
DATE: January 19, 2006

SUBJECT: **PLANNING POLICY AND RESEARCH
COMMENTS ON THE CLEAN WATER ACT (BILL 43)**

FROM: Nick Tunnacliffe, Commissioner of Planning
M. D. Zamojc, Commissioner of Public Works
Janette Smith, Commissioner of Health
Dr. Hanif Kassam, Medical Officer of Health
R. Kent Gillespie, Commissioner of Corporate Services and Regional Solicitor

RECOMMENDATION

That a copy of the joint report of the Commissioners of Planning, Public Works, Health, Corporate Services and Regional Solicitor, and the Medical Officer of Health dated January 19, 2006, titled, "Comments on the *Clean Water Act* (Bill 43)" be forwarded to the Ontario Ministry of the Environment (MOE) for their information and action, in response to the Environmental Bill of Rights (EBR) Postings AA05E0001 and RA05E0022;

And further, that the MOE be advised that the Region of Peel supports water source protection in principle and urges the MOE to revise the proposed *Clean Water Act* to address municipal concerns and allow municipalities to participate as full partners;

And further, that the comments to the Ministry indicate that the Region is not prepared to fund source protection until implementation costs are known and a funding formula acceptable to municipalities is confirmed;

And further, that the subject report serve as the preliminary response of the Region of Peel to the *Clean Water Act* consultation;

And further, that a copy of the subject report be forwarded to the Town of Caledon; the Cities of Brampton and Mississauga; Credit Valley Conservation (CVC), Toronto and Region Conservation Authority (TRCA), Central Lake Ontario Conservation Authority, and the Association of Municipalities of Ontario (AMO), for their information.

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REPORT HIGHLIGHTS

- A number of concerns with the proposed *Clean Water Act* have been identified by Regional staff including the proposed approval process for source protection plans, the proposed status and nature of source protection plans, the scope of the legislation, and municipal financial and staffing liabilities that would arise from new responsibilities.
- Source protection plans will prevail over an official plan or zoning by-law and municipal councils will be required to amend their official plans to conform with source protection plans.
- Source protection plans and other strategies to address Great Lakes objectives would potentially erode municipal land use planning authority and diminish the current role of municipalities in watershed planning. These measures would also have potential implications to a number of regional services related to wastewater treatment plant operations, wellhead protection, and servicing in rural areas.
- The proposed legislation would assign new responsibilities to municipalities to regulate activities without providing sustained funding or a municipal approval role.

DISCUSSION

1. Background

On December 5, 2005, the Ontario government gave first reading to Bill 43, the *Clean Water Act*. The *Clean Water Act* is the provincial source water protection legislation which responds to recommendations from the Part Two Report of the Walkerton Inquiry directing that drinking water supplies be protected at source.

The new legislation establishes a formal role for conservation authorities and source protection committees to prepare source protection plans and significant new responsibilities for municipalities to implement source protection plans once they are approved by the Ministry of the Environment (MOE).

The purpose of this report is to provide recommendations and update Regional Council on the proposed *Clean Water Act (Bill 43)*. The report highlights key issues and concerns relevant to the interests of the Region and contains staff comments that will be forwarded to the MOE for consideration.

The proposed legislation was posted to the Environmental Bill of Rights Registry for a 60 day commenting period ending on February 3, 2006. Appendix I provides a summary of the legislation and the proposed organizational structure for source protection planning. Appendix II describes roles and responsibilities. Staff comments, attached in Appendix III, will be forwarded to the Province prior to the February 3 commenting deadline with notification that Regional Council would be receiving a staff report and recommendations for consideration, and that any additional comments or recommendations would be forwarded in accordance with further direction from Council. Further comments from Council would constitute the official position of the Region of Peel.

It is anticipated that the *Clean Water Act* will receive final readings in 2006 and that regulations and technical guidelines will be released for further consultation at that time.

Staff from the Town of Caledon, City of Brampton, City of Mississauga and the Conservation Authorities were consulted during the preparation of this report.

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In accordance with the legislation, Credit Valley Conservation (CVC), Toronto and Region Conservation Authority (TRCA) and the Central Lake Ontario Conservation Authority have joined to form one source protection region ("the CTC Region"). The conservation authorities, identified as 'source protection authorities,' have designated the TRCA as their lead 'source protection authority' under the legislation for the CTC Region. The TRCA lead authority will appoint a multi-stakeholder Source Protection Committee (SPC) and will coordinate the preparation of assessment reports and source protection plans for each of the watersheds. Assessment reports and source protection plans will be prepared by the Source Protection Committee and submitted through each source protection authority (i.e., Conservation Authority Boards) to the Province for approval. The lead authority will also act as liaison between the CTC Region and the Ministry of Environment for the purposes of carrying out source protection responsibilities under the Act. Municipalities will be assigned roles through regulation to develop component parts of source protection plans and will be responsible for implementing plans.

3. Staff Comments and Issues

In previous submissions to the Province, staff indicated a number of key issues that needed to be addressed when drafting the legislation to ensure that source protection plans are coordinated, flexible and not onerous for municipalities with respect to financial and staffing resources. It was also important that source protection planning not be implemented in a way that resulted in erosion of municipal land use planning authority and that municipal councils be provided with an appropriate role commensurate with their responsibilities under the legislation. In most recent comments from the Region of Peel, the Province was advised that the Region has serious concerns with the cost and proposed regulatory framework, particularly in areas such as Peel Region where source water protection is already handled in a proactive manner.

