

April 14, 2022

VIA email

Hon. David Piccini
Minister of the Environment, Conservation and Parks
College Park, 5th Floor, 777 Bay Street
Toronto, ON M7A 2J3

Dear Minister Piccini:

Re: Best Practices for Source Water Protection

Canadian Environmental Law Association (CELA) provides the following comments and recommendations in response to the *Best Practices for Source Water Protection*,¹ which were released by the Ministry of the Environment, Conservation and Parks (MECP) on February 10, 2022.

About CELA

For over 50 years, CELA has been actively involved in casework, advocacy and public legal education relating to drinking water safety, provincial well standards, groundwater protection and public health. As such, CELA has had a long history of involvement in the development and implementation of source water protection mechanisms in Ontario.

For example, following the Walkerton tragedy in May 2000, CELA counsel represented residents at both phases of the Walkerton Inquiry. Since then, CELA has been extensively involved in various initiatives, policies, and programs under the *Clean Water Act (CWA)*, *Safe Drinking Water Act, 2002*, *Nutrient Management Act, 2002*, *Ontario Water Resources Act* and the regulations under these statutes. In addition, CELA's Executive Director, Theresa McClenaghan, participated on the Implementation Committee and Technical Experts Committee when the CWA was first being developed. Similarly, for the past 15 years CELA counsel Richard Lindgren has been a member of a source protection committee established under the CWA in eastern Ontario.

Comments on the Best Practices for Source Water Protection

The current legislative and regulatory regime under the CWA continues to be largely (if not exclusively) focused on protecting sources of **municipal** drinking water,² which means that approximately 18% of Ontario's population does not have appropriate drinking water protections

¹ See <https://www.ontario.ca/document/best-practices-source-water-protection>.

² However, there are municipal drinking water systems in Ontario that are still not covered by mandatory policies in source protection plans under the CWA.

under the CWA.³ For years, CELA and other environmental groups have been calling on the MECP to extend source water protection coverage under the CWA to **non-municipal** drinking water systems that serve some of the most vulnerable and disadvantaged communities in Ontario (e.g. children, elderly persons, Indigenous communities, etc.). In 2019, CELA filed an Application for Review of the CWA and Ontario Regulation 287/07 under the *Environmental Bill of Rights*⁴ (EBR) to remedy this alarming and continuing omission.

While the MECP's *Best Practices for Source Water Protection* (Best Practices) provide a useful compilation of general information about water and what individuals can do to protect it, CELA maintains that voluntary, non-binding guidance is an unacceptable substitute for effective and enforceable protection of non-municipal sources of drinking water under the CWA. Further, without complimentary funding to support technical assessments or implement any on-the-ground measures to ensure protection of source water for non-municipal systems, the Best Practices do very little to provide meaningful protection of human health and the environment.

If the provincial government wants to ensure and enhance drinking water safety for all residents of Ontario, CELA continues to **recommend** that CWA coverage be expanded to non-municipal systems. For example, expanded application of the CWA is critically important for ensuring mandatory protection of groundwater used by people who draw drinking water from domestic wells in the villages, hamlets, and towns that lack municipal drinking water systems and many Indigenous communities across the province. In some cases, such aquifers may supply drinking water for hundreds or even thousands of residents.

Accordingly, CELA suggests that the following facilities should be prioritized for immediate inclusion in source water protection planning if they do not receive water from a municipal drinking water system:

- children and youth care facilities;
- children's camps;
- community centres or recreational facilities; health care facilities, including retirement homes and assisted living or long-term care centres;
- schools or private schools;
- social care facilities, including group homes and emergency or homeless shelters;
- facilities that serve food or provide overnight accommodation, including restaurants, hotels, motels, trailer parks, campgrounds, and marinas;
- private well clusters serving six or more private residences; and
- such other non-municipal drinking water systems as may be prescribed by regulation.

CELA further **recommends** that appropriate CWA reforms should be developed (with meaningful consultation with Indigenous communities) to better accommodate or assist source protection

³ See https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v2_en_web.pdf.

⁴ See <https://cela.ca/wp-content/uploads/2019/12/1308-EBR-App-for-Review-of-CWA-Regulations-December-2019.pdf>.

planning for drinking water systems serving Indigenous communities. In our view, this step is clearly necessary in light of the numerous long-term “boil water” advisories, “do not consume” warnings, and other serious water-related problems that continue to plague many Indigenous communities in Ontario.

Leaving it to the discretion of individuals and municipalities to take steps to safeguard the source water of non-municipal systems is neither acceptable nor justifiable, particularly given the serious public health risks posed by contaminated drinking water sources. This is particularly true if the province remains committed to using the multi-barrier approach to fully protect the health and safety of all Ontarians, not just those who are fortunate enough to be served by municipal systems.

