SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON GENERAL GOVERNMENT REGARDING THE *SAFE DRINKING WATER ACT, 2002* (BILL 195) [EBR REGISTRY NO AA02E0002]

Prepared by
Richard D. Lindgren[1]

A. INTRODUCTION

These are the submissions of the Canadian Environmental Law Association ("CELA") regarding Bill 195, the proposed *Safe Drinking Water Act, 2002* ("SDWA").[2]

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, much of CELA's casework and law reform activities have focused on drinking water quality and quantity. For example, CELA has advocated passage of the SDWA since the early 1980s.[3] 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;*[4]
- applying under the *Environmental Bill of Rights* ("EBR") for a review of the need for the SDWA in Ontario;[5]
- submitting model water legislation to entrench watershed planning and water conservation in Ontario;[6]
- commenting on the Drinking Water Protection Regulation (O.Reg. 459/00), the *Sustainable Water and Sewage Systems Act, 2001* (now Bill 175), the *Nutrient Management Act* (Bill 81), and proposed regulations thereunder;[7] and

---

[1] Counsel, Canadian Environmental Law Association. The assistance of CELA staff during the preparation of this brief is gratefully acknowledged by the author.
[2] The SDWA was introduced for First Reading on October 29, 2002, and received Second Reading on November 7, 2002.
[3] T. Vigod and A. Wordsworth, "Water Fit to Drink: The Need for a *Safe Drinking Water Act* in Canada", (1982) 11 C.E.L.R. 80.
[4] These documents are available at: www.cela.ca.
[5] Ironically, this EBR Application for Review was rejected by the Ministry of the Environment in 2000 on the grounds that a SDWA was unnecessary in Ontario.
[6] These documents are available at: www.cela.ca.
[7] *Ibid.*

- commenting on various municipal land use planning reforms and amendments to the *Municipal Act*.[8]

In addition, CELA recently provided detailed comments to the Ministry of the Environment ("MOE") on the discussion paper entitled *Proposed Components of a Safe Drinking Water Act* (MOE, August 2002).[9] Unfortunately, it appears that only a few of CELA's recommendations regarding the discussion paper have been reflected in the legislative text of the SDWA, as discussed below.

It is against this extensive background and experience that CELA has reviewed the provisions of the proposed SDWA. For comparative purposes, we have also considered various relevant documents, including:

- Commissioner O'Connor's Part I and II Reports of the Walkerton Inquiry;
- Bill 3 (SDWA, 2001), as introduced by MPP Marilyn Churley;
- other components of the Ontario government's "Clean Water Strategy"; and
- provisions of safe drinking water legislation in other jurisdictions (eg. the U.S. *Safe Drinking Water Act*, which is attached as Appendix 1 to this brief).

B. GENERAL COMMENTS REGARDING BILL 195

In principle, CELA strongly supports the SDWA, and urges Ontario legislators to work towards the expeditious passage and implementation of the SDWA (provided that the SDWA is amended as described below). On this point, CELA is relieved that the question is no longer *whether* Ontario needs a SDWA, but rather *how* the SDWA should be drafted. Accordingly, CELA concurs with the views expressed by Premier Ernie Eves upon introduction of the SDWA:

> Ontarians deserve to have safe and clean drinking water... Commissioner O'Connor was firm about Ontario's need for legislation that would ensure the safety and sustainability of our drinking water.[10]

Similarly, CELA is pleased by Environment Minister Chris Stockwell's commitment to enacting strong and effective drinking water legislation:

> Safe drinking water remains a top priority of this government. We are committed to ensuring that Ontario has, and enforces, the best and toughest clean water policies in the world...
>
> By passing [the SDWA], the members of this House will make Ontario a world leader in drinking water protection and preservation.[11]

---

[8] *Ibid.*
[9] *Ibid.*
[10] Media Release, "Eves Moves to Protect Ontario's Drinking Water" (Oct. 29, 2002).
[11] The Hon. Chris Stockwell, Minister's Statement on Bill 195 (*Hansard*, Oct. 29, 2002).

This commitment to passing the "best" and "toughest" drinking water legislation was repeated by the Minister during Second Reading debate on the SDWA:

> We are strongly committed... to ensuring that the people of Ontario have safe drinking water, and that all of Justice O'Connor's recommendations are implemented...
>
> The proposed SDWA is an environmental milestone... [Bill 195] is the toughest legislation in the world for safe drinking water – not Canada and not North America; it's the toughest legislation in the world.[12]

Despite such assurances, however, CELA has significant concerns about the SDWA as drafted, and CELA submits that a number of amendments are necessary to transform the SDWA into effective and enforceable legislation. Without such amendments, the SDWA, on its face, will be incapable of achieving its public policy objectives, *viz.* to prevent a recurrence of the Walkerton Tragedy, and to ensure that Ontarians have the "best" and "toughest" drinking water protection "in the world".

