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Dear Mr. Scott:

**Re: The First Phase of Regulations under the *Clean Water Act***  
**EBR Registry No. 010-0122**

Via e-mail to james.scott@ontario.ca

**Thank you for the Additional Opportunity to Input**

Thank you for the additional opportunity to comment on the first phase of regulations related to the *Clean Water Act, 2006*. Our organization has submitted comments at earlier stages (i.e. draft legislation, response to Implementation and Expert Technical Committee reports, Source Protection Committees Discussion Paper), has appeared before Standing Committees of the Legislature when the legislation was before the Legislative Assembly, and has been supportive of submissions from organizations such as the Canadian Environmental Law Association and Environmental Defence, particularly on matters relating to the role, composition, and operation of Source Protection Committees. At this time, we commend the Province of Ontario for taking steps to strengthen the multi-barrier approach to protection of drinking water sources and to implement the recently passed legislation. These reforms and protections are long overdue. We hope that the Province will now move expeditiously to implement the legislation given the risks facing drinking water sources across the province.

**FORCE**

As you may be aware, Friends of Rural Communities and the Environment (FORCE) is a federally registered not for profit corporation. It is a citizen-based advocacy group with hundreds of supporters in Kilbride, Campbellville, Mountsberg, Freelon, and Carlisle. FORCE was formed in June 2004 to protect our natural and built environments in the face of a proposed large-scale, below the established groundwater table, aggregate development by St Marys CBM (formerly Lowndes Holdings Corp.) in the Northeast Flamborough portion of the amalgamated City of Hamilton. We note upfront that our organization is neither anti-aggregate nor anti-road; indeed, our area is home to some of Ontario and Canada's largest aggregate operations. We do, however, have significant

issues with the pending application in its proposed location for substantive reasons; reasons that relate to ground water protection for municipal and private communal, cluster and individual well systems; active and productive agricultural operations; acknowledged fragile natural systems within the Greenbelt and its Natural Heritage System; and, impacts on existing rural communities. With respect to source water, the development application before our municipalities and provincial agencies would see its extraction area, and ensuing expansion, sited within both the recharge area and the 2 year Time of Travel in the Wellhead Protection Area for the community of Carlisle. Hundreds of private wells, including clusters and communal wells, would potentially be affected.

We also believe that our organization has a responsibility to promote good government in the municipal and provincial arenas and therefore, we have a responsibility to input into the broader planning reform processes which bear upon the application processes for development proposals such as the one before our communities. Review of the first set of regulations under the *Clean Water Act, 2006* is clearly an opportune time to impact the ground rules about how we should be protecting our drinking water sources and watersheds as well as how development proposals should be evaluated and approved in a municipal jurisdiction and by relevant provincial agencies.

### **General Comments**

The *Clean Water Act* is a positive step towards watershed-based drinking water source protection in the Province of Ontario. Its scope is broad; “conflict” provisions exist to ensure consistent application of its protective measures; and, a range of new municipal powers, roles and requirements will assist in providing tangible improvements to our watersheds. While the provisions of the Act are important, many important functions are equally delegated to the discretionary regulation-making powers of the Minister and the Lieutenant-Governor-in-Council. FORCE supports the general directions proposed in the draft regulations but believes that there are some areas of improvement necessary. Notably, this is because some of the regulatory powers, including those pertaining to the structure of the Source Protection Committees and Working Groups, will greatly impact the public’s ability to participate in protecting drinking water in a meaningful way. As such, our submission will touch briefly upon each of the five draft regulations. Each regulatory section will be opened with some general commentary on the principle(s) that we believe should underpin the regulation’s construct, i.e. public participation and education should underpin the formation and operation of the Source Protection Committees. We will then make some specific comments regarding particular issues and/or questions raised by the draft regulation either where we disagree or where we agree but believe further elaboration or emphasis is required in order to support and supplement Ministry directions.

### **Source Protection Areas and Regions Regulation**

Justice O’Connor’s first recommendation in the Report of the Walkerton Inquiry noted that “...source protection plans should be required for all watersheds in Ontario. This broad based and universal level of protection is also reflected in the *Statement of Expectations* which documents themes of key importance and concern to the environmental NGO community. Regrettably, this level of protection is not reflected in the draft regulation

although we acknowledge that two additional source protection areas – the North Bruce Peninsula Source Protection Area and the Severn Sound Source Protection Area – have been added since the Discussion Paper was circulated.

**More needs to be done to fulfill Justice O'Connor's vision of province-wide source water protection.** In this regard, we are supportive of the recommendations from the Canadian Environmental Law Association to provide for mandatory assessment of risks, reduction of significant threats, and implementation of the full range of protections across the province. We also believe that regardless of the organizational arrangements – whether a non-Conservation Authority body or a municipality by agreement serves as the source protection authority in effect – there should be an equivalent degree of public involvement.

