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COMMUNICATION
SP CW (WS) - January 17, 2019
ITEM - 1

Subject: FW: Special Committee of the Whole Report No.1 Bill 66
Attachments: CELAlegalanalysis-Bill66andCWA.pdf; ATT00001.htm; Bill 66.pdf; ATT00002.htm

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Subject: Re: Special Committee of the Whole Report No.1 Bill 66

To City Clerk, Mayor and Council of the City of Vaughan.

I'm requesting that these to attachments are added to the Public agenda for.

Special Committee of the Whole Report No.1

Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

"OPEN-FOR-BUSINESS" PLANNING BY-LAWS, DRINKING WATER SAFETY, AND THE LESSONS OF THE WALKERTON TRAGEDY: LEGAL ANALYSIS OF SCHEDULE 10 OF ONTARIO BILL 66

Prepared by
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ABSTRACT: *Schedule 10 of Ontario's Bill 66 proposes to enable municipalities to attract largescale economic development by passing "open-for-business planning by-laws" under the Planning Act. If Bill 66 is enacted, these municipal by-laws will require the prior approval of the Minister of Municipal Affairs and Housing, but will not be subject to the mandatory public notice, comment or appeal provisions under the Planning Act. In addition, these by-laws will be exempt from the application of key parts of important provincial laws, plans and policies, including the Clean Water Act, 2006 that was enacted in response to the Walkerton Tragedy. Section 39 of this Act currently requires planning and approval decisions at the provincial and municipal levels to conform to policies in source protection plans that address significant drinking water threats and the Great Lakes. However, Schedule 10 of Bill 66 proposes to exempt open-for-business planning bylaws from section 39, which is one of the most critical provisions in the Clean Water Act, 2006. This analysis[1] reviews the evolution of, and public policy rationale for, section 39, and identifies various adverse legal consequences if this proposed exemption is enacted. In order to safeguard public health and safety, the authors conclude that Schedule 10 of Bill 66 should be immediately abandoned or withdrawn by the Ontario government.*

PART I – INTRODUCTION

On December 6, 2018, the Ontario government introduced Bill 66 (*Restoring Ontario's Competitiveness Act, 2018*) for First Reading.[2] If enacted, Bill 66 amends various provincial statutes, including the *Planning Act*.[3]

The proposed *Planning Act* changes in Schedule 10 of Bill 66 will empower municipalities to pass "open-for-business planning by-laws" aimed at facilitating major new development in order to create employment.[4] In addition, this Schedule specifically exempts these extraordinary by-laws from current *Planning Act* requirements that govern the passage of zoning by-laws.

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[1] This analysis provides general legal information about Schedule 10 of Bill 66, and should not be construed or relied upon as legal advice.

[2] Bill 66 is available at: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-66.

[3] The *Planning Act* is available at: https://www.ontario.ca/laws/statute/90p13.

[4] See the Environmental Registry posting for this legislative "planning tool" proposal in Schedule 10 of Bill 66 (https://ero.ontario.ca/notice/013-4125). See also the Environmental Registry posting for related regulatory details on how open-for-business by-laws may be passed by municipalities (https://ero.ontario.ca/notice/013-4239).

Schedule 10 of Bill 66 further specifies that open-for-business planning by-laws do not have to comply with important environmental protections and land use controls established under other provincial laws, plans and policies.

For example, Schedule 10 expressly provides that section 39 of the *Clean Water Act, 2006* (*CWA*)[5] does not apply to an open-for-business planning by-law. This key section of the *CWA* was enacted by the Ontario Legislature over a decade ago, and it generally requires planning and approval decisions at the provincial and municipal levels to be consistent with policies in *CWA*-approved source protection plans that address significant drinking water threats and the Great Lakes.

The purpose of this analysis by CELA is to examine the adverse legal consequences and public health implications of exempting open-for-business planning by-laws from section 39 of the *CWA*. CELA's more detailed analysis of other contentious aspects of Bill 66 will be submitted shortly to the Ontario government during the public comment period on the proposed legislation.[6]

For the reasons outlined below, CELA concludes that Schedule 10 of Bill 66 is a regressive, unwarranted and potentially risky proposal that is inconsistent with the public interest, and that does not adequately safeguard the health and safety of the people of Ontario.

Moreover, Schedule 10's proposed exclusion of section 39 of the *CWA* is contrary to the recommendations from the Walkerton Inquiry and three specialized, multi-stakeholder advisory committees that were established by the Environment Ministry in relation to source protection planning.

Accordingly, CELA strongly recommends that Schedule 10 be immediately abandoned or withdrawn by the Ontario government.

PART II – THE PUBLIC INTEREST PURPOSE OF SECTION 39 OF THE *CWA*

In order to understand the nature, scope and significance of Schedule 10 of Bill 66, it is instructive to briefly review the historical and legislative context of section 39 of the *CWA*.

(a) The Walkerton Tragedy

In May 2000, seven persons died, and over 2,300 persons fell ill, after the municipal drinking water system in Walkerton, Ontario became contaminated with harmful bacteria (*E.coli* 0157:H7 and *Campylobacter jejuni*).

The source of contamination was cattle manure that had been spread in accordance with best management practices on agricultural lands in close proximity to a municipal well.

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[5] The *CWA* is available at: https://www.ontario.ca/laws/statute/06c22.

[6] See the general Environmental Registry posting for Bill 66 (https://ero.ontario.ca/notice/013-4293).

