

SUBMISSION OF THE
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE STANDING COMMITTEE ON
GENERAL GOVERNMENT

RE: *Sustainable Water and Sewage Systems Act, 2002*
(Bill 175) EBR REGISTRY NO. XA02E0006

Publication No. 434
ISBN No. 1-894158-75-X



Prepared by:

Theresa McClenaghan,
Counsel
November 27, 2002

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

INTRODUCTION	2
MUNICIPALITIES SHOULD CHARGE FULL COST	3
WHAT IS FULL COST?	5
THE BILL LACKS A PURPOSES SECTION.....	7
MUNICIPAL WATER PRICES ARE LOW	8
PROTECTING LOW INCOME RESIDENTS	9
SMALL SYSTEMS	10
EXISTING NEEDS AND EXISTING CAPACITY	12
GROUNDWATER VERSUS SURFACE WATER SYSTEM COSTS.....	14
SOURCES OF FUNDING FOR WATER SYSTEMS	14
INCENTIVES FOR DECREASED CONSUMPTION	17
EXISTING MECHANISMS.....	18
WHO IS REGULATED?	20
MINISTER’S ORDERS.....	21
INAPPROPRIATE DELEGATION.....	22
LACK OF ADEQUATE REPORTING	23
NEED FOR AN INTEGRATED APPROACH TO WATER POLICY IN ONTARIO	23
REFERENCES:.....	25

**SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE STANDING COMMITTEE ON GENERAL GOVERNMENT
Re: Bill 175, Sustainable Water and Sewage Systems Act, 2002
EBR Registry No.: XA02E0006**

*Prepared by
Theresa A. McClenaghan*

Introduction

The Canadian Environmental Law Association (“CELA”) is a public interest law clinic founded in 1970 for the purpose of using and improving laws to protect the environment and public health and safety. Funded as a legal aid clinic specializing in environmental law, CELA lawyers represent individuals and citizens’ groups in the courts and before tribunals on a wide variety of environmental protection and resource management matters.

Over the years, CELA has been particularly active in casework involving ground and surface water impacts both as to water quality and water quantity sustainability. Furthermore, CELA has extensive expertise in local, regional and international water policy. For example, CELA represented the Concerned Walkerton Citizens in both phases of the Walkerton Inquiry. Similarly, CELA provides summary advice to numerous members of the public who contact CELA with concerns and questions about the environmental, land use and municipal laws pertaining to ground and surface water and water works issues. CELA has also submitted numerous briefs to the Ontario government on water policy issues and proposals.

CELA made a submission under the Environmental Bill of Rights registry with respect to the proposed “Act respecting the cost of water and waste water services”, Bill 155 as it then was, on February 15, 2002¹. At that time, and in fact when Bill 155 was originally

¹ [Comments by the Canadian Environmental Law Association concerning Bill 155, "An Act respecting the cost of water and waste water services."](#) T. McClenaghan and S. Miller. February 15, 2002. CELA Brief Number 415 (PDF file: 5 p.)

introduced, Part Two of the Report of the Walkerton Inquiry, A Strategy for Safe Drinking Water, had not yet been released. CELA has reviewed the Bill again, in its present form as Bill 175, with the advantage of the Walkerton Part Two report². CELA has also reviewed Bill 175 with the benefit of several studies regarding water system financing that were prepared for and submitted to Part II of the Walkerton Inquiry by knowledgeable parties with standing in that process.

Municipalities Should Charge Full Cost

CELA agrees with the premise of Bill 175 which proposes to require all “regulated entities” to charge for the full cost of their water systems. However, CELA’s fundamental concern with Bill 175 is that it very narrowly defines full cost.

The proposed definition reads,

“The full cost of providing the water services includes the operating costs, financing costs, renewal and replacement costs and improvement costs associated with extracting, treating or distributing water to the public and such other costs as may be specified by regulation.” (Section 3(4)).

This is a “pipes and pumps” definition and does not appear to extend to source protection, including aquifer and watershed protection. It is also unclear whether conservation and retrofit costs could be included. Where water sources are already degraded, this definition does not extend to restoration and rehabilitation costs. Also doubtful are water quality and quantity monitoring costs upstream of the well head or intake source, as well as post-distribution monitoring, such as for health indicators in the population.

Too narrow a definition will act contrary to the objectives of watershed based source protection planning, restoration and rehabilitation and adequate monitoring. This is because the Act provides that regulations will specify the sources of revenue that a regulated entity is or is not permitted to include in its full cost financing plan.

² Part Two Report of the Walkerton Inquiry A Strategy for Safe Drinking Water, The Honourable Dennis R. O’Connor, 2002, Published by the Ontario Ministry of the Attorney General

Municipalities wanting to include source protection and watershed protection costs, restoration costs or monitoring costs may find that they are expressly forbidden from charging for these costs.

