

November 26, 2019

**BY EMAIL**

Naomi Herold  
Water Policy Section – Environmental Policy Branch  
Ministry of the Environment, Conservation and Parks  
40 St. Clair Avenue West, 10<sup>th</sup> Floor  
Toronto, ON  
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Dear Ms. Herold:

**RE: Proposed Amendments to Regulation 903 (Wells)  
ERO #013-1513**

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On behalf of the Canadian Environmental Law Association (CELA), we are writing to provide comments to the Ministry of the Environment, Conservation and Parks (MECP) in relation to proposed changes to Regulation 903 (Wells) under the *Ontario Water Resources Act (OWRA)*.

Despite long-standing public concerns about the continuing inadequacy of Regulation 903 in its entirety, the MECP is only proposing three regulatory amendments at this time:

- modify minimum insurance requirements for licensed well contractors;
- update well casing standards for new water supply wells; and
- allow shallow well screens to be placed in new test holes and dewatering wells.

CELA welcomes this opportunity to comment on these proposed changes, and we appreciate that the MECP's draft regulatory text has been included within the ERO notice for review/comment purposes.

We have carefully considered the MECP's proposals on the basis of CELA's lengthy experience in drinking water matters, and we have evaluated the implications of these changes from the public interest perspective of CELA's client communities.

For the reasons outlined below, CELA concludes that the proposed amendments are relatively minor in nature, but they still require some further revision or clarification in order to enhance their efficacy and enforceability.

More importantly, CELA notes that the MECP's modest proposals do not address the systemic shortcomings of Regulation 903 that have persisted for many years. Similarly, they do not implement various commitments made by the MECP in response to CELA's most recent Application for Review of Regulation 903, as discussed below.

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Accordingly, CELA recommends that the MECP should go back to the “drawing board” in order to immediately develop (with meaningful public and stakeholder input) substantive improvements to Regulation 903 that are long overdue.

## **PART I - INTRODUCTION**

### **(a) Background**

CELA is a public interest law group that represents low-income clients and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues. For example, CELA served as counsel for Walkerton residents in the public inquiry into the Walkerton Tragedy in 2000, when seven persons died and thousands were sickened after consuming contaminated drinking water supplied by a municipal well. CELA also undertakes law reform advocacy and public legal education in relation to drinking water safety.

In recent years, CELA’s water-related work has identified the need to improve and strengthen Regulation 903 under the *OWRA*. In general terms, Regulation 903 is intended to help protect the environment and public health by establishing provincial requirements for the construction, cleaning, maintenance, abandonment and reporting of wells throughout Ontario. In addition, Regulation 903 creates licensing and training requirements for well contractors (businesses) and technicians who work in the well construction sector across Ontario.

However, CELA concludes that the current regulatory requirements remain deficient, incomplete and difficult (if not impossible) to enforce for various reasons. Accordingly, CELA recommends that the MECP should extend and reframe the present consultation process to develop a broader suite of regulatory reforms that are necessary to finally transform Regulation 903 into an effective mechanism for safeguarding environmental and public health across the province.

**RECOMMENDATION 1: The MECP should immediately develop and widely consult upon other proposed amendments to Regulation 903 that are necessary for the purposes of protecting public health and the environment.**

### **(b) CELA’s Previous Involvement in Regulation 903 Reform**

In the Part 2 Report of the Walkerton Inquiry, Mr. Justice O’Connor correctly recommended that “Regulation 903 should be updated and reviewed if necessary to ensure that it requires best construction practices.”<sup>1</sup> Therefore, in the wake of the Walkerton Inquiry, CELA has undertaken various steps to improve the content, and to enhance the enforceability, of Regulation 903.

For example, in addition to commenting on regulatory changes and “Requirements and Best Management Practices” manuals proposed from time to time by the Ontario government, CELA filed its first Application for Review of Regulation 903 in late 2003, pursuant to Part IV of the *Environmental Bill of Rights, 1993* (“*EBR*”). However, in early 2004, the MECP informed CELA that it would not conduct the requested review of Regulation 903.

