent land uses and promote land use compatibility. Too often, aggregate producers do not undertake rehabilitation of these sites. The data from the aggregate industry indicate that there are approximately 6,700 abandoned aggregate pits and quarries in Ontario.[xxii] The Enviromental Commissioner of Ontario (ECO) in his 2002 -2003 Annual Report stated that provincial data indicated that "from 1992 to 2000 an average of 1,064 hectares of new area was disturbed on an annual basis, while over the same time period an average of only 449 hectares of land was rehabilitated each year." The ECO concluded that unless rehabilitation rates improved significantly, the "validity of the term interim land use concept in the aggregate sector will be a serious concern."[xxiii] CELA is, therefore, concerned that while the PPS calls for rehabilitation of aggregate sites, in reality this too often does not take place.

Enforcement

CELA recommends that the province provide clear time limits for undertaking rehabilitation and should undertake enforcement to address any non-compliance. We are concerned that the amendments to the *Aggregates Resources Act* in 1996, which provided for the establishment of a self-monitoring regime for the aggregates industry in relation to

site inspections, have seriously weakened provincial government regulatory oversight over the aggregate industry.[xxiv]

Moreover, the substantial cuts to the MNR budget and staff over the past decade has also severely eroded the province's capacity to undertake inspections and take enforcement measures to address non-compliance with the *Aggregate Resources Act*.[xxv] This prompted the ECO, in his 1999-2000 Annual Report to note "that MNR does not have sufficient resources, at least in the Guelph District, to regulate the self-monitoring system for aggregate extraction." The ECO investigation found that the "ministry policy in 1999 was to field check 10 percent of the licenses, but that Guleph District did not field check any in 1997/88 or 1998/99 due to inadequate staffing, and was planning to inspect only 25 (or 8 percent) of the 334 licenses in the District in 1999/2000."[xxvi] Consequently, the ECO recommended that MNR review the effectiveness of its Aggregate Resources Compliance Program.[xxvii] The review undertaken by MNR produced rather disturbing results and indicated significant weakness in compliance. For example, MNR found that the annual Compliance Assessment Report (CAR), which all holders of licenses and permits had to submit, was seriously deficient with respect to the quality of information provided. The CAR reports routinely omitted information such as excavation depth, rehabilitation information, site sketches or information regarding consultation with municipalities. MNR's review also "revealed that some licensees continually submitted incomplete and or inaccurate reports that did not truly reflect the conditions of the site."[xxviii]

Interim Use

Section 2.5.4.1 states that "extraction of mineral aggregates is permitted as an *interim use* provided rehabilitation of the site will be carried out whereby substantially the same areas and the same average soil quality for agriculture are restored" (emphasis added). The use of the term "interim" does not accurately reflect the nature of aggregate operation in the province.[xxix] The term "interim" implies a short-term benign use, whereas in reality aggregate extraction dramatically and often permanently alters the landform, topology, and ecology, as well as the water table.[xxx] Thus, the term "interim use" is misleading because it fails to correctly characterize the range of long-term environmental problems associated with aggregate extraction.

Furthermore, degraded lands are not being restored to their original form.
In fact, the data indicates that lands are being degraded at a faster rate than pits and quarries are being rehabilitated. This has resulted in the accumulation of approximately 5,500 hectares of degraded land due to aggregate extraction within just an eight-year time span, during 1992-2000.[xxxi]

Exemption from rehabilitation

Section 2.5.4.1 a) states that on prime agricultural lands, "complete rehabilitation is not required if there is a substantial quantity of mineral aggregate resources below the water

table, or the depth of the planned extraction in a quarry makes restoration of pre-extraction agricultural capability unfeasible." CELA recommends that the PPS should impose a requirement on applicants to discourage reliance on this section, except in exceptional cases, by imposing appropriate financial assurance requirements. [xxxii]

Wayside Pits

Section 2.5.5.1 exempts the Ontario government, and/or its agents, from complying with the PPS procedures and safeguards regarding aggregate extraction. CELA fails to see any compelling policy rationale reason why the public sector should be exempt from regulatory controls, and recommends that this provision be deleted.