RECOMMENDATION #1: The Components of “full cost” for water services should be expanded to explicitly include watershed-based source protection plans, conservation, retrofits, source restoration and monitoring costs.

The identical concerns arise with the narrow definition of the full cost of providing wastewater services. The definition states:

4(4) The full cost of providing the waste water services includes the operating costs, financing costs, renewal and replacement costs and improvement costs associated with collecting, treating or discharging waste water and such other costs as may be specified by regulation.

This definition does not on its face encompass such public and environmental costs as untreatable or untreated discharges to the environment, or the increased costs of waste water treatment caused by sprawl from hard surfaces and fast run-off. These are only two examples of issues that affect waste water services. The full cost of providing waste water services should include a component of those source protection measures and the prevention measures that would ensure appropriate treatment of all waste water, and would ensure that untreatable contaminants are kept out of the waste water treatment system.

On the revenue side of the Bill, again, the concern arises that the Bill may unduly restrict the costs that regulated entities are permitted to charge for. As stated with respect to water systems, the Act provides that regulations will specify the sources of revenue that a regulated entity is or is not permitted to include in its full cost financing plan.

Municipalities wanting to include the source protection and prevention components of waste water systems or monitoring costs may find that they are expressly forbidden from charging for these costs.

RECOMMENDATION #2: The components of “full cost” for waste water services should be expanded to include components of watershed-based source protection plans and contaminant prevention measures.

What is Full Cost?

C.N. Watson Inc. in its OWWA/OWMA paper to the Walkerton Inquiry clarified three distinct terms:

- Full Cost Accounting – recording all costs associated with providing the service including appropriate overhead and asset costs
- Full Cost Recovery – all costs are identified, budgeted for and recovered via a variety of user fees and charges including rates
- Full Cost Pricing – “may refer to the concept that all costs for the provision of the service are recovered via one all encompassing rate.”³

The OWWA/OWMA supported full cost accounting and full cost recovery, but not full cost pricing if that meant that all costs are recovered only through rates.⁴ Their definition included an allowance for infrastructure renewal. While agreeing with the need to have municipalities develop long term financial plans for infrastructure replacement, OWWA/OWMA advocated that there are a variety of approaches to incorporating replacement of infrastructure into the long term planning process. Furthermore, they recommended that municipalities must be left the flexibility to determine the financing methods they wish to pursue.⁵

CELA agrees with both of these propositions – that there must be full cost accounting (including source protection) and that there must be full cost recovery. CELA also agrees

³ C.N. Watson, OWWA, page 3-2.

⁴ C.N. Watson, OWWA, page 3-2.

⁵ C.N. Watson, OWWA page 3-5

that municipalities should be accorded flexibility in meeting these requirements based upon provincial standards which include source protection.

RECOMMENDATION #3: Municipalities should expressly be assured flexibility in meeting the cost recovery requirements of Bill 175.

In the Strategic Alternatives paper, “Financing Water Infrastructure”, commissioned by the Walkerton Inquiry, the authors note that there are various definitions of “full cost” and that environmentalists want environmental costs included.⁶

This is true. CELA does advocate inclusion of the environmental costs of the activity in the definition of full cost. As will be noted later, CELA also advocates a variety of mechanisms to recover those full costs.

The Strategic Alternatives authors note that costs are “external” – such as the environmental impact of the withdrawals from source or discharges to the environment from treatment or sewage if they are not paid by the service providers. However, once there are regulations requiring the operator to deal with these costs, the costs are internalized.⁷

The Strategic Alternatives paper prepared for Justice O’Connor stated that municipalities should not be expected to estimate and recover externalized costs. However, CELA submits that those costs should be internalized (and will be after source protection legislation is enacted). Portions of watershed source protection planning costs will be real obligations of the municipalities once the government enacts that legislation pursuant to Justice O’Connor’s recommendations. The definition of full cost recovery needs to be broad enough to cover these new responsibilities.⁸

⁶ Strategic Alternatives, page 51

⁷ Strategic Alternatives, pages 52, 53

⁸ Strategic Alternatives, page 53

The Bill Lacks a Purposes Section

Bill 175 provides that the Minister may approve the contents of the regulated entities' cost recovery plans, but does not provide any indication as to what standards will be applied in approval of the plans. With no purposes section, there is no basis to assume that any standards eventually set by regulation will achieve purposes such as providing safe water or promoting conservation. There is no provision in the proposed legislation that would ensure that the Act is applied in a way that is beneficial to the environment or to the public. Accordingly, the Minister may have unfettered discretion, subject to whatever is or is not in the regulation.

CELA prepared a Model Act to Conserve Ontario Waters which CELA published in 2001⁹. CELA's Model Act provides a contrast to Bill 175 in that there both a purposes section and express standards for the plans that municipalities and other entities would be required to prepare were provided.

