



February 2, 2006

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Fax: 416 314-2976

Re: EBR Registry #AA05E0001 – Proposed Clean Water Act (Bill 43)

Dear Ms. O'Keefe:

The Ontario Mining Association (OMA) and its members appreciate the opportunity to review and offer comments on the Proposed Clean Water Act (Bill 43).

The OMA works to support and improve the competitiveness of the mining sector in the province while representing companies engaged in the environmentally responsible exploration, production and processing of minerals in Ontario. Our members are supportive of the concept of source water protection and we recognize that a quality water supply is essential for sustaining life, the health of citizens and protection of the natural environment within Ontario.

Recognizing that water regulation is a broad issue based upon the realities of the watershed, we do not agree however that the only solution is to create new "water protection authorities." In most cases, they will be existing Conservation Authorities (CAs) or, in unorganized jurisdictions, a group of CAs, or nearby municipalities. Without an extraordinary shifting of resources to CAs, municipalities, and the Ministry of Environment (MOE), the proposed regulatory paradigm will not only suffer from a lack of expertise, but also lead to delays. This could have a significant impact on the mining industry in Ontario, as uncertainty and delays become *de rigueur* for water issues, which are already heavily regulated by other legislative authorities.

Bill 43 gives the MOE the power to override existing land use planning statutes. While the goal, water protection, is laudable, the MOE's narrow focus within the broader

expanse of an existing land use planning regime, including stakeholder participation and other accountabilities, may not be successful. It is troubling that Bill 43 does not allow for statutory appeal from this overriding decision-making power by the MOE.

The Ontario government should not move this Bill forward without a stronger business case for doing so and without the necessary commitment of resources to carry out its activities. Alternatively, a pilot project initiated in one or two jurisdictions to assess the efficiency and cost of such an approach, as discussed below, would be acceptable.

In addition to these general comments, we have the following specific comments on the rationale and wording of the Bill:

I. “Source Protection Committee”

In general, the Bill establishes each CA as a drinking water source protection authority. Preparation of a drinking water source protection plan begins with the establishment of a drinking water source protection committee by the source protection authority. In terms of the composition of the source protection committee, we feel that the appointment of the sixteen members should be equitable in consideration of all stakeholders in the area. Also, it should be ensured that sound science is the basis for the operation and decisions of the committee, so that unattainable targets are not created. Consistency must be ensured throughout the province. It would be an unmanageable task to keep abreast of the desires of every area committee if they are all independent. Corporations that may operate in several areas must be able to keep abreast of the standards and expectations with efficiency.

RECOMMENDATION: Equal representation from various groups – municipal, industry, consumer, etc. must be ensured on the source protection committees. MOE should establish a well-defined facilitator role to ensure the practical functioning of the committee and to meet the requirement for consistency and clarity throughout the province.

II. “Drinking Water Threats”

The Bill establishes that source protection committees will prepare assessment reports that will identify all of the watersheds in the source protection area and will set out a water budget for each watershed. It will also identify vulnerable areas within each watershed and “drinking water threats” associated with those vulnerable areas. Risk assessments would then be prepared to identify “significant drinking water threats”.

A “drinking water threat” is defined as:

...an existing activity, possible future activity or existing condition that results from a past activity,

(a) 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, or

- (b) that results in or has the potential to result in the raw water supply of an existing or planned drinking-water system failing to meet any standards prescribed by the regulations respecting the quality or quantity of water,

and includes an activity or condition that is prescribed by the regulations as a drinking water threat...

A “significant drinking water threat” is defined as:

...a drinking water threat that, according to a risk assessment, poses or has the potential to pose a significant risk...

The definitions of these terms are unduly broad and subjective, and lack any meaningful criteria as a screening mechanism. In particular, including in the definition the phrase “...potential to adversely affect the quality or quantity of any water that is or may be used as a source of drinking water...” casts the broadest possible net.

