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May 23, 2006

The Honourable Laurel C. Broten  
Minister of the Environment  
12th Floor, 135 St. Clair Avenue West  
Toronto, Ontario  
M4V 1P5

Dear Minister Broten,

The undersigned organizations are signatories to the ENGO Source Protection Statement of Expectations, and are keenly interested in the passage of the *Clean Water Act, 2005*. The legislation introduces a process by which threats to drinking water sources are identified and risk management strategies are put into action. It also provides municipalities with the additional tools and powers they so desperately need to protect their waters. We strongly support the source protection initiative, and we believe that this *Act* is an essential step towards the ultimate goal of protecting drinking water sources in all watersheds across Ontario.

In order to ensure that the legislation provides the necessary level of protection to human health and the environment, we have identified several areas of concern which we submit will require further consideration. As the legislation moves forward, we will be paying close attention to how the *Act* and any amendments address these concerns. It should be noted that the signatories to this letter reserve the right to submit further or more detailed submissions on any of these topics as may be warranted.

### ***Integration with Existing Legislation***

The *Act* contains many important provisions regarding its integration with other laws, and generally provides that in the case of conflict with another law, the more protective provision will prevail. Moreover, the *Clean Water Act* will prevail over the *Nutrient Management Act* where conflicts arise. We believe these provisions are appropriate, as they provide clarity on the role of the *Act* within Ontario's water protection regime and establish the minimum framework necessary to ensure the consistent application of the *Act* and all of its protective measures with respect to human health and drinking water.

### ***Universal Level of Protection***

We are concerned that the *Act* does not yet achieve sufficient protection for all of Ontario's source waters. In its current form, the *Act* is weighted towards protection of municipal drinking water systems within source protection areas. We strongly recommend that this scope be broadened to more rigorously address private systems, and drinking water systems outside of source protection areas. These objectives can be accomplished, at least in part, through the following amendments:

1. The legislation should require the identification of all drinking water sources for both private and municipal systems in all watersheds across the province,

including those systems outside of source protection areas. For example, assessment reports should include the location of all wells on provincial water well records.

2. Furthermore, a basic threats assessment should be conducted for all systems and significant drinking water threats across the province should be addressed, at a minimum.
3. The province should review all provincially regulated facilities on a priority basis to ensure that they do not jeopardize drinking water sources.
4. The legislation should provide additional means by which clusters of private water systems can be “nominated” for inclusion in assessment reports, such as by petition signed by members of the public, or by Ministerial direction.
5. Currently, under section 19(6), source protection plans may not designate significant drinking water threats as prohibited activities, regulated activities or restricted land uses if they fall within groundwater recharge areas or highly vulnerable aquifers. Instead, the ability to prohibit, regulate, or restrict the land use of significant drinking water threats is limited to surface water intake protection zones and wellhead protection areas. In order to clarify to source protection committees that the source protection plans can, and should, require additional measures to address significant drinking water threats in groundwater recharge areas and highly vulnerable aquifers, section 19(2) should be amended to read as follows:

(2) A source protection plan shall, in accordance with the regulations and the terms of reference, set out the following:

[...]

9. Identify, for each groundwater recharge area and highly vulnerable aquifer identified in the assessment report under section 13(2)(d), one or more measures intended to achieve the following objectives:
  - i. Ensuring that every existing activity identified in the assessment report as a significant drinking water threat for that vulnerable area ceases to be a significant drinking water threat.
  - ii. Ensuring that none of the possible future activities identified in the assessment report as activities that would be drinking water threats for that vulnerable area ever become significant drinking water threats.

The committees could include both mandatory and voluntary measures under this section.

6. Similarly, the source protection committees need to be provided with the explicit authority to include measures intended to address moderate or low drinking water threats in the source protection plans. The committees should be able to include both mandatory and voluntary measures under this section. It is acknowledged that source protection committees are already required to set out policies to ensure that moderate or low drinking water threats do not become significant drinking water threats in the future. Accordingly, the following subsection should be added to section 19:

(2.1) A source protection plan may, in accordance with the regulations and the terms of reference, set out measures in response to drinking water threats identified in the assessment report under section 13(2)(g) which are not or would not become significant drinking water threats.