Among the purposes that should be stated for Bill 175 are those of ensuring appropriate financing for all systems, including small systems, on a life-cycle basis, and of ensuring that all residents of Ontario are adequately supplied with water as a necessity of life at an affordable cost. Some of the other purposes that CELA included in its Model Bill were:

- Ensure that principles of sustainable development are applied to the use of water
- Ensure that the precautionary principle is applied to the protection, conservation, restoration and enhancement of water
- Protect the natural functions of the ecosystem.

These purpose statements should also be included in Bill 175.

RECOMMENDATION #4: Bill 175 should be amended to include a purposes statement which includes ensuring appropriate financing for all systems, including small systems, ensuring that all residents of Ontario are adequately supplied with

⁹ Canadian Environmental Law Association, [Model Bill - An Act to Conserve Ontario Waters](#), J. Castrilli, May 2001 Brief # 401

water as a necessity of life at an affordable cost; ensuring that principles of sustainable development are applied to the use of water; ensuring that the precautionary principle is applied to the protection, conservation, restoration and enhancement of water; and protecting the natural functions of the ecosystem.

CELA's Model Bill also expressly stated what the duties of the government and each minister are *vis a vis* the model legislation. For example, there is stated to be a duty to "protect the public trust in water for the benefit of present and future generations." Express duties should be provided in Bill 175 to guide any discretion provided in the Bill.

Municipal Water Prices are Low

For most of us, municipal water prices are very low. In the paper prepared for CELA at the Walkerton Inquiry, C.N. Watson noted the cost of water to residents and how inexpensive the service is from as low as \$89 per year to a high of \$312, with the median \$178 per year. As C.N. Watson noted, this is less expensive than cable television and much less expensive than bottled water. By their calculations, a standard \$1.25 cost of a bottle of spring water purchases 3200 glasses of municipal water at the median price.¹⁰

Pollution Probe found that most Canadians pay three to four times less for their drinking water than residents of Germany, Denmark, the Netherlands, France and the United Kingdom.¹¹ This means that for most of the people in Ontario, there is plenty of capacity to raise rates and other water-related charges a reasonable amount so as to charge full costs that include a portion of source protection costs. However, there are two exceptions to this statement. One is for people in poverty. The other is for some small systems.

¹⁰ C.N. Watson, CELA, section 9.3

¹¹ Pollution Probe, page 4

Protecting Low Income Residents

Low-income Ontario residents, including families of approximately 19% of Ontario children,¹² will experience difficulty with any rate increases. There must be appropriate protections for low-income residents and for people on fixed incomes since water is a necessity of life and for children at least, a universal right explicitly recognized in the 1989 Convention of the Rights of the Child.¹³

The Strategic Alternatives paper for the Walkerton Inquiry sets out methods to deal with affordability for those in poverty. However, CELA submits that of these measures, only Lifeline Rates and Shorter Billing Cycles are clearly appropriate. Lifeline rates provides a “minimum volume of water at a low cost; the cost recovered being only the direct operating and maintenance costs net of capital charges”. Shorter billing cycles make bill payment easier. Both of these methods would apply to all customers and avoid the problem of being discriminatory. Some of the other methods listed by Strategic Alternatives are not appropriate since they further penalize low income residents by not offering an equivalent water service or discriminate against low income residents. For example, “Targeted Conservation” “promotes and subsidizes the adoption of conservation measures by poor households to help them reduce their water bill” and “Flow Restrictions” are a “degrading of the service level (as an alternative to disconnection) as an inducement to pay arrears. The restricted flow provides water for drinking and basic sanitation needs.” Neither of these solutions is acceptable as low income Ontarians are thus further penalized for their low income situation with a radical reduction of their water services. “Discounts or Income-Based Payments” and “Community Assistance” bear further investigation as means to protect a reasonable supply of water for all domestic purposes to low income residents including their

¹² Almost 19% of Canadian children under the age of 18 live in poverty (Canadian Council on Social Development, 2001).

¹³ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49 at article 24(2), c) “To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution”

children. Conservation programs need to be tailored for and directed to the whole community on an equal basis.¹⁴

The Province should encourage municipalities to protect disadvantaged residents from prohibitive water rate increases. The Province could do this by providing a guidance document for municipalities. This document could explore the full range of options available to municipalities to achieve protection for the poor while continuing to provide these essential services.

RECOMMENDATION #5: The province should encourage municipalities to protect disadvantaged residents from prohibitive water rate increases.

Small Systems

The other exception to the statement that most water rates now are very low, is for small systems. There was consensus during the Walkerton Inquiry expert meetings that no one wanted to advocate a water system in Ontario in which only the big cities had safe water. Almost universally, all perspectives advocated a system in which everyone's water is safe to drink.