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<sup>1</sup> Part 1 Report of the Walkerton Inquiry (2002), page 480.

The MECP's refusal prompted sharp criticism from the independent Environmental Commissioner of Ontario:

The well regulation should require best construction practices, as recommended by Mr. Justice O'Connor. However, concerns have been raised (for example, through an EBR application...) that the new well regulation, as currently drafted, does not meet those intentions, especially with respect to private domestic wells. For instance, there are concerns that the regulation does not require well constructors to verify, through water testing, that new wells have indeed been disinfected. Nor is there a requirement that well contractors disinfect private wells after carrying out repairs...

RECOMMENDATION 11: The ECO recommends that MOE ensure that key provisions of the Wells Regulation are clear and enforceable, and that the ministry provide a plain language guide to the regulation for well installers and other practitioners (emphasis added).<sup>2</sup>

In light of the MECP's continuing inaction on disinfection and other significant issues, CELA filed its second *EBR* Application for Review of Regulation 903 in late 2013. In essence, CELA's Application for Review in 2013 again raised serious environmental and public health concerns about the ongoing inadequacy of key provisions of the *OWRA* and Regulation 903.

In 2014, the MECP agreed with CELA that it was in the public interest to review the *OWRA* and Regulation 903, and MECP staff proceeded to conduct the *EBR* review. However, there were no opportunities for CELA to meaningfully participate in the MECP's internal review process.

Upon completion of the *EBR* review in late 2016, the MECP informed CELA in writing about the outcome of the review. In short, the MECP's decision letter indicated that it would not pursue the specific legislative and regulatory improvements suggested in CELA's Application for Review.

Instead, the MECP decision letter mostly proposed some inconsequential changes to the Ministry's non-binding guidance manual for water wells. At the same time, the MECP committed to undertake a small handful of housekeeping amendments to Regulation 903. However, to CELA's knowledge, the MECP's promised actions have largely been delayed or non-existent to date, as described below.

### (c) Public Interest Rationale for Strengthening Regulation 903

Regulation 903 has been made under the *OWRA*, which defines the public interest purpose of the legislation as follows:

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<sup>2</sup> ECO 2003/04 Annual Report, page 113. Online, <http://docs.assets.eco.on.ca/reports/environmental-protection/2003-2004/2003-04-AR.pdf>.

The purpose of this Act is to provide for the conservation, protection, and wise management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being.<sup>3</sup>

At the present time, about 1.3 million Ontarians use or rely upon domestic wells for drinking water purposes. However, these private residential wells are not covered by Source Protection Plans approved under the *Clean Water Act, 2006* (or the *Safe Drinking Water Act, 2002*) to safeguard municipal drinking water supplies. Therefore, Regulation 903 is, in effect, the only line of regulatory defence for Ontarians who are wholly dependent upon private domestic wells for potable water.

Moreover, it is well-documented that poorly constructed or improperly abandoned wells can serve as direct pathways for surface contaminants to enter and degrade aquifers that are being used as drinking water supplies by Ontario residents.

Accordingly, in light of the stated purpose of the *OWRA*, CELA maintains that it is in the public interest to ensure that the requirements in Regulation 903 are clear, robust and enforceable in order to help prevent waterborne illness or disease arising from the consumption of well water containing bacteriological or chemical contaminants.

Unfortunately, as described below, the three minor amendments that are currently being proposed by the MECP fall considerably short of achieving this important outcome. Indeed, the ERO notice itself concedes that the changes are not intended to improve the protection of public health or the environment, but are instead aimed at making "it easier for the well construction industry to operate in Ontario by reducing administrative burden, clarifying requirements, and providing more flexibility."<sup>4</sup>

A similar comment is offered in the sparse "regulatory impact statement" contained within the ERO notice, which states that "the proposed amendments are expected to make it easier for the well construction industry to operate by reducing regulatory burdens."