Based on staff review of the legislation, it is clear that the Province had not addressed the concerns expressed by the Region. Although the legislation is appropriately focused on specific vulnerable ground and surface water areas, and takes a "polluter pay" approach, it proposes an unnecessarily cumbersome and multilayered framework of administrative bodies that would be responsible for various aspects of the source protection planning process. It also appears to assign much of the responsibility to regulate activities to municipalities without providing Provincial funding support or a municipal approval role over source protection plans. Detailed staff comments on key issues are provided below.

a) Municipal Roles in the Approval of Source Protection Plans

Bill 43 limits the role of municipal councils to a commenting body in the process of preparing, submitting and approving terms of reference, assessment reports and source protection plans to the Province. With no direct approval authority, formal participation by the Region will be through representation on the SPC, which limits membership to 16 for the entire CTC Region, and secondarily through representation on conservation authority boards. There will be no requirement to obtain municipal council endorsement directly, at either the regional or area municipal level, before plans are submitted to the Province for approval. Although staff supports the role of the conservation authorities

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and recognizes their technical expertise in the preparation of source protection plans, conservation authorities have no mandate to provide potable water. The technical expertise with respect to the planning, management and provision of public drinking water supplies is provided by municipalities. Municipalities also provide the necessary professional and technical expertise to implement the land use planning system in Ontario. In considering the implications of plan recommendations related to drinking water, municipal implementation responsibilities, and potential impact to land use decision making within vulnerable areas, it is therefore important that the legislation provide municipal council endorsement or approval requirements at every opportunity in the process.

b) Appointment of Source Protection Committees

In the CTC Source Protection Region, a single multi-stakeholder source protection committee (SPC) of 16 members will be appointed to represent four regional municipalities and the City of Toronto. We understand that the regulation will propose one-third municipal representation of five members. If there is guaranteed representation for Regional municipalities, all five seats will be required, one for each upper-tier municipality and the City of Toronto. Regional staff recommends that there should be guaranteed representation by regional municipalities as the upper-tiers have the direct responsibility and mandate for the safe provision of drinking water.

If the single SPC committee model is used, it may not be feasible that all lower-tier municipalities have guaranteed representation. However, lower-tiers will be affected by source protection plan policies and will have an important part in the implementation of source protection initiatives within their watersheds. Therefore, it is also necessary that suitable representation for lower-tiers be provided as well so that this sector is directly represented on the committee and that their representations also reflect rural and urban municipal interests.

c) Land Use Planning Authority

Previous comments submitted by the Region of Peel to the Province indicated concerns with the potential erosion of municipal land use planning authority that would arise from two parallel planning processes that are required to make decisions about environmental protection, land use and development. Although focus of the CWA on specific vulnerable source protection areas reduces potential conflict with municipal official plan objectives, it leaves potentially extensive areas of the Region under the future policy direction of source protection plans (i.e., within highly vulnerable aquifers and groundwater recharge areas).

The Region and the Town of Caledon have already implemented policies for highly vulnerable aquifers on the Oak Ridges Moraine and wellhead protection area policies and zoning throughout the Region. The Regional Official Plan also contains policy for the protection of surface and ground water resources, including recharge areas, and the Provincial Policy Statement (PPS), issued under the *Planning Act*, requires Council decisions to be consistent with PPS policies that address ground and surface water resources. There is already a high level of consideration of water resources required in current municipal land use planning decision making, including protection of drinking water supplies, and appropriate decisions are made as to where ground water resources, important to local communities, should receive highest levels of protection.

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Municipalities are the appropriate body to make decisions on land use and protect areas where water resources are significant or highly sensitive to development in order to allow urban and rural growth to proceed in an orderly and efficient manner while still protecting the environment. The proposed mandatory content and approval of source protection plans would erode this municipal decision making authority.

d) Scope of Legislation

The Region had commented previously that source protection plans should not duplicate watershed planning by addressing natural areas protection and ecological sustainability in a broad fashion. The proposed Act provides clarification of this issue by setting out content requirements for source water protection plans that focus on specific vulnerable ground and surface water areas. This focus is appropriate in light of current source water protection needs and should not be expanded without further analysis and consultation.

In addition to its focus on vulnerable areas, the legislation proposes to include target setting to meet Great Lakes related water management objectives. These provisions should be reconsidered to ensure the process does not duplicate or erode municipal participation in existing local watershed planning processes.

Currently, target setting on a local watershed basis is not a feature of the existing bi-national or federal-provincial agreements which are currently focused on Great Lakes basin-wide issues, lake-wide management plans and specific Areas of Concern. Target setting on a watershed basis, as suggested by the proposed *Clean Water Act*, has been traditionally undertaken by conservation authorities on behalf of municipalities through local watershed planning. The current approach is integrated with municipal land use planning which has allowed municipal councils to balance growth needs and watershed objectives on a specific watershed basis. This enables target setting to be tailored to the needs of local communities with significant input by the communities who would be affected. Provincially determined targets would alter the way that watershed planning is undertaken and would potentially diminish municipal involvement, especially if municipalities are limited to a commenting role in the process as currently proposed.

Provincial Great Lakes targets may result in additional treatment costs as well as treatment facility site capacity impacts if different or greater sized treatment processes are required to be installed that were not expected. Similar implications will arise for the management and treatment of stormwater by area municipalities.

The achievement of targets to meet Great Lakes objectives is important; however, the imposition of provincial targets through source protection legislation at this time has not been fully evaluated through the provincial consultation process and should not be implemented without consideration of impacts to municipal infrastructure and further evaluation of the existing watershed planning framework as currently carried out in Ontario.

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e) Content of Source Protection Plans and Municipal Responsibilities

Source protection plans will be required to set out policies ensuring that every existing activity identified as a significant drinking water threat ceases to be a significant drinking water threat.

The way in which significant threats are determined, and the mandatory nature of the legislation to ensure significant threats are eliminated, is a concern that would potentially result in a number of undetermined impacts to regional workloads, services and programs. New standards or requirements in source protection plans may affect wastewater treatment facility and operations in the Region, wellhead protection programs and small private water system inspections and enforcement program. It is also not clear whether new regional or area municipal responsibilities for septic systems would arise if these are identified as significant threats to drinking water.

Given that requirements will only become known once regulations are available and plans have been prepared, it is not possible to assess the degree to which the *Clean Water Act* requirements will impact regional services. Planning, Public Works and Public Health staff will be identifying a number of technical questions where the interpretation of the legislation is unclear with respect to future impacts to regional services and will be seeking further clarification from the Province through comments on the proposed legislation.

f) New Municipal Responsibilities within Wellhead Protection Areas

Within wellhead protection areas, it would appear that municipalities will be required to enact a permitting by-law and appoint a permit official to regulate activities to ensure that significant threats cease to exist. Because the regulations and technical rules that establish the need for permitting are not yet available for review, it is impossible to know the degree to which the Region would be required to implement new permitting programs. The legislation also allows municipalities to delegate responsibility for permitting enforcement to conservation authorities. Once a permit official is appointed, the position will carry a great deal of responsibility and therefore the Region will need to assess staffing and financial requirements to support any program that would be mandated by source protection plans, and to evaluate potential municipal liabilities in relation to the roles carried by permit officials. Whether appointments come from municipal council or conservation authority boards, financial responsibility for hiring permit officials and inspectors will lie with the Region.

