

Source Water Protection in Indigenous Communities

Presentation to the Chiefs Of Ontario
Thunder Bay, Ontario

Kerrie Blaise, Counsel
Canadian Environmental Law Association
March 4, 2019

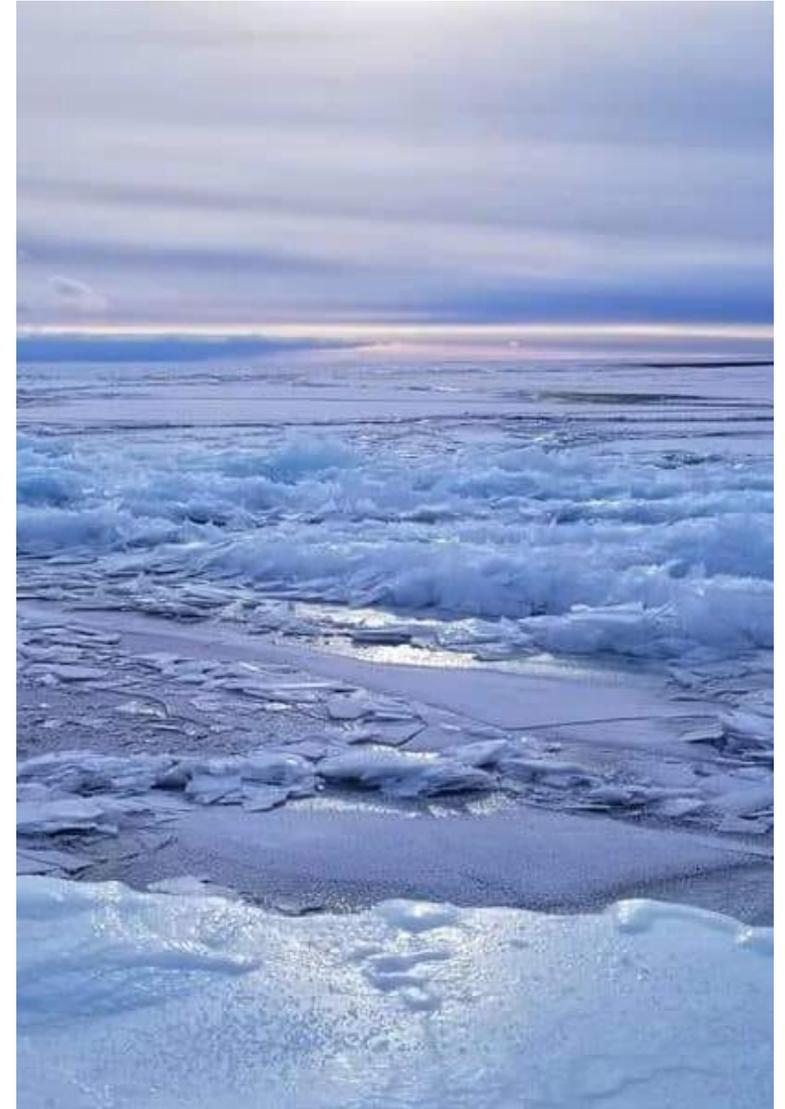
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Introduction

Who is CELA?

- Public interest law organization, funded by Legal Aid Ontario
- Founded in 1970
- Core mandate is to provide access to justice, use and improve laws that protect human health and the environment
- **Northern Services pilot program launched in Sept 2018** -
<http://www.cela.ca/collections/justice/northern-services>



Overview

- Multi-barrier approach to protecting drinking water
- Community-based source water protection planning
 - Types of contaminant pathways
 - Legal tools to protect source water
- **Case Study** Chippewas of the Thames, Munsee-Delaware and Oneida Nation (CMO) Source Water Protection Project

Why Source Water Protection?

Need for multi-barrier, watershed approach

Walkerton, ON (2000)

- 7 people died, 2300 became seriously ill from bacterial contamination of drinking water
- Walkerton Inquiry finds inconsistent water quality standards apply across the province

Kashechewan, ON (2005)

- Water crises caused partly by drinking water intake located downstream of sewage effluent

“First Nations reserves [have] some of the poorest-quality water in the province.” “There is no justification for permitting lower public health standards for some residents of Ontario than those enjoyed by others.”