The ERO notice also suggests that the MECP's proposals will nevertheless maintain current regulatory "protections for the environment, human health and consumers." In CELA's opinion, this claim is based on the erroneous premise that Regulation 903 is already sufficiently protective of public and environmental health. To the contrary, there is considerable room for vast improvement in Regulation 903 in order to safeguard people and the environment, as previously noted by CELA, the Environmental Commissioner of Ontario, and other commentators.

In CELA's view, the Ontario government's misplaced priority on reducing perceived "red tape" – rather than strengthening Regulation 903 to better protect public and environmental health – is both unfortunate and unacceptable, especially in light of the protective purposes of the *OWRA*.

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<sup>3</sup> *OWRA*, section 0.1.

<sup>4</sup> See <https://ero.ontario.ca/notice/013-1513>.

Moreover, the MECP's current proposals to amend Regulation 903 appear to substantiate the Environmental Commissioner's comments about Ontario's continuing failure to improve the "severely flawed" Regulation 903, which "endangers public health and impedes environmental protection":

Since the revised Wells Regulation came into effect in 2003, tens of thousands of wells have been constructed, repaired or abandoned under a regulation that is widely seen as inadequate, and with little enforcement or oversight from MOE. The ministry is neglecting its obligations to those whose drinking water comes from the most vulnerable of sources: small private wells...

The ECO is very disappointed that MOE has shown itself unable or unwilling to resolve widespread and well-founded concerns about a regulation that is so vital to Ontario's environmental protection and drinking water safety.<sup>5</sup>

## **PART II – CELA COMMENTS ON CHANGES TO REGULATION 903**

### **(a) Comments on the Three Proposed Amendments to Regulation 903**

#### *(i) Minimum Insurance Requirements*

According to the ERO notice, this amendment is intended to "modify minimum insurance requirements for licensed well contractors to match insurance policies available in the marketplace."

Accordingly, the MECP proposes to revise the wording of subsection 4(2) of Regulation 903 so that licensees are required to maintain third-party general liability insurance of not less than \$2 million per occurrence, and annual aggregate limit of not less than \$5 million.

CELA has no comment on the adequacy of the insurance coverage limits specified within the new subsection. However, it is unclear to us whether this revised requirement applies only to the construction of new wells, or whether it also applies to well repairs or the decommissioning of abandoned or flowing wells (which may be as technically challenging and environmentally significant as establishing a new well).

In addition, CELA is unclear whether the proposed insurance is the correct type of insurance to address incidents under the *OWRA* and Regulation 903. Presumably, based on the purpose of the *OWRA* (see above), the intent of requiring such insurance is to ensure that there is a sufficient amount of funds available in the event that a person constructing a well contravenes the prescribed construction and abandonment requirements, or otherwise causes impairment of "waters" within the meaning of the *OWRA* and Regulation 903. Accordingly, CELA assumes that the insurance funds will be used by the well constructor, the well owner, the MECP, or a combination thereof, in order to mitigate or remedy the issue(s) arising from non-compliance.

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<sup>5</sup> ECO 2005/06 Annual Report, pages 53-54. Online, <http://docs.assets.eco.on.ca/reports/environmental-protection/2005-2006/2005-06-AR.pdf>.

However, having regard for the language of the new proposed subsection, it appears to CELA that the proposed liability insurance may only provide funds for damage to buildings or structures near a well, or for compensation to persons who may be injured due to well construction activities. In other words, the proposed subsection does not seem to ensure that insurance funds will be available for the protection of groundwater (or drinking water), as envisioned by the purpose of the *OWRA*.

In these circumstances, CELA concludes that the proposed regulatory amendments have not adequately considered the need to ensure that insurance funds can be used to address deficiencies in well construction, well abandonment or the impairment of waters (including drinking water) in order to achieve the purpose of the *OWRA* (e.g. the “conservation, protection and management on Ontario’s waters”).

In light of this uncertainty, CELA therefore recommends that the MECP should clarify that the insurance coverage required by subsection 4(2) must be applicable to all well-related work or activities undertaken by the licensee or its well technicians. Moreover, the MECP must ensure that sufficient insurance funds are available to be used to address deficiencies in well construction, well abandonment, or the impairment of waters (including drinking water).