### **Source Protection Committees Regulation**

One of the most fundamental prerequisites for an effective source protection regime, in our view, is public participation and education. The inclusiveness of the public, broadly defined, is critical to ensure quality source protection planning and acceptance or buy-in to the plan and its implementation requirements. It is a reality that design and implementation of each plan will occur mostly at the local level, through measures carried out by individual landowners, agricultural operations, businesses and industries. The most effective way to build support is to provide information/education opportunities and to thoroughly engage the public. Bottom-up rather than top-down community support – involving sectors, individuals, and groups already involved in watershed-based and source protection initiatives in the area - will be important. The Act does contain some mandatory public participation and consultation provisions but generally speaking, this issue has been left to the discretionary regulation-making powers of the Lieutenant Governor – in – Council. We believe it is important that the regulations include strong public participation measures and provide for meaningful public involvement throughout the various stages of the planning and implementation process.

Community groups and the public have a real contribution to make at the early stages of the source protection planning process as terms of reference, threats/risk assessment and assessment reports are being drafted. The people of a community often possess unique knowledge of local threats and conditions – the abandoned wells, the illegal dumps, the ponds and waterways that dry up in summer due to overuse or low precipitation conditions. This knowledge needs to be captured in order to inform the decision-making process. At a minimum, public participation in the Source Protection Committee and its networks means:

- open opportunity for individual, non-government organization, academic and related members of the public to participate on the Source Protection Committee through a transparent application process in meaningful numbers
- financial stipends for those public members in order to support the costs of their participation on the Source Protection Committee, sub-committees and working/advisory groups and to ensure capacity for active long-term engagement
- easy access, including public meetings and electronic web access, to all information including minutes, policy instruments and scientific data, relevant to local source protection as well as Environmental Bill of Rights Registry postings of the draft

Terms of Reference, Assessment Reports and Source Protection Plans (notice and comment) before those documents are finalized.

### Size of the Source Protection Committee

Section 1 of the proposed regulation on Source Protection Committees stipulates that there shall be 16 members for large regions, 13 for mid-sized regions, and 10 for small regions. Section 11 of the regulation restricts the Minister from granting exemptions to the number stipulated in section 1. We believe that this makes the regulation too inflexible for the Minister and restricts the ability to accommodate local complexities. The size/composition of the committees should be designed to maximize effectiveness and to ensure fairness. **The Minister should be given the authority to grant exemption or amend the maximum number of members set out in section 1.**

### Composition of the Source Protection Committee

Section 2(1) of the proposed regulation specifies the general composition of the Source Protection Committee. It states that the composition of the committees consist of one-third municipal representation, one-third sector representation, and one-third other representation (including in particular the interests of the general public.). This approach is consistent, albeit with slight variations on a theme, with past discussion documents and with the report of the Advisory Committee on Watershed-Based Source Protection Planning. We are not uncomfortable with this direction. **To add more detail to the proposed template, however, we recommend that environmental/community non-governmental organizations be considered as bringing a specific local expertise/constituency/interest meriting a distinct place on the Source Protection Committee, even if considered within the public representation rubric.** That is, we recommend that some representation, at a minimum one representative, from these organizations be a requirement not simply an option.

While environment groups could be included in the umbrella term “other” interests, it is left up to the source protection authorities to divide up the appointments among the various stakeholder interests. It is possible that the vacancies could be filled, to the exclusion of environmental groups. The *Clean Water Act* is a piece of environmental legislation and its purpose is to protect existing and future sources of drinking water. It could be argued that the existing composition is weighted in favour of those responsible for causing the greatest threats. We recognize the importance of involving from the outset those individuals, businesses and sectors who will be required to make the largest changes as a result of the source protection plans. Having said this, it is equally important to include environmental groups to counter-balance the economic drivers and to ensure that source protection plans fulfill their intended purpose.

**We are also supportive of representation from public health being specified specifically on the Committee.** Public health representation on sub-committee and working groups and as staff advisors to the Committee is appropriate as well. These roles must be appropriately resourced. The public health role is currently stretched based on

existing roles and resource levels. Similarly, a Ministry of the Environment liaison should be available to each Source Protection Committee and Source Protection Authority.

## **Selection of Committee Members and Committee Operations**

There are several general principles – related to transparency, contribution, integrity and ethics - that should apply to the selection of the chair and individual committee members and guide their operations. We have attached our submission regarding the Source Protection Committee Discussion Paper for your reference so that we need not repeat the full document again here. We do ask that consideration be given to the following specific issues as the regulations and the implementation guidelines are finalized.