The Honourable Dennis O'Connor, Report of the Walkerton Inquiry (p. 17, 487)

Post-Walkerton Lessons:

The first barrier is the protection of the sources of drinking water

Watershed approach:

- Includes all activities impacting water quality throughout the watershed

Multi-barrier approach:

- From source water protection to treatment technology, distribution system maintenance, water quality monitoring, and emergency response planning
- If one barrier should fail, there are more safeguards to prevent contamination

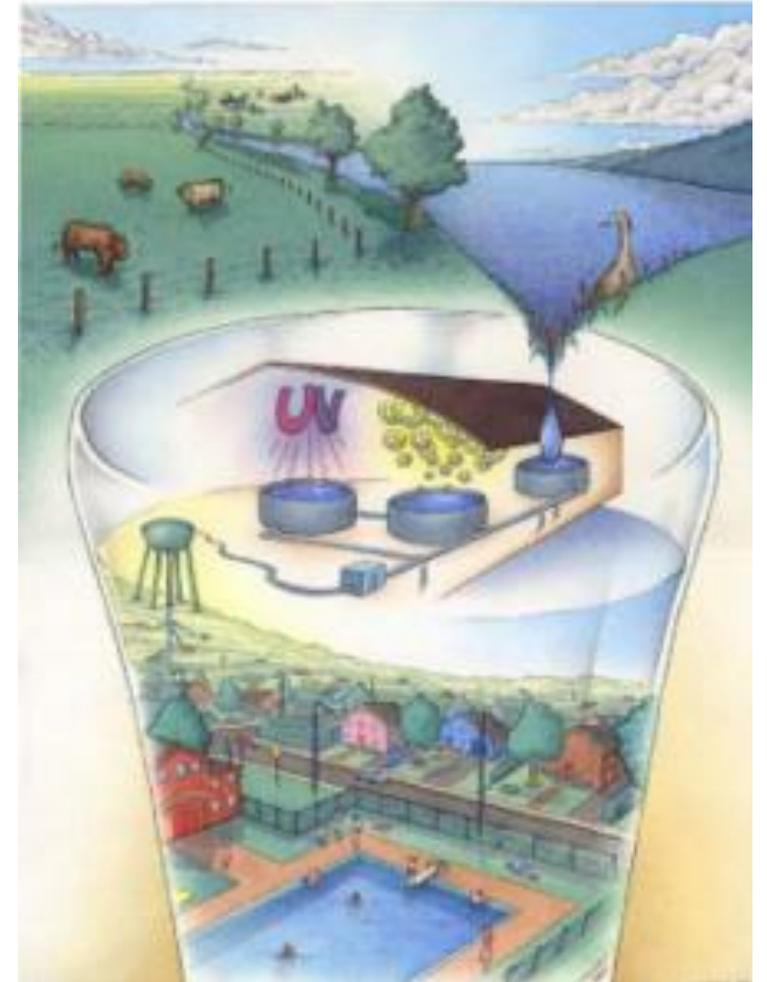


Image Source: Indigenous and Northern Affairs Canada, 2004

What is Source Water Protection?

Definitions

Source water

- Surface water or ground water
- Feeds private wells and municipal drinking water systems
l.e. lakes, rivers, wetlands, underwater aquifers

SWP – the first “barrier”

