CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

May 3, 2007

Caroline Cosco
Senior Policy Analyst
Ontario Ministry of the Environment
Land and Water Policy Branch
Toronto, Ontario
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Dear Ms. Cosco,

Re: EBR Registry Number 010-0163
Bill 198 Safeguarding and Sustaining Ontario's Water Act 2007

The Canadian Environmental Law Association (CELA) has been involved in Ontario's efforts to successfully negotiate the *Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement* signed in December 2005 by the Province of Ontario and the nine other Great Lakes jurisdictions. Since 2004 CELA has served on an Advisory Panel with over 45 other stakeholders to the Ministry of Natural Resources, Ontario's negotiators on this Agreement. Advice from this Advisory Panel shaped the positions of the Ontario government at the negotiating table and led to a final Agreement that would serve the needs and expectations of Ontarians. The Agreement prohibits diversions and large transfers of water out of the Great Lakes Basin and sets a framework to measure and reduce our water use within the Region. As well, CELA served on an Advisory Committee to the Council of Great Lakes Governors who coordinated the negotiations between 2001 and 2005. This gave us a valuable insight on the positions of the US States on the issues discussed.

CELA also has worked for decades to improve Ontario's own water allocation policies and regulations and has endeavoured to get a legal framework for water conservation implemented. Ontario's water resources are extremely valuable and need to be protected and managed sustainably, particularly in light of threats from pollution and climate change.

CELA supports the proposed changes to the Ontario Water Resources Act (OWRA). These changes are a significant step towards improving our water allocation and management practices for the sustainability for the Great Lakes and all of Ontario waters. We believe that the proposed changes to the Act accomplish three things:

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- Creates the legal authority to implement the commitments made under *the Great Lakes - St. Lawrence River Basin Sustainable Water Agreement*. This is important as the reciprocal *Great Lakes-St. Lawrence River Basin Water Resources Compact* also signed in December 2005 by all the US States is legally binding.
- Provides the Province with the authority to charge consumptive water users for the costs of water management programs. This will improve Ontario's capacity to change and improve the permit to take water regime, to implement the Agreement along with pending programs that will be set out by regulations flowing from this Act, and
- Modernize and update the Act to reflect recent changes and needs.

OWRA Changes to Implement the Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement ("the Agreement")

Because this is an implementing piece of legislation, the proposed changes to the OWRA are not transparent without an understanding of the provisions of the Agreement and a side by side comparison. Inserting all aspects of the Agreement into an existing piece of legislation is challenging. Consequently it is not easily transparent how the changes relate to or enable the clauses of the Agreement. The complexity of each of these changes has led us to our first recommendation.

1. We recommend that the OWRA prescribe in the Act that a plain language Interpretive Manual be written and updated regularly to explain the intent, the provisions, implementation and timetables associated with the provisions of the Act implementing the Agreement.

We recognize that placeholders have already been put in the PTTW Manuals anticipating the need to include Agreement language. However we feel that the Agreement contains so many new obligations and concepts that additional explanation and education will be needed for its effective implementation.

The Agreement contains obligations for the Province to undertake new activities in water management. These include:

- establishing a baseline of current water use,
- tracking cumulative use of Great Lakes waters including groundwater,
- requirements to return water from large withdrawals back to the source watershed and track return flow,
- provisions that discourage transfer between one Great Lake watershed to another Great Lake watershed with some exceptions,
- the drafting of a conservation program ,
- the collection and sharing of new water use data and,
- development of a scientific strategy to address our knowledge gaps on such areas as the relationship between ground and surface water and the impacts of climate change and water shortages on the integrity of ecosystems.

The majority of the important details of these programs will be spelled out later in regulation. We are committed to continuing to work through MNR's Advisory Panel and with other environmental and conservation groups to ensure that Ontario implements the most effective water management program possible through these regulations. We trust that the Ontario government will continue to support the work of this Advisory Panel to assist in discussions on all of the forthcoming regulations.

Past practices in Ontario have allowed water allocations that would now trigger Regional Review under this Agreement. These include large intrabasin transfers from one Great Lake watershed to another and transfers of water allocated by permit by another party other than the permit holder. Today we recognize that there are ecological, social and economic consequences for the areas in these scenarios that are permanently deprived of water. At this point we do not know how wide spread these practices are. We do know that several Ontario municipalities are currently considering new requests for intrabasin transfers. This presents a significant challenge for the Province when framing the regulations governing future practices. Some of these new intrabasin transfers may be avoidable if the Province introduces an aggressive conservation programme as soon as possible.

2. We support the new provisions of this act that allow the Minister to require that grandfathered water users (prior to the April 1961 commencement of the permit to take water system) to obtain a permit for any new or increased water takings. We ask that the Act make it explicit that the Director can require that any new permit be for the cumulative amount and not be limited to the increase. Giving the Minister these additional authorities and other discretionary powers will enhance our ability to track and understand our current use of water (which we are not able to do now). This will assist in establishing the baseline required in the Agreement and assist us in understanding cumulative and adverse impacts.

3. We ask that the provisions of this Act explicitly mandate that a public website be created on the Agreement Provisions and the permit to take water system Province wide. This website should include data on the baseline of water use required by the Agreement, information on consumptive use and on return flow, permits by sector, cumulative impacts and other relevant scientific information as it becomes available and in a timely manner. This will build public understanding and support for water conservation and other programs.

It is possible for water conservation to help prevent disputes over water, water shortages and the need for Ontario municipalities to undergo Regional Reviews. As well, many of the decision-making standards within the Agreement hinge on the determination that adequate water conservation has taken place before exceptions are allowed. However adequate water conservation programs are left to each jurisdiction to define.