In summary, CELA's major concerns about the SDWA as drafted may be summarized as follows:

- there are no provisions related to the assessment or protection of sources of drinking water;
- there are inadequate provisions related to the community "right to know";
- there are inadequate provisions relating to inspections, compliance and enforcement;
- there are no provisions regarding funding mechanisms or programs;

etc. etc

Each of these concerns are elaborated upon below, and are accompanied by CELA's recommendations for legislative amendments to Bill 195 in order to address such concerns. On this point, we note that Minister Stockwell has already committed to "fixing" any flaws found in Bill 195:

> If you find flaws as we debate the Bill, tell me because I want to hear it. I didn't draft this Bill in a partisan way. I want to hear the flaws, and if we can fix them, we can.[13]

Thus, it is in the spirit of non-partisan cooperation that CELA is pleased to join in the debate on Bill 195 in order to identify the numerous opportunities to improve and strengthen the proposed SDWA.

---

[12] The Hon. Chris Stockwell, Second Reading Debate on Bill 195 (*Hansard*, October 31, 2002).
[13] *Ibid.*

C. CLAUSE-BY-CLAUSE REVIEW OF BILL 195

This section of CELA's submission on Bill 195 consists of our comments on the various Parts of the SDWA (in chronological order), as well as CELA's recommendations for legislative amendments where necessary and appropriate.

Part I – Interpretation

(a) Lack of A Preamble

The first and most obvious omission in the proposed SDWA is the lack of a preamble outlining the public policy underpinnings of the Act.

CELA is aware that under current legislative drafting practice, most statutes do not include preambles. There are, however, some notable exceptions, particularly in relation to environmental statutes. At the federal level, for example, a detailed and lengthy preamble is found within the *Canadian Environmental Protection Act, 1999*. Similarly, Ontario's *Environmental Bill of Rights* ("EBR"), which is generally regarded as an environmental milestone, includes a preamble.

Given that SDWA has also been characterized as an "environmental milestone" by Minister Stockwell, CELA submits that it is reasonable and appropriate to include a preamble in the SDWA. Indeed, CELA previously made this recommendation in its submissions on the MOE discussion paper,[14] but it appears that this recommendation has not been reflected in the SDWA as drafted.

On this point, it should be recalled that Marilyn Churley's Bill 3 (SDWA, 2001) included a brief preamble that included the following recitals:

> The people of Ontario have the right to clean and safe drinking water.
>
> Clean, safe drinking water is a basic human entitlement and essential for the protection of human health.

It is CELA's understanding that the Ontario government's proposed SDWA was supposed to build upon the contents of Bill 3.[15] However, it appears that the Bill 3 preamble was simply jettisoned from the SDWA as drafted.

In CELA's view, this omission is unfortunate and significant. As a matter of statutory interpretation, a preamble confers no substantive rights, but can serve as an important legislative mechanism to assist in the proper implementation of an Act's provisions.

---

[14] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 21, Recommendation 15 (b)..

[15] Media Release, "Eves Moves to Protect Drinking Water" (October 29, 2002): "The proposed legislation builds upon a private member's bill introduced by NDP MPP Marilyn Churley."

The legal effect of a preamble is specified by section 8 of Ontario's *Interpretation Act* as follows:

> 8. The preamble of an Act shall be deemed a part thereof and is intended to assist in the purport and object of the Act.

Similarly, a leading authority on statutory interpretation has summarized the function and value of a preamble as follows:

> The primary function of a preamble is to recite the circumstances and considerations that gave rise to the need for legislation or the "mischief" the legislation is designed to cure. However, the recitals constituting a preamble may mention not only the facts which the legislature thought was important, but also principles or policies which it sought to implement or goals to which it aspired...
>
> Along with purpose statements, [preambles] are often included in modern regulatory legislation, and with the current emphasis on purposive analysis, they are often relied upon by the courts...
>
> Preambles are relied upon most often to reveal legislative purpose... Given the traditional importance of legislative intent, an explanation of purpose that emanates from the legislature itself carries a desirable authority...
>
> Preambles are an important source of legislative values and assumptions... By spelling out the assumptions *the legislature* takes to be true, the policies and principles *it* wants to advance and the values to which *it* is committed, the preamble offers interpreters an authoritative form of guidance...
>
> Since preambles are an integral part of an enactment, they are part of the context in which the words of the enactment must be read. As such, they may be relied on to resolve ambiguity, determine scope or generally understand the meaning and effect of legislative language (original emphasis).[16]

Accordingly, CELA again recommends that the SDWA include a preamble that contains the above-noted Bill 3 recitals, as well as other appropriate recitals (eg. the relevant "Congressional Findings" that underlie the U.S SDWA: see Appendix 1 herein). CELA's suggested language for the SDWA preamble is set out below.