CELA Recommendation # 4

(i) Applicants should demonstrate the "need" for aggregate extraction, including demand/supply analysis prior to receiving regulatory approval to undertake extraction. In addition, before permitting aggregate resource extraction, planning authorities should consider the availability of mineral aggregate resources both locally and outside the municipality. In addressing the "need" for a pit or quarry, applicants should be required to justify the need in a "particular location."

(ii)A clause should be added to Section 2.5.2.3 setting clear targets for achieving conservation, (e.g. seek up to 40% recovery of mineral aggregate by 2006).

(iii) The Ministry of Natural Resources needs to take action to ensure that aggregate producers undertake progressive and final rehabilitation to accommodate subsequent land uses and promote land use compatibility.

(iv) The Ministry of Natural Resources should provide clear time limits under which aggregate operators must rehabilitate degraded lands, and should undertake prompt enforcement action to address any non-compliance.

(v) The term *interim use* in section 2.5.3.1 is misleading and fails to correctly characterize the range of environmental problems associated with aggregate extraction. The term "interim use" should therefore be deleted.

(vi) A clause should be added to section 2.5.4.1 a) requiring applicants to meet appropriate financial assurance requirements, in order to obtain an exemption from rehabilitation requirements.

(vii) Section 2.5.5.1, which exempts the Ontario government and its agents from complying with the PPS procedures and safeguards regarding aggregate extraction, should be deleted.

SECTION 3.1 - NATURAL HAZARDS

No development on Hazardous Lands or Hazardous Sites

CELA recommends Section 3.1.6 of the PPS, which provides municipalities with flexibility to allow development on hazardous lands and hazardous sites, be deleted from the PPS. The section permits development where the risk to public safety and other effects, can be absorbed, managed or mitigated. The criteria for assessing whether the risks can be addressed include whether (a) the hazard can be safely addressed, and the development and site alteration is carried out in accordance with floodproofing standards, protection works standards and access standards; (b) vehicles and people have a way of safely entering and exiting the areas during times of flooding, erosion, and other emergencies; (c) new hazards are not created and existing hazards are not aggravated; and (d) no adverse environmental impacts will result.

CELA is of the view, given the inherent risks of development on hazardous lands and hazardous sites, that the province should focus on preventing as opposed to undertaking a risk assessment and management approach, and devising engineering solutions to permit development on these sites. A MNR publication entitled "Understanding Natural Hazards" states:

> Protective structures can lull communities into a false sense of security. In some areas, these structures have actually contributed towards increased encroachment into hazardous lands, because all too often it has been assumed that the hazard is controlled. Structures can only mitigate effects of natural hazards depending on the design life, their maintenance and their upkeep. A protective structure always has the potential to fail, depending on the event….
>
> Potential risks associated with slope failure and erosion can be addressed through site-specific studies, and sometimes through the construction of protective erosion control works. These approaches may not prove to be entirely reliable over the long term as they do not take into account broader watershed processes or land use change, which may result in, altered drainage patterns. In addition, activities by homeowners located in these areas may actually exacerbate problems. Removal of vegetation on slopes, and the construction of pools or additions, weaken roots, which bind soil particles and place a new load on the slope. In some areas, slopes have become susceptible to failure because property owners have used the ravine as a place to dump gardening debris, leaves and sometimes even garbage. This material plugs natural drainage outlets on the face of the slope and groundwater and cannot properly drain. A build up of moisture in the soil can weaken a slope causing slope failure. [xxxiii]

CELA recommends that the province should focus on identifying hazardous lands and hazardous sites, and preventing development in these areas as opposed to undertaking a risk management exercise, since prevention provides the best, and ultimately the most

cost-effective, means of protecting the public's health and safety. CELA, therefore, recommends that section 3.1.6 be deleted in its entirety.

Hazard Identification and Assessment

CELA also recommends that the province provide funding to municipalities and conservation authorities to identify hazardous lands and hazardous systems through the completion of technical studies. Hazard management in the province is presently undertaken on a risk management basis to assess the appropriate level of risk for the public. [xxxiv] CELA recommends that the province develop a strategy for identifying and assessing new and emerging conditions, such as climate change, which will have a significant impact on hazard management in the province. [xxxv]

SECTION 3.2 HUMAN–MADE HAZARDS

Need for Provincial Review and Sign-off

CELA recommends that development on lands affected by mine hazards, oil, gas and salt hazards or former mineral resources operations, should only be permitted if the rehabilitation measures to address or mitigate known or suspected hazards have been reviewed and received sign-off from the appropriate Ministry.