These measures would be in addition to existing municipal tools including official plan policy, the zoning of wellhead protection areas and initiatives such as the Region of Peel's land securement, road salt management, rural water quality and well abandonment programs, as well as provincial requirements under the *Environmental Protection Act*, *Ontario Water Resources Act* and *Nutrient Management Act*. Within Peel, there is also additional protection afforded through the Oak Ridges Moraine Conservation Plan, the Greenbelt Plan and the Niagara Escarpment Plan, making the need for further regulatory controls somewhat redundant for many land use activities.

In a recent submission, the Association of Municipalities of Ontario (AMO) recommended that the Province restructure the nature of source protection plans so that they are "outcome" based plans and not prescriptive inflexible documents. AMO suggested that plans could characterize valuable and vulnerable drinking water sources, assess

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drinking water threats and recommend strategies that municipalities, the Province and others could undertake using planning processes or instruments that are available under current legislation. It appears that the Province intends that source protection plans will be prescriptive. Within wellhead protection areas, source protection plans will duplicate the prohibition, regulation and restriction of land uses that are currently provided through municipal official plans and zoning by-laws.

While new regulatory powers may be necessary for some municipalities, it is preferred that the requirement to regulate activities be optional for Peel Region and not be mandatory through provisions in the legislation. Alternatively, the technical rules for risk assessment, risk management and identification of significant threats should be flexible to allow a variety of management approaches to be considered including existing incentive programs, zoning and voluntary best practice approaches. A one-size-fits-all approach is not appropriate given the variability of groundwater management needs in Ontario and the many other barriers that are components of the Province's multi-barrier approach.

g) Funding

In the November 2004 Implementation Committee Report to the Minister, the Committee recommended that the Province establish a sustainable long-term funding program for source protection that would share costs between the Province, municipalities and other water users. The Committee recommended development of a funding formula and that municipal councils consider whether a portion of the municipal share should be recovered from municipal water and sewage rates.

In 2004, the Province provided \$12.6 million to conservation authorities to hire staff and to prepare interim watershed characterization reports. More recently, the Province funded an additional \$51 million for technical studies and \$16.7 million to cover additional staffing costs within conservation authorities. Based on recent discussions with provincial staff, provincial funding will continue to focus on initiating studies and will likely scale down in the longer term. The obligations to provide sustained funding to fill technical study gaps, complete source protection plans and to meet ongoing implementation costs will therefore eventually fall to municipalities if there is no provincial commitment to sustained funding.

It is clear that the Region will be expected to carry additional program costs to implement source protection including new regulatory and inspection programs in wellhead protection areas. The financial implications to the Region may be significant and will continue to be unknown until further details in the regulations are provided. Even if the regulations and technical rules for identification of significant threats are provided, the full scope of financial implications may not be available until the initial source protection plans are developed for the Region and source protection needs are evaluated. The legislation should therefore not prescribe mandatory requirements that would be onerous for municipalities to fund or that are unnecessary in light of current tools.

It is not appropriate that municipalities take on financial obligations with such uncertainty. It is recommended that the Province commit to fully funding all source protection plan preparation, monitoring and review costs, including future funding for plan updating. It is also recommended that the Province commit to funding for municipal plan implementation costs until such time that implementation costs are known and a funding formula acceptable to municipalities is in place.

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h) Legal Issues Related to Municipal Liability

As noted earlier in this report, under the proposed legislation, the role of municipalities in the process of developing and approving terms of reference, assessment reports and source protection plans will be very limited. However, since municipalities, and, in particular upper-tier municipalities, possess the essential technical expertise and body of knowledge to manage public drinking water supplies, Part IV of the proposed Act provides that municipalities will be responsible for the enforcement of the provisions of a source protection plan which prohibit or regulate specified activities, including uses of land, which would constitute existing drinking water threats or possible significant drinking water threats, within the definitions of those terms which are set out in the Act.

The major portion of this new responsibility will involve the creation of a system for reviewing applications by owners of property to engage in certain activities, and in carrying out inspections, and, if necessary, issuing enforcement orders and possibly commencing legal proceedings against persons who engage in prohibited activities, or who engage in regulated activities without obtaining the required permit.

If the municipality does not transfer the responsibility for issuing permits and enforcing the permitting system to another body, such as a conservation authority, considerable care will have to be exercised in reviewing, and either approving or rejecting individual applications for permits. In particular, the Act will require that a permit official be satisfied that proposed activities will comply with the requirements of the source protection plan, and will not be a significant drinking water threat.

Recognizing the serious nature of the various responsibilities under the Act, the proposed legislation contains provisions which will provide broad measures of legal protection for source protection committees, source protection authorities, municipalities and other agencies, as well as their employees, in developing source protection plans. However, any agency which administers the permitting system and related enforcement activities under Part IV of the proposed Act, will be exposed to potential legal liability for any actions or alleged defaults in carrying out those functions. Therefore a very high standard of due diligence will have to be exercised in order to avoid claims based on alleged negligence in administering the permitting system.

FINANCIAL IMPLICATIONS

Financial implications to the Region are not known at this time. Future obligations and costs will depend on further clarification of requirements through recommendations contained in source protection plans. Where risk removal or management measures are mandatory, these may require the municipality to implement actions or enforcement programs that would require financial and staffing resources above what is currently dedicated to source protection.

CONCLUSION

Regional staff is recommending that the Ministry of the Environment be advised that the Region does not support the proposed *Clean Water Act (Bill 43)* in its current form and that revisions should be made to address the concerns raised in this report before further readings of the Bill are given. In response to the *Clean Water Act* consultation, Regional staff will be submitting

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detailed comments prior to the provincial commenting deadline and will forward any further recommendations or comments from Regional Council.

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Appendix I – Summary of the Proposed Clean Water Act (Bill 43)

1. Overview of Proposed Legislation

The proposed *Clean Water Act* provides a framework for the preparation and implementation of assessment reports and source water protection plans on a watershed basis. The legislation generally follows direction provided in the White Paper on Watershed-Based Source Protection Planning (February 2004) and the earlier draft legislation that was circulated in June 2004. The Bill contains 110 provisions in five parts and makes amendments to other legislation including the *Building Code Act*, *Conservation Authorities Act* and *Planning Act*.

