



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
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ONTARIO'S CLEAN WATER ACT, 2006: CELA FAQ #2

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(May 2008)

QUESTION: Under the *Clean Water Act, 2006*, what are “Terms of Reference,” and how will these documents be drafted, reviewed and approved?

ANSWER: Terms of Reference are locally drafted “work plans” to direct the source protection planning process now underway in Source Protection Areas and Regions across Ontario. The mandatory content requirements for Terms of Reference are largely prescribed by regulation. There are key opportunities for public review and comment upon proposed Terms of Reference before these documents are approved by the Minister of the Environment.

ANALYSIS:

Background

The overall purpose of Ontario's *Clean Water Act, 2006* (“CWA”) is to protect existing and future sources of drinking water.¹ To achieve this purpose, the CWA has established a source protection planning process that is locally driven, science-based, and consultative in nature.

In 2007, the Ontario government designated “Source Protection Authorities” (i.e. existing conservation authorities) in nineteen watershed-based areas or regions across Ontario.² Each of these Authorities, in turn, appointed its own Source Protection Committee consisting of persons representing municipal, industrial, agricultural, environmental, and public interests.³ Some Committees also include representatives from First Nation communities.

The first major documentary step in the source protection planning process is the development of the Terms of Reference (“TOR”) in 2008.

The TOR Process

The process for preparing, reviewing, and approving the TOR is largely set out in the CWA.⁴ In essence, each Source Protection Committee is legally obliged to prepare a TOR to guide the

¹ CWA, section 1.

² See O.Reg.284/07.

³ See O.Reg.288/07.

⁴ CWA, sections 8 to 14.

subsequent steps of the source protection planning process (i.e. development of the “Assessment Report” and “Source Protection Plan”).⁵

When preparing the TOR, Source Protection Committees “shall consult” with all municipalities within their geographic jurisdiction.⁶ This consultation is intended to allow municipalities to decide whether to pass resolutions to take the lead on forthcoming assessment or planning tasks,⁷ or to “elevate” certain non-municipal drinking water systems for inclusion within the source protection planning process.⁸

Once the TOR preparation has commenced, Source Protection Committees are legally obliged to provide notice to clerks of local municipalities and to chiefs of any bands whose reserves are located within the area or region.⁹ In addition, the Committees are expressly required to undertake various consultation measures, including web-posting the draft TOR, publishing public notices, holding public meetings, and receiving public comments.¹⁰

As of May 2008, it appears that most Source Protection Committees have released and web-posted their draft TOR, and these Committees are now soliciting comments on the draft TOR.

In the coming months, it is anticipated that Source Protection Committees will finalize and forward the proposed TOR to their respective Source Protection Authorities. Among other things, the Committees must also web-post the proposed TOR, provide copies to local municipalities, and invite interested persons to send any further comments to the Source Protection Authority.¹¹

In turn, Source Protection Authorities are obliged to submit the proposed TOR to the Minister of the Environment for review and approval.¹² It is anticipated that the nineteen proposed TOR will be submitted to the Minister by the fall of 2008. When considering whether to approve the TOR, the Minister is specifically empowered to amend the TOR in order to “elevate” non-municipal drinking water systems into the source protection planning process.¹³

Notice of the Minister’s approval of the TOR will be posted on the on-line Registry under the *Environmental Bill of Rights*.¹⁴ At this point in time, it is anticipated that the Minister will be deciding whether to approve the submitted TORs in late 2008 or early 2009. Source Protection Authorities must web-post the approved TOR and make it available to the public through other appropriate means.¹⁵

⁵ CWA, subsection 8(1).

⁶ CWA, subsection 8(2).

⁷ O.Reg.287/07, section 4.

⁸ O.Reg.286/07, section 3.

⁹ O.Reg.287/07, section 2.

¹⁰ O.Reg.287/07, section 6.

¹¹ CWA, section 9.

¹² CWA, subsection 10(1).

¹³ CWA, subsection 10(6).

¹⁴ CWA, section 11.

