

March 4, 2020

BY EMAIL

Chloe Stuart
Assistant Deputy Minister
Land and Water Division
Ministry of the Environment, Conservation and Parks
300 Water Street, 5th Floor North Tower
Peterborough, Ontario
K9J 3C7

Dear Ms. Stuart:

**RE: APPLICATION FOR REVIEW OF THE *CLEAN WATER ACT, 2006* AND O.REG.
287/07 (19EBR002.R)**

We acknowledge receipt of your letter dated February 18, 2020 in relation to the above-noted Application for Review filed under the *Environmental Bill of Rights (EBR)*.

Your letter maintains that the public interest does not warrant our requested review of the *Clean Water Act, 2006 (CWA)* and O.Reg. 287/07 in order to protect the source water used by certain non-municipal drinking water systems.

In our view, the Ministry's position in this matter is unpersuasive, inadequate and non-responsive to the serious issues, uncontradicted evidence, and detailed legal submissions contained in our *EBR* Application for Review.

Moreover, your letter offers simplistic (if not highly debatable) claims about drinking water safety in Ontario, and fundamentally fails to commit the Ministry to making any timely progress in providing legislative protection under the *CWA* for the numerous Ontarians who not served by municipal drinking water systems.

For example, the first page of your letter proclaims that "Ontario's drinking water is among the best protected in the world," and that "Ontarians can be confident that they enjoy clean and safe drinking water." This overbroad statement may be true for those Ontarians who are lucky enough to be served by municipal drinking water systems caught under the *CWA*. However, this claim is manifestly untrue for First Nations communities in Ontario that are subject to ongoing drinking water advisories or warnings that last for many months or years, as outlined in our *EBR* Application.

The second page of your letter goes on to state, without elaboration or explanation, that the Ministry has been "considering" the Auditor General's recommendation about drinking water safety for private wells and intakes. Apparently, this "consideration" will be completed "in the

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coming months,” and your letter indicates that we will be provided with the “results” of the Ministry’s internal review.

Please be advised that the Ministry’s closed-door exercise is unsatisfactory for various reasons. First, there appears to be no opportunities for meaningful public or First Nation input into the Ministry’s review process. In our view, this does not bode well for the outcome of the Ministry’s internal process, particularly since the Ministry has been adamant over the years that no further legislative and regulatory reforms are necessary. This erroneous argument has been repeated in your letter. Accordingly, it would be highly surprising if the Ministry’s review process suddenly concludes that the Ministry position has been wrong all these years, and that some non-municipal drinking water systems should now be immediately brought under the *CWA*.

Second, there is no evidence to substantiate your letter’s claim that the requested *EBR* review would be a “separate parallel review” that would be duplicative of what the Ministry is currently “considering” behind closed doors (page 2). While the Auditor General’s recommendation merely requires the Ministry to consider the “feasibility” of protecting non-municipal source water under the *CWA*, our *EBR* Application identifies the specific legislative and regulatory reforms that are necessary to implement source protection planning in relation to certain non-municipal drinking water systems. Given the different scope of these two initiatives, there appears to be no merit to your letter’s suggestion that the two reviews are substantially similar (if not identical).

Third, if our requested review had been granted under the *EBR*, then it would have been open to the Ministry to proactively solicit public and First Nation feedback on potential *CWA* reforms. This open and accessible approach would clearly facilitate input from interested persons and other stakeholders to assist the Ministry in reaching an informed decision on whether – and how – the *CWA* regime should be reformed.

On this point, we note that the Ministry conducted province-wide public consultations on *EBR* reform after granting CELA’s Application for Review of the *EBR* itself years ago. We further note that while the Ministry’s Statement of Environmental Values under the *EBR* contains a clear commitment to public consultation, it appears that the Ministry is conducting its “feasibility” review in absence of any meaningful public participation. In our view, the Ministry’s proposed *ex post facto* release of its “feasibility” outcome is both problematic and ill-advised.

Your letter also notes that it is currently possible under the *CWA* for certain non-municipal drinking water systems (e.g. well clusters) to be included in source protection planning (page 2). This statement is true, and is acknowledged in our *EBR* Application. However, the Ministry’s description of the status quo misses the critically important point made in the *EBR* application: no such systems have been elevated in the past 13 years under the current discretionary provisions of the *CWA* regime. This is precisely why the *EBR* Application contends that it is now time to make this obligation mandatory, not optional.

Similarly, your letter argues that “other legislation” (e.g. the *Municipal Act*) “can be used to manage activities on the landscape.” Again, this overgeneralized statement misses the point raised in the *EBR* Application: the existing land use planning tools under provincial law are inherently discretionary, appealable to the Local Planning Appeal Tribunal, and otherwise inadequate for the

purposes of implementing source water protection. This is precisely why the specialized CWA (including the new tools in Part IV of the Act) was enacted despite the continuing existence of the *Municipal Act*, *Planning Act*, and other provincial statutes of general application.

In addition, we draw no comfort from your letter's promise of yet more forthcoming consultation on "draft guidance" aimed at local communities, First Nations and individuals. While public education/outreach is important, it is not an acceptable substitute for effective, equitable and enforceable legislative protection of source water, especially in relation to certain non-municipal drinking water systems serving vulnerable persons.

Moreover, given your letter's insistence that no new legal reforms are necessary, we strongly suspect that the so-called "guidance" will not be prescriptive in nature, nor will it be accompanied by any firm provincial commitments to provide funding or technical assistance to help defray the cost, or to address the complexity, of source protection planning at the local level. Although we intend to review and comment upon the draft guidance when it is released, it is reasonable to anticipate that the guidance will likely repackage generic information that has long been available on basic steps that may be taken to protect groundwater/surface water quality and quantity for drinking water purposes. In our view, such non-binding "guidance" falls considerably short of the mark,

In closing, it is our conclusion that the current Ministry position, as reflected in your letter, unfortunately continues the unacceptable status quo insofar as non-municipal drinking water systems are concerned. Given the ongoing public health/safety risks for Ontarians who are not served by municipal drinking water systems, it is exceedingly difficult to understand the Ministry's intransigence on this issue.

Accordingly, we hereby request an opportunity to meet with you and your staff to further discuss this matter, including the Ministry's unjustifiable refusal to undertake the requested review of the CWA. Contrary to your letter's assertions, we respectfully submit that it is not in the public interest for the Ministry to continue to obfuscate, delay or refuse to take protective action for the benefit of the countless persons and communities that are not currently protected by Ontario's CWA regime.

Please contact the undersigned if you have any questions arising from this letter, and we look forward to your timely response to our meeting request.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Theresa A. McClenaghan
Executive Director



Richard D. Lindgren
Counsel

cc. Mr. Jerry DeMarco, Commissioner of the Environment (AGO)