Overall, the proposed legislation establishes a formal role for conservation authorities to prepare assessment reports and source protection plans and provides significant new authority and responsibilities for municipalities to implement source protection plans. Actions recommended in source protection plans would be mandatory for significant risks and would require decisions under the *Planning Act* and official plans to conform with source protection plans.

2. Background

The introduction of the *Clean Water Act* follows considerable consultation by the Province on source water protection since the release of the Walkerton Report in May 2002. In April 2003, the Final Report of the Provincial Advisory Committee on Watershed-Based Source Protection Planning was released for review followed by the release of the White Paper on Watershed-Based Source Protection Planning in February 2004. Draft legislation, referred to at the time as the *Drinking Water Source Protection Act*, was circulated for discussion in June 2004, but was not introduced for first reading. This was followed by two advisory committee reports in December 2004: the Implementation Committee and Technical Experts Committee reports on Watershed Based Source Protection. It is anticipated that the *Clean Water Act* will receive final readings in 2006 and that regulations and technical guidelines will be released for further consultation at that time.

3. Part I and Part II - General Matters and the Role of Conservation Authorities

Bill 43 establishes each conservation authority as a drinking water source protection area. In these areas, conservation authorities will act as 'source protection authorities' for the purpose of preparing and submitting assessment reports and source protection plans. Peel Region is included in the CTC Source Protection Region which is a partnership between Credit Valley Conservation, Toronto and Region Conservation Authority (TRCA) and the Central Lake Ontario Conservation Authority. The TRCA acts as the lead source protection authority for the CTC Region and provides technical and administrative assistance to the other source protection authorities. The lead authority also serves as liaison between the Ministry of the Environment and the other authorities for the purposes of the Act.

3.1 Creation and Role of Source Protection Committees

Within the CTC Region, a single Source Protection Committee (SPC), not exceeding 16 members, will be established by the TRCA lead authority that will have the responsibility of preparing terms of reference for the preparation of assessment reports and source protection plans. The SPC will be required to consult with municipal councils before submitting terms of reference to the source protection authorities (Conservation Authority Boards). Source protection authorities would then forward terms of reference to the Minister of the Environment who would have the authority to make amendments.

Bill 43 limits the role of municipal councils to a commenting body in the process of preparing, submitting and approving terms of reference, assessment reports and source protection plans to the Province. Section 21 provides that *"the council of a municipality may pass a resolution expressing its comments on the proposed source protection plan and may submit the resolution to the source protection authority"*.

3.2 Preparation of Assessment Reports

The source protection committee will ensure that an assessment report and a source protection plan are prepared for each watershed for approval by the Ministry of the Environment. Assessment reports will be approved by a Director appointed by the Minister. Source protection plans will be approved by the Minister.

Assessment reports will describe the quantity and quality of water and set out water budgets for each watershed. They will also identify vulnerable areas and drinking water threats associated with those vulnerable areas. Under the proposed legislation, vulnerable areas are defined as a groundwater recharge area, a highly vulnerable aquifer, a surface water intake protection zone or a wellhead protection area. Risk assessments for the vulnerable areas would be prepared to identify significant drinking water threats.

Terms of reference, regulations and technical guidance documents will dictate how assessment reports are prepared and the source protection committee will be required to consult with municipalities before submitting assessment reports to the source protection authorities.

3.3 Preparation of Source Protection Plans

Source protection plans will include the assessment report and will be required to set out the following:

- policies to ensure that every existing activity identified as a significant drinking water threat ceases to be a significant drinking water threat;
- policies to ensure that no future activity would become a significant drinking water threat;

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- a list of activities and land uses that would be prohibited, regulated or restricted under new authority in the legislation; and
- provisions governing criteria to be used when issuing permits and requiring risk management plans for regulated activities.

The identification of significant threats will be determined through regulations that prescribe the types of activities that are drinking water threats in vulnerable areas and risk assessment procedures that would determine which activity is considered a significant threat. In the Bill, "activities" include land uses.

Source protection plans are subject to approval by the Minister of the Environment, after consideration of public comments, including comments received from municipal councils. With respect to the preparation of source protection plans, municipal council roles are very limited. Council may only pass a resolution expressing its comments on a source protection plan and may submit the resolution to the source protection authority. There is no formal municipal council endorsement or approval role during the preparation and submission of source protection plans.

4. Part III – Effect of Source Protection Plans

When source protection plans are in effect, decisions under the *Planning Act* or *Condominium Act* made by a municipal council, minister of the Crown or the Ontario Municipal Board must conform with the source protection plan. In the case of a conflict, source protection plans will prevail over an official plan, zoning by-law or a policy statement issued under the *Planning Act* and municipalities will be prohibited from undertaking any work or passing any by-law that conflicts with a source protection plan. In the case of conflicts with other plans and policies, such as the Provincial Policy Statement, Greenbelt Plan, Oak Ridges Moraine Conservation Plan, and Places to Grow Growth Plan, the provisions that provide the greatest protection will prevail. Under Section 36, municipalities will be required to amend their official plans to conform with source protection plans.

4.1 Prohibited Activities

Under the proposed legislation, source protection plans will be required to undertake risk assessments and designate prohibited activities and land uses in wellhead protection areas and intake protection zones.

4.2 Regulated Activities

Where activities posing significant risks are not prohibited, these activities will be required to be regulated. Regulation will require municipalities to enact a permitting by-law and to appoint a permit official for the purpose of reviewing risk assessments submitted by individuals engaged in a regulated activity.

5. Part IV – Enforcement and Implementation of Source Protection

Part IV of the Bill assigns municipalities with the prime responsibility for implementing and enforcing source protection plan requirements. Municipalities will have new responsibilities, and depending on how policies are written and mandated in source protection plans, these responsibilities would require municipalities to prohibit, regulate or restrict land uses and activities that pose significant risks to drinking water supplies within vulnerable areas.

It is expected that the regulation of activities would not be duplicated if the activities are already regulated under the jurisdiction of the Province, such as under the *Environmental Protection Act* and *Nutrient Management Act*.

Although the legislation is enabling with respect to the passing of by-laws to regulate activities through a new permitting authority in the Act (the wording in Section 47 indicates that municipalities “may pass by-laws”), other provisions of the Bill would appear to make this necessary for the regulation of significant risks in vulnerable areas if source protection plans have identified the activities as significant risks. The identification and assessment of significant risks are dependent on regulations and guidelines that will prescribe how risk assessments are to be conducted. As regulations have not been released for consultation, it is not clear at this time what activities will be significant risks, how the risk assessment process will work, or the degree to which municipal regulation of activities would be mandatory.