¹⁵ CWA, section 12.

Significantly, it is possible under the CWA to amend the TOR even after Ministerial approval. For example, where site-specific assessment work identifies significant drinking water threats to eligible “clusters” of non-municipal wells or water intakes,¹⁶ an approved TOR can be amended to give effect to municipal resolutions “elevating” these clusters for inclusion within the source protection planning process.

The TOR Product

The mandatory content requirements for the TOR are largely set out in a general regulation under the CWA.¹⁷ In general, the proposed TOR must include the following elements:

- map of the source protection area/region and municipal boundaries therein;
- listing of all municipalities within the source protection area/region;
- copies of any relevant municipal resolutions under the CWA;
- tables identifying the particulars of existing or planned drinking water systems within the source protection area/region;
- listing of transboundary issues which require consultation with other specified Source Protection Committees;
- work plan for all the major tasks in the forthcoming source protection planning process, including descriptions of the entities responsible for the tasks and the anticipated timeframe and estimated cost of the tasks; and
- final date by which the proposed Source Protection Plan (and related documentation) must be submitted to the Minister of the Environment.

In addition, where the source protection area/region contains water that flows into the Great Lakes or St. Lawrence River, the proposed TOR must include provisions requiring consideration of various Great Lakes – St. Lawrence River agreements (i.e. Great Lakes Water Quality Agreement, Great Lakes Charter, Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, etc.).¹⁸

It should be noted that the foregoing list constitutes the minimum requirements for what must be included within the proposed TOR. In other words, the CWA and the general regulation establish a “floor” (not a “ceiling”) for TOR content, and, as a matter of law, it is open to Source Protection Committees to propose additional or discretionary TOR provisions, provided that such provisions do not conflict with statutory or regulatory requirements.¹⁹

¹⁶ O.Reg.286/07, section 3.

¹⁷ O.Reg.287/07, section 3.

¹⁸ CWA, section 14; O.Reg.286/07, section 4; and O.Reg.287/07, section 5.

¹⁹ For example, a proposed TOR cannot commit to landowner compensation in light of section 98 of the CWA: see CELA FAQ #1.

For example, the proposed TOR may include items such as executive summaries, mission statements, background information, summaries of available surface water/groundwater studies, glossaries, FAQs, overviews of implementation options, proposed working groups, list of references/links, or criteria for evaluating policies to address drinking water threats, even though none of these items are specifically prescribed by regulation.

Public Interest Considerations

When reviewing the proposed TOR, it will be instructive for public interest representatives to consider the following “checklist” of questions and issues:

- did the Source Protection Committee or Authority comply with all the prescribed steps for preparing, publishing and consulting upon the proposed TOR?
- does the proposed TOR address all of the prescribed content requirements at a sufficient level of detail, including Great Lakes provisions where applicable?
- does the proposed TOR canvass the need to solicit aboriginal traditional knowledge and community-based local knowledge to supplement the gathering of technical or scientific data regarding water quality/quantity or drinking water threats?
- does the proposed TOR commit to a consultation program containing timely opportunities for meaningful participation in the decision-making process by First Nations, stakeholders, and the public at large?
- does the proposed TOR set out an appropriate approach (or establish priorities) for data collection, modelling and analysis in the source protection planning process?
- does the proposed TOR commit to using the precautionary principle to ensure that lack of scientific certainty does not delay or preclude policies intended to address significant drinking water threats?
- will the proposed TOR ensure that known or suspected threats to local drinking water quality/quantity (i.e. direct, indirect or cumulative impacts from point- and non-point sources) will be identified, evaluated and mitigated?
- does the proposed TOR stipulate that certain non-municipal drinking water systems are eligible for inclusion in the source protection planning process?

Under the CWA, there is no statutory right to “appeal” the TOR to an administrative tribunal or to court. Therefore, where a proposed TOR may require strengthening or improvement, it is incumbent upon public interest representatives to directly raise their concerns in a timely manner with the Source Protection Committee, Source Protection Authority, or the Minister of the Environment prior to TOR approval.