### ***Precautionary Principle***

Despite numerous recommendations advocating the inclusion of the precautionary principle, there is not a single reference to precaution in the proposed *Act*. The precautionary principle should be inserted into the *Act* both as a guiding principle in the purpose statement and as an operationalized component of the source protection plans. Accordingly, the two subsections listed below should be added to the *Act*:

7. The following subsection should be added to the *Act*'s purpose statement in section 1:

(2) In the administration of this Act, the Government of Ontario, the Minister, and all bodies subject to the provisions of this Act, including provincial authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

8. The following subsection should be added to section 19:

(1.1) In preparing a source protection plan, the source protection committee must apply the precautionary principle, so that where there are threats of serious or irreversible damage to an existing or future source of drinking water, lack of full scientific certainty should not be used as a reason for postponing measures to prevent the threat.

### ***First Nations***

We strongly believe that First Nations and Métis peoples have a critical role to play in the source water protection framework. In its current form, the *Act* does not include provisions related to drinking water systems on reserves, nor does it in any way include First Nations or Métis peoples in the source protection process. We continue to stress that federal and provincial governments should support the ability of First Nations and Métis peoples to be full participants in source protection planning and implementation, in addition to allocating appropriate resources to facilitate meaningful involvement.

### ***Great Lakes***

Given the critical importance of the Great Lakes as a source of drinking water, we are pleased to note the inclusion of several provisions addressing Great Lakes' concerns. These provisions include the requirement that source protection plans consider existing agreements related to the Great Lakes, the formation of a Great Lakes advisory committee, and the establishment of quality and quantity targets for watersheds within the Great Lakes basin. While we support the importance of these measures, the legislative language is largely permissive. We believe that these Great Lakes protections should be required, and not simply permitted, by the *Act*.

### ***Interim Measures***

We are encouraged by several promising interim measures contained within the *Act* as it is currently drafted, such as the requirement for interim progress reports to be prepared, and the option to order risk management plans. Additionally, if imminent drinking water health hazards are identified during the course of collecting information, there is an obligation to notify the Ministry. However, we remain concerned that significant threats to source waters could develop

or continue unabated before the source protection plans are approved. Accordingly, the following amendments should be applied:

9. The province, municipalities and Conservation Authorities should be required to take immediate, precautionary action in response to high-risk activities and land uses once these are identified. According, subsection 80(1.2) should be added and subsection 80(2) amended as follows:

(1.2) The Director shall, within 30 days after receiving a notice under subsection (1), take action intended to achieve the following objectives:

- (a) ensuring that the substance which is being discharged or which is about to be discharged ceases to be an imminent drinking-water health hazard, if the notice was given under subsection (1)(a); or
- (b) ensuring that the raw water supply of an existing drinking-water system meets all standards prescribed by the regulations, if the notice was given under subsection (1)(b).

(2) The Director shall, within 30 days after receiving a notice under subsection (1), give written notice of the action taken by the Ministry to

- (a) the source protection authority, if the notice under subsection (1) was given by an employee or agent of a source protection authority; or
- (b) the municipality, if the notice under subsection (1) was given by an employee or agent of a municipality.

Subsection 80(1.2)(b) could be broadened to alternatively require corrective actions akin to those prescribed under the *Safe Drinking Water Act, 2002*, where applicable.

10. Furthermore, until source protection plans are in place, government should not issue any new instruments that could potentially cause significant or irreversible harm to source water in vulnerable areas, such as Certificates of Approval and Permits to Take Water.

### ***Public Participation***

Implementation of each source protection plan will occur mostly at the local level, through measures carried out by individual landowners, industries, and businesses. Considerable public support will be needed, and the most effective way to build public support is to thoroughly engage the public in the planning and implementation process.

We are troubled by the fact that there are few mandatory public participation provisions currently included in the *Act*. At a minimum, meaningful participation requires the public's involvement on source protection committees, financial support for participation outside of the committees, easy access to all relevant information, and the opportunity to comment on proposed terms of reference, assessment reports, and source protection plans before these documents are finalized.

11. The following section should be added after section 9:

9.1 The source protection authority shall,

- (a) publish the proposed terms of reference in accordance with the regulations;
- (b) give notice of the proposed terms of reference in accordance with the regulations to the persons prescribed by the regulations, together with information on how copies of the terms may be obtained and an invitation to submit written comments on the

terms to the source protection authority within the time period prescribed by the regulations; and

(c) publish notice of the proposed terms of reference in accordance with the regulations, together with information on how members of the public may obtain copies of the terms and an invitation to the public to submit written comments on the terms to the source protection authority within the time period prescribed by the regulations.

12. The following subsections should be added to section 10:

(1) The source protection authority shall submit the proposed terms of reference to the Minister, together with,

[...]

(c) any written comments received by the source protection authority after publication of the terms under section 9.1.