The Association of Municipalities of Ontario (AMO) reported, based on an OMOE report, that 74% of all waterworks are small systems providing drinking water to communities of 3,300 people or less.¹⁵ On this basis, solutions must be found for financing small systems so that they have water every bit as safe as bigger centres and can meet the specified standards.

¹⁴Strategic Alternatives, Table 6-3, page 71)

¹⁵ Association of Municipalities of Ontario, page 23

In its paper for the Walkerton Inquiry, Pollution Probe found that several jurisdictions had specialized funding for small water supply systems. These included Wisconsin, New York, California and France.^{16 17}

France's National Fund for Rural Water Supply provides smaller systems with access to resources. It does so by a levy of 10.5 centimes for every cubic metre of water supplied in France. This levy is used to provide subsidies for small rural communities to enable them to invest in potable water supply and storm and waste water collection and treatment. The reason for this special levy is to compensate for the small population base to support rural water supply systems.¹⁸

The OWWA / OWMA supported regionalization of smaller systems "where the viability of the smaller system to protect public health and conserve public resources may not be sustainable".¹⁹ Their report stated that 89% of water plants / systems serving 11% of the population may not be viable, where viable is defined as self-sustaining with financial, technical, managerial and operational expertise and capacity to reliably meet present and future requirements. The OWWA report recommended a more detailed analysis to determine where such systems are and what options are feasible in terms of regionalization.²⁰

Justice O'Connor noted that there are many options available to small systems in order to make their systems more viable. Examples that he gave included consolidating

¹⁶ Pollution Probe, page 17

¹⁷ Post script: In several of the states, legislation has been passed to enable the state to effectively implement the provisions of the Federal SDWA. The SDWA established a new financial assistance State Revolving Fund (SRF) which allowed states to create a technical assistance program for small systems. This legislation also prevents the formation of new PWS (either through creation of a totally new system or change of ownership) unless that system has been certified by the State as having adequate technical, managerial and financial (TMF) capacity to ensure safe, reliable drinking water on a long term basis. In late 1997, the California legislature enacted [Senate Bill \(SB\) 1307](#) (from California Department of Health Services, http://www.dhs.cahwnet.gov/ps/ddwem/technical/dwp/tmf/TMF_Index.htm accessed November 21, 2002)

¹⁸ International Office for Water Web Site, "Organization of Water Management in France," http://www.oieau.fr/anglais/gest_eau/part_d.htm, accessed November 21, 2002

¹⁹ Ref. Watson OWWA pages 2-4

administrative functions (for example, Kingston Utilities deals with Kingston’s municipal water system, sewer system, electrical system and natural gas system all under one administrative entity²¹); seeking cooperative or contractual arrangements with nearby larger municipalities; consolidating operations with those of other municipalities in the region; contracting to suitably competent operators; and upgrading their own staff through training. However, Justice O’Connor noted that many already approved systems may still be unable to meet the standards at a reasonable cost. He recommended that these situations be dealt with as the need arises on a subsidy basis, “rather than cause a departure from the high standards of drinking water safety that Ontario residents expect.”²²

RECOMMENDATION #6: Bill 175 should establish a program for additional funding for small systems to meet Ontario’s water standards where no other municipal solutions are available.

One category of small systems is that of privately owned trailer parks which can have a large proportion of low-income residents. The province must establish small system provisions and extend them to privately owned small systems, particularly those in low-income neighbourhoods or communities. For example, municipal loans, already allowed under the Municipal Act, may be extended to private owners at beneficial interest rates. The province itself should administer such a loans program. The province should also support research into appropriate, cost-effective new technology for small systems.

Existing Needs and Existing Capacity

It is important to note that only a portion of anticipated future costs of water systems in Ontario is for upgrading or replacing the existing system. In C.N. Watson’s paper prepared for CELA for Part II of the Walkerton Inquiry, “Financial Management of

²⁰ Watson OWWA page 2-5

²¹ Keech, Jim, “Services for Profit-Hybrid Corporations”, Ontario Bar Association, “Making Over the Body Politic: A Practical Guide to the Municipal Act, 2001, November 22, 2002, Tab 14

²² Walkerton Inquiry Part Two Report, page 476; Recommendation 84

Municipal Water Systems in Ontario” it was noted that the “existing needs” category is the only category of future costs not covered by growth-related financing. This financing comes from developers; from new homes or from new services. In other words the “existing needs category” is the only one needing to be financed from rates and other user fees over time. This segment of future needs represents only 9% to 14% of municipalities’ existing debt capacity on an overall basis for Ontario.²³

C.N. Watson noted one common difference between full cost pricing in the private sector and in the municipal sector. The private sector fully depreciates as the asset is used up thus charging the full cost of that depreciation or asset to the users. The municipal sector does not necessarily charge the full cost of asset depreciation to current users; some impose the charge on future users (e.g. by debenture) and some use a mixture of both.²⁴ Many municipalities are already planning for full financing for their future costs. C.N. Watson reviewed several examples in its report for CELA:

- Aurora – fully finances life cycle replacement using the sinking fund method; the cost is 10% of the current rates;
- Chatham-Kent, with 22 municipalities amalgamated is in the process of fully implementing a life cycle replacement system that will be about 12% of their rates when in place;
- St. Thomas is using a combination of debt, reserves and operating funds with a 20 year replacement plan which will equate to 30% of their rates;
- Lincoln, with a relatively young system will take 5 years to fully implement a life cycle replacement scheme which will equal to 9% of their rates.