CELA RECOMMENDATION #1: The SDWA should be amended to include a preamble as follows:

> **The people of Ontario have the right to safe drinking water;**
>
> **Safe drinking water is a basic human entitlement and essential for the protection of human health;**

[16] Sullivan, *Driedger on the Construction of Statutes [full cite]*, pages 259-61 (footnotes omitted).

Effective protection of drinking water requires a multi-barrier approach that includes assessing and protecting sources of drinking water;

The public has the right to participate in decision-making and standard-setting in relation to drinking water and its sources;

The public has the right to information about drinking water and its sources, and to prompt notification where there are violations of regulatory requirements for protection of drinking water and its sources;

The process for identifying and regulating current and future drinking water contaminants must be open, transparent, based upon the precautionary principle, and aimed at protecting public health and safety;

Since protecting drinking water and its sources may exceed the technical and financial capability of smaller municipal and non-municipal drinking water systems, the Government of Ontario has the responsibility to provide assistance to ensure that such systems comply with regulatory requirements; and

The Government of Ontario has the primary responsibility to prevent a recurrence of the Walkerton Tragedy, and has committed to the full implementation of all recommendations in the Reports of the Walkerton Inquiry.

(b) Purposes

We have reviewed the statement of purpose reflected in section 1 of the proposed SDWA, and we find it deficient for various reasons, as described below.

It is beyond dispute that a purpose statement plays a number of important roles in modern regulatory legislation. These roles may be summarized as follows:

> First, purpose statements reveal the underlying principles and policies that the legislature intends to achieve by enacting the statute in question. Second, purpose statements help define the limits of discretion granted under the statute, such as administrative discretion conferred upon a minister, official or tribunal. Third, purpose statements carry more legal weight than preambles, and can be an invaluable source of legislative intent when courts are attempting to construe the meaning of substantive provisions which may be vague or reasonably capable of alternative interpretations.[17]

[17] CELA, *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act* (2001), Vol. II, page 113.

Accordingly, in its submission on the MOE's discussion paper on the SDWA, CELA clearly recommended that the SDWA include "a comprehensive statement of legislative purpose similar to that found in Bill 3".[18] On this point, it is noteworthy that the Bill 3 purpose statement provided as follows:

> 1.(1) The purposes of this Act are,
>
> (a) to recognize that people who use public water systems have a right to receive clean and safe drinking water from them;
> (b) to restore public confidence in the quality of drinking water throughout Ontario; and
> (c) to protect and enhance the quality of drinking water in Ontario.
>
> (2) In order to fulfill the purposes set out in subsection 1, this Act provides,
>
> (a) means for reviewing decisions about drinking water quality made by the Government of Ontario and holding it accountable for those decisions; and
> (b) increased access to the courts for the protection of drinking water quality.

Unfortunately, CELA's recommendation regarding the purpose statement was not reflected in section 1 of the SDWA as drafted. Instead, section 1 of the SDWA states that Ontarians are merely entitled to "expect" safe drinking water, and that the Act is intended to protect human health and to prevent drinking water health hazards. In our view, this purpose statement is problematic for several reasons.

First, the minimalist language of section 1 inadequately addresses the various functions of a proper statement of legislative purpose, as described above. Second, the trite recognition of a public "expectation" of safe drinking water is virtually meaningless (surely, there is no public expectation of poisoned water). In our view, saying Ontarians "expect" clean water is no different than repeating other self-evident facts or well-known platitudes (eg. that Ontarians expect to breath clean air, to enjoy good health, to have adequate housing, etc.). Third, and more fundamentally, it is our view that the SDWA, as drafted, is unlikely to even achieve the modest objectives of section 1, for the reasons described throughout this brief.

On this point, it must be recalled that Commissioner O'Connor declined to recommend the creation of a stand-alone, substantive right to clean water in the SDWA (eg. something analogous to a *Charter* right enforceable by legal action). Instead, he commented that the "ultimate goal" of the SDWA was to ensure safe drinking water (which all Ontarians reasonably expect), and that this goal should be recognized in the SDWA.[19] Aside from this limited commentary (and after ruling against creating a new

---

[18] CELA, *Comment on Proposed Components of the Safe Drinking Water Act* (September 2002), page 8, Recommendation 4.
[19] Part II Report, page 405.

statutory cause of action), Commissioner O'Connor made no explicit recommendation on the actual legislative text of the SDWA purpose statement. In these circumstances, CELA submits that there is considerable room for the Ontario Legislature to expand and improve upon the statement of purpose in section 1 of the SDWA.

