Energy Probe Research Foundation's Recommendations for
Public Hearing No. 4: Source Protection
August 2-3, 2001

The protection of source water should include the protection of both the quality and the quantity of the water. In order to protect the quality of source water, we recommend that:

The provincial government should grant no one the right to contaminate a source of water.

Sewage treatment plant owners, farmers, and industrial polluters should ensure that their wastes do not impair the quality of water. They should be responsible for any damage they cause. Criminal and tort liability should apply.

The principle that no one has the right to contaminate a water source is firmly established under the common law, where pollution is a violation of riparian rights or a nuisance. In the absence of statutory provisions to the contrary, people have a right to clean water (water in its "natural state," or water "substantially unaltered in quality") in the lakes and rivers beside which they live. There are no riparian rights to groundwater. However, nuisance law does address groundwater: Pollution of groundwater is a nuisance.

The common law's intolerance of pollution provides adversely affected individuals and municipalities with powerful tools – injunctions and damages – to protect themselves and their water. Equally important, by requiring polluters to cease their harmful activities and to pay for damages, it establishes incentives not to pollute.

Over the years, at great cost to the environment and public health, the principle that individuals have rights to clean water has been eroded. Successive provincial governments have passed laws that have taken precedence over the common law. They have introduced regulations that have had the effect of granting statutory authority to polluters. By now, few industries do not enjoy some measure of regulatory protection.

All such protections externalize the costs of pollution. They shift the costs from the polluters to other users of the water. Consumers are required to pay for well-head protection, additional treatment, or alternative sources of water. In addition to being inequitable, the transfer of costs from polluter to other users is counterproductive, since it reduces polluters' incentives to avoid polluting. It is also often economically inefficient, since pollution prevention is often the cheapest alternative.

The provincial government should re-establish the principle that individuals have rights to clean water flowing under, through, or beside their property. It should both restore such rights under the common law and confirm them in statutes. The government should ensure that nothing in provincial acts legalizes violations of riparian rights or nuisances. It should replace permits

granting power to pollute with those permitting activities on the condition that they do not violate others' rights. In all relevant acts, it should include "savings clauses" that preserve plaintiffs' rights to bring tort actions against those who harm them.

The provincial government should restore full tort liability for the owners and operators of water and sewage utilities. It should:

> Repeal section 331 of the Municipal Act. The section shields municipalities, council members, and municipal employees from common-law liability for poorly operating water and sewage systems by forbidding nuisance proceedings in connection with the escape of water or sewage from water or sewage works.
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> Repeal section 50 of the Municipal Act. The section protects municipal employees through the provision of liability insurance and the payment of damages or costs awarded against them.
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> Repeal section 59 of the Ontario Water Resources Act. The section effectively immunizes sewage works from tort challenges by deeming them to be operated by statutory authority as long as they are in compliance with the Ontario Water Resources Act and with the Environmental Protection Act.

The government should prohibit agricultural pollution. Farmers now enjoy considerable rights to do harm, some of which are entrenched in statute and others of which are normative. The Farming and Food Production Protection Act exempts farmers from liability for odour, noise, and dust. Although the act does not legalize water pollution, in permitting other nuisances it contributes to the presumption that harmful agricultural activities, as long as they are considered "normal," should be permitted.

The costs of normal farm practices may be considerable, as is indicated by two examples from the United States: The Environmental Protection Agency estimates that reducing agricultural pollution could save at least US$15 billion in avoided costs of constructing advanced water treatment facilities. According to Worldwatch, utilities in the American Midwest spend an extra US$400 million annually to treat water for atrazine, a pesticide commonly found in groundwater. We are unaware of comparable estimates of the costs of agricultural pollution in Canada. The magnitude of the figures suggests that lax rules regarding pollution put an enormous burden on consumers and provide enormous subsidies to farmers.

A host of other industries also enjoy subsidies in the form of a right to pollute. Laws protecting specific industries date back to 1885, when the Ontario government passed a law limiting the use of injunctions against polluting sawmills. The following decades saw protections granted to smelters, then to pulp mills, and later to sewage utilities, mining companies, power producers, and many others. As with other liability limitations, these are both unjust and ecologically unsustainable and should be removed.

In order to protect the quantity of source water, we recommend that:

Water should be priced to reflect its scarcity.

Pricing is the most effective method of allocating scarce resources. Prices that reflect scarcity internalize the costs of resource use. They encourage users to weigh the costs against the benefits and to seek less expensive alternatives – including conservation – where appropriate.

In Canada, water is generally exempt from the market's pricing regime. Even providers that charge the "full cost" of water charge only for treatment and distribution. In Ontario, the price never includes a resource charge for the water itself. The fact that water is free contributes to our waste of it.

A number of prominent bodies have recommended the establishment of a price for water. Peter Pearse, in his report on the Inquiry on Federal Water Policy, wrote that the price of water should "recognize the value of the water itself, including its opportunity cost wherever limited supplies are demanded for other useful purposes." Commodity charges, he said, should vary with availability.

The absence of clear ownership of water creates challenges to pricing. The province has in the past been reluctant to charge for the use of a resource that it does not own. (In order to get around this problem as it affects "water rental fees" charged to hydroelectric producers, it defines the charges as fees for the use of provincially owned riverbeds rather than as fees for the use of water.) We believe, however, that the province, as a trustee, administrator, or manager, has an obligation to protect the resource. In times of scarcity, a user charge is an essential component of resource protection.