If activities are identified for regulation, individuals wanting to carry out regulated activities would be required to submit risk assessments to permit officials appointed by municipal councils and to comply with permit conditions. Municipalities could also appoint permit inspectors and require inspection programs and fees to regulate activities.

6. Great Lakes

Section 12 of the proposed Act requires source protection plans to consider Great Lakes agreements to which Canada and Ontario are a party, including the Great Lakes Water Quality Agreement of 1978 and the 2002 Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem. Part V would permit the Minister to set targets respecting the quality or quantity of water and direct a source protection authority to report on any matter relating to the use of the Great Lakes as a source of drinking water. If targets are established, the Minister may direct a source protection authority to recommend steps that should be taken to achieve the target. In this process, municipal roles would be limited to providing comments.

Appendix II Clean Water Act - Roles and Responsibilities

Ministry of the Environment	Source Protection Committee	Source Protection Authority (Conservation Authority)	Municipality
Plan Preparation			
<ul style="list-style-type: none"> ▪ Minister may amend terms of reference ▪ Director approves assessment report (AR) ▪ Minister all consultation and approves source protection plan ▪ Minister may require hearings on source protection plans 	<ul style="list-style-type: none"> ▪ prepares terms of reference, assessment report and source protection plan ▪ consults with municipalities on assessment report ▪ submits terms of reference, assessment report and source protection plan to source protection authority 	<ul style="list-style-type: none"> ▪ appoints source protection committee (SPC) ▪ provides technical and admin. Assistance to SPC ▪ comments to SPC on terms of reference, assessment reports and source protection plan ▪ consults with municipalities and public on assessment reports and source protection plans ▪ submits terms of reference, assessment report and source protection plan together with comments to Ministry ▪ may propose amendments to a source protection plan for endorsement by municipal council 	<ul style="list-style-type: none"> ▪ provides comments to source protection committee on terms of reference ▪ provides comments to source protection authority on assessment report and source protection plan
Plan Monitoring and Implementation			
<ul style="list-style-type: none"> ▪ enforces and implements plan requirements with other Provincial ministries in areas of Provincial jurisdiction (i.e., under Environmental Protection Act, Ontario Water Resources Act, Nutrient Management Act, etc.) 		<ul style="list-style-type: none"> ▪ following approval of AR submits interim progress reports to Ministry on actions taken to ensure significant threats cease ▪ SPA conducts a monitoring program in accordance with regulations for drinking water threats in vulnerable areas ▪ SPA submits annual progress reports to Minister describing measures taken to implement plan ▪ implements source protection plans through programs 	<ul style="list-style-type: none"> ▪ assumes prime responsibility for implementing and enforcing source protection plan requirements ▪ if significant threats are required to be regulated, municipal councils will regulate land use activities by permitting by-law ▪ appoints permit official and permit inspectors for the purpose of regulating activities within wellhead protection areas and intake protection zones ▪ may delegate authority to regulate activities to source protection authority

PL-11-14

January 19, 2006

Sarah O'Keefe, Policy Adviser
Strategic Policy Branch
Ministry of the Environment
135 St. Clair Ave. West, 11th Floor
Toronto, Ontario, M4V 1P5

Dear Ms. O'Keefe:

**RE: Comments on the Proposed *Clean Water Act, 2005 (Bill 43)*
Environmental Bill of Rights Registry (EBR) Postings AA05E0001 and
RA05E0022**

This letter is in response to the EBR posting of the proposed *Clean Water Act, 2005 (Bill 43)* that was introduced on December 5, 2005 and the request for comments on proposed regulations relating to the establishment of source protection areas, source protection committees and terms of reference for the preparation of assessment reports and source protection plans.

As noted below, protecting drinking water sources is supported by the Region of Peel; however, there will need to be significant revisions to the legislation to ensure that municipal needs and capabilities are addressed. We therefore request that the Ministry carefully consider the comments and make appropriate revisions to the proposed *Clean Water Act* when the legislation is completed later this year.

The Region of Peel appreciates these consultation opportunities and suggests that further consultation with municipalities will be necessary to ensure that workable legislation is developed. Please note that the comments are to be considered preliminary as our comments on several key aspects of the legislation could not be finalized as these depend on further review of regulations and technical rules that are not available for review at this time.

Please also note that the following are Peel Region staff comments and that the General Committee of Regional Council will be receiving a staff report on the EBR postings on February 9, 2006, to be considered by Regional Council on February 16, 2006. Regional Council may decide to provide further comments and a formal resolution which would constitute the Region's official comments on the reports.

A - Comments on Clean Water Act, 2005 (Bill 43) EBR Posting AA05E0001

1. General

Although the Region supports a source protection framework in principle, there continues to be unresolved issues with the planning process set out in the proposed *Clean Water Act*, the significant responsibilities that will be downloaded to municipalities, the erosion and duplication of municipal land use planning authority and the ability of

municipalities and water users to afford the very complex, multilayered and costly program that will be mandated by the proposed Act.

2. Municipal Roles in the Approval of Source Protection Plans (Part II)

Bill 43 limits the role of municipal councils to a commenting body in the process of preparing, submitting and approving terms of reference, assessment reports and source protection plans to the Ministry. The lack of a formal approval role is a concern given that municipalities will be assigned significant implementation and enforcement responsibilities and will also apparently inherit considerable costs to fund source protection if there is no commitment to sustained funding from the Province.

With no direct approval authority, the Region of Peel's formal participation will be through representation on the Source Protection Committee for the CTC Source Protection Region, which limits membership to 16 members. While the Region may also have indirect input through municipal council representation on conservation authority boards and, at a staff level, through working groups responsible for developing assessment reports and source protection plans, this level of involvement is not matched to the responsibilities that will be assigned to the Region.

The model provided by the *Planning Act*, where regional councils adopt official plans for approval by the Province, is a better example in our view and may address the request to provide an appropriate balance of local accountability, implementation responsibility and decision making authority. An alternative concept that source protection plans not be prescriptive with respect to regulation of land uses and activities and instead provide strategies and guidance for implementation is recommended and should be considered as well. This alternative is explained in more detail in our comments on impacts to municipal land use planning authority.