In our view, this would result in nearly all, if not all, of our industry’s activities in a source protection area to be so designated, at first instance, a drinking water threat. This definition fails to recognize existing approvals, guidelines or standards in place at the facility. This subjective initial assessment triggers an extensive, time consuming process (to be measured in years) before an activity is determined not to constitute such a threat. This uncertainty, and its consequent investment of resources to deal with any and all such “threats”, is unreasonable.

As well, the distinction between “drinking water threats” and “significant drinking water threats” is not made clearly in the Bill. Section 13 of the Bill outlines the content of an assessment report, including, in subsection 2(g) and (h), the following:

- (g) identify, for each vulnerable area identified...,
 - (i) existing activities that are drinking water threats,
 - (ii) possible future activities that would be drinking water threats, and,
 - (iii) existing conditions that result that from past activities and that are drinking water threats;
- (h) identify which of the activities and conditions identified under clause (g) are or would be significant drinking water threats;

As seen in the definition of “significant drinking water threat”, risk assessments would be prepared to identify significant drinking water threats. However, no criteria are given for the “bump-up” from a “drinking water threat” to a “significant drinking water threat”

(compare, for example, the bump-up provisions of Ontario's *Environmental Assessment Act*). Although we understand that it is the MOE's intention to provide a regulation containing the protocol for a risk assessment, it remains a concern that the subjectivity of the term "significant" will not be adequately addressed.

RECOMMENDATION: Clear, specific criteria must be developed for "drinking water threats", as well as for the "bump-up" to "significant drinking water threats". Compliance with existing approvals, guidelines and standards should be recognized as eliminating the potential for characterization of an activity as a "drinking water threat".

III. Interim Progress Reports

Under Section 18 of the Bill, once the draft assessment report is complete, it is subject to the approval of a Director appointed by the Minister of the Environment. During the period between approval of the assessment report and the completion of the source protection plan, the source protection authority must submit reports to the Director on measures taken to address significant drinking water threats identified in the assessment report.

In our view, Section 18(1) gives the source protection authority an unlimited power to order interim measures that could negatively impact industry activities. Given that the next step following the approval of the assessment report is for the source protection committee to prepare a source protection plan, which then goes through an approval process including notice under the *Environmental Bill of Rights, 1993*, there may be a considerable period of time between the approval of the assessment report and a source protection plan.

Section 18 (1)(a) allows the source protection authority to "...ensure that existing activities specified...cease to be significant drinking water threats", "...ensure that possible future activities...do not become significant drinking water threats", and "...ensure that existing conditions...that result from past activities cease to be significant drinking water threats". This gives the source protection authority the power to take steps that could impact industry significantly, or, in fact, order the cessation of those activities. Following such measures, it could be determined that such measures were unnecessary and not consistent with the ultimate source protection plan.

In our view, the better course would be to use the MOE's existing powers to order or modify such activities.

RECOMMENDATION: The powers given to the source protection authority under Section 18 of the Bill to take interim measures during the period of time while report and plans are in preparation should be removed. The MOE has existing authority to deal with any interim issues that may arise.

IV. Unorganized Source Protection Areas

In areas of Ontario where there is no conservation authority that could become a source protection authority, Section 23 of the Bill allows the Minister of Environment and one or more municipalities to enter into an agreement governing the preparation by that municipality, or those municipalities, for a source protection plan and the consequent powers that come with that authority. There is no public process that would involve stakeholders, such as the industries in the affected area in this significant decision, at this stage, other than those in the ordinary course of municipal governance.

It is therefore possible that a municipality that is disinterested in, or even opposed to, a specific industry's activities outside of the municipality, could become the source protection authority in this process without the accountability inherent in the political process.

RECOMMENDATION: In areas of Ontario where there is no existing CA, the determination of the source protection authority must include consultation with affected stakeholders.

V. Immunity from Legal Action

Bill 43 gives source protection authorities and the MOE extensive powers to make decisions, such as a determination of "significant drinking water threat" and the ability to take measures to end such a perceived threat. Such decision-making can seriously impact the viability of the mining industry, if such decisions were made in an unreasonably or unsupportable manner.