In response to this tragedy, the Ontario government established an inquiry under the *Public Inquiries Act* to investigate the circumstances leading up to the outbreak, and to identify ways to better protect the safety of Ontario's drinking water.

This inquiry was headed up by Mr. Justice O'Connor, who held extensive public hearings, heard voluminous evidence and received detailed submissions on these matters from a large number of parties.[7]

(b) Findings and Recommendations of the Walkerton Inquiry

In 2002, Mr. Justice O'Connor published a two-volume report[8] which made a number of findings about the various factors that caused or contributed to the Walkerton Tragedy, including the following:

- the Town of Walkerton did not have the legal means to control land use in the vicinity of the affected well;[9]

- the regulatory culture created by the provincial government through the Red Tape Commission review process discouraged the passage of a new regulation that required prompt notification of adverse water quality test results;[9]

- despite warnings of increased risks to the environment and human health, the provincial government's budget cutbacks and staff reductions undermined the Environment Ministry's ability to proactively inspect municipal drinking water systems;[10] and

- land use planning can play an important role in the protection of surface water and groundwater.[11]

The Walkerton Inquiry report also contained a comprehensive set of recommendations aimed at preventing a recurrence of this public health catastrophe elsewhere in Ontario. On the basis of expert evidence, Mr. Justice O'Connor concluded that Ontario should implement a multi-barrier approach (including preventing the degradation of drinking water sources) in order to protect drinking water safety and human health.[12]

Accordingly, the Part Two Report of the Walkerton Inquiry made 93 recommendations, 22 of which involved drinking water source protection, such as:

- drinking water sources should be protected by developing watershed-based source protection plans, which should be required for all watersheds in Ontario;

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[7] CELA served as counsel for the Concerned Walkerton Citizens at the Walkerton Inquiry.
[8] The Walkerton Inquiry report is available at: http://www.archives.gov.on.ca/en/e_records/walkerton/ [9] Part One Report of the Walkerton Inquiry, page 20.
[9] *Ibid*, pages 33, and 235-36.
[10] *Ibid*, pages 34-35, and Chapter 10.
[11] Part Two Report of the Walkerton Inquiry, pages 52-53.
[12] Part One Report of the Walkerton Inquiry, pages 108-112, and Chapter 11. See also Part Two Report of the Walkerton Inquiry, Chapter 3.

- the Environment Ministry should ensure that draft source protection plans are prepared through an inclusive process of local consultation, which should be managed by conservation authorities where appropriate;

- draft source protection plans should be subject to review and approval by the Environment Ministry;

- provincial government decisions that affect the quality of drinking water sources must be consistent with approved source protection plans;

- where the potential exists for a significant direct threat to drinking water sources, municipal official plans and decisions must be consistent with the applicable source protection plan, and the plans should designate areas where consistency is required;

- for other matters, municipal official plans should have regard for the source protection plan;

- the regulation of other industries by the provincial government and by municipalities must be consistent with provincially approved source protection plans;

- given that the safety of drinking water is essential for public health, those who discharge oversight responsibilities of the municipality should be held to a statutory standard of care;

- the provincial government should enact a *Safe Drinking Water Act* to deal with matters related to the treatment and distribution of drinking water; and

- the provincial government should ensure that programs relating to the safety of drinking water are adequately funded (emphasis added).[13]

In response to the Walkerton Inquiry report, the Ontario government committed to implementing all of Mr. Justice O'Connor's recommendations, including those described above. Among other things, the provincial government enacted the *Nutrient Management Act, 2002* and the *Safe Drinking Water Act, 2002*, and undertook public consultations[14] on a White Paper[15] that eventually resulted in the passage of the *CWA*.

(c) Findings and Recommendations of Provincial Advisory Committees

After the Walkerton Inquiry but prior to the passage of the *CWA*, the Environment Ministry established three multi-stakeholder advisory committees to provide expert input and assistance on how to structure and implement the source protection planning process in Ontario.

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[13] Part Two Report of the Walkerton Inquiry, Recommendations 1-6, 17, 45, 67 and 78.

[14] CELA's submissions on the *CWA*, implementing regulations, technical rules and related matters are available at: http://www.cela.ca/collections/water/source-water-protection.

[15] See http://agrienvarchive.ca/download1/watshed-based_source_prot_planning2004.pdf.

In 2003, for example, the report of the Advisory Committee on Watershed-Based Source Water Protection Planning[16] found that:

> Ontarians have made it clear that clean and safe drinking water is one of the most significant priorities in our province today. The extensive public hearings that occurred as part of the Walkerton Inquiry confirmed that Ontarians' confidence in their drinking water requires that the systems that deliver, govern and protect our water – from source to tap – meet the highest standards. Protecting human health is paramount (emphasis added).[18]

The Advisory Committee concluded that while municipalities play a key role in source protection planning, municipal authorities require additional statutory powers to control land use and development in order to protect drinking water safety:

> Municipalities will be key players in the development and implementation of watershedbased source protection plans, not only through their representation on conservation authorities, but also through their critical role in implementation in terms of controlling and influencing land uses and land use planning...
>
> Municipalities can influence the location of new high risk land uses, but only prior to their establishment... However, it must recognized that the *Planning Act* applies primarily during that limited period when a proposed development is proceeding through the approvals process and during initial construction. These existing mechanisms do not provide for long-term monitoring and enforcement.
>
> Municipality ability to regulate existing uses is even more limited (original emphasis).[19]

Accordingly, the Advisory Committee made a number of recommendations on the design and implementation of source protection planning legislation, including the following:

- where risk to human health is the concern, source protection legislation should supersede other legislative provisions and considerations, and provincial decisions affecting water quality and quantity should be required to be consistent with source protection legislation;
- other provincial legislation (including the *Planning Act*) should be amended where necessary to be consistent with source protection legislation; and
- new powers should be developed for municipalities to better protect source water and implement watershed-based source protection plans (emphasis added).[17]

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[16] CELA served as a member of this Advisory Committee, as did members representing municipal, building, aggregates, agriculture and many other sectors. This Committee (like the ensuing Implementation Committee report noted below) arrived at consensus recommendations to the Ministers, and the recommendations from both reports formed the basis for the *CWA* when it was subsequently enacted. [18] Advisory Committee Report (2003), page 1. This report is available at:
http://agrienvarchive.ca/bioenergy/download/SWPA_Advisory_Committee_Report.pdf.
[19] *Ibid*, page 12.
[17] *Ibid*, Recommendations 8, 9 and 11.

Similarly, the Implementation Committee[18] reported to the Environment Ministry in 2004 that:

> It is important that all provincial and municipal decisions affecting drinking water be consistent with approved source protection plans. In addition, source protection plans must prevail if conflicts with other instruments occur. A primary clause would help ensure effective implementation of source protection plans by providing the legal basis for decision-making in the event of conflicts...
>
> Legislative and jurisdictional reviews... indicate that gaps exist in current municipal authority to address threats to vulnerable drinking water sources in existing built-up areas and from existing activities...
>
> The Committee also examined the relationship between source protection plans and municipal official plans and zoning by-laws and recommends that municipal land-use planning decisions be required to "be consistent with" source protection plans from the time a source protection plan is approved by the province. Municipal official plans should be updated to include source protection data and policies, and the province should work with municipalities to ensure a timely update of municipal official plans.[22]

Accordingly, the Implementation Committee made numerous recommendations, including the following:

- source protection legislation should ensure that:

  (a) provincial government regulation and decisions that affect drinking water are consistent with provincially approved source protection plans; and

  (b) municipalities implement source water protection plans through their land-use planning systems where applicable and that municipal regulation of activities shall complement and implement, where applicable, provincially approved source protection plans;

- source protection legislation should ensure that if there is a conflict between an approved source protection plan as it pertains to a significant risk to drinking water and (1) a provincial law or instrument or (2) a municipal official plan or by-law, the approved source protection should prevail;

- approved source protection plans should be binding on the Crown;

- there must be consistency between source protection plans and decisions that the province makes related to a wide range of activities, including those related to: the province's own lands and activities; new and expanding operations; and existing activities which operate under provincial approvals (permits, licences, etc.); and

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[18] CELA served as a member of the Implementation Committee. [22] Implementation Committee Report (2004), pages xiii and xiv. The Committee's report is available at: http://sourcewaterinfo.on.ca/images/uploaded/uploadedDownloads/4938e.pdf.

- to address the gap in municipal authority and support municipal implementation of source water protection plans, the Implementation Committee recommends that municipal landuse planning decisions be required to "be consistent with" source water protection plans from the time that the plans are approved by the province (emphasis added).[19]

In addition, the Technical Experts Committee[20] established by the Environment Ministry reported in 2004 that:

> Protection of drinking water sources is the first step in a multi-barrier approach to ensuring safe drinking water. The goal of source protection is to provide an additional safeguard for human health by ensuring that current and future sources of drinking water in Ontario's lakes, rivers and groundwater are protected from potential contamination or depletion. Protecting the quality and quantity of drinking water sources will also help maintain and enhance the ecological, recreational and commercial values of our water resources.[21]

The Technical Experts Committee report also contains detailed recommendations on how to implement a credible, science-based approach for identifying drinking water threats, analyzing source water vulnerability, and undertaking risk management. This Committee also recommended that source protection plans should prevail over other provincial or municipal decisions:

> Drinking water source protection must take priority over the *Nutrient Management Act*, farm water protection plans, and any other provincial or municipal legislation, policies or regulations that impact drinking water (emphasis added).[22]

The foregoing unanimous recommendations from the three provincial advisory committees were reflected in the *CWA* when it was passed by the Ontario Legislature in 2006 and proclaimed into force in 2007. In particular, the above-noted recommendations regarding the primacy of source protection plans were directly incorporated into section 39 of the *CWA*, as discussed below.

Given this extensive work by the provincial advisory committees, and given this history of broad multi-stakeholder support for the paramountcy of source protection plans, CELA questions why the Ontario government is now trying to evade or undermine the legal effect of source protection plans by ousting the application of section 39 of the *CWA* to open-for-business planning by-laws under Schedule 10 in Bill 66.

(d) Purpose and Provisions of the CWA

The overall purpose of the *CWA* is to protect existing and future sources of drinking water against "drinking water threats."[23]

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[19] *Ibid*, Recommendations 15, 16, 18, 19 and 21.

[20] As an Implementation Committee member, CELA participated as an *ex officio* observer in the meetings of the Technical Experts Committee.

[21] Technical Experts Committee Report (2004), page vii. The Committee's report is available at: http://www.ontla.on.ca/library/repository/mon/9000/249006.pdf.

[22] *Ibid*, Guiding Principle 15.

[23] *CWA*, section 1.

