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Ministry of the Environment
Strategic Policy Branch
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Via Facsimile (416) 314-2976

Re: First phase of regulations under the *Clean Water Act, 2006*, Registry # 010-0122

Dear Mr. Scott,

I am writing on behalf of the Canadian Institute for Environmental Law and Policy (CIELAP) to provide comments on the Ministry's consultation on the first phase of regulations under the Clean Water Act, 2006. CIELAP was founded in 1970, with the mission to provide leadership in the research and development of environmental law and policy that promotes the public interest and sustainability. CIELAP has been involved throughout the process of the development of the *Clean Water Act (CWA)*.

Source Protection Areas and Regions Regulation

The Source Water Protection Statement of Expectations (endorsed by NGOs across Ontario) suggested that the watershed-based source protection planning framework should be required across Ontario. As well, Justice O'Connor's first recommendation in the Report of the Walkerton Inquiry was that "...[s]ource protection plans should be required for all watersheds in Ontario."

Currently, the *CWA* extends to the areas over which conservation authorities ("CAs") have jurisdiction. In effect, this excludes large portions of central and northern Ontario from receiving the benefits of source protection. However, the Minister has the authority to make regulations altering the boundaries of a source protection area for the purposes of this Act. In addition, the Minister may create new source protection areas in these parts of central and northern Ontario, with two options available for implementation. First, the Minister may decide to designate a non-CA person or body to serve as the source protection authority from the outset, thereby imposing all of the same duties regarding source protection committees and public consultations as would typically be required of the CA- source protection authorities.

Advancing the Environmental Agenda

Second, the Minister may enter into an agreement with a municipality, whereby the municipality would prepare a “focused” source protection plan and would be exempted from all of the statutory requirements regarding the establishment of source protection committees and the role of public consultations. Rather, any requirements around public involvement would be set out in the terms of the agreement. Presumably, these municipalities would be designated as source protection authorities after the completion of the source protection plan, in order that the provisions of the plan could be enforced under the CWA.

The proposed Regulation on Source Protection Areas and Regions only establishes two additional source protection areas: the North Bruce Peninsula Source Protection Area and the Severn Sound Source Protection Area. These new areas have been created pursuant to the first option outlined above, and the Minister has designated source protection authorities from the outset. While we support the establishment of these two new areas, far more needs to be done to fulfill Justice O’Connor’s vision of province-wide source water protection.

Recommendation #1: Regulations passed under the CWA should provide for the mandatory assessment of risks and mandatory reduction of significant drinking water threats in vulnerable areas across the province.

Recommendation #2: Source protection areas should be created or expanded into parts of Ontario that are not currently covered, so that additional water users can receive the full range of protections offered by the legislation.

Recommendation #3: Where the Minister enters into an agreement with a municipality pursuant to section 26, the agreement should provide for an equivalent degree of public involvement as is required in those areas covered by conservation authorities.

Source Protection Committees Regulation

Size of the Committees

Section 1 of the proposed Regulation on Source Protection Committees stipulates that there shall be 16 members for large regions, 13 for mid-sized regions, and 10 for small regions. In section 11 of that Regulation, the Minister is given the authority to grant exemptions from any provision in sections 3 to 9. However, this authority is not extended to section 1. Therefore, the Minister does *not* have the authority to grant exemptions as to the maximum number of members on the source protection committees. The Regulation should allow for more than 16 members to be appointed to the committees in appropriate circumstances. By denying the Minister the authority to grant exemptions to section 1, the Regulation becomes too inflexible to accommodate local complexities. The ultimate goal of the Regulation should be to maximize the effectiveness and fairness of the source protection committees; this goal may not always be achievable within the size limits that have been proposed.

Recommendation #4: The Minister should be given the authority to grant exemptions to the maximum number of committee members, as set out in section 1 of the proposed Source Protection Committees Regulation.