CELA is concerned over the fact that a weak and vague conservation guidance document has already been released by the Council of Great Lakes Governors for public comment. Ontario has had a distinct advantage throughout the international negotiations on this Agreement because this Province has one of the most comprehensive and rigorous water permitting systems in the Basin. It tracks all water use over 50,000 litres (the amount of water typically used on a medium-sized farm). Only one other jurisdiction, Minnesota has anything comparable. It is clear that most of the US States are still unwilling to track water use at this level. We believe that it is imperative for Ontario to lead by example with the most effective water conservation program in the region. Because Premier McGuinty is currently the Chair of the Regional Body over seeing the implementation of the Agreement and the US Compact, Ontario's early leadership on conservation could have considerable influence on the other jurisdictions.

4. We recommend the immediate passage of this Act so that the important work of framing a conservation program in regulation can commence immediately. Early action by Ontario on a strong conservation plan could deflect future water conflicts and shortages within our Province and influence the other Great Lakes jurisdictions to follow our lead.

The commencement of work on water conservation will also benefit the Source Protection planning and watershed water budgets mandated by the *Ontario Clean Water Act, 2006*.

The full implementation of the *Great Lakes - St. Lawrence River Basin Sustainable Water Agreement* cannot occur until all of the 10 Great Lakes jurisdictions have passed the agreement through their legislatures and the US Compact also has passed through the US Congress. While all jurisdictions have schedules to do this, only one State, Minnesota has accomplished this. It is crucial that Ontario do this so that the international aspects of the Agreement are enshrined and others will be encouraged to follow suite.

Throughout this process the Ontario negotiators have felt that time is of the essence. Scans that they commissioned show that there will be a large shift of US populations and political influence to the arid southwest where the major water supply, the Ogallala aquifer is rapidly being depleted. This could lead to growing pressure to look farther for sources of water for the US Sunbelt. Indeed last week it was revealed that a US think tank, the Center for Strategic and International Studies, had released a report on their "North American Future 2025 Project" and convened a meeting in Calgary to promote that the Federal Governments of Canada, Mexico and the US have a common agenda on water consumption, water transfers, artificial diversions of fresh waters, water conservation technologies for agricultural irrigation and urban consumption. Continental water management schemes always seem to creep back into the discussion particularly when there is a regulatory vacuum.

Although the Federal Government has passed amendments to the *Boundary Water Treaty Act* banning water export out of the boundary waters of the Great Lakes, groundwater is

omitted from the definition of Boundary Waters in that 1909 Treaty. This makes it very important for Ontario to act to pass this legislation to do their part to extend these protections to the significant groundwater portions of the Great Lakes ecosystem. It is estimated that the groundwater portion of the Great Lakes could be as large as the surface waters of Lake Michigan.

Once the Agreements are passed by all of the 10 jurisdictions, aspects of their implementation will be phased in over five years. This means that we could be waiting for another seven years for the full Agreement to come into full force.

Amendments to modernize the OWRA and allow for water charges

5. Our Group supports the amendment to section 75 of the *Ontario Water Resources Act* ("*OWRA*"), to allow the Lieutenant Governor in Council to make regulations for water charges.

We note that a number of provinces, including British Columbia, Manitoba, Nova Scotia, Newfoundland and Labrador and Saskatchewan already impose a requirement that a fee must be paid for a license or a permit to withdraw water.

A recent Ontario MOE publication entitled "Water Conservation Charges Proposal" states that the primary purpose of the charge would be to recover the portion of the costs of programs required to manage water and the secondary objective is to provide financial incentives for companies to use water more efficiently. The Ministry has stated it would be taking a phased approach with the most consumptive users subject to charges first. The proposed rate for these users is $3.71 for one million litres of water. It is highly unlikely that the proposed fee would result in water conservation given that there does not appear to have been any analysis done by MOE as to what the unit charge should be in order motivate conservation by users. While we understand that this Bill gives the Minister authority to set charges and that those charges will be set by regulation and the subject of a separate consultation we feel it is important to raise these concerns to you today.

We are also concerned about the adequacy of funding for the MOE and MNR water management programmes. The Environmental Commissioner of Ontario's recent Special Report entitled "*Doing Less with Less*" raises serious concerns about the amount of funding for the mandates of these Ministries. The Environmental Commissioner has remarked that this lack of a capacity of MOE and MNR to fulfill their duties is due to the significant decline in their operating budgets. In view of these concerns the MOE and MNR should immediately undertake a thorough and comprehensive review of the actual costs required for implementing an effective water management programme in the province. This review is essential given that the proposed amendments to the *OWRA* via Bill 198 would significantly expand its responsibilities with respect to water management in Ontario. The MOE and MNR should then undertake the necessary expansion of its programme both in terms of budget and staff in order to fulfill its regulatory responsibilities. The Ministries

should forthwith reassess the water charges for users once they have expanded their programmes to ensure that the charges accurately reflect the cost of Ontario's water management programmes. We recommend that the assessment of the water charges be made initially after the water management programmes have been expanded and then every three years thereafter.

5. Our Group recommends that:

(a) The MOE and MNR immediately undertake a comprehensive and thorough review of their water management programmes with a view to assessing the actual costs required for implementing an effective water management programme in the province;
(b) The Ministries expand their water management programme as necessary to ensure that they has the appropriate budget and staff to carry out their regulatory responsibilities; and
(c) The MOE forthwith reassess the charges for water takings once it has expanded its water programme and undertake further assessments every three years thereafter.

Yours truly,
Canadian Environmental Law Association

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