"Drinking water threat" is defined under the *CWA* as "an activity or condition that adversely affects, or has the potential to adversely affect, the quality or quantity of any water that is or may be used as a source of drinking water, and includes an activity or condition that is prescribed by the regulations as a drinking water threat."[24]

For example, where a prescribed activity within a wellhead protection area or surface water intake protection zone may create significant risk to source water, the *CWA* makes it mandatory for source protection plans to include policies to ensure that the activity "never becomes a significant drinking water threat," or that the activity, if already underway, "ceases to be a significant drinking water threat."[25]

To date, *CWA* regulations have prescribed almost two dozen different agricultural, commercial or industrial activities as drinking water threats:

1. The establishment, operation or maintenance of a waste disposal site within the meaning of Part V of the *Environmental Protection Act*.
2. The establishment, operation or maintenance of a system that collects, stores, transmits, treats or disposes of sewage.
3. The application of agricultural source material to land.
4. The storage of agricultural source material.
5. The management of agricultural source material.
6. The application of non-agricultural source material to land.
7. The handling and storage of non-agricultural source material.
8. The application of commercial fertilizer to land.
9. The handling and storage of commercial fertilizer.
10. The application of pesticide to land.
11. The handling and storage of pesticide.
12. The application of road salt.
13. The handling and storage of road salt.
14. The storage of snow.
15. The handling and storage of fuel.
16. The handling and storage of a dense non-aqueous phase liquid.

[24] *CWA*, subsection 2(1).
[25] *CWA*, subsection 22(2), para 2.

17. The handling and storage of an organic solvent.

18. The management of runoff that contains chemicals used in the de-icing of aircraft.

19. An activity that takes water from an aquifer or a surface water body without returning the water taken to the same aquifer or surface water body.

20. An activity that reduces the recharge of an aquifer.

21. The use of land as livestock grazing or pasturing land, an outdoor confinement area or a farm-animal yard.

22. The establishment and operation of a liquid hydrocarbon pipeline.[26]

To ensure the effectiveness and enforceability of source protection plans in relation to significant drinking water threats and the Great Lakes, subsections 39(1) to (8) of the *CWA* currently stipulate that:

- municipal, provincial and tribunal decisions under the *Planning Act* "shall conform with" policies contained in source protection plans that prevent or stop activities that constitute significant drinking water threats, or that are designated Great Lakes policies;[27]

- municipal, provincial and tribunal decisions under the *Planning Act* must "have regard to" other policies in source protection plans;

[26] O.Reg.287/07, section 1.1. Subject to the approval of the Environment Ministry, it is also open to Source Protection Committees under the *CWA* to identify and evaluate local threats that are not found on the provincial list of prescribed threats.

[27] This mandatory requirement does not apply to the issuance of the Provincial Policy Statement or Ministerial zoning orders under section 47 of the *Planning Act*: see *CWA*, subsection 39(3). Given that Ministerial zoning orders have been previously used to facilitate major manufacturing plants in Ontario, CELA concludes that it is duplicative for Schedule 10 of Bill 66 to create a substantially similar planning tool to be used by municipalities.

- in cases of conflict, the significant threat policies and designated Great Lakes policies in source protection plans prevail over official plans, by-laws, and provincial plans or policies;

- within source protection areas, no municipality or municipal planning authority shall undertake any public work, structural development or other undertaking that conflicts with a significant threat policy or designated Great Lakes policy in source protection plans;

- no municipality or municipal planning authority shall pass a by-law for any purpose that conflicts with significant threat policies or designated Great Lakes policies in source protection plans; and

- provincial decisions to issue "prescribed instruments"[28] (e.g. environmental licences, permits or approvals) must conform with significant threat policies and designated Great Lakes policies in source protection plans, and must have regard to other policies in source protection plans.

It should be noted that the application of subsections 39(1) to (8) to policies in source protection plan is further addressed by section 34 of O.Reg.287/07 under the *CWA*. In essence, this regulation indicates that in order for policies to have legal effect under the *CWA*, the source protection plan must specify which subsections under section 39 (or other Part III provisions) are applicable to which policies.[29]

In general, source protection plans can designate lands upon which prescribed activities are prohibited,[30] restricted,[31] or regulated through risk management plans.[32] Under the *CWA*, municipalities are required to amend their official plans and zoning by-laws under the *Planning Act* in order to bring them into conformity with the significant threat policies contained in source protection plans.[33]

To develop significant threat policies and Great Lakes policies in source protection plans, the *CWA* established a locally-driven, science-based and participatory planning process to identify and protect the quality and quantity of drinking water sources (e.g. groundwater and surface water).

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[28] To date, a lengthy list of instruments have been prescribed under the *CWA*, including: permits, licences and site plans under the *Aggregate Resources Act*; environmental compliance approvals for waste disposal sites and sewage works under the *Environmental Protection Act*; nutrient management plans and strategies under the *Nutrient Management Act, 2002*; water-taking permits under the *Ontario Water Resources Act*; pesticide permits under the *Pesticides Act*; and certain permits and licences under the *Safe Drinking Water Act, 2002*: see O.Reg.287/07, section 1.0.1.

[29] See, for example, Schedule C to the approved source protection plan for the Cataraqui Source Protection Area in southeastern Ontario: http://cleanwatercataraqui.ca/PDFs/Studies-and-Reports/AppendixC-Applicable-LegalProvision-of-Policies.pdf.

[30] *CWA*, section 57.

[31] *CWA*, section 59.

[32] *CWA*, section 58.

[33] *CWA*, sections 40 to 42.