Moreover, even if "rights" language is used in the SDWA purpose statement, this terminology does not create an enforceable legal right per se, nor does it run afoul of Commissioner O'Connor's decision not to create a substantive right to safe drinking water. By way of comparison, it is noteworthy that in the EBR, the Ontario Legislature recognized the "right to a healthful environment" in both the preamble and section 1(1)(c). Using "rights" language in this manner helped recognize and emphasize the importance of the public right, but did not create a legally enforceable right in and of itself. Instead, persons wishing to assert or protect that right had to do so through the means specifically provided in the EBR itself (eg. application for review, application for investigation, etc.). In CELA's view, the Ontario Legislature would be well-advised to follow this EBR precedent in the SDWA if the Legislature is otherwise unwilling to create a sustantive right to safe drinking water.

Accordingly, CELA again finds it necessary to recommend the inclusion of a comprehensive statement of purpose in the SDWA. In particular, CELA prefers and endorses the statement of purpose found in Bill 3, but suggests some slight modifications and some additional legislative language, as set out below.

CELA RECOMMENDATION #2: The SDWA should be amended to include the following statement of purpose:

1(1) The purposes of this Act are,

(a) to recognize that persons in Ontario expect, and have the right to receive, safe drinking water;

(b) to protect and enhance the quality of drinking water and its sources in Ontario; and

(c) to protect human health by protecting drinking water and its sources in Ontario through a multi-barrier approach.

(2) In order to fulfill the purposes of subsection (1), this Act provides,

(a) means to ensure that persons in Ontario have safe drinking water;

(b) increased public access to information about drinking water and its sources;

(c) enhanced public participation in decision-making and standard-setting in relation to drinking water and its sources;

(d) means to ensure that drinking water standards are set, reviewed, revised and enforced in order to protect public health;

(e) funding and technical assistance programs for smaller municipal and non-municipal drinking water systems; and

(f) increased accountability of the Government of Ontario for protecting drinking water and its sources.

(c) Definitions

We have reviewed the numerous definitions found in section 2(1) of the SDWA, and we generally have no objection to them, except as set out below.

First, we note that the SDWA definition of "municipality" includes a "local board as defined under the *Municipal Affairs Act* ". It is unclear whether this definition includes municipal service boards ("MSBs") under the *Municipal Act, 2001*. If it does, this may create serious accountability concerns in context of municipal drinking water systems, particularly since members of MSBs are not elected by (nor directly accountable to) the inhabitants of the municipality. Accordingly, CELA recommends that the SDWA definition of "municipality" should not extend to MSBs at the present time.???????? Cf. defn. of owner??

Second, we note that the SDWA definition of "raw water supply" simply refers to "water outside the drinking water system that is a source of water in the system". For the purposes of greater certainty (and to better integrate source protection measures), CELA recommends that this definition should be extended to include the relevant elements of the OWRA definition of "water" (which, curiously, has been omitted from the SDWA). Without this extended definition, there will undoubtedly be debate about what exactly constitutes "raw water supply" for the purposes of the SDWA.

Third, we note that the SDWA does not include a definition of "groundwater under influence of surface water". In our view,??

Other missing/critical defns?

CELA RECOMMENDATION #3: The SDWA's definition section should be amended as follows:

(a) "municipality" includes a local board as defined by the *Municipal Affairs Act,* but does not include a municipal service board under the *Municipal Act, 2001*;

(b) "raw water supply" means water outside a drinking water system that is a source of water for the system, and includes a well, lake, river, spring, stream, reservoir, artificial watercourse, groundwater, or other water or watercourse;

(c) "groundwater under the influence of surface water" means...

Part II – Administration

(a) Powers and Duties of the Minister

We note that section 3 of the SDWA designates the Minister of the Environment as the Minister responsible for "overseeing the regulation of safe drinking water in Ontario". In our view, this is the appropriate lead ministry for the overall administration of the Act.

However, section 3 goes on to indicate that the Minister "may" undertake various activities in relation to drinking water safety. First, CELA objects to the use of the permissive word "may" since that word means, in effect, that the Minister has discretion to do none of the listed activities.[20] In our view, the SDWA should utilize the mandatory word "shall" in order to impose positive duties on the Minister to undertake the measures contemplated in section 3(1). On this point, we note that Bill 3 used "shall" so as to impose a number of specific tasks and duties upon the Minister (eg. section 6 (water quality registry); section 13 (research); section 14 (private water testing); section 15 (annual reports); and section 18(5) (annual review of regulations)).[21]

Registry???