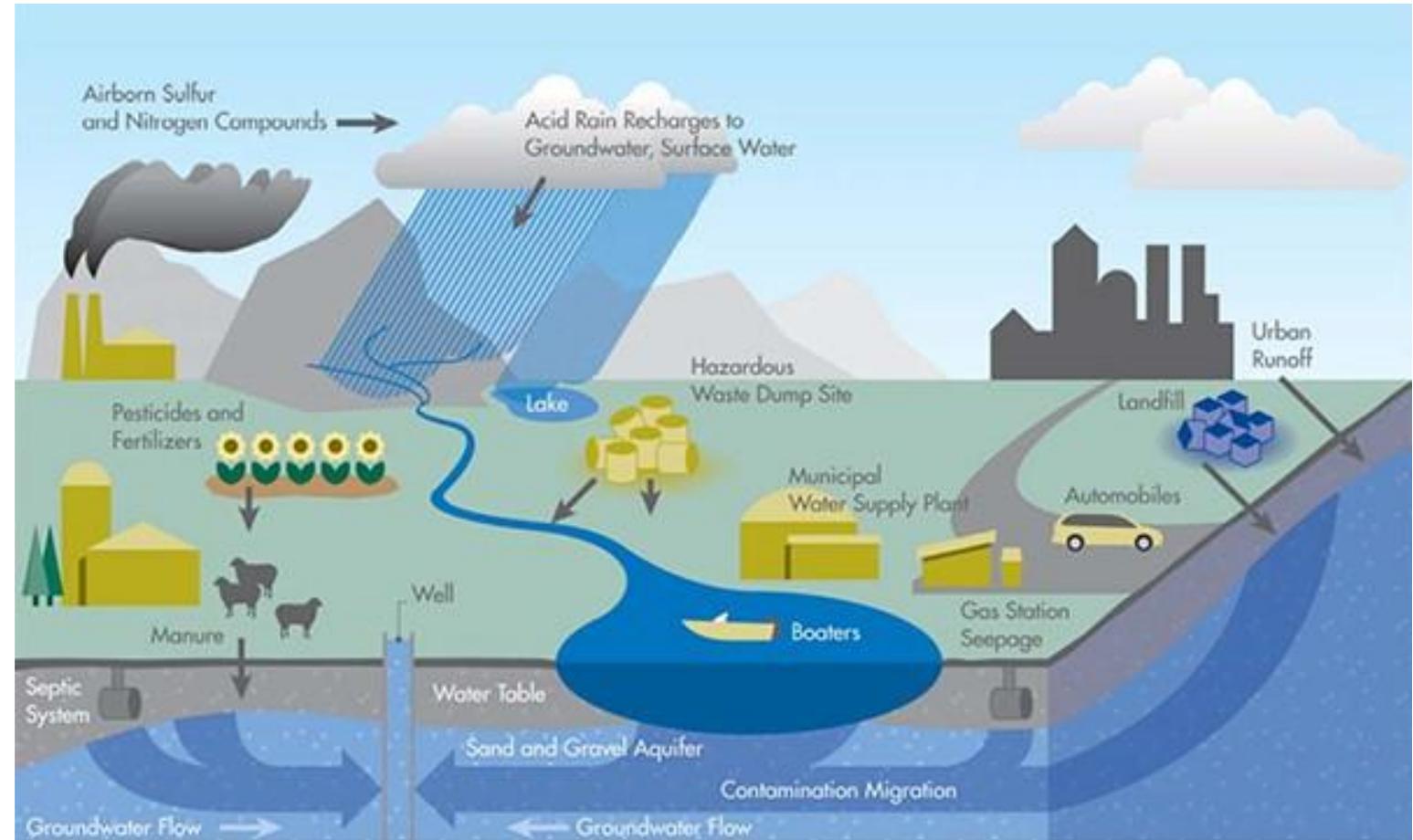
- Preventing source water contamination or depletion
- Common threats include run-off from farms, sewage disposal, industrial waste, fuel storage tank leaks and others
- Easier and cheaper to protect, than to clean up a water source after contamination is found

Barriers in a multi-barrier approach

- **Watershed-based** source water protection
- **Monitoring** the supply at the intake
- **Treating** water at the point of supply and in the distribution system
- Monitoring treated water and distribution system
- **Training** of water operators and certification of labs
- Robust **reporting** of adverse results as against health based standards
- Prompt **responses** to adverse results – warning the public and mitigating the issue