In 2007, for example, the Ontario government designated "Source Protection Authorities" (existing conservation authorities) in a large number of watershed-based areas or regions across Ontario.[34] Each of these Authorities, in turn, appointed its own Source Protection Committee consisting of persons representing municipal, industrial, agricultural, environmental, and public interests.[39]

These Source Protection Committees prepared and consulted upon assessment reports under the *CWA* that identified municipal drinking water sources, evaluated the vulnerability of these sources, and classified potential threats[35] to these sources arising from activities on nearby lands and waters.

The Committees then drafted and consulted upon source protection plans that, among other things, contained watershed-specific policies to mitigate significant drinking water threats, address Great Lakes issues where applicable, and enhance the protection of other sensitive areas (e.g. highly vulnerable aquifers and significant groundwater recharge areas).

The draft source protection plans were then submitted to the Environment Ministry for review and approval. By the end of 2015, 38 source protection plans had been approved by the Ministry, and all of the approved plans are currently being implemented by provincial, municipal and risk management officials across Ontario.

In the meantime, Source Protection Committees are now gearing up to update their original assessment reports to determine if their plan policies require any amendments in light of new information or changed circumstances at the local level.

CELA notes that the most recent Annual Report of the Environmental Commissioner of Ontario (ECO) independently reviewed the first generation of approved source protection plans.[41] After interviewing stakeholders and examining 500 plan policies from across the province, the ECO concluded that the *CWA* process has worked well to produce "individually tailored source protection plans that respond to the specific geography and local circumstances of each watershed," and that contain "policies that thoughtfully weighed the financial consequences of complying with more onerous policies without sacrificing the ultimate goal of drinking water safety."[36]

Similarly, the ECO found that *CWA* source protection plans have resulted in "thousands of on-theground actions to reduce drinking water threats," and these actions "should over time reduce the risk of spills and unsafe discharges to municipal drinking water sources, which supply water for about 80% of Ontarians."[37] The actions cited by the ECO include "ministries are updating

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[34] See O.Reg.284/07.
[39] See O.Reg.288/07.
[35] Activities undertaken in or near wellhead protection areas and surface water intake protection zones were assessed under the *CWA* to determine whether they constituted low, moderate or significant threats to drinking water sources.
[41] ECO 2018 Annual Report, Volume 2, Chapter 1: https://eco.on.ca/reports/2018-back-to-basics/.
[36] *Ibid*, page 5.
[37] *Ibid.*

pollution permits to incorporate source protection provisions," and "municipalities are amending their official plans to designate restricted areas for source protection."[38] CELA notes that these types of action are specifically mandated by Part III of the *CWA*, including section 39.

Given the ECO's findings, and given the considerable time, effort and resources that have gone into the source protection planning process to date, CELA is gravely concerned by the attempt in Schedule 10 of Bill 66 to allow open-for-business planning by-laws under the *Planning Act* to circumvent or override section 39 of the *CWA*, as described below.

CELA also shares the ECO's concern that provincial funding to continue the *CWA* source protection program beyond March 2019 has not yet been confirmed by the Ontario government,[39] despite Mr. Justice O'Connor's above-noted recommendation that this critically important program must be adequately funded. As correctly noted by the ECO, "the province should not squander the substantial investment it has made"[40] in source protection planning since the *CWA* was first enacted in 2006.

PART III – ANALYSIS OF EXEMPTING OPEN-FOR-BUSINESS PLANNING BY-LAWS FROM SECTION 39 OF THE *CWA*

(a) Purpose and Provisions of the Planning Act

The overall purpose of the *Planning Act* has been framed by the Ontario Legislature as follows:

- promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
- provide for a land use planning system led by provincial policy;
- integrate matters of provincial interest in provincial and municipal planning decisions;
- provide for planning processes that are fair by making them open, accessible, timely and efficient;
- encourage co-operation and co-ordination among various interests; and
- recognize the decision-making authority and accountability of municipal councils in planning.[41]

The *Planning Act* also identifies a broad range of provincial interests that the Minister of Municipal Affairs and Housing, municipal councils and other decision-makers must have regard to when exercising their statutory powers under the Act. These matters include:

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[38] *Ibid.*
[39] *Ibid*, pages 47-50.
[40] *Ibid*, page 49.
[41] *Planning Act*, section 1.1.

- the protection of ecological systems, including natural areas, features and functions;
- the protection of the agricultural resources of the province;
- the conservation and management of natural resources and the mineral resource base;
- the supply, efficient use and conservation of energy and water;
- the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems;
- the orderly development of safe and healthy communities;
- the protection of public health and safety;
- the appropriate location of growth and development; and
- the mitigation of greenhouse gas emissions and adaptation to a changing climate.[42]

In general, Ontario's *Planning Act* enables municipalities to pass zoning by-laws which permit, restrict or prohibit land uses within their respective boundaries.[43] Municipal decisions on official plans and zoning by-laws are typically subject to public notice and comment opportunities,[44] and these decisions "shall be consistent"[45] with the directions set out in the Provincial Policy Statement (PPS) issued under the *Planning Act*. Land use planning disputes may be heard and decided in proceedings before the independent Local Planning Appeal Tribunal.

The 2014 PPS contains a number of provincial policies aimed at ensuring safe, healthy and liveable communities and protecting natural heritage features and functions. For example, the PPS stipulates that all *Planning Act* decisions must:

- avoid development and land use patterns which may cause environmental or public health and safety concerns;

- ensure that water services are provided in a manner that can be sustained on water resources on which they depend, and that complies with all regulatory requirements and protects public health and safety;

- protect, improve or restore the quality and quantity of surface water and groundwater resources;

- implement necessary restrictions on development and site alteration in order to protect all municipal drinking water supplies and designated vulnerable areas; and

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[42] *Ibid*, section 2.
[43] *Ibid*, section 34.
[44] *Ibid*, sections 17 and 34.
[45] *Ibid*, subsection 3(5).