In another paper done by C.N. Watson for the Walkerton Inquiry (on behalf of the Ontario Water Works Association and the Ontario Municipal Water Association), C.N.

²³ C.N. Watson, CELA, Page 1-6

²⁴ Ref. Watson Page 5-5 C.N. Watson recommended using the sinking fund method of depreciation, in order to recognize that the money charged each year is invested until the time it is needed to replace the asset. Thus rates are not affected as much as the straight line depreciation method. (Ref. C.N. Watson CELA page 5-5.)

Watson stated that the municipal sector can finance capital at lower costs than the private sector.²⁵

Accordingly, ability to finance water systems with current legislative and financial tools is not a concern for most municipalities other than small systems.

Groundwater versus surface water system costs

Is there a difference between groundwater costs and surface water costs for municipal supply systems? C.N. Watson also compared the costs of water systems, comparing groundwater, lake-based surface water, river-based surface water and big pipe from lake systems. They found that groundwater and lake-based surface water systems are less expensive than river surface water and big pipe from lake systems.

On the whole, groundwater systems are less expensive than surface water systems. Thus from an economic perspective, it makes sense to protect our groundwater for drinking water purposes.²⁶

Sources of Funding for Water Systems

There is a range of sources of funding already available for water systems. A sample list is provided in the C.N. Watson OWWA report and includes debt, reserves, reserve funds, development charges, local improvement charges, local services installed by developers, special assessments under the municipal act, various service charges and various arrangements for financing under section 210.1 of the existing Municipal Act²⁷. These are all forms of “user-pay” financing mechanisms and CELA agrees that these are all appropriate sources of funding for water systems.

²⁵ C.N. Watson, OWWA page 2-4

²⁶ C.N. Watson, CELA, page 6-2 , 6-3

²⁷C.N. Watson OWWA, page 5-1

In addition to the rate base, user fees, development charges, extensions to non-serviced areas and the other mechanisms listed by C.N. Watson, CELA submits that there are important additional sources of funding for water systems that must be pursued in Ontario.

Ontario is about to develop a watershed based source protection framework in Ontario, led by Conservation Authorities and municipalities as set out in Justice O'Connor's report. An important issue in developing the framework will be the allocation of the costs of the source protection framework.

CELA submits that some of the costs ought to be allocated across the sectors that affect the source: water takers and sectors that impact the quality of sources including agriculture; industry; development and others.

RECOMMENDATION #7: Bill 175 should be amended to provide that a portion of the costs of the watershed based source protection framework are allocated across the sectors that affect the source, including water takers and sectors that impact the quality of sources such as development, industry, agriculture and others.

There will also be many costs that are borne directly the municipalities and conservation authorities leading the watershed based source protection plan. These costs will include development of the plans; monitoring; enforcement; decision making; and data collection to name a few. Rates should not be expected to pay all of these costs but they should pay a portion.

A portion of these source protection costs should be estimated as attributable to municipal water users (industrial and institutional as well as residential) and included in the full cost formula. These costs should be included in the definition of full cost recovery. Additional revenues should come to municipalities and conservation authorities and to the province from water-takers on a per unit basis; and from those

putting loads into the waterways and groundwater, to cover the balance of their watershed planning and protection costs.

RECOMMENDATION #8: Bill 175 should be amended to provide a portion of the source protection charges derived from water takings and impact charges to municipalities and conservation authorities to use for source protection purposes and pollution prevention purposes.

Such an approach has been taken in France. There a Water Agency levies water charges on withdrawals and wastewater discharges at the level of each of the six large river basins. The levies are used to subsidize community investments to improve water resources and treat effluents or to improve the operation of treatment plants.²⁸

CELA developed a Model Water Bill which we released in 2001, An Act to Conserve Ontario Waters. Among the suggestions CELA made was to include levies on all water takings. Even a very small levy per unit of water taken will provide substantial revenue from this segment of water users. CELA submits that these revenues should be allocated to the watershed source protection framework. With the balance, CELA submits that a fund should be maintained to assist with small systems and low income residents' needs.