Potential Sources of Contamination

Point and non-point sources

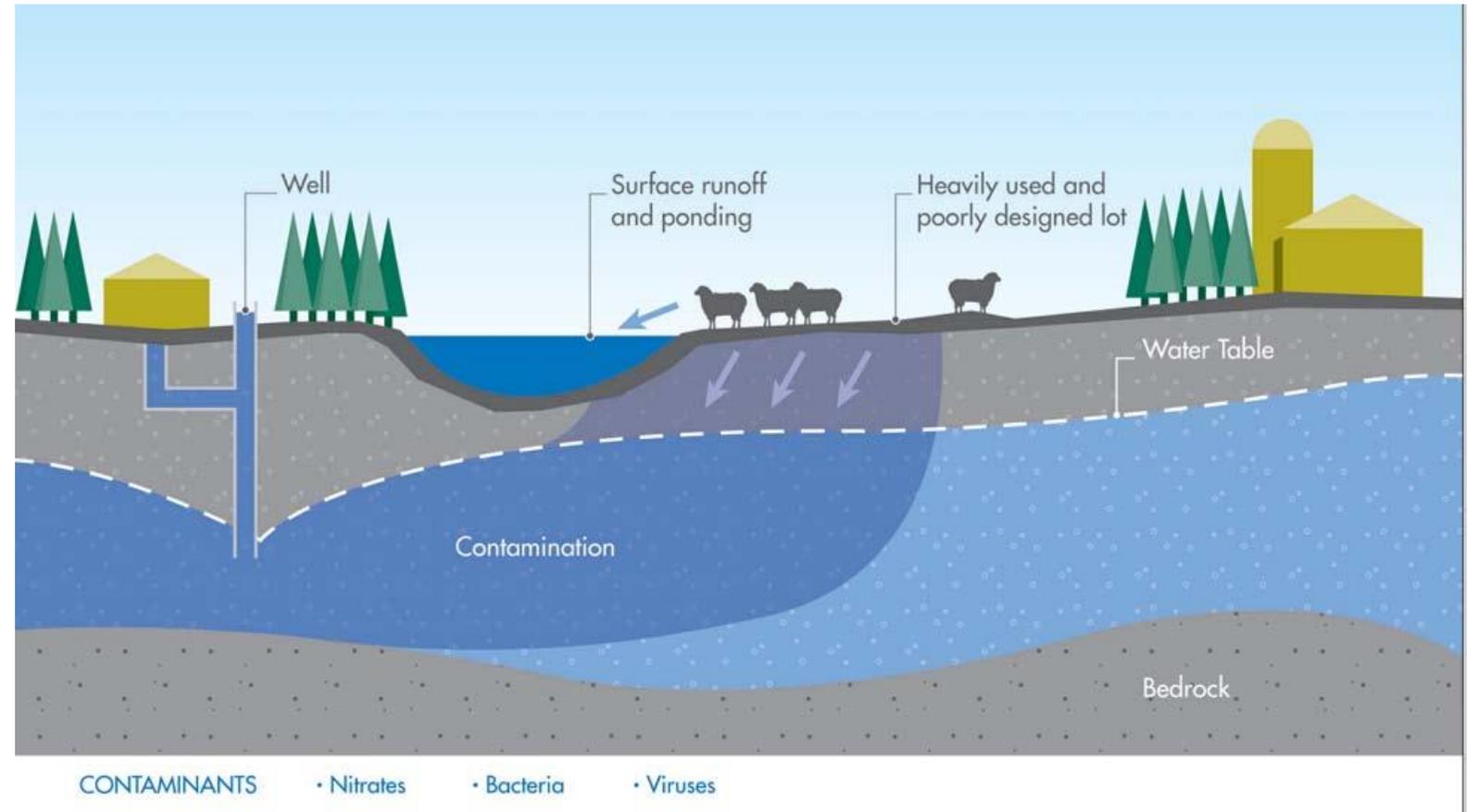


Source: Pollution Probe – The Source Water Protection Primer 2004

Categorizing the Threats *Properties*

- **Physical** – e.g. turbidity from non-point sources
- **Microbial** – e.g. pathogens from sewage effluent to water or manure spreading on land
- **Radioactive** – can be natural or anthropogenic – eg radon is present naturally in many areas of Canada
- **Inorganic** – e.g. metals such as arsenic or lead, or nitrates from fertilizers
- **Organic** – e.g. Volatile Organic Chemicals such as degreasing or dry cleaning solvents

Identifying Potential Pathways



Source: Pollution Probe – The Source Water Protection Primer 2004

Source Water Protection for Safe Drinking Water

- Looking upstream to source water protection is one essential step in protecting drinking water
- Other efforts to implement a multi-barrier approach are also essential such as selecting appropriate treatment for the types of contaminants in the source water that cannot be prevented
- Source water protection can also help protect drinking water in contexts without a central treatment system such as communities where people take water directly to their homes from their own wells or a lake

Source Water Protection *Plans and Resources*

Chippewas of the Thames, Munsee-Delaware, Oneida Nation of the Thames

- Funded by the Law Foundation of Ontario
- **Toolkit** and **5 legal tools** available in CELA's online collection at:
<http://www.cela.ca/source-water-protection-indigenous-communities>

INAC, First Nations On-Reserve Source Water Protection Plan:
<https://www.aadnc-aandc.gc.ca/eng/1398369474357/1398369572276>

Pays Plat and Grassy Narrows First Nation

- Developed during 2013-2014 (see <http://www.cela.ca/first-nations-source-protection-toolkits>)
- Intended for use in other communities to protect source water from contamination
- **Toolkit** available at:
<http://www.cela.ca/publications/first-nations-reserve-source-water-protection-legal-toolkit>

Source Water Protection in Indigenous Communities

Collection of legal tools, policies and resources for the protection of source waters

Since 2017, the Chippewas of the Thames First Nation, the Oneida Nation of the Thames, and the Munsee-Delaware Nation (CMO) and the Canadian Environmental Law Association (CELA) have undertaken a collaborative, community-based project to identify threats to source waters in the Indigenous communities along the Thames River and, develop legal tools and policy aimed at their protection.

A short film, introducing this tri-nation-CELA initiative, the meaning of water and its importance to the CMO communities can be viewed at: <https://youtu.be/wlnig0ou35o>

With funding from the Law Foundation of Ontario, the CMO communities in collaboration with CELA, devised legal and policy tools to address concerns from community members, whose historical use and enjoyment of the Thames River had been diminished, because of threats from industrial discharges and spills, sewage overflows, and the impact of phosphorus loading and pesticide use.

In response to threats to source water identified and prioritized by the CMO communities, an Indigenous Source Water Protection Toolkit was created. The Toolkit provides a range of legal tools which can be used in Indigenous communities to protect source waters and mitigate threats.