Despite the fact that the process for appointment of the chair is not subject to the regulations, **we strongly urge the Ministry to issue guidelines specifying the transparent procedure that is to be followed for appointment of the chair.** The procedure should include sharing information regarding the role and desired qualifications as well as publishing a short-list of candidates beforehand for public comment. This is particularly important given the fact that the chair is intended to act as a neutral member. By allowing the various stakeholders to comment before a final decision is made, the Source Protection Authority and the Minister will be better able to gauge the perceived neutrality of the candidates. We would encourage an open and transparent application process that involves advertising, press releases, mailings, flyers, postings in public venues like libraries, notice on the Environmental Registry and notice to community leaders and local groups.

Several conservation authorities have already initiated the selection process by publicly advertising the position of chair. This is undoubtedly due to the tight regulatory timelines that are being proposed for the appointment of the source protection committees. However, we caution that although the appointment of the chair is not a regulatory matter, the establishment of the source protection areas and regions *is* included in the proposed regulations, and the source protection committees (including the chairs) are established for the source protection areas. Accordingly, it would be improper for the chairs to be selected prior to the finalization of the source protection areas and regions via regulation.

Consistent with comments later in this letter regarding the time limit regulation, **we believe that there should be a time frame within which the Minister should appoint the chair,** even if that time limit is specified for guidance in the implementation guidelines.

Under section 12(2) of the regulation, **the alternate or “acting” chair should be selected by the Minister, in a process akin to the selection of the chair.** As with the selection of the chair, all stakeholder groups should be given an opportunity to comment on the short-list of candidates for alternate chair to ensure both the reality and perception of neutrality.

Under section 8(1) of the proposed Regulation, simply being “employed in” the source protection area should not qualify a person for appointment to a source protection committee in and of itself. **The employment provision should be a companion qualification to representation of a sector or other interest** where the representative may work in the watershed but not be resident therein.

In section 8(3) paragraph 1, the requirement that appointees must regularly “attend” meetings should be defined as including participation via conference calls.

We support the proposed regulation including such matters as mechanisms for setting the specific composition of the committee, the qualifications of committee members, and the establishment of the working groups. If not, those matters should be spelled out in detail in the Implementation Guidelines.

**The inclusion of working groups in the regulation is of particular importance,** especially since the working groups will be critical to ensuring an adequate level of consultation and collaboration takes place among the different sectors. Adequate and appropriate funding is critical to the success of the working groups. Specific funds should be earmarked for the working groups, so that these lower tiers of involvement are neither overlooked nor hindered.

In sections 14 and 15, **we believe that the rules of procedure, code of conduct, and conflict of interest policy should not be left to the guidance materials and the discretion of each individual source protection committee.** In order to promote consistency across the province, the government should include these items, or at least the core minimum requirements for same, in the proposed regulation. The proposed regulation should require that all potential conflicts of interest are reported to the chair and to the committee at the outset, and include a due process whereby any member who engages in activities that are in conflict of interest is removed from the committee.

**The proposed regulation should include stringent transparency requirements on information sharing to be followed by the committee.** Both the committees and the working groups should circulate draft versions of working documents (with qualifications included, as appropriate) and the peer reviews of scientific studies. The quarterly reports provided by the chair of the committee under section 19 should be made public. A web-based portal should be created where the public can submit comments on the documents under review.

Under section 18(2), it seems reasonable that any individual requesting that the committee maintain confidentiality should be required to provide valid justification for his or her request.

As noted in the composition section, we believe that there should be one provincial liaison from the Ministry of Environment assigned to each of the 19 source protection regions and areas. This position is important to ensure consistency, provide training, and facilitate the transfer of information between government and the committee, and visa versa.

## Terms of Reference Regulation

Meaningful consultation with First Nations has been defined, at least in part, by the courts. Specifically, the courts have recognized that the duty to consult may extend to situations in which claims to Aboriginal title have not yet been settled.

Section 2 of the proposed regulation requires the Source Protection Committee to give notice of the preparation of the Terms of Reference to the Chief of any reserve of a band that is included in a source protection area. We are concerned that this level of involvement does not constitute meaningful consultation. **The Minister, on behalf of the Provincial Crown, should ensure meaningful consultation takes place with not only those bands with reserves within the source protection area, but also those First Nations with traditional territories and/or pending land claims within the source protection area. First Nations should be involved at all stages of the development of source protection plans.**

## Time Limits Regulation

The principle underpinning the time limits regulation is implicit in its name: time limits. The principle of bringing the work to a timely implementation still must understandably reflect the need for a balance between moving expeditiously to protect existing and future drinking water sources and the time required to undertake the necessary science-based work (quantitative, qualitative, and consultative) to achieve that end. Accordingly, we support the direction to establish time limits at key stages of the source protection process.