Second, it appears that there several important drinking water matters that have been omitted from the section 3(1) list in the SDWA. For example, no reference is made in section 3(1) to the comprehensive, "source to tap" Drinking Water Policy that Commissioner O'Connor recommended the Ministry develop (Recommendation 66).[22] To ensure this Drinking Water Policy actually gets developed (and to better integrate source protection within the SDWA), CELA recommends that the section 3(1) list must include reference to the Policy and the need to develop it expeditiously.

Other drinking water matters that should also be included on the section 3(1) list include: (a) conducting annual public reviews of drinking water standards to evaluate their

---

[20] See Ontario's *Interpretation Act*, section 29(2): "The word 'shall' shall be construed as imperative, and the word 'may' as permissive."

[21] Another example of an environmental statute that uses "shall" to impose specific governmental duties is the *Canadian Environmental Protection Act, 1999*, section 2.

[22] It should be noted, however, that Commissioner O'Connor envisioned an overarching, "government-wide" water policy covering all ministries and legislation, not just the MOE and its programs: see Part II Report, page 4.

adequacy in protecting public health; (b) conducting five-year public reviews of the SDWA itself to evaluate its effectiveness in protecting public health;[23] (c) researching and developing measures for protecting sources of drinking water; and (d) researching and developing water conservation measures.

Third, we strongly support the use of the word "shall" in section 3(4) of the SDWA so as to impose a mandatory duty on the Minister to table annual reports on drinking water with the Ontario Legislature. The section 3(4) list of the minimum content requirements for the annual report represents a good starting point, but fall short of the Bill 3 list (see section 15) and should be expanded to include other important monitoring/reporting matters related to drinking water safety.

For example, the Minister should also be required by the SDWA to review and report upon: (a) the work of the Advisory Council established under section 4 of the SDWA (including information posted by the Advisory Council on the EBR Registry); (b) the findings and recommendations arising from the public annual review of the adequacy of drinking water standards; (c) the findings and recommendations arising from the five-year public review of the SDWA; (d) summaries of financial assistance provided by the Government of Ontario to the owners/operators of municipal and non-municipal drinking water systems; (e) researching and developing water conservation measures. In our view, the inclusion of these additional items in the Minister's annual report will significantly improve the effectiveness of this accountability mechanism.

We are somewhat surprised that the SDWA does not describe when the first annual report is due to be tabled by the Minister with the Ontario Legislature. To avoid any confusion or uncertainty over this reporting obligation, CELA recommends the inclusion of reporting frequency provisions similar to those found in subsections 15(2) and (4) of Bill 3.

CELA RECOMMENDATION #4: The SDWA should be amended to:

(a) use the word "shall" in section 3(1) so as to impose a mandatory duty on the Minister to undertake the various activities, programs and research listed therein;

(b) expand the section 3(1) list of the Minister's drinking water duties to include:

- **developing a comprehensive, "source to tap" Drinking Water Policy for Ontario as soon as practicable;**

---

[23] Other statutory examples of five-year review mechanisms include: public review of the Niagara Escarpment Plan under section – of the *Niagara Escarpment Planning and Development Act*; parliamentary review under section 343 of the *Canadian Environmental Protection Act, 1999*; and parliamentary review under section 72 of the *Canadian Environmental Assessment Act.* It should be further noted that the U.S. SDWA has also been periodically reviewed and strengthened since its original enactment in 1974.

- **conducting annual public reviews of the adequacy of drinking water standards to protect public health;**

- **conducting five-year public reviews of the effectiveness of the SDWA in protecting public health;**

- **researching and developing measures for the protection of sources of drinking water; and**

- **researching and developing water conservation measures;**

(c) expand the list of prescribed content requirements for the Minister's annual reports to include:

- **the work of the Advisory Council established under section 4 (including information posted by the Advisory Committee on the EBR Registry);**

- **the findings and recommendations arising out of the public annual review of the adequacy of drinking water standards;**

- **the findings and recommendations arising out of five-year annual review of the SDWA; and**

- **summaries of financial assistance provided by the Government of Ontario to owners/operators of municipal and non-municipal drinking water systems;**

(d) specify that:

- **the annual report for a calendar year shall be tabled by the Minister on or before April 1 of the following calendar year; and**

- **the first annual report shall be tabled by the Minister on or before April 1, 2004, and shall cover the period that begins on the day that this Act comes into force and ends on December 31, 2003.**

(b) Advisory Council

CELA strongly supports the mandatory creation of the Advisory Council on Drinking Water Quality and Testing Standards pursuant to section 4 of the SDWA. We are also supportive of the section 5 requirement that the Minister shall consider the views of the Advisory Committee when setting or revising drinking water standards. Given such provisions, we believe that the Advisory Council should prove to be a valuable accountability mechanism as well as an important avenue for stakeholder input into standard-setting under the SDWA. In light of CELA's extensive involvement with other

provincial advisory bodies,[24] we would be pleased to participate as a member of the Advisory Council if requested.