As this toolkit is a living document, we encourage all readers to refer to the websites of the individual CMO communities for updates regarding the use of these legal tools by community members, Chief and Council, and administration.



Resource Title

January 7, 2019

Legal Toolkit - Source Water Protection in Indigenous Communities

Download PDF file

January 2019

Legal Tool 1: By-laws as an Authority for Environmental Protection and Enforcement

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Legal Tool 2: Consultation and Accommodation Protocol to Advance Source Water Protection

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Legal Tool 3: Public Environmental Rights and Appeals Related to Source Waters

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Legal Tool 4: Considering Source Water within Agricultural Leases on First Nation Reserve Lands

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January 2019

Legal Tool 5: Protecting Source Waters Under the Clean Water Act

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Source Water Protection *A CMO-CELA Project*

CMO-CELA
Source Water
Protection
Project
An Introduction

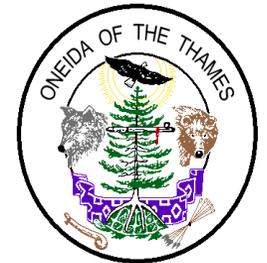


<https://www.youtube.com/watch?v=wlnigoou350&feature=youtu.be>

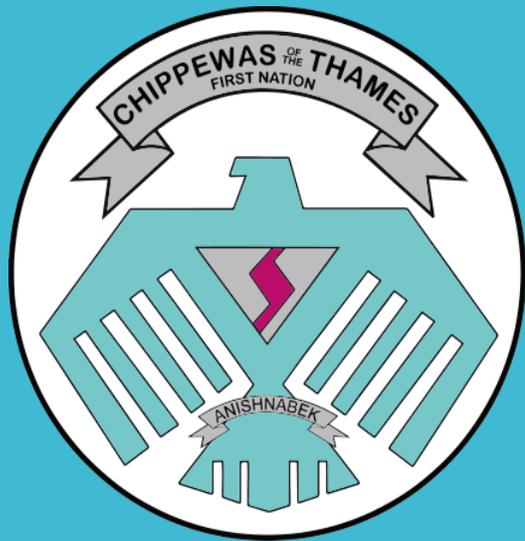
Source Water Protection *Project Profile*

The Chippewas of the Thames, the Oneida Nation of the Thames, and the Munsee Delaware Nation (“CMO”) First Nations with CELA collaborated to:

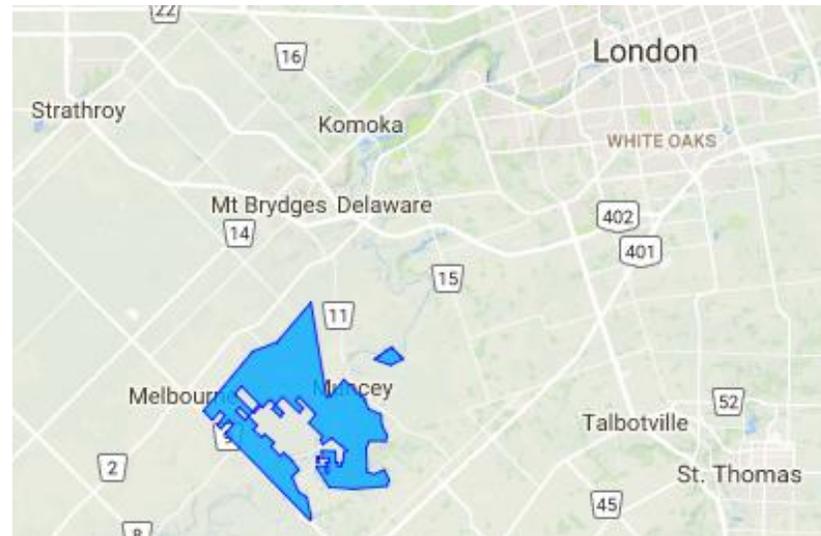
- Identify, assess, and mitigate actual and potential threats to sources of drinking water
- Develop legal and policy tools to protect and improve our source waters