Composition of Committees

Section 2(1) of the proposed Regulation specifies the general composition of the source protection committees. It is essential that the committees reflect the communities they serve. The proposed Regulation states that one third of the members will reflect municipal interests; one

third of the members will reflect the interests of the agriculture, commercial, and industrial sectors; and one third of the members are to reflect “other” interests, including, in particular, interests of the general public. This breakdown is inappropriate due to its omission of groups representing environmental interests.

While environmental groups *could* be included in the umbrella term “other” interests, it is left up to the source protection authorities (in most cases, conservation authorities) to divide up the appointments amongst the various stakeholder groups. Therefore, it is entirely possible that the source protection authorities will choose to fill the “other” vacancies with individuals such as those representing the general public and health, labour, and consumer interests, to the exclusion of environmental groups.

The *Clean Water Act* is a piece of environmental legislation, and its purpose is to protect existing and future sources of drinking water. However, proposed membership on the source protection committees is currently weighted in favour of those stakeholders who are, arguably, responsible for causing the greatest threats. We recognize the importance of involving from the outset those local individuals and groups who will be required to make the largest changes pursuant to the source protection plans. Having said this, it is equally (if not more) important to include environmental groups to counter-balance economic drivers and to ensure that the source protection plans fulfill their intended purpose.

As such, environmental groups must have the ability to impact discussions in a meaningful way. Groups representing environmental interests should be accorded an equal role on the committees, rather than being overlooked and undervalued relative to the other sectors. Furthermore, local environmental groups often have separate interests, constituencies, and expertise from the “general public.” It is therefore insufficient and inappropriate for groups with environmental interests to compete with other NGOs and the public for space on the committees. Finally, the “other” interests category should not include local public health representatives or medical officers of health. These individuals should be guaranteed positions on the committees, either as voting or non-voting members (depending on their preference), separate and apart from the spots reserved for environmental groups and other stakeholder interests.

Environmental non-governmental organizations and community groups hold unique perspectives; possess the requisite knowledge of local watersheds, communities, and issues; and have demonstrated a clear commitment to the *CWA* through their extensive involvement with government and other stakeholders on this issue over the last several years. There should be an explicit requirement that all source protection committees include members that represent environmental interests, and the Regulation should be drafted accordingly. An appropriate selection process for the representative of environmental interests could be developed through the Ontario Environment Network or another mechanism.

Recommendation #5: Section 2(1), paragraph 3 of the proposed Source Protection Committees Regulation should be amended to read as follows:

One third of the members to be appointed by the source protection authority, not counting any member appointed pursuant to section 6, must be persons appointed to reflect interests other than the interests referred to in paragraphs 1 and 2, including a minimum of one member to reflect environmental interests and a minimum of one member to reflect the interests of the general public.

This language is consistent with numerous recommendations that have been made throughout the conceptualization and development of the *Clean Water Act*. For instance, the Ministry's own Advisory Committee on Watershed-Based Source Protection Planning indicated that "[i]t is *mandatory* for each SPPC [Source Protection Planning Committee] to include appropriate representation of ... environmental groups" (emphasis added).

Selection of Committee Members and Committee Operations

There are several general principles that should apply to the selection of the chair and individual committee members.