**RECOMMENDATION 2: The MECP should revise the proposed subsection 4(2) of Regulation 903 to specify that the required insurance coverage to be obtained by licensees shall be applicable to all well-related work or activities conducted by or for licensees, and ensure that sufficient insurance funds are available for use in addressing deficiencies in well construction, well abandonment, or the impairment of waters (including drinking water), in accordance with the purpose of the *OWRA*.**

*(ii) Updated Well Casing Standards*

The ERO notice indicates that this amendment is intended to “update well casing specifications to harmonize with international standards.”

Accordingly, the MECP proposes to replace paragraphs 1 to 8 of subsection 13(16) of Regulation 903 with new provisions that refer to certain specifications for steel, concrete, plastic and fibre-reinforced plastic casing. At the same time, the MECP is proposing to delete the current requirement that high-yield wells must have casing that meets prescribed AWWA specifications, and to instead “allow the well technicians to exercise professional judgment when selecting casing for high-yield wells.”

CELA has no concern about providing greater prescriptive detail in Regulation 903 in relation to casing specifications, or about ensuring flexibility in the event that these specifications are updated by the relevant body, institute or organization in the future. On this latter point, we are aware that the MECP is proposing a new section 13.01.1, which simply requires that these documents are to be kept “on file in the office of the Ministry at the Toronto.”

However, given that the MECP has a number of different offices throughout Toronto, CELA recommends that this new section should be further amended to specifically identify which office,

branch or division within the MECP will be tasked with keeping and maintaining these documents, as may be amended from time to time.

Moreover, it goes without saying that Ontario is a vast province characterized by lengthy travel distances between cities, towns and villages in northern and southern Ontario. CELA submits that it is unrealistic, inefficient and unduly time-consuming to expect a person living in Thunder Bay or Pembroke to commute to Toronto in order to review the MECP's standards documentation. CELA therefore recommends that other MECP offices throughout Ontario should be required by new section 13.0.1 to keep and maintain these documents, and to make them readily available to the well industry.

More generally, CELA must question the enforceability of the current casing standards in Regulation 903. Since the existing Regulation 903 does not prescribe any requirements regarding the location of the standards documentation, are the current standards unenforceable? If so, why has the MECP not informed the public through the ERO notice that this change is needed in order to make the standards enforceable?

**RECOMMENDATION 3: For the purposes of greater certainty, transparency and accessibility, the MECP should amend proposed section 13.0.1 of Regulation 903 to provide further particulars on precisely where the international casing documentation will be kept and maintained by MECP officials in Toronto and other specified locations across the province.**

More importantly, CELA notes that the revised casing specifications only apply to new well construction, rather than to existing wells that may need new or upgraded casing. In CELA's view, this is an unfortunate and long-standing drafting oversight under Regulation 903 that should be corrected by a corresponding amendment to subsection 13(01) to provide that these casing specifications also apply to existing wells (other than test holes and dewatering wells) if replacement casing is to be installed.

**RECOMMENDATION 4: The MECP should amend subsection 13(01) of Regulation 903 to specify that the prescribed casing specifications apply to casing installed in a new well and when a casing repair or upgrade occurs on an existing (or operational) well.**

*(iii) Shallow Well Screens*

The ERO notice states that this amendment is intended to permit well screens to be installed at depths less than 2.5 metres below the ground surface in certain situations.

Accordingly, the MECP proposes to add a new exception to subsection 14.4 of Regulation 903 to conditionally allow well screens to be installed in test holes or dewatering wells in order to intercept shallow groundwater flow at less than 2.5 metres in depth.

CELA has no comment on this proposal, except to note that this appears to be another example where a decade-old drafting problem in Regulation 903 is now being belatedly addressed by the MECP. Viewed in this context, we see no compelling reason why the MECP should not take all

necessary steps to remedy several other long-standing errors and omissions in Regulation 903, including those outlined below.