RECOMMENDATION #9: A portion of the levies on all water takings should be used to establish a fund to assist with small systems and low income residents' needs for water.

Other jurisdictions have found various solutions for properly funding water systems. Pollution Probe prepared a paper for the Walkerton Inquiry and found that in Germany, an ecotax is applied to many activities, including wastewater being discharged directly to water. In the Netherlands, Groundwater Taxes are applied to extraction and delivery of groundwater and a Federal Tax on Water Supply is applied to delivery activities and

²⁸ International Office for Water Web Site, "Organization of Water Management in France," http://www.oieau.fr/anglais/gest_eau/part_d.htm accessed November 21, 2002

sewerage taxes.²⁹ In France, water charges are based on two principles: “The polluter or the consumer pays” and “water pays water”.³⁰

Incentives for Decreased Consumption

CELA’s Model Bill included a requirement to develop water conservation plans.

However, the requirement to prepare such a plan is required in the Model Bill to follow a public assessment of the water use in the relevant area, and then to proceed by way of a public consultation process to meet goals and objectives expressly stated in the legislation, such as:

- (a) efficient water use;
- (b) protection of water as a valuable resource;
- (c) reduction in per capita consumption;
- (d) reduction in water usage from industrial, commercial, institutional, and residential customer classes compared to 1999 levels of 25 per cent by the year 2010 . . . ³¹

In contrast, Bill 175 contains no requirements that its limited approach to “full cost recovery” would promote efficient water use; reduce consumption; protect water for the future; enhance source protection; or better protect public health. In addition, approval of a report or a plan under the act will have important fiscal and other implications for drinking water consumers serviced by a regulated entity. Consequently, there should be public notice and comment opportunity, for example, via the Environmental Bill of Rights registry, prior to Ministerial approval of reports or plans.

To the extent that consumption of water services is affected by rate price, increasing block rates and per unit flat rates are the most conducive to conservation.³² CELA submits that only these methods of charging rates should be allowed under Bill 175.

²⁹ Pollution Probe pages 17, 18

³⁰ “Water Management in France”, Ministère de l’Aménagement du Territoire et de l’Environnement Direction de l’Eau <http://www.waternunc.com/gb/ageau2gb.htm> accessed November 21, 2002

³¹ Section 11(7) of CELA’s Model Act

³² C.N. Watson, CELA, page 4-7

The need for such a provision is demonstrated in the AMO report (Ref. AMO study) to the Walkerton Inquiry which reported that the number of municipalities charging declining block rates increased from 29 in 1997 to 68 in 1999!³³

CELA agrees with the OWWA/OWMA submission to the Walkerton Inquiry that flat rate structures are appropriate for the smallest systems (under 300 homes). Increasing block rates should normally be charged and as the OWWA paper stated, “declining block rate structures should be discouraged.”³⁴

RECOMMENDATION #10: Bill 175 should permit flat rate structures for small systems (under 300 homes) and increasing block rates for all other systems. Bill 175 should prohibit declining block rate structures.

Existing Mechanisms

There are a variety of existing mechanisms for funding municipal water and sewer systems. Bill 40 in 1993 provided for a variety of municipal financing mechanisms and arrangements with private partners.³⁵

C.N. Watson noted in the CELA paper that a full range of arrangements from fully public to fully private is contemplated. A wide range of facilities are included in Reg. 46/94 and include water, sewage, drainage and flood control.³⁶ Among the issues to be dealt with in any arrangements are minimizing environmental impacts, and maximizing economic benefits, among others.³⁷ AMO, Good Roads and Municipal Engineers submitted to the Walkerton Inquiry that they have extensive experience and capability to create cost-savings by creating economies of scale such as bulk purchasing, pooled investments, joint operating agreements, or having another municipality operate the service. They

³³ Association of Municipalities, Financing, page 38

³⁴ Ref. C.N. Watson OWWA, page 5-1

³⁵ *Municipal Act*, R.S.O., 1990, c. M. 45 as amended, section 210.1

³⁶ C.N. Watson, CELA, page 7-2

³⁷ C.N. Watson, CELA, section 7.3 page 7-5

referenced the Municipal Act authority whereby two or more municipalities may establish a joint operating agreement for specific services, section 207(5).³⁸

Another option is that a municipality by section 221 of Municipal Act can extend loans to landowners to construct works, thereby dealing with private well quality problems.³⁹ For most municipalities, raising capital is not an issue. New services and growth have existing mechanisms for financing and the cost of upgrading existing systems is only 1/5th to 1/10th of the available capital to municipalities. Capital costs, interest rates and return on investment mean that private systems may be considerably more expensive than present costs being paid by consumers.⁴⁰

Demonstrated improvements have resulted from regionalization of water services, as was seen with creation of Regions in the 1970's and as is demonstrated by the Chatham-Kent case study in the C.N. Watson report. Benefits included more specialized staff, a broader rate base, better planned allocation of resources, and standardization of quality of service.⁴¹