- Despite the fact that the appointment of the chair is not subject to the regulations, we strongly urge the Ministry to issue Guidelines specifying the transparent procedure that will be followed. The procedure should include publishing a short-list of candidates beforehand for public comment. This is particularly important given the fact that the chair is intended to act as a neutral member. By allowing the various stakeholders to comment before a final decision is made, the source protection authority and the Minister will be better able to gauge the perceived neutrality of the candidates.
- We have noted that several conservation authorities have already initiated the selection process by publicly advertising the position of chair. This is undoubtedly due to the tight regulatory timelines that are being proposed for the appointment of the source protection committees. However, we caution that although the appointment of the chair is not a regulatory matter, the establishment of the source protection areas and regions *is* included in the proposed regulations, and the source protection committees (including the chairs) are established for the source protection areas. Accordingly, it would be improper for the chairs to be selected prior to the finalization of the source protection areas and regions via regulation.
- There should be a time frame within which the Minister should appoint the chair.
- After a final decision is made regarding the selection of the chair, the Minister should post this information in a similar fashion as the original call for candidates.
- Under section 12(2), the alternate or "acting" chair should be selected by the Minister, in a process akin to the selection of the chair. As with the selection of the chair, all stakeholder groups should be given an opportunity to comment on the short-list of candidates for alternate chair.
- Under section 8(1) of the proposed Regulation, simply being "employed in" the source protection area should not qualify a person for appointment to a source protection committee.
- In section 8(3) paragraph 1, the requirement that appointees must regularly "attend" meetings should be defined as including participation via conference calls.
- The proposed Regulation should include such matters as the mechanism for setting the specific composition of the committee, the qualifications of committee members, and the establishment of the working groups.
- The inclusion of working groups in the regulation is of particular importance, especially since the working groups will be critical to ensuring an adequate level of consultation and collaboration takes place among the different sectors. Adequate and appropriate funding is critical to the success of the working groups. Specific funds should be earmarked for the working groups, so that these lower tiers of involvement are neither overlooked nor hindered.
- In sections 14 and 15, the rules of procedure, code of conduct, and conflict of interest policy should not be left to the guidance materials and the discretion of each individual source protection committee. In order to promote consistency across the province, the government should include these items in the proposed Regulation.

- The proposed Regulation should require that all potential conflicts of interest are reported to the chair and to the committee at the outset, and any member who engages in activities that are in conflict of interest should be removed from the committee. Those appointed as members be known for their ability to see beyond their own special interests.
- The proposed Regulation should include stringent transparency requirements to be followed by the committee. Both the committees and the working groups should circulate draft versions of working documents (with qualifications included, as appropriate) and the peer reviews of scientific studies. The quarterly reports provided by the chair of the committee under section 19 should be made public. A web-based portal should be created where the public can submit comments on the documents under review.
- Under section 18(2), any individual requesting that the committee maintain confidentiality should be required to provide valid justification for his or her request.
- There should be one provincial liaison from the Ministry of Environment assigned to each of the 19 source protection regions and areas. This position is important to ensuring consistency, providing training, and facilitating the transfer of information between government and the committee, and visa versa.

Terms of Reference Regulation

Notice to band

In section 2 of the proposed Terms of Reference Regulation, the source protection committee is required to give notice of the preparation of the terms of reference to the chief of any reserve of a band that is included in a source protection area. This level of involvement does not constitute “meaningful consultation” as has been defined by the courts. The Minister, on behalf of the provincial Crown, should ensure that meaningful consultation takes place with not only those bands with reserve lands within the source protection area, but also those First Nations with traditional territories and/or pending land claims within the source protection area. The courts have recognized that the duty to consult may extend to situations in which claims to Aboriginal title have not yet been settled.

Recommendation #6: The Minister has an obligation to ensure that meaningful consultation takes place with those First Nations peoples who have reserve lands, traditional territories, and/or pending land claims within the source protection area.

Performance of tasks by municipality

Section 4 of the Regulation specifies that the terms of reference shall not require a municipality to perform a task unless the municipal council has first passed a resolution consenting to do the work. Similarly, once a municipal council has passed such a resolution, the terms of reference *shall* require the municipality to perform the task. This section fails to include an assessment of whether or not a given municipality is qualified to take on the task at hand. Before work is delegated via the terms of reference, the source protection committee should first establish the municipality’s capacity and capability to conduct the work, and institute a peer review system to ensure the accuracy and impartiality of the end product.

Recommendation #7: The last sentence of subsection 4(1) of the proposed Terms of Reference Regulation “the terms of reference shall require the municipality to perform the task” should be changed to “the terms of reference may require the municipality to perform the task”, subject to certain qualifiers noted above.

Submission of proposed terms of reference to the source protection authority

Recommendation #8: When a source protection committee submits a proposed terms of reference to the source protection authority under clause 9(a) of the Act, it should give the source protection authority a summary of any written comments on the draft that were submitted to the source protection committee within 35 days after the notice was published under subsection 6(2) of the proposed Terms of Reference Regulation, and a summary of comments made at the public meeting.

