



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

May 14, 2004

**BY COURIER**

Mr. Gordon Miller  
Environmental Commissioner of Ontario  
1075 Bay Street, Suite 605  
Toronto, Ontario  
M5S 2B1

Dear Mr. Miller:

**RE: EBR APPLICATION FOR REVIEW – ONTARIO REGULATION 903 (WELLS)  
EBR FILE NO. 03EBR009.R**

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As you know, the Canadian Environmental Law Association (“CELA”) applied in October 2003 under Part IV of the *Environmental Bill of Rights* (“EBR”) for a review of Ontario Regulation 903 (Wells), as amended by O.Reg. 128/03.

CELA’s Application for Review identified numerous deficiencies within Regulation 903, and raised serious concerns about the effectiveness and enforceability of Regulation 903. Accordingly, CELA concluded that Regulation 903 was inadequate to protect the environment and public health, and further noted that the amendments to Regulation 903 were inconsistent with recommendations from the Walkerton Inquiry.

The Ministry of the Environment (“MOE”) failed to reply to CELA’s Application for Review within the 60 day timeframe prescribed by section 70 of the EBR. In fact, CELA did not receive a copy of the MOE’s formal reply to the Application for Review until March 2004.

In essence, the MOE reply advises that the requested review of Regulation 903 will not be undertaken. In refusing CELA’s Application for Review, the MOE argues that:

- the Regulation 903 amendments “reflect extensive consultation with key stakeholders over a two year period”, and were based upon a multi-jurisdictional review of “best practices” and “best available science”;
- the issues raised by CELA were largely “operational matters best addressed by trained and licenced persons who construct wells”; and
- some of CELA’s concerns were based on a misinterpretation of Regulation 903, or involved “highly situational events not common to most well drilling operations across the province”.

Not surprisingly, then, the MOE reply asserts that “taken as a whole, the amendments will greatly enhance the safety of groundwater drinking supplies in the province and will therefore not result in harm to the environment or the public”.

CELA has carefully considered the MOE reply, which consists of a four-page cover letter signed by Brian Nixon, Director of the MOE Water Policy Branch (“the Nixon letter”), and an unsigned eleven-page document entitled *EBR Application for Review Decision Summary: EBRO File No. 03EBR009.R* (“the EBR Decision Summary”). Assuming that the EBR Decision Summary was also prepared under the auspices of the Water Policy Branch, there appears to be no evidence that Branch staff consulted the Provincial Well Coordinator (the MOE’s lead expert in well construction and the Director of well licencing) or any other well experts within the MOE’s Operations Division for the purposes of formulating a response to CELA’s Application for Review.

It should be noted that this very issue was raised in the Ontario Legislature on May 10, 2004, when the Minister of the Environment was directly asked by the NDP environment critic whether the Provincial Well Coordinator had been consulted regarding this matter. The Minister declined to answer this question, and refused to commit to contacting the Provincial Well Coordinator and reporting back to the Legislature on the Coordinator’s views on Regulation 903.

CELA further notes that in her answers, the Minister referred to source protection and the forthcoming reports by the implementation and technical committees on source protection. CELA is a member of the implementation committee, and notes that the MOE’s wells management program is more than just “source protection”. Instead, this program is intended to protect groundwater and provide standards to ensure drinking water safety for private, public and communal well users across Ontario

In any event, having reviewed the MOE reply, CELA concludes that the MOE reply is riddled with errors and omissions, and is largely unresponsive to the numerous concerns raised in the Application for Review.

In particular, the MOE reply (and Regulation 903 itself):

- ignores “best available science” and fails to address the serious health risks created by lowering the chlorination standard from 250 mg/L to “approximately” 50 mg/L;
- fails to ensure “best practices” in relation to:
  - (a) removing chlorinated water from wells;
  - (b) cleaning, developing and disinfecting of wells;
  - (c) preventing unnecessary sedimentation of bedrock wells; and
  - (d) using vermin-proof well caps and stainless steel well screens;

- fails to adequately regulate waterline connections;
- fails to require testing for dangerous naturally occurring gases that can be present in wellwater;
- fails to ensure proper regulation of test holes and dewatering wells;
- fails to prohibit or restrict the use of “used materials” in well system components;
- fails to ensure proper completion of pumping tests;
- fails to properly regulate the placement of sealant for both drilled and dug wells; and
- fails to ensure effective compliance and enforcement activities.