- restrict development and site alteration in or near sensitive surface water features and sensitive groundwater features such that these features and their related hydrologic function will be protected, improved or restored.[46]

Given that these and other PPS policies are designed to safeguard the overarching provincial interest in protecting water quality and quantity, it is unclear, from a public interest perspective, why Schedule 10 of Bill 66 now proposes to expressly exempt open-for-business planning by-laws from being consistent with the PPS, as discussed below.

In addition, CELA notes that the PPS already expressly directs the municipalities to "promote economic development and competitiveness" by various means, including planning for, protecting and preserving "employment areas" for current and future uses.[47] Accordingly, it appears to CELA that Schedule 10's creation of the new "open-for-business" planning tool is both redundant and unnecessary.[48] Interestingly, the mayors of several large municipalities in southern Ontario have already publicly declared that their communities do not intend to use this new planning tool even if Schedule 10 of Bill 66 is enacted.

(b) Schedule 10's Proposed Amendments to the Planning Act

When Bill 66 was first introduced, the Ontario government rationalized the proposed legislation on the grounds that the Bill will eliminate "red tape and burdensome regulations," and will thereby enable businesses to create "good jobs."[49]

On this apparent basis, Schedule 10 of Bill 66 proposes to amend section 34 of the *Planning Act* by adding new provisions that allow municipalities to pass "open-for-business planning by-laws" in manner that circumvents key procedural requirements under the Act.

For example, if a municipality requests and obtains written permission from the Minister of Municipal Affairs and Housing[50] to pass an open-for-business planning by-law, then the by-law is not subject to the public notice, comment and appeal opportunities that routinely apply to zoning by-laws.[57]

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[46] PPS, Policies 1.1, 1.6.6, and 2.2

[47] *Ibid*, Policy 1.3.

[48] The regulatory proposal (https://ero.ontario.ca/notice/013-4239) that accompanies Bill 66 indicates that "open-forbusiness" by-laws are intended to approve manufacturing plants, research/development facilities and other industrial developments that create 50 jobs in smaller municipalities and 100 jobs in larger municipalities. It appears that such developments may also include residential, commercial or retail components as long as they are not the "primary" land use.

[49] See https://news.ontario.ca/medg/en/2018/12/ontarios-government-for-the-people-cutting-red-tape-to-help-createjobs.html

[50] Schedule 10 contains no statutory criteria or environmental factors that the Minister must take account when deciding whether to approve or reject a municipal request to pass an open-for-business by-law. [57] Schedule 10, proposed subsection 34.1(6), para 3.

Similarly, Schedule 10 provides that no notice or hearing is required prior to the passage of such by-laws.[51] However, after the by-laws are passed, municipalities are obliged to promptly notify the Minister, and to provide notice to any persons or public bodies that municipalities "consider proper" to receive *ex post facto* notice.[52]

If the people of Ontario are the presumed beneficiaries of making municipalities "open-forbusiness," it is unclear why interested or potentially affected members of the public are being excluded from any meaningful participation in developing open-for-business planning by-laws.

In our view, requiring discretionary public notification only after the by-laws are passed in a secretive manner (and excluding public rights of appeal under the *Planning Act*) does not ensure good land use planning, enhance accountability of decision-makers, guarantee source water protection, or otherwise safeguard the public interest.

Schedule 10 of Bill 66 goes to provide additional exemptions and/or preferential treatment under the *Planning Act* in relation to open-for-business planning by-laws. For example, Schedule 10 proposes that such by-laws:

- do not have to be consistent with the protective provincial policies in the PPS;[53]
- are not subject to the legal requirement that public works and municipal by-laws must conform with official plans;[54]
- are not subject to the holding by-law provisions under the Act;[55]
- do not allow "density bonus" agreements for the provision of municipal facilities or services from the developer in exchange for increased height or density in the development;[56]
- are not subject to traditional site plan controls;[57]
- can only be modified or revoked by the Minister before they come into force;[58] and
- take precedence over any previously passed zoning by-laws or interim control by-laws that conflict with the open-for-business planning by-law.[59]

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[51] *Ibid*, proposed subsection 34.1(11).
[52] *Ibid*.
[53] *Ibid*, proposed subsection 34.1(6), para 1.
[54] *Ibid*, proposed subsection 34.1(6), para 2.
[55] *Ibid*, proposed subsection 34.1(6), para 4.
[56] *Ibid*, proposed section 34.1(6), para 5.
[57] *Ibid*, proposed subsection 34.1(7).
[58] *Ibid*, proposed subsection 34.1(13).
[59] *Ibid*, proposed subsection 34.1 (19).

In addition to the above-noted *Planning Act* exemptions, Schedule 10 of Bill 66 proposes that open-for-business by-laws will not be subject to a number of other environmental statutes and provincial land use plans.[60]

However, this analysis by CELA focuses on Schedule 10's controversial proposal to exempt openfor-business planning by-laws from section 39 of the *CWA*. In CELA's opinion, this proposed exemption has considerable potential to adversely affect drinking water sources and the health of millions of Ontarians who are served by municipal drinking water systems.