CELA acknowledges that the Best Practices correctly indicate that it is theoretically possible under the CWA for certain non-municipal drinking water systems included in the source protection planning process. However, this description of the status quo misses a critically important point: no such systems have been elevated in the past 15 years under the discretionary provisions of the CWA regime.⁵ This inaction is largely attributable to the MECP’s 2008 directive that effectively discouraged municipalities from elevating private systems under the CWA. In this directive, the former Director of the Source Protection Programs Branch acknowledged that municipalities had been expressing interest in elevating some non-municipal drinking water sources under the CWA regime, but he advised that such elevation requests should be “deferred.”⁶

In response to CELA’s concerns about the general exclusion of non-municipal systems under the CWA, the MECP has opined that other legislation (e.g., *Municipal Act*, *Planning Act*, etc.) can be used to manage activities on the landscape that may affect groundwater or surface water resources that supply non-municipal drinking water systems. However, it is beyond dispute that current land use planning tools under provincial law are inherently discretionary, appealable to the Ontario Land 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 existence of the *Municipal Act*, *Planning Act*, and other provincial statutes of general application.

Comments on Public Survey on the Best Practices

The MECP is soliciting public feedback on the Best Practices in an online survey⁷ until April 18, 2022. CELA notes that the survey questions have primarily been designed for individuals in order to solicit information about their drinking water source, whether they are in a source protection area, and whether they found the Best Practices helpful. The survey consists of multiple-choice answers with no field or box to type in additional comments.

⁵ Moreover, only three First Nations passed band council resolutions authorizing the inclusion of their drinking water systems under the CWA.

⁶ Letter dated January 8, 2008 from Ian Smith to Source Protection Chairs, page 1.

⁷ See <https://www.ontario.ca/form/survey-best-practices-source-water-protection>.

CELA submits that this approach is an ineffective means of seeking public feedback and does not allow for the public to meaningfully engage with or respond to the Best Practices. We **recommend** that the MECP immediately initiate an appropriate public comment period (via a posting on the Environmental Registry) that allows for more meaningful responses from individuals, municipalities, civil society groups, and Indigenous communities about the Best Practices and, more fundamentally, whether non-binding guidance is sufficient to safeguard drinking water sources that supply the numerous Ontario residents who are not served by municipal drinking water systems.

CELA further notes that prior to their release in February 2022, the Best Practices were not subject to any public consultation under the EBR. On this point, the MECP recently advised CELA that posting on the Registry was not mandatory because the Best Practices do not constitute “policy”, have no legal effect, and do not impact approved source protection plans. Instead, the MECP concedes that the Best Practices are simply “a resource for the public that are entirely voluntary in nature.”⁸ Nevertheless, CELA maintains that it was still open to the MECP to post an information notice or bulletin on the Environmental Registry to raise public awareness of the matter and to solicit public input on the appropriateness, scope, and content of the Best Practices before they were finalized.

In addition, it should be recalled that the MECP previously undertook public consultation on various water-related best practice manuals, including the draft *Water Supply Well Best Management Practices Manual* (Registry Nos. 010-8451 and 012-1394), the draft *Test Holes and Dewatering Wells: Requirements and Best Management Practices* (Registry No. 011-5722) and draft *Permit to Take Water Manual* (Registry No. PA04E0036). Significantly, three of these MECP postings classified the non-binding guidance documents as “policy”, thereby triggering public comment periods of 30 to 45 days under the EBR. In these circumstances, CELA is unclear why the MECP refused to undertake a similar consultative approach in the development of the Best Practices for source water protection.

Finally, CELA notes that when the MECP attempted to rationalize its refusal to grant CELA’s EBR Application for Review of the CWA, the then Assistant Deputy Minister committed the Ministry to undertake consultation on its proposed Best Practices:

Our ministry intends to conduct consultations this spring related to draft source protection guidance for posting on Ontario.ca to support local communities and individuals to take action to protect their sources of drinking water.⁹

Unfortunately, this MECP commitment has not been properly implemented, and the Best Practices were finalized and posted on Ontario.ca as a fait accompli, not as a draft document.

⁸ Email to CELA from MECP dated March 16, 2022.

⁹ Letter to CELA from MECP dated February 18, 2020, page 2.

Conclusion and Recommendations

CELA appreciates the need for public education and outreach regarding source water protection across Ontario. However, the mere online publication of non-binding guidance material is an inadequate substitute for clear, robust, and enforceable protection of non-municipal systems under the CWA. Accordingly, CELA makes the following recommendations to the MECP:

Recommendation No. 1: In support of the Best Practices, complimentary funding should be provided to support technical assessments and implement on-the-ground measures to ensure protection of source water for non-municipal drinking water systems.

Recommendation No. 2: Source water protection coverage under the CWA should be expanded to include non-municipal drinking water systems.

Recommendation No. 3: Appropriate CWA reforms should be developed (with meaningful consultation with Indigenous communities) to better accommodate, integrate, or assist source protection planning for drinking water systems serving Indigenous communities.

Recommendation No. 4: The MECP should initiate an appropriate public comment period (via a Registry posting) that allows for more meaningful responses from individuals, municipalities, civil society groups, and Indigenous communities about the Best Practices and, more importantly, the overdue need to extend the CWA coverage to non-municipal drinking water systems.

We would welcome the opportunity to discuss the above comments and recommendations. We look forward to your timely response.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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cc. Alison Pilla, ADM, MECP Drinking Water and Environmental Compliance Division
Tyler Schulz, Assistant Auditor General and Commissioner of the Environment