(1.1) If proposed terms of reference are submitted to the Minister under subsection 10(1), the Minister may confer with any person or body that the Minister considers may have an interest in the proposed terms.

13. The following section should replace the existing section 11:

11. As soon as reasonably possible after the terms of reference are approved by the Minister, the Minister shall publish notice of the approval on the environmental registry established under the *Environmental Bill of Rights, 1993*, together with,

(a) a brief explanation of the effect, if any, of any comments submitted under section 10; and

(b) any other information that the Minister considers appropriate.

14. The follow section should be added after section 11:

11.1 The source protection authority shall ensure that the terms of reference, including any amendments made by the Minister, are available to the public on the Internet and in such other manner as the source protection authority considers appropriate as soon as reasonably possible.

15. The amendments included in recommendations 10 through 13 should be similarly applied to the sections dealing with assessment reports.

16. Subsection 18(3) should be amended as follows with respect to the interim progress reports:

(3) The source protection authority shall ensure that the reports are available to the public as soon as reasonably possible after they are submitted to the Director.

17. Subsection 41(2) should be amended as follows with respect to the annual progress reports:

(2) The source protection authority shall ensure that the report is available to the public as soon as reasonably possible after it is submitted to the Minister.

18. Subsection 23(2) should be amended to ensure that the source protection plans prepared by municipalities are subject to the same public consultation requirements as plans prepared by source protection committees.

### ***Designation of Activities for sections 49, 50 and 51***

Currently, activities and land uses need to be prescribed by the regulations in order for source protection committees to be able to designate them for prohibition, regulation, or restriction in their source protection plans. In other words, under section 100(1) the Lieutenant Governor in Council must specifically identify those activities or land uses that may be subject to a permit scheme or otherwise regulated. Similarly, permit officials cannot require a risk management plan for an activity unless it has been prescribed by the regulations. This arrangement could severely curtail the ability of source protection committees and permit officials to respond to local threats in a flexible and appropriate manner. Additionally, there may be particular local activities that are not reflected in the generic list of prescribed activities identified by the province.

Accordingly, we recommend that the relevant sections be amended to allow source protection committees to designate *any* activities or land uses for prohibition, regulation, or restriction *unless* they are prescribed by regulation. By reversing the emphasis, the Lieutenant Governor in Council need not identify every conceivable activity that should be included, but need only identify those which should be excluded from the list of designated activities. The following amendments are intended to accomplish this objective:

19. Subsections 19(3) should be replaced with the following:

- (3)(a) An activity may be designated under paragraph 3 of subsection (2) unless the activity is a type of activity prescribed by the regulations; and
- (b) An activity shall not be designated under paragraph 3 of subsection (2) unless the activity is identified in the assessment report as a possible future activity that would be a significant drinking water threat.

Equivalent amendments should be made to subsections 19(4)(a) and 19(5)(a).

20. Subsection 48(1) should be amended to read as follows:

- (1) If the Director has approved an assessment report for a source protection area under section 15 or 16 or under an agreement under section 23 and, in a surface water intake protection zone or wellhead protection area identified in the report, at a location or within an area specified in the report, a person is engaged in an activity that is not prescribed by the regulations and is identified in the report as an activity that is or would be a significant drinking water threat at that location or within that area, the permit official may issue an order requiring the person to prepare and submit to the permit official, within such time as is specified in the order, a risk management plan for the activity.

### ***Adequate Funding***

It is essential that there be a sustainable and reliable approach to securing funds for the implementation of source protection plans. The province should consider all of the funding mechanisms identified in the Implementation Committee's report, including water taking charges, water rates, pollution charges, incentive programs, general revenues, and stewardship approaches, and structure a funding system that allows for the equitable reallocation of funds.

## ***Conclusion***

The *Clean Water Act* is a significant piece of legislation which provides long-awaited protections for watersheds and watershed communities. It also supports the implementation of at least 22 of Justice O'Connor's recommendations following the Walkerton Inquiry. The 19 amendments we have proposed above will help ensure the source protection framework fulfills its purpose in as comprehensive and effective a manner as possible. We look forward to the passage of the *Clean Water Act* so that the important work of protecting drinking water sources can proceed as expeditiously as possible. We thank you for your attention, and we look forward to providing further feedback on the development, implementation, and funding of source protection in Ontario.

Yours truly,

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William Phillips, President of Federation of Urban Neighbourhoods of Ontario

Terry Rees, Executive Director of the Federation of Ontario Cottagers' Associations

David Taylor and Carol Dillon, Co-chairs of Friends of the Tay Watershed