In summary, CELA submits that the MOE refusal to review Regulation 903 is completely unjustified, and that the reasons for the refusal, as set out in the MOE reply, are unpersuasive and unacceptable. CELA concludes that unless and until Regulation 903 is properly revised, public safety and environmental health remain at risk in relation to the construction, maintenance and decommissioning of wells across the province.

Accordingly, please find attached a copy of CELA’s detailed response to the claims made within the MOE reply. For each concern raised in CELA’s Application for Review, the attached document provides a synopsis of the issue, a description of the MOE reply, and an assessment by CELA of the adequacy of the MOE reply.

After this detailed review, CELA concludes that the MOE reply is seriously inadequate if not largely misleading. Not only did the MOE fail to comply with the 60 day deadline for filing the reply, but the MOE has filed a reply that does not properly address the numerous concerns raised in the Application for Review. In our view, if the provisions of Part IV of the EBR are intended to ensure governmental accountability, then surely there is an obligation on ministries to provide responsive and meaningful replies to Applications for Review.

Moreover, CELA concludes that in preparing the reply, the MOE failed to have proper regard for the principles and commitments within the MOE’s *Statement of Environmental Values*. In addition, the MOE reply contains assertions or takes positions that are inconsistent with Mr. Justice O’Connor’s recommendations from the Walkerton Inquiry, as discussed in the attached document.

It should be further noted that Regulation 903, as amended, has been in effect since August 1, 2003. Thus, approximately, 11,600 new wells have been constructed in Ontario during the past 9 months under the deficient standards contained within Regulation 903. This figure does not include the tens of thousands of pump installations where water well records do not have to be submitted to the MOE and test hole installations. In our view, these figures underscore the pressing need to review and revise Regulation 903 to ensure that it is sufficiently protective of public health and the environment.

Given the substantive inadequacy (and misleading nature) of the MOE reply, CELA strongly recommends that you intervene in this matter pursuant to Part III of the EBR. Indeed, given the importance and urgency of ensuring wellwater safety, CELA submits that this matter should not be deferred to the Annual Report for 2004.

Instead, CELA hereby requests that you immediately exercise your authority under section 58(4) of the EBR to research, prepare and file a special report on wellwater safety in Ontario. In our view, a special report is urgently required in the circumstances surrounding the questionable amendments to Regulation 903, and is consistent with your previous reports regarding groundwater protection, drinking water, and public health.

In addition, CELA recommends that while preparing this special report, you should broadly utilize your powers under section 60 of the EBR to question the relevant MOE officials and to compel the production of MOE documents regarding the amendments to Regulation 903. On this latter point, it should be noted that CELA has been unable to access the relevant documentation through provincial freedom-of-information legislation due to the excessive fees and numerous exemptions claimed by MOE.

If such steps are undertaken by your office, CELA anticipates that you will reach the same conclusion as CELA regarding Regulation 903, *viz.* that it is substantially deficient and remains virtually enforceable despite the recent amendments. Accordingly, Regulation 903 must be reviewed and revised forthwith in order to protect the environment and public safety.

Please contact the undersigned if you have any questions or comments about this important matter. In addition, could you kindly advise us in writing at your convenience as to what your intentions are in relation to CELA's request for a special report?

We look forward to your reply.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



Richard D. Lindgren  
Counsel

cc. The Hon. Leona Dombrosky, Minister of the Environment  
Mr. Brian Nixon, Director, MOE Water Policy Branch  
Mr. Kim Yee, MOE Coordinator of Water Well Management  
Ms. Marilyn Churley, NDP MPP  
Mr. Paul Muldoon, CELA Executive Director