Having said this, however, it is CELA's view that the SDWA should provide greater detail on the composition and mandate of the Advisory Council. In fact, the SDWA, as drafted, is silent on who is eligible to sit on the Advisory Council, and provides little direction on what the Advisory Council is supposed to under the Act (other than to "consider" drinking water issues and "provide recommendations" to the Minister). In addition, the SDWA, as drafted, fails to impose a deadline for the Minister to actually establish the Advisory Council. In our view, these are legislative oversights that can be easily corrected. Indeed, in its comments on the MOE's SDWA discussion paper, CELA made recommendations to address these matters, but the SDWA, as drafted, failed to incorporate such recommendations.[25]

For example, CELA recommends that the SDWA should compel the Minister to establish the Council and appoint its members (including the Chair and Vice-Chair) within 45 days of the Act's coming into force. It should be pointed out that similar provisions were contained within Bill 3.

With respect to the composition of the Advisory Council, CELA recommends that the SDWA should set minimum and maximum numbers for Council membership in order to keep Council proceedings efficient and manageable. In addition, the SDWA should specify the qualifications of persons who may be appointed to the Advisory Council. Again, it should be pointed out that both matters were addressed in Bill 3.

CELA further recommends that to reinforce the independence of the Advisory Council, the members of the Advisory Council should not be provincial employees. Instead, Council members should be drawn, *inter alia*, from academia, municipalities, First Nations, public health organizations, environmental groups, and the waterworks industry. However, the work of the Advisory Council would be greatly assisted with input from an inter-ministerial technical working group, and the Minister should be compelled by the SDWA to provide sufficient resources to the Advisory Committee.[26]

Finally, CELA recommends that the SDWA should more fully articulate the various functions of the Advisory Council. In our view, the SDWA should set out a non-exhaustive list of matters that the Council can address, either upon request by the Minister or upon its own initiative. Section 12 of Bill 3 included such a list, but should be expanded upon to capture the full range of relevant drinking water matters.

---

[24] For example, CELA staff and/or directors have participated on the EBR Task Force, MISA Advisory Committee, Advisory Committee on Environmental Standards (ACES), and numerous other advisory panels.

[25] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 12, Recommendation 7.

[26] For example, section 20 of the *Species at Risk Act* compels the federal Environment Minister to provide sufficient resources to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

CELA RECOMMENDATION #5: The SDWA should be amended to provide that:

(a) **the Minister shall establish the Advisory Council and appoint its members (including the Chair and Vice-Chair) within 45 days of the Act's coming into force;**

(b) **the Advisory Council shall consist of not fewer than seven and not more than twelve members, who shall not be part of the public service of Ontario;**

(c) **members of the Advisory Council shall be persons who are unbiased, free of conflict of interest, and have knowledge or experience in drinking water matters;**

(d) **the mandate of the Advisory Council shall be to:**

- **generally assist the Minister in carrying out the duties imposed by section 3 of the Act;**
- **review and report upon the adequacy of current drinking water standards, and to recommend revisions thereto as may be necessary to protect public health;**
- **identify, evaluate and make recommendations in relation to new or emerging drinking water contaminants;**
- **review and comment upon the annual reports tabled by the Minister under section 3(4) of the Act;**
- **undertake and disseminate research into drinking water treatment, drinking water testing, source protection measures, or the diagnosis, treatment and prevention of health effects caused by drinking water contaminants;**
- **consider any matter affecting drinking water or its sources that the Minister refers to the Advisory Council or that the Advisory Council decides to consider on its own initiative; and**
- **address such matters as may be prescribed by regulation;**

(e) **the Minister shall provide the Advisory Council with sufficient professional, technical, secretarial, clerical resources, and any other**

facilities or supplies, that are necessary for the Advisory Council to carry out its mandate under the Act.

(c) Chief Inspector

In principle, CELA supports the creation of the office of the "Chief Inspector" pursuant to section 7 of the SDWA. At the very least, establishing and empowering this specialized office should, in theory, raise the priority and profile of drinking water safety within the MOE's institutional structure and day-to-day operations.

However, we have serious concerns about the efficacy of this new office, particularly in light of Commissioner O'Connor's findings and recommendations regarding MOE budget cuts, staff reductions, and inspection/enforcement practices and protocols, as described below.

