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BRIEFING NOTE:
ONTARIO BILL 66 AND THE *CLEAN WATER ACT, 2006*
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Overview

On December 6, 2018, the Ontario government introduced Bill 66 (*Restoring Ontario's Competitiveness Act, 2018*) for First Reading. Schedule 10 of Bill 66 proposes to amend the *Planning Act* by:

- empowering municipalities to request provincial approval to pass "open-for-business planning by-laws" aimed at facilitating major new development in order to create employment;
- exempting these by-laws from *Planning Act* requirements that govern the passage of zoning by-laws; and
- exempting these by-laws from having to be consistent with environmental protections and land use controls established under other provincial laws, plans and policies.

For example, Schedule 10 expressly states that section 39 of the *Clean Water Act, 2006* (*CWA*) does not apply to an open-for-business planning by-law. This key section of the *CWA* generally requires provincial and municipal decisions to conform to policies in *CWA*-approved source protection plans that address significant drinking water threats and the Great Lakes.

Current Legal Effect of Section 39 of the *CWA*

The overall purpose of the *CWA* is to protect existing and future sources of drinking water against drinking water threats. To achieve this purpose, section 39 of the *CWA* provides that:

- municipal, provincial and tribunal decisions under the *Planning Act* "shall conform with" policies contained in source protection plans that prevent or stop activities that constitute significant drinking water threats, or that are designated Great Lakes policies;
- municipal, provincial and tribunal decisions under the *Planning Act* must "have regard to" other policies in source protection plans;
- in cases of conflict, the significant threat policies and designated Great Lakes policies in source protection plans prevail over official plans, by-laws, and provincial plans or policies;
- within source protection areas, no municipality or municipal planning authority shall undertake any public work, structural development or other undertaking that conflicts with a significant threat policy or designated Great Lakes policy in source protection plans;
- no municipality or municipal planning authority shall pass a by-law for any purpose that conflicts with significant threat policies or designated Great Lakes policies in source protection plans; and

- provincial decisions to issue "prescribed instruments" (e.g. environmental licences, permits or approvals) must conform with significant threat policies and designated Great Lakes policies in source protection plans, and must have regard to other policies in source protection plans.

The requirements of section 39 of the *CWA* give overarching primacy and binding legal effect to source protection plans in relation to activities that constitute significant drinking water threats, as had been recommended by the Walkerton Inquiry and three provincial advisory committees. To date, 38 source protection plans across Ontario have been approved by the Environment Ministry.

Exempting Open-for-Business Planning By-laws from Section 39 of the *CWA*

Schedule 10 of Bill 66 proposes to wholly exclude section 39 of the *CWA* from applying to major development projects that may be authorized by open-for-business planning by-laws.

If enacted, Schedule 10 enables municipalities to pass such by-laws under new section 34.1 of the *Planning Act* to approve large-scale projects that may be contrary to source protection plan policies regarding significant threats to communities' drinking water supplies.

For example, open-for-business planning by-laws could be used to allow massive industrial projects to be constructed and operated in wellhead protection areas or surface water intake protection zones delineated by source protection plans, even if activities or facilities associated with the project (e.g. high-volume water-takings, on-site sewage works, waste disposal site, or the handling or storage of solvents, fuel, dense non-aqueous phase liquid, etc.) may constitute significant drinking water threats.

The Minister of Municipal Affairs and Housing must review and approve municipal requests to pass open-for-business planning by-laws. However, Schedule 10 does not legally require the Minister to refuse such requests (or to impose health-based safeguards) if the proposed development may threaten drinking water sources, contrary to a source protection plan.

Conclusions

In CELA's view, there is no legal justification or compelling public policy rationale for allowing open-for-business planning by-laws to circumvent or override significant threat policies in source protection plans approved under the *CWA*. Accordingly, Schedule 10 of Bill 66 is a regressive, unwarranted and potentially risky proposal that is inconsistent with the public interest, and that does not adequately safeguard the health and safety of the people of Ontario

CELA concludes that Schedule 10 of Bill 66 represents an unjustifiable rollback of current legal requirements that were specifically enacted under the *CWA* to prevent a recurrence of the Walkerton Tragedy. Accordingly, CELA strongly recommends that Schedule 10 be immediately abandoned or withdrawn by the Ontario government.

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