Of primary concern, however, is the length of time being provided to undertake the work and specifically, the five year time frame provided for the completion of the proposed source protection plans. If this timeframe is followed, it will have taken a full twelve years from the time of the Walkerton tragedy and ten years from the release of the Inquiry report for the planning process to be completed. And, protection will still not have been achieved. Following finalization of the source protection plans, it will still take an indeterminate amount of time for the actual plans to be implemented. **We believe that the timeframe for completion of the source protection plan should be shortened.**

The draft regulation currently provides time limits that relate to submission of the Terms of Reference by the Source Protection Committee to the Source Protection Authority, the submission of Terms of Reference by the Source Protection Authority to the Minister, the submission of the proposed assessment report by the Source Protection Authority to the Director, and the submission of the proposed source protection plan by the Source Protection Authority to the Minister. There are a multitude of other steps along the way that need to be completed in a timely fashion for the proposed time limits to be met. **We believe that the proposed regulation should be amended to include time limits for these steps or, at a minimum, that time limit parameters should be specified in the implementation guidelines. Similarly, appropriate resources must be available to the bodies involved – whether Source Protection Authorities or the Ministry – to ensure the capacity to adequately complete the work on time.** These additional time limits should pertain to such things as the Minister's response to the Terms of Reference, the amendment and resubmittals of Terms of Reference by Source Protection Authorities, the

Minister's approval of amended Terms of Reference, submission of Assessment Reports by Source Protection authorities, the Director's Response to the Assessment Report, etc. CELA has submitted an exhaustive list of time limits required. We can point to our own local experience and how long it has taken MOE to sign-off on Groundwater Protection Characterization Studies – the Carlisle study (spring 2004) within the City of Hamilton has still not been signed off - to show that lack of specified deadlines and limited resources lead to work being bogged down and source water protection lagging.

### **Miscellaneous Regulation**

This draft regulation addresses a range of issues such as “planned” drinking water systems, drinking water systems that cannot be included in the Terms of Reference and exemptions relating to plans to discontinue existing drinking water systems. We direct our comments to section 3 of the proposed regulation that identifies non-municipal drinking water systems that cannot be included in the Terms of Reference through a municipal resolution or through an amendment by the Minister. We do, however, note and generally support the recommendations made by CELA pertaining to the other provisions and the rationale which supports them.

In principle, the fact that non-municipal drinking water systems can be excluded from the Terms of Reference and protection of the Act in section 3 of this regulation seems again to be contrary to Justice O'Connor's call for province-wide watershed-based planning and protection. That being said, we understand both the Ministry's need to phase-in implementation of the legislation, and its regulatory framework, and to achieve the greatest impact with limited resources. A focus on municipal drinking water systems meets these tests.

### **We believe, however, that section 3 should not be used to constrain a municipal resolution or the Minister's authority to nominate private systems under the Act.**

The purpose of the section appears to be to avoid the potential overuse of the option to nominate private systems, particularly those with single wells. Overuse seems unlikely. At the provincial level, the Ministry has its own working understanding of the term “cluster”. At the municipal level, there is an economic disincentive for municipalities to include an excessive number of private single well systems. If anything, the opposite concern should be what the regulation addresses – that being that municipalities should be encouraged to nominate those clusters of private systems that truly merit risk assessment and corollary protection.


While we support the capacity to nominate private systems, we are concerned that key terms are not defined and rationales are not provided. As examples, cluster remains undefined, despite the Ministry's understanding, and there is no justification provided for the threshold proposed – a cluster of six or more wells or intakes or the system is located with an area of settlement under the *Planning Act*. We do support the minimum cluster number of wells being in this order of magnitude and would not support it being significantly increased. **The term “cluster” should be defined in the regulation and/or implementation guidance materials, along with further direction to municipalities**

**regarding the circumstances in which they should be including private systems through resolutions.**

**Thank You Again**

Thank you again for the opportunity to input to the first set of regulations under the *Clean Water Act, 2006*. We commend the Province for its leadership in the area of source water protection following the Walkerton Report and encourage it to move with dispatch. We look forward to the final product, along with future companion regulations, and the impact they will have on the protection of our drinking water as well as on the quality of land use planning decisions.

Respectfully submitted,

A handwritten signature in black ink that reads "G. Flint". The signature is written in a cursive style with a horizontal line underneath the name.

Graham Flint BAsC, P. Eng  
Chair & Spokesperson