Recommendation:

In considering the implications of plan recommendations, municipal implementation responsibilities, and potential impact to land use decision making within vulnerable areas, it is necessary that the legislation require municipal council endorsement or approval of source protection plans before they are forwarded to the Ministry for approval.

3. Erosion of Municipal Land Use Planning Authority (Parts II and III)

The proposed mandatory content of source protection plans to include prohibition and regulation of land uses posing significant threats, their preparation by source protection committees, and approval by the Ministry will inappropriately erode and duplicate municipal land use decision making authority.

Although the *Clean Water Act's* focus on specific vulnerable source protection areas reduces potential conflict with municipal official plan objectives, it leaves potentially extensive areas of the Region under the future land use policy direction of source protection plans (i.e., within wellhead protection areas, highly vulnerable aquifers and ground water recharge areas).

The Region and the Town of Caledon have already implemented policies for highly vulnerable aquifers on the Oak Ridges Moraine and wellhead protection policies and zoning throughout the Region. The Regional Official Plan also contains policy for the

protection of surface and ground water resources, including recharge areas, and the Provincial Policy Statement, issued under the *Planning Act*, requires Council decisions to be consistent with PPS policies that address ground and surface water resources. There is already a high level of consideration of water resources required in current municipal land use decision making, including the protection of drinking water supplies, and appropriate decisions are made as to where ground water resources, important to local communities, should receive highest levels of protection.

The existing provincial policy framework under the *Planning Act* could be revised, as necessary, to provide the same level of protections envisioned by the proposed *Clean Water Act* without the need to duplicate the existing planning framework and repeat similar policy and zoning powers that are exercised by municipalities. At the end of the day, the proposed process will be unwieldy, especially for source protection committees, conservation authorities, municipalities, communities and affected landowners who will be faced with preparing, approving, amending and potentially appealing two sets of plans that deal with the prohibition and regulation of land uses.

In a recent submission, the Association of Municipalities of Ontario recommended that the Province restructure the nature of source protection plans so that they are "outcome" based plans and not prescriptive documents. AMO suggested that plans could characterize valuable and vulnerable drinking water sources, assess drinking water threats and recommend strategies that municipalities, the Province and others could undertake using planning processes or instruments that are available under current legislation.

In summary, it is our conclusion that the proposed organizational and administrative framework will be fragmented, multilayered and unnecessarily cumbersome when it should be streamlined by making better use of existing decision making and implementation structures.

Recommendation:

It is recommended that the Ministry consider the AMO model, consult with municipalities on the appropriate framework, and then revise the legislation accordingly to remove the provisions in Sections 19 and 51 that would duplicate the land use planning function that is now carried out by municipalities under the *Planning Act*.

4. Conflicts with Other Provincial Plans (Part III)

The very broad and generic approach proposed in Part III of the Act to resolve conflicts with other provincial plans will create a great deal of uncertainty among the various planning processes that will be affected.

The determination of whether there are conflicts or what provisions provide the greatest protection to the quality and quantity of water may not be straightforward for many cases. In many instances, it will be municipal official plans that provide refinement and interpretation of the higher order provincial plans and Provincial Policy Statement. The identification of conflicts may therefore depend on the timing and manner in which municipal official plans are updated (i.e., comprehensive updates vs. policy or site specific amendments).

There will also be considerable uncertainty if growth plans under the *Places to Grow Act* are completed ahead of source protection plans that would later prevail if greater protection to water resources is provided. Source protection plans will potentially deal with very extensive areas that, by necessity, will be important to meeting growth objectives, particularly in the GTA municipalities. Unless there is clarity provided through the risk assessment process that lands, excluding vulnerable areas containing critical drinking water supplies, that are required for urbanization, may be developed without unnecessary restrictions, the parallel processes under the *Clean Water Act*, *Places to Grow Act* and *Planning Act* will be uncoordinated and potentially at cross purposes. The proposed solutions to address conflicts through hearings and regulations under the *Clean Water Act* will be administratively difficult to implement and overly bureaucratic especially as conflicts may arise at numerous scales and at various stages in the different planning processes.

Recommendation:

The regulations governing the preparation of risk assessments and the proposed guidance modules for completing water quality and water quality risk assessments for highly vulnerable aquifers and groundwater recharge areas in areas that are significant to meeting growth objectives under the *Places to Grow Act* and *Planning Act*, and that are not required for future drinking water supplies, are not unnecessarily restricted through source protection plan requirements.

5. Scope of Legislation

The Region commented previously that source protection plans should not duplicate watershed planning by addressing natural areas protection and ecological sustainability in a broad fashion. The proposed Act provides clarification of this issue by setting out content requirements for source water protection plans that focus on specific vulnerable ground and surface water areas. This focus is appropriate in light of current source water protection needs and should not be expanded without further analysis and consultation.

In addition, the legislation proposes to include target setting to meet Great Lakes related water management objectives. These provisions should be reconsidered to ensure the process does not duplicate or erode municipal participation in existing local watershed planning processes.

Currently, target setting on a local watershed basis is not a feature of the existing bi-national or federal-provincial Great Lakes agreements. Target setting on a watershed basis, as suggested by the proposed *Clean Water Act*, has been traditionally undertaken by conservation authorities on behalf of municipalities through local watershed planning. The current approach is integrated with municipal land use planning which has allowed municipal councils to balance growth needs and watershed objectives on a specific watershed basis. This enables target setting to be tailored to the needs of local communities with significant input by the communities who would be affected. Provincially determined targets would alter the way that watershed planning is undertaken and would potentially diminish municipal involvement, especially if municipalities are limited to a commenting role in the process as proposed.

Provincial Great Lakes targets may also affect wastewater effluent quality limits for discharges to Lake Ontario as municipally treated wastewater effluent could be deemed

to be a potential threat to a drinking water source. This could result in more stringent compliance and additional treatment costs as well as treatment facility site capacity impacts if different treatment processes are required. Similar implications will arise for the management and treatment of stormwater by area municipalities.

Recommendation:

The imposition of provincial targets through source protection legislation has not been fully evaluated through the Ministry's consultation process and should not be implemented without consideration of the implications to municipal infrastructure and further evaluation of the existing watershed planning framework as currently carried out in Ontario.

6. Content of Source Protection Plans and Municipal Responsibilities (Part II)

It is Regional staff's understanding that source protection plans will be required to set out policies ensuring that every existing activity identified as a significant drinking water threat ceases to be a significant drinking water threat. The way in which significant threats are determined, and the mandatory nature of the legislation, is a concern that would potentially result in a number of undetermined impacts to Regional workloads, services and programs and result in significant financial burdens to municipalities.