CELA Recommendation # 5

(i) Section 3.1.6 of the PPS, which provides municipalities with flexibility to allow development on hazardous lands and hazardous sites should be deleted.

(ii) The province should provide funding to municipalities and conservation authorities to identify hazardous lands and hazardous systems through the completion of technical studies. In addition the province should develop a strategy for identifying and assessing new and emerging conditions, such as climate change which will have a significant impact on hazard management in the province.

(iii) A clause should be added to section 3.2.1 which explicitly states that development on lands affected by mine hazards, oil, gas and salt hazards or former mineral resources operations, will only be permitted if the rehabilitation measures to address or mitigate known or suspected hazards have been reviewed and received sign-off from the appropriate Ministry.

SECTION 4.0 - IMPLEMENTATION AND INTERPRETATION

Subsection 3 of the policy on Implementation and Interpretation allows the Minister to take into account other considerations when making decisions to support strong communities, a clean environment, and the economic vitality of the province. The wording of this provision confers unfettered discretion to the minister in implementing the PPS. In our view, this section is unnecessary and should be deleted. The conferral of any discretion on the minister in implementing the PPS should, at the very minimum, specify the additional factors that the minister can take into consideration, and should be tied to fulfilling the objectives and purposes of the PPS.

CELA is pleased with the inclusion of subsection 10, which will require the province, in consultation with municipalities, to identify performance indicators for measuring the effectiveness of some or all of the polices, and to monitor their implementation, including reviewing performance indicators concurrent with any review of the PPS. We note, however, that other stakeholders have recommended the need for performance indicators in the past, and that MMAH had indicated that it was set to develop performance indicators in 1996.[xxxvi] CELA considers the passage of eight years since this original commitment to be an unduly lengthy delay, and urges the province to establish and commit to clear time frames for the development of performance indicators and monitoring the implementation of the PPS.

Subsection 11 allows the MMAH, together with other ministries with land use planning interests, to issue new support materials and /or update existing materials to assist planning authorities and decision-makers in implementing the PPS. CELA recommends that subsection 11 be amended to impose a mandatory obligation on MMAH to develop technical manuals and implementation manuals to provide guidance on how the PPS is to be implemented. In particular, CELA recommends that the province develop a decision-making model on how to balance competing and conflicting interests to ensure that PPS objectives will be applied in an environmentally, socially and economically sustainable manner.

Finally, CELA recommends that MMAH post any revisions to the draft PPS on the *Environmental Bill of Rights* Registry to allow the public an opportunity to provide comments on any further amendments. We recommend a 30-day public comment period.

CELA Recommendation # 6

(i) Section 3 of the Implementation and Interpretation Section that confers unfettered discretion to the minister in implementing the PPS is unnecessary and should be deleted. The conferral of any discretion on the minister, in implementing the PPS should, at the very minimum, specify the additional factors that the minister can take into consideration and should be tied to fulfilling the objective and purposes of the PPS.

(ii) Section 10 of the Implementation and Interpretation Section, which allows the province to identify performance indicators for measuring the effectiveness of some or all of the policies and to monitor their implementation, should include a clause establishing clear time frames for achieving these objectives.

(iii) Section 11 of the Implementation and Interpretation Section should be amended to impose a mandatory obligation on MMAH to develop technical manuals and implementation manuals to provide guidance on how the PPS is to be implemented. These manuals should address how to balance competing and conflicting interests to ensure that PPS objectives will be applied in an environmentally, socially and economically sustainable manner.

(iv) MMAH should post any revisions to the draft PPS on the *Environmental Bill of Rights* Registry to allow the public an opportunity to provide comments on any further amendments. The public comment period should be for 30 days.

PART IV - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

CELA supports many of the proposed amendments to the PPS but submits that a number of key provisions regarding the wise use and management of resources require further amendments to prevent inappropriate land use planning decisions in Ontario.

In particular, we are very concerned that the protection afforded in the PPS, to minerals and petroleum and mineral aggregates, in effect trump the application of other provisions that seek to protect the natural environment. In addition, the PPS should provide permanent protection to Ontario's agricultural land base, if the government is truly committed to protecting the dwindling supply of these lands. The PPS provisions pertaining to water should also be reviewed and amended to ensure that they integrate source protection plans under the proposed *Drinking Water Source Protection Act* with land use planning. Unless the Ontario government is prepared to make these changes, CELA is of the view that the draft PPS is unlikely to operate any more effectively than the previous PPS.