Chippewa of the Thames *Project Partner*



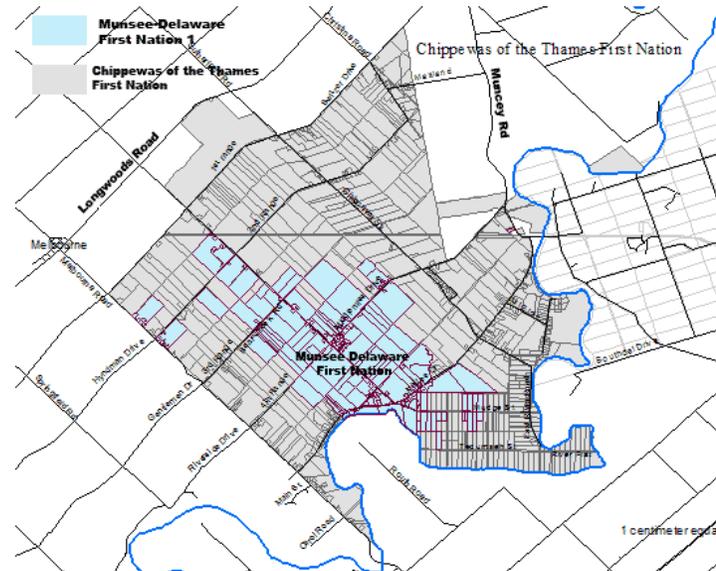
- Deshkan Ziibiing edbendaagzijig, **“those that belong to Antler River”**
- Ancestral lands include lands and waters between Lake Huron to the north and Lake Erie to the south, and eastward from St. Clair and Detroit rivers to the Mississaugas of New Credit
- Inherent rights grounded in Creator’s gift of lands and waters – embodied in (and not created by) several treaties



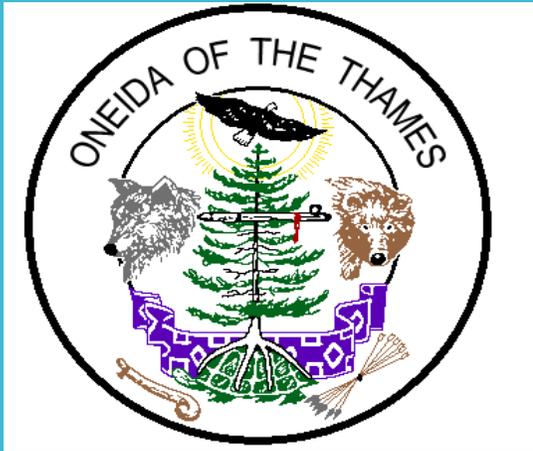
Munsee- Delaware *Project Partner*



- Ancestors of the Munsee-Delaware Nation came to then-Upper Canada from SE New York, northern New Jersey and eastern Pennsylvania following American Revolution, 1783.
- Signatories to a number of Treaties of Alliance with the British Crown during the 18th century.
- A Wampum Belt representing the Treaty by which Munsees moved into Upper Canada is on display at the Museum of Natural History in New York



Oneida of the Thames *Project Partner*



- OnNyota'a:ka – Oneida Nation **“People of the Standing Stone”**
- Originate from present day New York along the Finger Lakes; 1 of 5 original nations that make up the Haudenosaunee confederacy
- More than a 175 years later, Oneida Nation of the Thames continues to live peacefully and co-operatively with the land and indigenous and non-indigenous neighbours