In short, CELA submits that the MECP should not take a selective or piecemeal approach to fixing Regulation 903, and should not squander this important opportunity to upgrade deficient requirements that continue to exist in Regulation 903.

#### (b) Comments on Other Amendments that are Overdue in Regulation 903

CELA's 2013 Application for Review<sup>6</sup> of Regulation 903 identified a lengthy list of interpretive difficulties, unacceptable loopholes and operational problems in Regulation 903 that warranted immediate action by the MECP.

CELA's concerns included the following matters, which, in our opinion, remain largely unresolved under Regulation 903 to this day:

- establishing provincial standards without adequately defining key words and phrases that are necessary to enforce compliance with the regulatory requirements;
- containing a number of confusing, open-ended or unjustified exemptions of certain types of wells from provincial requirements;
- allowing unlicensed and/or untrained persons to perform key well-related tasks and activities;
- setting inadequate separation distances between water supply wells and nearby sources of contaminants;
- failing to establish a provincial well permitting system for certain types of wells;
- omitting important safeguards that are necessary in relation to well casing specifications and placing sealant in annular space;
- failing to impose a legal duty to conduct post-treatment bacteriological testing of drinking water wells to verify that the water is safe to drink, and failing to require re-treatment if the initial chlorination of wellwater was ineffective in eliminating harmful bacteria;
- lacking sufficient standards in relation to managing or controlling flowing wells;
- containing inadequate provisions regarding testing, reporting, corrective measures and well abandonment in situations where natural gas, mineralized water or non-potable water is encountered;

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<sup>6</sup> See <https://cela.ca/wp-content/uploads/2019/07/974EBRAppforReviewOWRAReg903.pdf>.

- splitting up well construction requirements between different regulations made under different statutes;
- failing to incorporate or fully reflect best management practices (“BMPs”), many of which are expressed in non-enforceable language in the two guidance manuals prepared by the MECP for use by the wells industry; and
- failing to meet or exceed well requirements established in other leading North American jurisdictions.

It is beyond the scope of this submission to reiterate CELA’s detailed concerns about these issues, as articulated in our 2013 Application for Review. Suffice it to say that until these fundamental problems are remedied by the Ontario government through appropriate amendments to Regulation 903, CELA maintains its position that groundwater resources and well users remain at risk across the province.

In its 2016 decision letter on the outcome of the *EBR* review of Regulation 903, the MECP acknowledged the existence of serious problems within Ontario’s wells regime. During a subsequent meeting between CELA and MECP officials in 2017, we were advised by MECP policy staff that MECP staff had prepared a gap analysis that categorized most of the issues raised by CELA’s *EBR* Application as “high-risk”, and that identified 24 “priority” items that needed to be addressed under the Regulation 903 program.

However, when CELA filed a freedom-of-information request to obtain a copy of the gap analysis and related documentation, the MECP refused to disclose these records. In June 2017, CELA appealed the MECP’s refusal to the Information and Privacy Commissioner, and the adjudicator’s decision is pending at the present time.

In the meantime, it is CELA’s understanding that few, if any, of the commitments or “proposed actions” contained in the MECP’s “Notice of Outcome” in the *EBR* review have been actually implemented to address the “high risk” and “priority” issues acknowledged by MECP staff.

For example, while the Notice of Outcome identifies “opportunities” to develop various “improvements” to the regulatory and non-regulatory components of Ontario’s wells program, CELA is unaware of any tangible progress made by the MECP to date, except in relation to the three minor amendments to Regulation 903 that are currently being proposed.

For the most part, it appears to CELA that other long-overdue reforms to Regulation 903 have been shelved indefinitely, with no clear timeframe for engaging stakeholders or otherwise moving forward with such reforms in an expeditious manner.

In the circumstances, CELA submits that the MECP’s dilatory approach to date is highly unsatisfactory, and that any further delay in fixing Ontario’s flawed well requirements is clearly inconsistent with the above-noted recommendations from Mr. Justice O’Connor and the former Environmental Commissioner that Regulation 903 should be reviewed and revised.