RECOMMENDATION # 1

(i) The province should review, and where necessary, revise its environmental and land use planning statutes as well as the PPS to ensure consistency with the source water protection regime. In addition, all planning authorities should review and update all official plans and zoning by-laws to ensure consistency with the source protection plans.

(ii) The PPS provisions on water should include a clause which explicitly states that all land use planning decisions by planning authorities shall be consistent with

source protection plans and in the event of a conflict the source protection plan will prevail.

(iii) Section 2.2.2 of the PPS should be amended to state that development and site alteration will not be permitted in or near sensitive surface and groundwater features such that these features and their related hydrological functions will be protected, improved or restored.

(iv) The PPS should also include a clause which states that development or land use specified in an approved source protection plan or a source protection regulation will not be permitted in an area where such development or land use would be a water risk in the watershed.

(v) The PPS should include the same definition of "water risk" as the proposed *Drinking Water Source Protection Act*, which states, "water risk means an existing or anticipated activity or thing prescribed by the regulations that contributes or has the potential to contribute to;

> **(1) a reduction in the quality or quantity of water in a watershed, or**
>
> **(2) water in a watershed failing to meet any standards prescribed by the regulations respecting the quality or quantity of water.**

CELA RECOMMENDATION # 2

(i) Section 2.3. 1 should be delete the word "predominant" and instead replace it with the word "significant", which would impose a less stringent test for assessing prime agricultural land and specialty crop lands.

(ii) The definition of the prime agricultural areas in Section 6.0 should include a clause which states that identification of prime agricultural lands will focus on identifying lands with "potential" for agriculture and not just those already in production.

(iii) The definition of specialty crop areas in Section 6.0 should be defined as areas where "specialty crops may be grown" as opposed to "predominantly grown".

(iv) A new section should be added after Section 2.3.2 stating that the province will make it a priority to work in conjunction with municipalities and experts to map and/or re-map specialty cropland with the potential to expand the mapping of specialty cropland based on microclimate and soil quality. The new section should also explicitly state that any review of mapping of specialty croplands should be undertaken with a view to expanding these areas, rather than contracting them.

(v) Section 2.3.4.1 should include a clause, which states that lot size will not be the only determinant in assessing whether lot creation should be permitted. Rather,

consideration will be given to whether the farm parcels can be rented or sold to nearby farms.

(vi) Section 2.3.4.1 should include a clause requiring that any newly created lots be located on the most unproductive areas of the farm.

(vii) Section 2.3.5, which permits the redesignation of prime agricultural areas for urban expansion and extraction of mineral resources, should be deleted.

CELA RECOMMENDATION # 3

(i) MMAH should develop specific criteria to assess whether to forego an undeveloped mineral deposit for another competing use and under what circumstances an existing land use ought to take priority over resource extraction. This should include community involvement and an analysis of the economic, social and environmental benefits that will result from the proposed land use and development, in comparison to the proposed resources use.

(ii) Section 2.4.3.1 requires rehabilitation to accommodate subsequent land uses after extraction and other activities have ceased. The clause should be re-worded to reflect the principle that rehabilitation should also be compatible with the surrounding uses and the long-term planning objectives of the community.

CELA RECOMMENDATION # 4

(i) Applicants should demonstrate the "need" for aggregate extraction, including demand/supply analysis prior to receiving regulatory approval to undertake extraction. In addition, before permitting aggregate resource extraction, planning authorities should consider the availability of mineral aggregate resources both locally and outside the municipality. In addressing the "need" for a pit or quarry, applicants should be required to justify the need in a "particular location."

(ii)A clause should be added to Section 2.5.2.3 setting clear targets for achieving conservation, (e.g. seek up to 40% recovery of mineral aggregate by 2006).

(iii) The Ministry of Natural Resources needs to take action to ensure that aggregate producers undertake progressive and final rehabilitation to accommodate subsequent land uses and promote land use compatibility.

(iv) The Ministry of Natural Resources should provide clear time limits under which aggregate operators must rehabilitate degraded lands, and should undertake prompt enforcement action to address any non-compliance.