In its paper, AMO et al cited the Town of Napanee as an example where a joint operating agreement benefited small municipalities. For example, rates were negotiated, and all residents received equal service priorities. The larger municipality saw cost per customer decrease with the additional rate base. In Napanee, each municipality finances their own distribution system capital costs thus respecting each municipality's land use plan.⁴² The AMO submission argued against a "one-size-fits-all" approach to drinking water system structure, governance and financing. Circumstances vary greatly across the province.⁴³ Similarly, the OWWA/OWMA paper argued that municipalities ought to retain flexibility with respect to how to finance their systems to meet provincial standards. Such options would include hiring staff, retaining consultants, sharing

³⁸ Association of Municipalities of Ontario et al Issues 7, 8,

³⁹ C.N. Watson, CELA, page 8-3

⁴⁰ C.N. Watson, CELA, pages 7-7, 7-8

⁴¹ C.N. Watson, CELA, page 8-3

⁴² Association of Municipalities of Ontario et al, Issues 7, 8

resources, with adjacent municipalities, voluntary amalgamations of water systems and other inter-municipal arrangements.⁴⁴

CELA agrees with the submissions of AMO and OWWA/OWMA to the Walkerton Inquiry, that municipalities should retain the variety of approaches they now have and the flexibility to finance their systems as best fits that municipality's circumstances. However, the premise for this statement is that the minimum requirement will be to have a viable long term financing plan that meets all provincial standards including the municipalities' components of source protection.

RECOMMENDATION # 11: Bill 175 and its regulations should expressly provide for municipalities to retain the variety of approaches to financing as they currently possess.

Who is Regulated?

One glaring deficiency with the proposed Bill 175 is that it is stated to apply to persons and entities "designated by regulation as regulated entities". Accordingly it is difficult to evaluate the scope of application of the Bill without knowing who will be the regulated entities.

During the debates in 1993 on Bill 107, which transferred water and sewage systems held by the Province to municipalities, there was wide public concern voiced about the entrance of the private sector into the business of providing these services. Those concerns remain. Today, there is a variety of private sector involvement in Ontario water and wastewater services. These range from public/private partnerships to the franchising of operations by municipalities to the private sector. The risk of private arrangements is the potential for loss of control over the utility. Public Policy Consultant, Neil Freeman points out some of these risks in his 1997 report *Ontario's Water Utilities: Governance Models*.

⁴³ Association of Municipalities of Ontario et al, Issues 7, 8

⁴⁴ C.N. Watson, OWWA, page 2-5

- "Public accountability is a serious issue in water utility operations because of the monopoly nature of the business..."
- A related problem is that the franchise has an incentive to out-bid competitors for the operation of the water franchise, knowing that the cost can be charged back to customers through rates...
- In the near future Ontario can expect customers and especially business to make performance demands on utilities and be compensated for loss in the event of poor performance by the utilities."

These risks have certainly been bought home to us over the past month in the problems Ontario is experiencing with the deregulated electrical sector.

In order to ensure this does not happen to water and wastewater, Ontario needs to consider the further need to regulate the private sector. Currently the regulatory framework in this Bill and in the SDWA, omits any rigorous consumer protection.

In England and Wales the private sector sewage and water companies have their own regulator Ofwat (the Office of Water Services) which works with their Drinking Water Inspectorate to protect the consumer. The mandate of Ofwat includes: limiting charges, ensuring investment of revenues into infrastructure renewal, setting timetables for this renewal, carrying out dispute resolution, and protecting public interest from misuse of monopoly powers. The regulation setting up this system requires an Ofwat National Consumers Council and ten regional Customer Service Committees. Until Ontario provides similar consumer protections, Ontarians will remain vulnerable to the vicissitudes of these unregulated markets.

RECOMMENDATION #12: Bill 175 should be amended to include broad consumer protection provisions.

Minister's Orders

There are distinct advantages to municipalities retaining the management and financing of their water and wastewater systems. Retaining direct control of their systems allows

for more public scrutiny and consultation. Municipal finance advantages include their ability to borrow at reduced rates and to collect development charges among other matters and to be subject to reduced GST provisions. C.N. Watson's study for CELA concluded that even most small municipalities could keep water affordable while replacing infrastructure if they plan for the long term utilizing lifecycle costing.

Section 21 of Bill 175 provides for broad Minister's Orders for a regulated entity "to do or refrain from doing such things as the Minister considers advisable to ensure that the entity pays the full cost . . . Without limiting the generality . . . an order may require the regulated entity to generate revenue in a specified manner or from a specified source to pay all or part of the cost of providing the services and to make specified or necessary amendments to existing contracts, resolutions or by-laws."⁴⁵

The Minister's Orders should be bounded by purposes specified in the Act, and/or by express standards or duties.