First, it goes without saying that this new office cannot perform effectively unless it is adequately resourced and properly staffed. On this point, CELA takes little comfort in the MOE's claim that a number of drinking water inspectors have been rehired by the provincial government. Given the massive MOE budget cuts and staff reductions documented by Commissioner O'Connor,[27] it cannot be concluded that these belated hirings fully restore the MOE's inspection/enforcement capabilities to pre-1995 levels. Indeed, merely hiring back inspectors – but not restoring the institutional resources (eg. laboratory services) required by inspectors – can only serve to undermine rather than enhance enforcement efforts. Accordingly, CELA recommends that the SDWA must be amended so as to compel the Minister to provide adequate staffing, funding and other resources to enable the Chief Inspector to properly carry out his/her duties under the Act.

Second, it appears to us that the Chief Inspector's duties under section 7 of the SDWA are far more bureaucratic than investigatory in nature. Among other things, for example, the Chief Inspector is obliged to provide "advice" and "recommendations" to the Minister regarding inspections, and to develop training programs for inspectors under the SDWA. While such activities are important, they do not necessarily translate into effective and timely inspections of drinking water systems across Ontario. Indeed, there is no guarantee that the Chief Inspector's review and training efforts will actually produce inspection policies and procedures that are responsive to Commissioner O'Connor's detailed critique of MOE inspections (and lack of followup) in the context of the Walkerton Tragedy.[28]

For this reason, CELA recommends that section 7 should be amended to require the Chief Inspector to develop a new SDWA compliance/enforcement manual that, *inter alia*, specifies:

- inspection frequency, etc etc

---

[27] Part I Report, pages ----.
[28] Part I Report, pages ---; Part II Report, pages 209-10.

CELA further recommends that this SDWA manual shall be subject to public review/comment prior to its finalization, and that the Chief Inspector should approve and implement the manual within three months of the Act's coming into force.

CELA's additional concerns and recommendations regarding inspection/enforcement matters are set out below in the context of Parts VIII and IX of the SDWA (Inspections, Compliance and Enforcement).

CELA RECOMMENDATION #6: The SDWA should be amended to:

(a) require the Minister to provide adequate funding, staffing and other resources to enable the Chief Inspector carry out the duties imposed by section 7;

(b) require the Chief Inspector to develop a new compliance/enforcement manual that specifies:

-
-

(c) require the Chief Inspector to undertake public consultation on the new compliance/enforcement manual prior to its finalization, and to approve and implement the manual within three month's of the Act's coming into force.

Part III – General Requirements

(a) Lack of Source Protection/Watershed Planning

Arguably, the most significant omission in Part III (or, indeed, the entire SDWA) is the failure to include any general provisions regarding drinking water source protection and watershed planning. Alarmingly, the concept of source protection is barely even mentioned anywhere in the SDWA. This omission stands in stark contrast to the U.S. SDWA, which has a number of important statutory requirements and regulatory Rules regarding source protection (see Appendix 1, sections....).

It is important to recall that throughout his Part I and II Reports, Commissioner O'Connor repeatedly endorsed the "multi-barrier" approach to ensure drinking water safety.[29] The first critical step of the multi-barrier approach is to find, secure and protect the best possible source(s) of drinking water.[30] Not surprisingly, the issue of source

[29] See, for example, Part II Report, pages 5-6.
[30] *Ibid.*, pages 3, 8-10.

protection attracted more public support than any other aspect of drinking water safety during the Part II town hall meetings held by the Walkerton Inquiry.[31]

Accordingly, Commissioner O'Connor recommended , *inter alia*, that the *Environmental Protection Act* ("EPA") be amended so as to require the development of "Watershed Source Protection Plans".[32] It goes without saying that source protection requirements could just as easily fit under the SDWA, but CELA is prepared to leave these substantive requirements to the EPA in accordance with Commissioner O'Connor's recommendations.

This also appears to be the preference of Minister Stockwell, who has indicated that source protection requirements will be addressed under forthcoming EPA amendments. However, Minister Stockwell went on to opine that developing source protection amendments is a "large", "difficult", and "monumental task".[33] Accordingly, Minister Stockwell has recently proposed to create a multi-stakeholder advisory committee to develop a source protection "framework" by the end of 2002. In addition, the Minister indicated that the EPA amendments regarding source protection will be in place by the spring of 2003:

> ... We all want source protection. I've committed as best I can to see that a source protection bill comes into place by next spring.

With respect, CELA suggests that the Minister has overstated the difficulty of developing source protection requirements. Similarly, CELA submits that at this late stage, the belated creation of an advisory committee is <u>not</u> an adequate substitute for timely legislative action on source protection. Indeed, we are are unclear why the advisory committee was not created until some 2 ½ years after the Walkerton Tragedy occurred, and over six months after the release of Commissioner O'Connor's Part II Report. Given the critical importance of source protection, this inexplicable delay is both unfortunate and avoidable.