(c) Schedule 10's Proposed Exclusion of Section 39 of the CWA

As discussed above, section 39 of the *CWA* contains eight different subsections which collectively require provincial and municipal decisions under the *Planning Act* and other statutes to conform to significant threat policies and designated Great Lakes policies in approved source protection plans.

Thus, section 39 gives overarching primacy and binding legal effect to source protection plans in relation to activities that constitute significant drinking water threats, as had been recommended by Mr. Justice O'Connor and three different provincial advisory committees.

However, Schedule 10 of Bill 66 now proposes to wholly exclude subsections 39(1) to (8) from applying to major development projects that may be authorized by open-for-business planning bylaws. Therefore, as a matter of law, Schedule 10 enables municipalities to pass such by-laws pursuant to new section 34.1 of the *Planning Act* to approve large-scale development that is contrary to source protection plan policies regarding significant threats to communities' drinking water supplies.

For example, the exclusion of section 39 of the *CWA* means that open-for-business planning bylaws could allow massive industrial projects to be constructed and operated in wellhead protection areas or surface water intake protection zones delineated by source protection plans, even if certain activities or facilities associated with the project (e.g. high-volume water-takings, on-site sewage works, waste disposal site, or the handling or storage of solvents, fuel, dense non-aqueous phase liquid, etc.) may constitute significant drinking water threats.

Similarly, it is our view that ousting the application of section 39 of the *CWA* would enable provincial officials to issue prescribed instruments (e.g. environmental licences, permits, or approvals) for such activities or facilities, even if they would be contrary to the significant threat policies in an approved source protection plan.

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[60] Aside from the *CWA* exemption, open-for-business by-laws will not be subject to certain provisions in the *Great Lakes Protection Act, 2015, Greenbelt Act, 2005, Lake Simcoe Protection Act, 2008, Metrolinx Act, 2006, Oak Ridges Moraine Conservation Act, 2001, Ontario Planning and Development Act, 1994, Places to Grow Act, 2005,* and *Resource Recovery and Circular Economy Act, 2016.*

On this point, we are aware that section 34 of O.Reg.287/07 prescribes how the subsections in section 39 are to be applied under the *CWA*. However, as a general principle of statutory interpretation, provisions in regulations do not trump or override the clear language used in legislation. In our view, the unambiguous wording of Schedule 10 in Bill 66 is that section 39 is excluded in its entirety from applying to open-for-business planning by-laws under the *Planning Act*, irrespective of what may be stated in O.Reg.287/07 under the *CWA*.

In addition, Schedule 10 appears to make it permissible for municipalities to undertake public works or structural development (e.g. infrastructure expansion) within or across a wellhead protection area or intake protection zone in order to service private development authorized under open-for-business planning by-laws, although such actions may facilitate land uses that conflict with significant threat policies in source protection plans.

In our view, there is no legal justification or compelling public policy rationale for allowing openfor-business planning by-laws to override significant threat policies (or designated Great Lakes policies) in source protection plans under the *CWA*.

This is particularly true since these policies have been carefully crafted on the basis of local field studies, technical investigations and scientific analysis, and the policies were subject to extensive public consultations by Source Protection Committees in watersheds across Ontario.

Moreover, the significant threat policies in current source protection plans were provincially approved over three years ago, and the implementation of these plans to date has successfully reduced threats to drinking water throughout the province, as recently reported by the ECO. In addition, the paramountcy of significant threat policies (as entrenched in section 39 of the *CWA*) is fully responsive to Mr. Justice O'Connor's recommendations, which the Ontario government has pledged to implement and maintain.

Furthermore, we are unaware of any cogent evidence that demonstrates that open-for-business planning by-laws (particularly those which conflict with source protection plans) are actually wanted by municipalities for employment creation purposes. We further note that the Ontario government has failed or refused to explain why new major development cannot be accommodated on employment lands already set aside beyond the boundaries of wellhead protection areas or intake protection zones.

Finally, CELA derives no comfort from the Schedule 10 proposal that open-for-business planning by-laws will be reviewed and approved by the Minister of Municipal Affairs and Housing. First, in our respectful view, this Ministry has no particular expertise under the *CWA* or drinking water safety in general, and therefore cannot be realistically expected to gather and assess the detailed on-the-ground evidence needed to make an informed decision on whether or not a proposed development poses a significant drinking water threat.

Second, on its face, Schedule 10 only prescribes two statutory conditions for passing such by-laws at the municipal level: (a) Ministerial approval; and (b) prescribed criteria "if any."[61] Neither of these "conditions" have any built-in environmental or public health safeguards. This is also true for the illustrative criteria set out in the Environmental Registry posting for the proposed regulation that accompanies Bill 66. These suggested criteria address the type of development for which an open-for-business planning by-law may be passed (e.g. the job creation threshold), but they do not expressly include any environmental or public health factors that must be satisfied.

Third, while the Minister may impose unspecified conditions on his/her approval of an open-forbusiness planning by-law,[62] it is unlikely that these conditions can or will be used to crossreference or re-impose significant threat policies from approved source protection plans, especially since Schedule 10 expressly excludes the application of such policies.

Put another way, if it is open to the Minister, in his/her discretion, to impose the key elements of relevant significant threat policies as conditions of approval for open-for-business planning bylaws, then it is contrary to the public interest (and defies common sense) to exempt such policies in the first place under Schedule 10. Assuming that such conditions can even be requested by a municipality or imposed by the Minister, it appears to CELA that crafting case-specific exemptions to the statutory exemptions under Schedule 10 seems unwieldy in law and unworkable in practice.