New standards or requirements in source protection plans may affect the Region's wastewater treatment facility and operations, wellhead protection program and small private water system inspection and enforcement program. It is also not clear whether new regional or area municipal responsibilities for septic systems would arise if these are identified as significant threats to drinking water.

While we anticipate impacts to the Region, Regional staff is not able to fully evaluate the implications of the legislation as several key provisions of the Act depend on further clarification through regulations and/or technical rules that have not been provided for review.

The regulations prescribing procedures for risk assessments, identification of significant drinking water threats and the identification of land uses and activities that may be required to be prohibited, regulated or restricted to ensure significant threats cease to exist should be provided in order that comments on the proposed *Clean Water Act* can be finalized.

Specific comments related to additional municipal responsibilities are provided below.

a) New Municipal Responsibilities within Wellhead Protection Areas (Part IV)

Within wellhead protection areas, it would appear that municipalities will be required to enact a permitting by-law, hire inspection officers and appoint a permit official to regulate a potentially wide scope of activities. Without the regulations and technical rules that establish the need for permitting, it is not possible to know the degree to which the Region would be required to regulate activities.

Regional staff anticipates this will require significant staffing and financial resources to support programs mandated by source protection plans and may result in additional liabilities related to the roles carried out by permit officials. Such mandatory measures are unnecessary in Peel where there are existing municipal tools in place, including

official plan policy, the zoning of wellhead protection areas and initiatives such as Peel's land securement, road salt management, rural water quality and well abandonment programs, as well as provincial requirements under the *Environmental Protection Act*, *Ontario Water Resources Act* and *Nutrient management Act*. Within Peel, there is also additional protection afforded through the Oak Ridges Moraine Conservation Plan, The Greenbelt Plan and the Niagara Escarpment Plan, making the need for further regulatory controls redundant for many land use activities.

The ability to regulate activities is a new authority that municipalities should have the option of enacting based on local needs, priorities and capabilities. In this respect, the legislation should be enabling and not prescriptive as currently provided in Parts II and IV of the Act. Alternatively, the technical rules and regulations for risk assessment, risk management and the identification of significant threats should be flexible to allow a variety of management approaches to be considered including use of existing incentive programs, zoning and voluntary best management approaches. A one-size-fits-all approach is not appropriate given the variability of ground water management needs in Ontario and the many other barriers that are components of the Province's multi-barrier approach.

Recommendation:

The provisions in Part II (Section 19 - contents of source protection plans) and Part IV (Sections 42, 50 and 51 – enforcement by municipalities, regulated activities and restricted activities) of the proposed *Clean Water Act* should be revised to enable rather than force municipalities to enact permitting by-laws to regulate activities or the Province should take this responsibility on directly.

b) Regulation of Activities that are Significant Threats (Part IV, Section 50)

It is our understanding that the *Clean Water Act* will not prohibit existing activities that are deemed to be significant drinking water threats, however, there will be a requirement that source protection plans contain policies to ensure that every existing activity identified as a significant threat ceases to be a significant threat.

The Act, in Section 50, provides the possibility that these activities would be regulated if a source protection plan designated the activity to be regulated, and, once designated, a person carrying out such an activity will not be permitted to do so unless 1) a risk assessment concludes there is no threat or 2) an acceptable risk management plan is in place to manage the risk. Risk management plans must be acceptable to permit officials who will operate under a municipal permitting by-law or delegated permitting system. In this scheme, it is not clear what happens to significant threat activities that cannot be adequately managed to remove the threat or if owners of designated activities fail or refuse to submit risk management plans. Is it the Ministry's intent that these activities be prohibited? Will municipalities be expected to enforce such sweeping requirements or does the Ministry intend to provide an enforcement role to ensure compliance with the legislation? Will municipalities, through their exercise of permitting by-law powers, be open to requests for compensation if activities are forced to cease?

Depending on the extent to which existing activities are required to be designated as significant threats, this provision may result in both great hardships for affected businesses and landowners and significant program costs and liabilities for municipalities.

c) Municipal Roles Related to Monitoring and Progress Reporting (Part III, Section 40 and 41) and Data Transfer to Conservation Authorities (Part V, Section 77)

The proposed legislation assigns all of the monitoring and progress reporting responsibilities to conservation authorities while most of the implementation responsibilities that are the subject of the monitoring will be carried out by municipalities. The assignment of conservation authorities to this function exclusively is unnecessary and would further complicate the multilayered framework that is proposed. While conservation authorities will have an important role monitoring watershed conditions in assessment reports consistent with their current technical expertise and capabilities, it is not clear the role is needed for all monitoring that the Province may prescribe.

Municipal public works and public health departments already report directly to the Province on matters related to the safety of drinking water under the *Safe Drinking Water Act* for water sampling at municipal water treatment plants and for small drinking water systems and can assume similar roles under the *Clean Water Act*. The provisions in Sections 40 and 41 would create inefficiencies and waste especially where the objectives to be monitored are directly related to municipal programs. It would make little sense, for example, to require continuous transfer of data that is collected and maintained by municipalities to conservation authorities for the purposes of compiling, interpreting and re-forwarding to the Ministry. This may unnecessarily duplicate the cost of data management in two organizations for data that is collected in support of municipal operations.

There are also concerns with respect to proper data interpretation, data security and data ownership as the Region has collected data from private well users on a confidential basis and would not be in a position to provide this data to other organizations. There are also other data that would need to be subject to data sharing agreement provisions to the satisfaction of the Region. The provisions in Section 77 of the *Clean Water Act* would appear to provide broad powers to conservation authorities that, on request, could order municipalities to transfer any document or record in the possession of municipalities. It is not clear whether this is the intent of the legislation?

Recommendation:

It is recommended that the provisions in Sections 18, 40 and 41 allow for monitoring and reporting by municipalities for implementation responsibilities and programs that will be undertaken by municipalities.

7. Funding

In the November 2004 Implementation Committee Report to the Minister, the Committee recommended that the Province establish a sustainable long-term funding program for source protection that would share costs between the Province, municipalities and other water users. The Committee recommended development of a funding formula and that the Province support both capital and operating expenditures over a multi-year period related to ongoing source protection plan implementation, monitoring, review and updating.