In any event, CELA has agreed to serve as a participant on the advisory committee, and we are hopeful that meaningful source protection requirements will be drafted and implemented as soon as possible. At the same, however, we remain highly concerned that the SDWA is proceeding apace without proper source protection requirements in place. On this point, we note that we can find no recommendation from Commissioner O'Connor that suggests that the EPA amendments should only be developed <u>after</u> the SDWA has been enacted. Nevertheless, the Minister appears to have elected to proceed first with the SDWA, and then proceed afterwards with source protection amendments to the EPA in a somewhat vague timeframe. Since we are unaware of any legal or policy basis for this curious chronology, we can only assume that the decision to fast-track the SDWA – but to move slowly on the EPA amendments – must have been motivated by political rather than jurisdictional considerations.

---

[31] *Ibid.*

[32] *Ibid.*, page 92 (Recommendation 1) and page 410 (Recommendation 68).

[33] The Hon. Chris Stockwell, Second Reading Debate on Bill 195 (*Hansard*, October 31, 2002).

In light of this awkward, "two-track" approach, it is unlikely that there will be any explicit legislative linkages between the SDWA and the as-yet undeveloped source protection requirements under the EPA. In our view, this legislative disconnect can only serve to perpetuate the legislative confusion and fragmentation that Commissioner O'Connor's recommendations (in their entirely) were intended to avoid. Moreover, since the SDWA is intended to be the centrepiece of Ontario's drinking water "safety net", there can be little doubt that source protection must be fully integrated with the SDWA. In short, source protection should not be treated as an afterthought; instead, source protection must be an integral component of the SDWA regime.

It should be noted that in its previous comments on the MOE's SDWA discussion paper, CELA recommended the integration of the SDWA with the EPA amendments regarding source protection.[34] Unfortunately, it appears that this recommendation has not been acted upon to date by the Ontario government, which has opted instead to create an *ad hoc* advisory committee on source protection.

Accordingly, it is again necessary for CELA to recommend integration of the SDWA and the EPA amendments regarding source protection. In particular, CELA recommends that the EPA amendments themselves must be fast-tracked and attached as "Complementary Amendments" under Part XIII of the SDWA.[35] At the same time, we recognize that comprehensive source protection measures may also require consequential amendments to other provincial statutes (eg. the *Planning Act* and the *Conservation Authorities Act*) in order to facilitate proper implementation of the "Watershed Source Protection Plans" developed and approved under the EPA.

If this recommendation means that the timetable for amending and passing the SDWA has to be adjusted, then CELA submits that such adjustments are clearly justifiable and entirely consistent with the public interest. However, CELA is also confident that this should not unduly delay the passage of the SDWA since all parties and stakeholders appear to strongly agree on the overwhelming need for source protection in Ontario. After all, CELA and Ontarians have been literally waiting for decades for the enactment of the SDWA, and waiting a few more months (but no later than the spring of 2003) will be worthwhile if it means that source protection requirements will be properly integrated within the SDWA.

CELA RECOMMENDATION #7: The EPA amendments (and other necessary statutory amendments) regarding source protection should be fast-tracked and attached to Part XIII of the SDWA as "Complementary Amendments".

(b) Duties of Owners and Operating Authorities

---

[34] CELA, *Comments on Proposed Components of the Safe Drinking Water Act* (September 2002), page 5, Recommendation 2.

[35] At the present time, Part XIII of the SDWA only contains a single amendment to the *Health Protection and Promotion Act*.

Part IV – Accreditation of Operating Authorities

Part V – Municipal Drinking Water Systems

Part VI – Regulated Non-Municipal Drinking Water Systems

Part VII – Drinking Water Testing

Part VIII – Inspections

Part IX – Compliance and Enforcement

Part X – Appeals

Part XI – Offences

Part XII – Miscellaneous

- built in review clause

Part XIII – Complementary Amendment

Not just hppa, but epa etc, re source protection

Part XIV – Commencement and Short Title

D. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

Representatives of the Ontario government have repeatedly claimed that Bill 195, as drafted, will prevent the recurrence of another Walkerton Tragedy, and that Bill 195 represents the "toughest" drinking water legislation in the world. In our respectful view, however, neither of these claims are supportable on the evidence or in theory, as described above.

Accordingly, if the Ontario government truly intends to enact a "tough" SDWA that will prevent another Walkerton Tragedy, then the government must either initiate or support the various amendments recommended throughout this brief. In particular, CELA's recommendations are as follows:

- cut/paste all rec's from text

In our view, the legacy of the Walkerton Tragedy should be the timely passage of effective and enforceable drinking water legislation in Ontario. However, if Bill 195 is passed in its present form without the above-noted amendments, then this legacy will remain sadly unfulfilled.

November --, 2002

_____

Richard D. Lindgren
Counsel