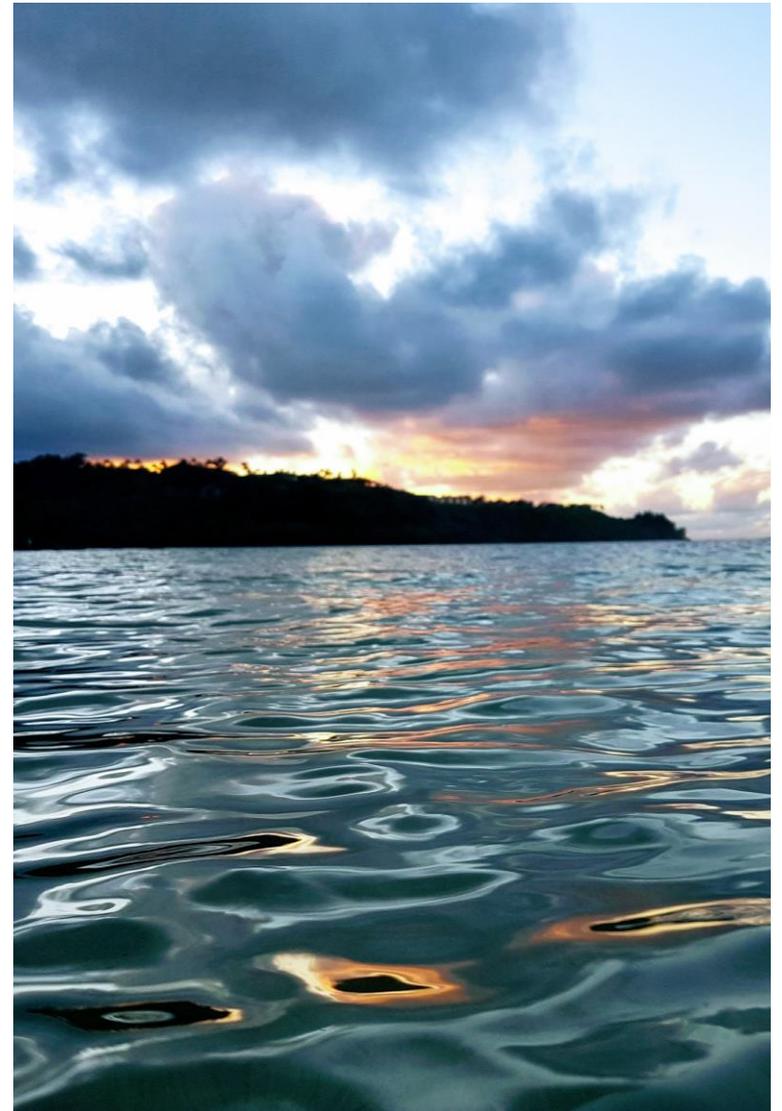


A 5-Phased Approach to Community-Based SWP

- **Phase 1:** Form a Source Water Protection Steering Committee
- Phase 2:** Identify the community's source water protection challenges
- Phase 3:** Consult with the communities to determine priority threats and issues
- Phase 4:** Develop legal tools to address threats to source water protection
- Phase 5:** Communicate and share project results

Source Water Protection *Project Layout*

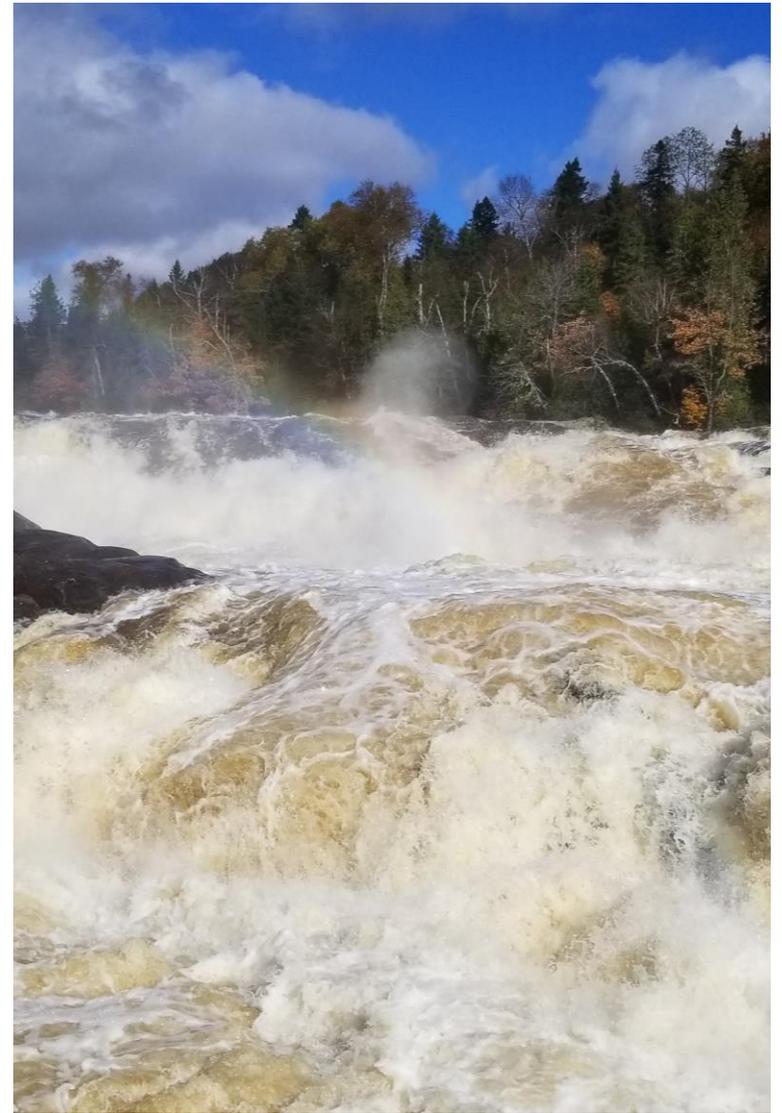
- 6 workshops in the community, including input from youth and elders
- With guidance from the community-based steering committee, CELA has drafted legal instruments to respond to source water threats identified and prioritized by the communities
- Youth ambassadors share report and outcomes with community members



Source Water Protection

*Seeking
community
feedback and
threat
prioritization*

- What concerns do you have about the health of the watershed?
- Have you noticed any changes in its quality or health?
- Do you have any traditional knowledge involving water or how to combat the threats to the water?