RECOMMENDATION # 13: Minister's Orders should be bounded by purposes specified in the Act, and/or by express standards or duties.

Inappropriate Delegation

Section 23 of the Bill contains a delegation clause that is far too broad. It would empower the Minister to delegate "any of his or her powers or duties under this Act . . . to any person or entity." There is no statement as to the purposes of such delegation, no limitation on the delegation power and no provision as to the type of entity to which the powers may be delegated. Anything from an industry association to a private entity to an agency could be envisaged. The government should clearly state in the legislation its intention as to whom it will be delegating the powers under the Act; if there is no present intention, this section should be deleted.

⁴⁵ Bill 175, section 21 (2) and (3) excerpts

RECOMMENDATION # 14: Bill 175 should provide expressly the person or entities to whom powers may be delegated and those specific powers should be specified. If there is no present intention for delegation, section 23 should be deleted from the Bill.

Lack of Adequate Reporting

Bill 175 does not require the Minister to aggregate, summarize or report upon trends or statistics found in the numerous full cost reports or plans to be submitted by the individual regulated entities. Without provincial level monitoring and reporting, there will be no overview of the state of the water system across Ontario. Bill 175 should require the Minister to periodically report to the Legislature every five years. Furthermore, the approved plans and reports should be accessible to the public via a water database or registry.

RECOMMENDATION #15: Bill 175 should require the Minister to aggregate, summarize and report upon trends and statistics derived from the full cost reports and plans and periodically report to the Legislature on a regional and provincial basis every five years. Furthermore, the approved plans and reports should be accessible to the public via a water database or registry.

Need for an Integrated Approach to Water Policy in Ontario

Because it is not expressly linked to other water policy and legislation, especially the yet to be developed source protection framework, Bill 175 as drafted runs counter to the recommendations of almost all of the parties to the Walkerton Inquiry and of the Commissioner, which universally called for an integrated water policy in Ontario.

CELA agrees that Ontario's water policy should include "full cost recovery" for delivery of water and waste water services, but that doing so should be in the context of specified

goals, with a much more inclusive, environmentally rational definition of the components of “full costs”.

CELA RECOMMENDS: Defer Bill 175 for Integration with Source Protection Framework

Because municipalities already have a variety of funding mechanisms and because many if not most municipalities are already planning for full cost recovery through that variety of mechanism, Bill 175 is not urgently required. It certainly is not required in advance of the watershed source protection framework.

Since funding of the source protection framework will be a critical issue and since both source protection and overall system financing and management must be integrated, CELA submits that Bill 175 should be deferred until it can be integrated with the source protection framework.

All of which is respectfully submitted

This 27th day of November, 2002

Canadian Environmental Law Association

A handwritten signature in black ink, appearing to read 'Theresa A. McClenaghan', written in a cursive style.

Theresa A. McClenaghan, Counsel

References:

C.N. Watson, prepared on behalf of CELA at Walkerton Inquiry, “Financial Management of Municipal Water Systems in Ontario”,

<http://www.walkertoninquiry.com/part2info/partieswithstanding/pdf/CELA18financial.pdf>

Pollution Probe, “The Management and Financing of Drinking Water Systems: Sustainable Asset Management”

A submission to the Walkerton Inquiry by Pollution Probe, April 2, 2001

<http://www.walkertoninquiry.com/part2info/partieswithstanding/pdf/pollutionprobe.pdf>

Strategic Alternatives, Michael Fortin, Enid Slack Consulting Inc. and Mike Loudon, “Financing Water Infrastructure” Commissioned Paper 16 by 2002

http://www.walkertoninquiry.com/part2info/commissuepapers/14alternatives/16-Strategic_Alternatives.pdf

Association of Municipalities of Ontario, Municipal Engineers’ Association and the Good Roads Association, “Financing of Municipal Waterworks: Analysis and Case Studies”, June 2001, submitted to the Walkerton Inquiry Part II

<http://www.walkertoninquiry.com/part2info/partieswithstanding/pdf/AMO.pdf>

Association of Municipalities of Ontario, Ontario Good Roads Association and Municipal Engineers Association, September 14, 2001, Walkerton Inquiry, Part II, Public Meeting #7 & 8: Management of Water Providers; Laboratories

<http://www.walkertoninquiry.com/part2info/partieswithstanding/pdf/AMOograMEAph7and8.pdf>

C.N. Watson and Associates Ltd., Review of Various Papers Submitted to the Walkerton Inquiry Commission Regarding Financial Matters on Behalf of the Ontario Municipal Water Association and the Ontario Water Works Association, September 2001.

<http://www.walkertoninquiry.com/part2info/partieswithstanding/pdf/OWWA14.pdf>