However, Sections 88 and 89 prohibit any legal cause of action against a source protection committee, source protection authority, municipality or local board, by a minister, ministry, board, commission or agency of the Government of Ontario or by the Director of the MOE. As well, given the powers granted and duties imposed by the Bill, officials, inspectors, employees or agents of the above are provided with immunity from legal action. Although constraints do apply to these legal protections (acting "in good faith"), this wholesale protection from legal action closes an important avenue for such decision making to be tested in a judicial forum.

It should also be noted that landowners have no right to compensation for losses caused by these activities.

RECOMMENDATION: The limitations and immunity sections of the Bill do not allow adequate recourse for unreasonable decision-making and should be amended.

VI. Transfer of Responsibility

Under Bill 43, those facilities that are subject to land use planning controls (e.g. official plan, zoning by-law, Provincial Policy Statements) will now have an overriding authority created for a single purpose – water protection – that could reverse or overturn the commitments made in the land use planning process. The Bill transfers responsibility for land use planning in the source protection areas from the municipalities, Ministry of Municipal Affairs and the Ontario Municipal Board to the MOE, which has no experience in land use planning and has a much more limited public review process under this Bill. Essentially, public process is limited to the publication of source protection plans under the *Environmental Bill of Rights, 1993* for comment.

Further, no appeal from the decision made by a source protection authority is provided. Combined with the subjectivity of assessing “drinking water threats”, such a lack of accountability could lead to negative impacts. In our view, the Bill does not provide for reasonable points of stakeholder access to decisions made on assessment reports and source protection plans.

Finally, in the absence of the draft regulations required to clarify and support this significant legislative restructuring, the Bill should not move forward until key regulations, such as the determination of risk assessment standards, can be presented and subject to public comment. Given the broad authority being proposed in this Bill, it will be the regulations that provide stakeholders an opportunity to see what constraints are placed upon that authority.

RECOMMENDATION: An overriding transfer of authority to the MOE from the existing land use planning regime for the purpose of a single environmental issue is not desirable. However, if this approach is taken, reasonable points of stakeholder access must be provided. This legislation should not be proclaimed until such key regulations are available for review and comment.

VII. Timelines

Bill 43 provides a detailed step-by-step process of establishing committees, identifying risks, preparing plans, and seeking approval, not to mention the consequent detailed implementation of such activities. As an approval process, it adds to an already considerable backlog of approvals within the MOE. At the present time, even with approvals for air, water and waste projects in Ontario, companies can anticipate a delay of more than a year for receipt of such approvals.

Bill 43 presents a layered, complex restructuring of authority over a single environmental issue that can only be time-consuming and resource-intensive to implement. Yet, early in the process, the determination that a “potential drinking water threat” exists could negatively impact a specific industry or facility, which could take months, if not years to finally resolve.

We can only support this process if clear and efficient timelines are imposed for these proposed activities. While mandatory timelines would be the best approach (with an exception for clearly defined extenuating circumstances), we suggest it would not be possible to define such timelines without a pilot project.

RECOMMENDATION: A pilot project should be implemented and assessed before this legislation is proclaimed, to assist in the determination of mandated timelines, as well as providing specific guidance on a number of other issues discussed above.

Again, OMA would like to emphasize our support of the concept of water source protection and our commitment to meeting the requirements of environmental protection. However, we believe that the concerns with the proposed Clean Water Act, identified in this letter, need to be addressed before this legislation is introduced.

Thank you for the opportunity to review the proposed Clean Water Act and provide our comments. OMA would like to be involved in any further consultations on this issue.

Sincerely,

Chris Hodgson
President

CC: Hon. Rick Bartolucci, Minister, MNDM
Laurie Scott, MPP, PC Critic for the Environment
Michael Prue, MPP, Acting NDP Critic for the Environment