CELA remains particularly concerned about the MECP's continuing inaction on upgrading current disinfection requirements under Regulation 903. CELA first raised this concern over 16 years ago in our first *EBR* Application for Review, and the MECP responded by referring this important issue to the independent Ontario Drinking Water Advisory Council ("ODWAC") for consideration and expert advice.

In June 2005, the ODWAC sent its advice letter on Regulation 903 to the Environment Minister, and agreed with CELA that Regulation 903's disinfection requirements for well construction and repair are "deficient" for numerous reasons. Therefore, the ODWAC specifically recommended that Regulation 903 should ensure that a rigorous five-step disinfection and sampling protocol is followed before well water is consumed after well construction or repair.

However, this prescriptive advice has not been fully acted upon by the MECP to date, and in the interim tens of thousands of new wells have been constructed, repaired and cleaned in accordance with a standard that did not meet ODWAC's full recommendations. In CELA's view, the MECP's ongoing refusal to implement the recommendations from its own expert advisory body is unconscionable and unjustifiable.

**RECOMMENDATION 5: For the purposes of implementing Recommendation 1, the MECP should prioritize the development of appropriate amendments to Regulation 903 in relation to definitions, exemptions, licensing, separation distances, disinfection, permitting, abandonment, decommissioning and other regulatory requirements that are needed to safeguard public and environmental health.**

### **PART III - CONCLUSIONS**

For the foregoing reasons, CELA submits that the three proposed amendments to Regulation 903 require some further finetuning, but are otherwise minor in nature and essentially miss the mark. In short, these modest changes will do little or nothing to address overarching public and stakeholder concerns about the inadequate provincial requirements that still exist within Regulation 903.

In light of the outstanding recommendations for Regulation 903 reform made by Mr. Justice O'Connor, the Environmental Commissioner of Ontario, and other observers, CELA submits that it is incumbent upon the MECP to develop substantive regulatory improvements that effectively safeguard human health and the environment.

In our opinion, having regard for the public interest purpose of the *OWRA*, the paramount objective of reforming Regulation 903 is to ensure public health and safety and to protect environmental quality, rather than simply making it "easier" for the well industry to operate in this province. Moreover, CELA does not accept the MECP's unsubstantiated assertion that Regulation 903 imposes an undue administrative burden on well businesses.

Accordingly, CELA makes the following recommendations:

**RECOMMENDATION 1:** The MECP should immediately develop and widely consult upon other proposed amendments to Regulation 903 that are necessary for the purposes of protecting public health and the environment.

**RECOMMENDATION 2:** The MECP should revise the proposed subsection 4(2) of Regulation 903 to specify that the required insurance coverage to be obtained by licensees shall be applicable to all well-related work or activities conducted by or for licensees, and ensure that sufficient insurance funds are available for use in addressing deficiencies in well construction, well abandonment, or the impairment of waters (including drinking water), in accordance with the purpose of the *OWRA*.

**RECOMMENDATION 3:** For the purposes of greater certainty, transparency and accessibility, the MECP should amend proposed section 13.0.1 of Regulation 903 to provide further particulars on precisely where the international casing documentation will be kept and maintained by MECP officials in Toronto and other specified locations across the province.

**RECOMMENDATION 4:** The MECP should amend subsection 13(01) of Regulation 903 to specify that the prescribed casing specifications apply to casing installed in a new well and when a casing repair or upgrade occurs on an existing (or operational) well.

**RECOMMENDATION 5:** For the purposes of implementing Recommendation 1, the MECP should prioritize the development of appropriate amendments to Regulation 903 in relation to definitions, exemptions, licensing, separation distances, disinfection, permitting, abandonment, decommissioning and other regulatory requirements that are needed to safeguard public and environmental health.

Please feel free to contact the undersigned if you have any questions, or require any further information, in relation to the above-noted recommendations.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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cc. Mr. Jerry DeMarco, Commissioner of the Environment