Amendments proposed by source protection committee

The source protection committee should be required to propose amendments to the terms of reference in the circumstances enumerated in section 9 of the Regulation, as opposed to leaving it to the discretion of the committee. For instance, if the terms of reference “contain an error that, if left uncorrected, will affect the preparation of the assessment report of source protection plan,” the source protection committee should propose an amendment to the terms of reference as soon as reasonably possible.

Recommendation #9: Section 9 of the proposed Terms of Reference Regulation should be made mandatory rather than discretionary, except for paragraph 3 which should be deleted (see comments below on the Miscellaneous Regulation).

Time Limits Regulation

The proposed Regulation establishes a number of time limits stemming from the appointment of the first chair of the source protection committee, or subsequently, stemming from the date on which the review of the approved source protection plan is required to begin. The time limits relate to:

- the submission of the proposed terms of reference by the source protection committee to the source protection authority,
- the submission of the proposed terms of reference by the source protection authority to the Minister,
- the submission of the proposed assessment report by the source protection authority to the Director, and
- the submission of the proposed source protection plan by the source protection authority to the Minister.

In terms of the deadlines that are included, the one of primary concern is the five year time frame provided for the completion of the proposed source protection plan. If this time frame is followed, it will have taken approximately twelve years from the time of the Walkerton tragedy, and ten years from the release of Justice O’Connor’s Report of the Walkerton Inquiry for the planning process to be completed. Following the completion of a source protection plan, it will still take an indeterminate amount of time for the plan to be implemented.

Recommendation #10: The time period for completing the source protection plans should be shortened.

We are also concerned by the multitude of key deadlines that are excluded from this Regulation. There can be no guarantee that the planning process will proceed expeditiously unless a timeline is provided for every step along the way. Therefore, the proposed Regulation should be amended to include several additional time limits.

- The Minister should be subject to a time limit in responding to the proposed terms of reference. Under section 10(2) of the *Clean Water Act*, the Minister has the option of either approving the terms of reference or requiring the source protection authority to amend and resubmit.
- If the Minister requires the source protection authority to amend and resubmit the terms of reference, there should be a maximum time limit within which the source protection authority must respond. Although section 10(2) indicates that the time period is to be specified by the Minister, the Guidelines should specify a short turn-around period. Otherwise, there may be a disincentive for the source protection committees and authorities to complete the terms of reference in a satisfactory manner within the time frame provided, if they can expect a lengthy extension from the Minister after the initial submission.
- Similarly, there should be a time line for the Minister to approve the amended terms of reference after they have been resubmitted.
- There must be a deadline for the source protection committee to submit the proposed assessment report to the source protection authority. Currently, the source protection authority is obliged to submit the proposed assessment report to the Director within two years, but there are no means by which the source protection authority can compel the source protection committee to act in advance of this deadline.
- In keeping with the recommendations above, there should be a time limit for the Director to respond to the proposed assessment report.
- If the Director requires the source protection authority to amend and resubmit the assessment report, the Guidelines should specify a short timeframe within which this resubmission must take place.
- There should then be a deadline for the Director to approve the amended assessment report.
- There needs to be a deadline for the source protection committee to submit the proposed source protection plan to the source protection authority.
- In keeping with the recommendations above, there should be a time limit for the Minister to respond to the proposed source protection plan.
- If the Minister requires the source protection authority or the Municipality to amend and resubmit the source protection plan, the Guidelines should specify a short timeframe within which this resubmission must take place.
- There should then be a deadline for the Minister to approve the amended source protection plan.

Thank you for the opportunity to provide input on this proposal. Please contact me, or Maureen Carter-Whitney, CIELAP's Research Director, if you wish to discuss any of these comments further.

Yours sincerely



Anne Mitchell
Executive Director

Cc: Hon. Laurel Broten, Minister of the Environment
Gord Miller, Environmental Commissioner of Ontario