Source Water Protection *Community- based decisions*

- Communities have to decide which measures they wish to adopt, and it's best if they are broadly supported, with mandatory tools or enforcement actions limited to the most critical issues or egregious action
- There are often multiple approaches that can be taken and each community needs to decide which one works best for the situation – e.g. will relying on **outreach and education** work, or in another case should there be adoption of mandatory instruments such as permitting systems or **by-laws?** Sometimes incentives can help e.g. funding to upgrade septic systems (a source of pathogens) or older water wells (a pathway to groundwater).

Source Water Protection

*Technical
expertise and
watershed
monitoring*

- Water quality monitoring report by Dr. Najafi and Dr. Bahrami (Western University) gave quality of water a **Grade of C**
- Water supply is considered a wellhead protection area
- Based on the Canadian Council of Ministers of the Environment Water Quality Index, the waterbodies sampled are classified as **'Poor'**
- Monitoring of creeks is necessary to detect presence of contaminants from nearby agricultural activities

Legal Tool 1

Bylaws

Issue

- Lack of effective or comprehensive federal environmental legislation for SWP

Solution

- Environmental protection can be addressed through the enactment of by-laws in relation to First Nation lands under the *Indian Act* or the *Framework Agreement on First Nation Land Management*
- By-laws drafted related to (1) agricultural and nutrient management; (2) waste management, (3) septic systems and inspection and (4) wetland protection

Legal Tool 2: *Consultation and Accommodation Protocol*

Issue

- Developments outside of a community (ie. the siting of landfills or the issuance of water taking permits) can cause or exacerbate threats to source water

Solution

- Consultation and Accommodation Protocol with SWP measures helps to ensure concerns about source water protection considered & central to decision-making and discussions
- Template also potentially applicable for Terms of Reference or Community Benefit Agreements

<http://www.cela.ca/source-water-protection-indigenous-communities>

Legal Tool 3: *Environmental Bill of Rights*

Issue

- Decisions being made outside of the community which could have repercussive effects on the health and quality of source waters

Solution

- Environmental rights of all Ontario residents recognized in the *Environmental Bill of Rights*
 - Facilitates public participation in environmentally significant decisions with the aim of protecting, conserving and restoring the integrity of the environment.
 - Public comment option available online via Environmental Registry

<http://www.cela.ca/source-water-protection-indigenous-communities>

Legal Tool 4: Agricultural Leases

Issue

- Leases allow farming on reserve land, however, often an inability to oversee farm tenants' actions, methods of farming

Solution

- A template lease under the *Indian Act* was drafted which includes provisions that establish the rights and obligations of the landlord and tenant
 - Provisions can dictate how the land will be used
 - Clauses relating to methods of farming (*ie.* fertilizer application)

<http://www.cela.ca/source-water-protection-indigenous-communities>

Legal Tool 5: *Clean Water Act*

Issue

- Inclusion in source water protection planning

Solution

- Mechanisms for source water protection available to First Nation communities under the *Clean Water Act*
- Ontario mandates that Source Protection Committees (SPC) consult with First Nation communities in their source protection areas and solicit their participation in the process, either through working groups or as members of the SPC.

<http://www.cela.ca/source-water-protection-indigenous-communities>

With Thanks and In Remembrance

- We join in mourning the loss of Josephine Mandamin, a most unforgettable advocate for water
- We wish to pay tribute to the late George Henry, former Councillor and Elder, at the Chippewas of the Thames First Nation who was instrumental in the vision for pursuing the source water protection project; he was passionate passing knowledge on to future generations, and including the community deeply in decision making.
- Sincere thanks to Theresa McClenaghan, CELA's executive director and counsel for years of support and expertise in water law ; Rizwan Khan (counsel, CMO-CELA source water protection project)
- CELA appreciates the support of our funder, Legal Aid Ontario, along with funders who have supported our water source protection work with First Nations communities in Ontario, namely the Law Foundation of Ontario and Tides Canada



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Environmental Justice

CELA works to protect human health and our environment by seeking justice for those harmed by pollution and by working to change policies to prevent such problems in the first place. For almost 50 years, CELA has used legal tools to increase environmental protection and safeguard communities. As a **Legal Aid Clinic**, our top priority is to represent low-income individuals and communities and to speak out for those with less

Staff Blog

[BLOG - Chronicles from the North](#)

Kerrie Blaise | 4 weeks 11 hours ago

Last month, CELA was excited to announce its expansion of legal services in Northern Ontario. Six weeks into the pilot project, we are happy to share what we've learned and how

CELA's Lawyer Referral List

News and Events

Nov 16 2018

Nearly half a million concerned citizens call for immediate ban on bee-killing neonic pesticides in



Thank you!

kerrie@cela.ca

www.cela.ca

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<http://www.cela.ca/signup>



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Publication Number: 1252
ISBN #: 978-1-77189-958-1