PART IV - CONCLUSIONS

For the foregoing reasons, CELA concludes that Schedule 10 of Bill 66 represents an unprecedented and unjustifiable rollback of current legal requirements that were specifically enacted under the *CWA* to prevent a recurrence of the Walkerton Tragedy.

By any objective standard, the well-founded requirements under section 39 of the *CWA* are not "red tape" or "burdensome regulations", as implicitly suggested by the provincial government. To the contrary, section 39 is a vitally important safeguard that must remain in full force and effect across Ontario in order to protect drinking water safety and human health.

Moreover, it is well-established that protecting drinking water sources against significant threats also makes considerable economic sense, particularly since source protection efforts help reduce the need for municipalities to add (or enhance) expensive treatment technologies, or attempt to restore or cleanup contaminated drinking water sources, or build (or expand) drinking water infrastructure in order to draw supplies from alternative sources.[63]

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[61] Schedule 10, proposed subsection 34.1(2).
[62] *Ibid*, subsection 34.1(4).
[63] See Cataraqui Source Protection Plan, Chapter 2, page 10: http://cleanwatercataraqui.ca/PDFs/Studies-andReports/Chapter2-Introduction.pdf.

The financial benefits of drinking water source protection was also amply demonstrated in the Walkerton Tragedy, where the aggregate costs of the public inquiry, remediation, compensation, healthcare and related matters have been estimated to be $200 million.[64]

In our view, the Ontario government should not sacrifice drinking water quality, or create needless public health risks, in the pursuit of economic development throughout the province. Accordingly, CELA strongly recommends that Schedule 10 be abandoned and withdrawn by the Ontario government before Bill 66 proceeds any further in the legislative process.

December 17, 2018

[64] See https://www.thestar.com/news/queenspark/2018/12/09/tories-bill-66-would-undermine-clean-waterprotections-that-followed-walkerton-tragedy-victims-and-advocates-warn.html.

SPECIAL COMMITTEE OF THE WHOLE REPORT NO.1

BILL 66, RESTORING ONTARIO'S COMPETITIVENESS ACT, 2018- LEGISLATIVE REVIEW.

City Clerk, Mayor of the City of Vaughan, and Council, (January 17/2019).

Bill 66 -The potential Repercussions of Bill 66 if adopted in the City of Vaughan.

Quoting the Words of Carolyn Kim from Pembina Institute.

How proposed Changes to the Planning Act, will Impact Ontarians. **The Bill could "RESULT IN REAL, ADVERSE AND POTENTIALLY IRREVERSIBLE EFFECTS TO ONTARIO'S LAND, HOUSING AND CLIAMTE."**

"Our interest in Bill 66 is the potential impact from a land use and planning perspective,"

"if the bill is passed then it would have serious concerns and implications to how we plan and develop our cities across Ontario,

The Bill was introduced by the Doug Ford Government Dec 6.

" What we can see today from the proposed bill is that it's Farmed as attempting to cut red tape and facilitate development in the province but we believe it would result in adverse effects in terms of land use planning in the province and the implications to public health and our environment that includes access to clean water and a clean environment" Carolyn Kim

"THE PROPOSED CHANGES IN BILL 66 AS IT STANDS TODAY TAKES US IN THE WRONG DIRECTION"

Carolyn Kim, Pembina Institute.

The bill aims to amend the Planning Act and give municipalities the power to create a new type of zoning tool, called an open-for-business planning bylaw.

"Our top concerns around that is that development projects that would be pursuant to the open-for-business planning tool could bypass essentially all substantive environmental protections and planning policies that ensure development occurs in the province in a healthy and sustainable way,"

"it would bypass policies that are in the Planning Act, Places to Grow, the Oak Ridges Moraine Conservation Act, the Greenbelt Act. It would also allow development projects to bypass municipal plans such as official plans or site plans. These are the checks and balances that we have in our planning framework in the province to ensure that development are meeting the due diligence requirements and are ensuring that developments are in the best interest of the public" -Carolyn Kim.

It may also undermine the Growth Plan's vision to strategically grow in areas with existing or planned infrastructure and Services.

One thing for sure if this Bill 66 is adopted by council it will weaken the democratic planning process.

"The bill will dramatically weaken the public's right to comment on development projects that might affect the environment including access to clean water, natural heritage systems and agricultural lands," Carolyn Kim.

The proposed bill could also create an incoherent approach to economic development and may encourage fragmented economic investments across the province, putting municipalities in further competition with each other for employment development,

"The Bill states that the minister of municipal affairs has the authority to approve the open-for-business planning bylaw in a jurisdiction, but it may not approve that bylaw in another jurisdiction, or it would have differing conditions across municipalities," Carolyn Kim.

In that case it would create a patchwork approach to an economic development strategy for the province. Carolyn Kim.

Article written by *Daily Commercial News by ConstructConnect' Authored by Angela Gismindi, Jan 15/2019, Blogger Carolyn Kim from Pembina Institute.*

At this time is why it is so very important that this BILL 66 DOES NOT GET ADOPTED BY COUNCIL.

Because you will be going against your campaign promises to maintain an open, transparent, government that will govern under an Inclusive government to sustain more of an inclusive society. That creates Inclusive growth not only for a fairer society but also for a stronger economy. Also, to not undermine the economic growth between our local and provincial government and the citizens of Vaughan and across the Province of Ontario.

We are requesting that the **Vaughan Council Rejects Bill 66 Restoring Ontario's competitiveness Act, 2018**

Regards

Simone Barbieri