(v) The term *interim use* in section 2.5.3.1 is misleading and fails to correctly characterize the range of environmental problems associated with aggregate extraction. The term "interim use" should therefore be deleted.

(vi) A clause should be added to section 2.5.4.1 a) requiring applicants to meet appropriate financial assurance requirements, in order to obtain an exemption from rehabilitation requirements.

(vii) Section 2.5.5.1, which exempts the Ontario government and its agents from complying with the PPS procedures and safeguards regarding aggregate extraction, should be deleted.

CELA RECOMMENDATION # 5

(i) Section 3.1.6 of the PPS, which provides municipalities with flexibility to allow development on hazardous lands and hazardous sites should be deleted.

(ii) The province should provide funding to municipalities and conservation authorities to identify hazardous lands and hazardous systems through the completion of technical studies. In addition the province should develop a strategy for identifying and assessing new and emerging conditions, such as climate change which will have a significant impact on hazard management in the province.

(iii) A clause should be added to section 3.2.1 which explicitly states that development on lands affected by mine hazards, oil, gas and salt hazards or former mineral resources operations, will only be permitted if the rehabilitation measures to address or mitigate known or suspected hazards have been reviewed and received sign-off from the appropriate Ministry.

CELA RECOMMENDATION # 6

(i) Section 3 of the Implementation and Interpretation Section that confers unfettered discretion to the Minister in implementing the PPS is unnecessary and should be deleted. The conferral of any discretion on the Minister, in implementing the PPS should, at the very minimum, specify the additional factors that the Minister can take into consideration and should be tied to fulfilling the objective and purposes of the PPS.

(ii) Section 10 of the Implementation and Interpretation Section, which allows the province to identify performance indicators for measuring the effectiveness of some or all of the policies and to monitor their implementation, should include a clause establishing clear time frames for achieving these objectives.

(iii) Section 11 of the Implementation and Interpretation Section should be amended to impose a mandatory obligation on MMAH to develop technical manuals and implementation manuals to provide guidance on how the PPS is to be implemented. This model should address how to balance competing and conflicting interests to ensure that PPS objectives will be applied in an environmentally, socially and economically sustainable manner.

(iv) MMAH should post any revisions to the draft PPS on the *Environmental Bill of Rights* Registry to allow the public an opportunity to provide comments on any further amendments. The public comment period should be for 30 days.

ENDNOTES

[i] K. Cooper, *Submissions of the Canadian Environmental Law Association to the Standing Committee on Resources Development Reviewing Bill 20 , the "Land Use Planning and Protection Act*, "(Toronto: Canadian Environmental Law Association, 1996) at p. 1.

[ii] See Ontario, Commission on Planning and Development Reform in Ontario, *New Planning for Ontario: Final Report* (Toronto: Queen's Printer, 1993) (Commissioners: John Sewell and Toby Vigod).

[iii] See K.Cooper and T. McClenaghan, *Provincial Policy five-year Review, Response by the Canadian Environmental Law Association to the Request by the Ministry of Municipal Affairs and Housing for Public Comments, EBR Registry No. PF01E0002*, (Toronto: Canadian Environmental Law Association, October 2001). R. Lindgren, *Submissions of the Canadian Environmental Law Association to the Ministry of Municipal Affairs and Housing on the Oak Ridges Moraine Conservation Act, 2001 (Bill 122) EBR AF01E0003*, (Toronto: Canadian Environmental Law Association, December 2001). T. McClenaghan and L. Shaw, *Submission by the CELA to the Ministry of Natural Resources, for Development Application Review Manual*, (Toronto: Canadian Environmental Law Association, April 1999). P. Muldoon, T. McClenaghan, R. Nadarajah, L. Shaw and D. Zabelishensky, *The Lands for Life Proposal*, (Toronto: Canadian Environmental Law Association, May 1999).

[iv] Provincial Policy Statement, Draft Policies, June 2004, Part II: Legislative Authority, p. 14.

[v] The OMB case law, in general reflects the conflict between the Provincial Statement's mandatory language and the Planning Act's words "shall have regard to." See for example, *Re.Ottawa-Carleton (Regional Municipality) Official Plan Amendment No. 81* [1991] O.M.B.D. No. 1427. The OMB in commenting on the on the Ontario Foodland Guidelines stated "Statement of Government like the Foodland Guidelines ... must be regarded by the Board. The Board is not bound to follow them: however the Board is required to have regard to them, in other words to consider them carefully in relation to the circumstances at hand, their objectives and statements as a whole and what they seek to protect.