If the provisions of the *Clean Water Act* are enacted, municipalities will be expected to carry additional program costs that may be significant. The full cost of source protection requirements will not be available until source protection plans are in place and source protection needs are evaluated. It is therefore not appropriate that municipalities assume mandatory programs and financial obligations without commitments of provincial funding.

Recommendation:

It is recommended that the Province commit to fully funding all source protection plan preparation, monitoring and review costs, including future funding for plan updating. It is also recommended that the Province provide assurances to fund municipal plan implementation costs until such time that implementation costs are known and a funding formula acceptable to municipalities is in place.

a) Source Protection Funding and Grant Program

Regional staff understands that \$7.5 million of the Ministry's \$51 million technical studies funding program is being made available through an initial grant program which was announced in December 2005. The program provides three types of grant funding for groundwater related studies, inland waters intake protection zone delineation and Great Lakes intake protection zone delineation. The Request for Grant Proposals establishes a deadline for applications of January 31, 2006.

Regional staff intends to review previous source water protection studies and identify technical study gaps based on anticipated needs and new standards. There may be needs in Peel for grant funding to update wellhead protection area delineation and contaminant source inventories that were completed under previous studies and to complete new studies for delineation of Great Lakes intake protection zones for the Region's water intake pipes in Lake Ontario as well as other potential study requirements.

The very short timing of the application deadline comes at a time when Regional staff is required to prepare their reviews in response to the *Clean Water Act* consultation and does not provide adequate time to fully assess Regional study needs and complete grant proposals. Grant proposals require detailed work plans and a breakdown of study costs. We expect that similar timing constraints will apply to other municipalities and are therefore requesting that the Ministry extend the submission deadline in order that municipalities have the time needed to properly assess study needs and prepare applications.

Recommendation:

It is recommended that the \$7.5 million Source Protection Funding and Grant Program application deadline be extended to allow municipalities additional time to prepare applications.

B - Comments on Proposed Clean Water Act Regulations EBR Posting RA05E0022**8. The Appointment of Source Protection Committees**

In the CTC Source Protection Region, a single multi-stakeholder source protection committee (SPC) of 16 members will be appointed to represent four regional municipalities and the City of Toronto. We understand that the regulation will propose one-third municipal representation of five members. At a minimum, if there is guaranteed representation for Regional municipalities, all five seats will be required, one for each upper tier municipality and the City of Toronto. We feel there should be guaranteed representation by Regional municipalities as the upper tiers have the direct responsibility and mandate for the safe provision of drinking water.

If the SPC committee model is used, it may not be feasible that all lower tier municipalities have guaranteed representation. However, lower tiers will be affected by

source protection plan policies and will have an important part in the implementation of source protection initiatives within their watersheds. Therefore, it is also necessary that suitable representation for lower tiers be provided as well so that this sector is directly represented on the committee and that their representations also reflect rural and urban municipal interests.

Based on our earlier comments, the source protection committee could retain its role as proposed in the legislation, however, once source protection plans are prepared, they would be forwarded to municipal councils for adoption by by-law or resolution.

Recommendation:

It is recommended that Regional municipalities within the CTC Source Protection Region be granted guaranteed representation on the Source Protection Committee and that the SPC membership include lower tier municipal representatives representing both urban and rural municipalities.

9. Contents of Terms of Reference

The consultation on the proposed regulations indicates that working groups will be formed to undertake activities in the preparation of assessment reports and source protection plans and that working groups would be comprised of stakeholders (e.g., agriculture, industry, etc.). The intended role of stakeholder working groups is not clear to us; however, it is our experience that such groups would best contribute as advisory bodies to both staff working committees that would prepare reports and plans and to the source protection committee that will accept final reports before forwarding them for approval.

It is also indicated that regulations will prescribe roles for municipalities and conservation authorities to determine which bodies will develop assessment reports and source protection plans. In considering that municipalities have mandates to protect and provide safe drinking water to their communities and conservation authorities have traditionally provided technical watershed planning services on behalf of municipalities, it is appropriate that municipalities be assigned responsibility to lead assessment and planning in wellhead protection areas, intake protection zones, highly vulnerable areas and groundwater recharge areas. Municipalities would then have the option of requesting conservation authorities to do some or all of the work on their behalf. This approach is consistent with the current successful model of watershed planning in Ontario. Leaving all of these matters to be negotiated through terms of reference is not preferred.

Recommendation:

It is recommended that municipalities be assigned responsibility to lead assessment and planning in wellhead protection areas, intake protection zones, highly vulnerable areas and groundwater recharge areas in the regulations on terms of reference for the preparation of assessment reports and source protection plans.

C – Additional Comments and Questions

10. Subsection 42(6) – Permit Officials, Permit Inspectors

This subsection states that *“The council of a municipality that is responsible for the enforcement of this Part (Part IV – Enforcement by Municipalities) shall appoint a permit*

official and such permit official and such permit inspectors as are necessary for the enforcement of this Part in the areas in which the municipality has jurisdiction.” So as to clarify our understanding of this provision, will the Ministry of the Environment certify or provide training for the permit officials or permit inspectors to ensure consistency of standards in the Province? What qualifications and training must the officials or inspectors have?

11. Subsection 80(1) – Notice of Health Hazard or Exceeded Standard

This provision states “A person who has authority to enter property under Section 70 (Power of Entry) shall immediately notify the Ministry in accordance with the regulation if a) the person becomes aware that a substance prescribed by regulations is being discharged into the raw water supply of an existing drinking water system...or b) the person becomes aware that a test conducted on the raw water supply...indicates that the water does not meet a standard prescribed by the regulations.”

Will this person be required to review municipal raw water supply data and, if so, how often will this be conducted? Will this person be permitted to collect samples from the drinking water system and, if so, will they have to be licensed under O. Regulation 128/04 under the Safe Drinking Water Act? Will water samples be analysed by a licensed and accredited laboratory as required under O. Regulation 248/04? What water quality standards will be used to determine whether an “*imminent drinking water health hazard exists*”? Will re-sampling be required if a test result on the raw water supply does not meet the prescribed standard?

We trust that the above comments have been helpful and will be considered when the source water protection legislation is completed later this year.

If you have any questions, please contact Mark Head at extension 4354 or Alina Korniluk at extension 4727.

Yours truly,

Nick Tunnacliffe
Commissioner of Planning

MH/

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