[vi] Provincial Policy Statement, Draft Policies, Section 2.5.2.1, p. 28.

[vii] See *Drinking Water Source Protection Act, 2004* (draft) online: Environmental Bill of Rights Registry, <http:// www.ene.gov.on.ca/envregistry/023184ea.htm> (date accessed: 3, August 2004)

[viii] Ontario, *Part Two Report of the Walkerton Inquiry, A Strategy for Safe Drinking Water*, (Toronto: Queen's Printer, 2002) at pp. 89-116. (Commissioner: The Honourable D.R. O'Connor).

[ix] See EBR Registry No. AA04E0002.

[x] See EBR Registry No. AAO4E0002, pp.4-5.

[xi] See *Drinking Water Source Protection Act, 2004*, (draft) s.1.

[xii] This recommendation adopts the recommendation made by the Preservation of Agricultural Lands Society on the draft PPS, 2004. See *Response to the Proposed Provincial Policy Statement (PPS)* by John Bacher, PhD Researcher, August 31, 2004, pp.4-5.

[xiii] Niagara Regional Policy Plan, Appendix B.

[xiv] Ontario, *A Growth Plan for the Greater Golden Horseshoe*, (Toronto: Queen's Printer, 2004) p. 43.

[xv] Ibid.

[xvi] Ibid. p. 46.

[xvii] Douglas Baker, Christine Slanz and Tracy Summerville, "An Evolving Policy Network in Action: the Case of Construction Aggregate Policy in Ontario," *Canadian Public Administration*, Vol. 44 No. 4. Winter at p. 482.

[xviii] D. Estrin and J. Swaigen, "Environment on Trial," Third Edition, (Toronto: Emond Montgomery Publications Limited) p. 745.

[xix] Federation of Ontario Naturalists, *Provincial Policy Statement Five Year Review: Response by the Federation of Ontario Naturalists to the Request by the Ministry of Municipal Affairs and Housing for Public Comments*, Environmental Bill of Rights Registry Number PF01E0002, (Toronto: FON), October, 2001, p.6. Available online at <http://www.ontarionature.org/enviroandcons/issues/PPS.html>

[xx] Ibid.

[xxi] Ibid.

[xxii] http://www.toarc.com/Maap/Information/overview.htm

[xxiii] Environmental Commissioner of Ontario, *Annual Report 2002-2003*, (Toronto: ECO) p. 30-31.

[xxiv] See M. Winfield and G. Jenish"Ontario's Environment and the Common Sense Revolution: A Second Year Report," (Toronto: Canadian Institute of Environmental Law and Policy, July 1997) at p.102.

[xxv] Pembina Institute for Appropriate Development, *Ontario Environment Handbook, 2003* (Toronto: Pembina Institute for Appropriate Development) p.33.

[xxvi] Environmental Commissioner of Ontario, *Annual Report 1999-2000*, (Toronto: ECO) October 2000, p. 109.

[xxvii] Environmental Commissioner of Ontario, *Annual Report 2001-2002*, (Toronto: ECO) September 2002, p.143.

[xxviii] Ibid.

[xxix] Gravel Watch, *Comments on Ontario's Provincial Policy Statement in Regard to Aggregates*, August 3, 2004, p. 2.

[xxx] Ibid.

[xxxi] Environmental Commissioner's *Annual Report 2002-2003*, pp. 30.

[xxxii] *Comments on Ontario's Provincial Policy Statement in Regard to Aggregates*, p. 2.

[xxxiii] Ontario, *Understanding Natural Hazards*, (Toronto: Queen’s Printer 2001) p.9.

[xxxiv] Conservation Ontario, *PPS Five Year Review, Conservation Ontario Responses to the Stakeholder Questionnaire*, (Newmarket: Conservation Council, 2001) p. 4.

[xxxv] Ibid.

[xxxvi] *Provincial Policy Statement Five Year-Review: Response by the Federation of Ontario Naturalists to the Requests by the Ministry of Municipal Affairs and Housing for Public Comments* at pp.1-2.