

**Submission on the Proposed Amendments  
to the Water-Taking and Transfer Regulation  
(Regulation 285/99 under the *Ontario Water Resources Act*)**

EBR Registry No. RA03E0009

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## **PART I - INTRODUCTION**

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

CELA has had a long history with water issues both at the provincial and federal level. It has undertaken research, published briefs,<sup>1</sup> and conducted litigation in the field. CELA was involved in both phases of the Walkerton Inquiry and a CELA counsel sat on the Advisory Committee for Watershed-based Source Protection Planning. A CELA staff member has also been serving on the Advisory Committee to the Great Lakes Water Initiative of the Council of Great Lakes Governors and the Premiers of Ontario and Quebec. CELA has represented clients in relation to a number of controversial water taking permit applications, including a taking by a Swiss multinational company in Perth, Ontario, a taking by a water bottling company in Grey County and the appeal of the Nova Group permit to export water by tanker from Lake Superior (the hearing was eventually cancelled when the applicant withdrew the appeal). Consequently, the organization has considerable experience and insight into public concerns regarding water taking in the province.

The purpose of this brief is to respond to EBR Registry RA03E0009, the proposed Amendments to the Water Taking and Transfer Regulation (Regulation 285/99 under the *Ontario Water Resources Act*) and improvement to the Permit to Take Water Program with comments due on May 21, 2003.

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<sup>1</sup> See *Submissions by the Canadian Environmental Law Association to the Ministry of Environment on the Surface Water Transfers Policy*, EBR Registry Number PA8E0027, P.McCulloch, S.Miller, K.Cooper and P.Muldoon, (CELA: Toronto) June 1998; *Submission on Regulation made under the Ontario Water Resources Act: Water Transfers*, EBR Registry Number RA8E0037, P.Muldoon and S.Miller, (CELA: Toronto) February, 1999; *Commentary for an Act to Conserve Ontario Waters*, (CELA: Toronto), J.F. Castrilli, May 2001; *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act Volume 1 - An Overview*, (CELA:Toronto) A.Wordsworth, May 2001; *Tragedy on Tap; Why Ontario needs a Safe Drinking Water Act, Volume II*, (CELA:Toronto) R.Lindgren, L.McShane, G.Patterson and A.Wordsworth May, 2001.

## **PART II - GENERAL COMMENTS ON THE PROPOSED AMENDMENTS**

The proposed amendments seek to make a number of improvements to the Permit to Take Water Program. In particular, the amendments will:

- require permit applicants to notify municipalities, conservation authorities and adjacent landowners, about the proposed water taking;
- require reporting of water use by permit holders;
- define potential impacts that will be considered when reviewing permit applications; and,
- require recording and reporting of water taking.

CELA supports these amendments and believes these measures will improve the current Permit to Take Water Programme ("PTTW"). We note that a number of these amendments have been recommended by other stakeholders over the past years as a means of improving the PTTW programme.<sup>2</sup> The proposed amendments, however, do not sufficiently address the existing inadequacies of the Ministry of Environment's ("MoE") PTTW programme. We have therefore, included a number of additional recommendations to Regulation 285/99 which we believe are necessary to ensure the effective operation of the programme. In addition, we would strongly urge the MoE to ensure that the proposed amendments to Regulation 285/99 reflect the relevant recommendations made by the Advisory Committee on Watershed- based Source Protection Planning, which recently released its final report.

The MoE's Permit to Take Water Guidelines and Procedure Manual, 1999 ("PTTW Manual") must also be revised and updated to reflect the proposed regulatory and programme changes so that staff are able to ensure a consistent, province-wide implementation of the PTTW programme.

## **PART III - SPECIFIC COMMENTS**

### **1. ECOSYSTEM APPROACH AND THE PRECAUTIONARY PRINCIPLE**

A key criticism of the MoE's PTTW program is that the Ministry does not have any defined criteria for assessing the impact a water taking will have on the ecosystem, as mandated by section 2 of Regulation 285/99. The proposed amendment attempts to

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<sup>2</sup> *Proposed Improvements to Ontario's Water Taking Permitting Process, Recommendations to the Ontario Government*, A.M.O. Water Taking Task Force, December 19, 2002 at p.5. The Association of Municipalities of Ontario has noted that a "number of municipalities have expressed frustration with the lack of notification regarding PTTWs."

address this issue to some extent by amending section 2 of Regulation 285/99. The proposed amendments have added clause (a) and (b) to paragraph 1 of subsection 2(1). Section 2(1) would thus read as follows:

2(1) A Director who is considering an application under section 34 of the Act for a permit to take water shall consider the following matters, to the extent that each is relevant, in accordance with the procedures set out in the Ministry of Environment publication entitled "Permits to Take Water, Guidelines and Procedure Manual", 1999 as amended from time to time:

- 2 (1) Protection of the natural functions of the ecosystem, including potential impacts of the proposed taking on,
  - (a) the natural variability of the flows or levels of waters, including minimum in-stream flows, and
  - (b) habitat that depends upon the flow or levels of water.

We support the inclusion of clause (a) and (b), and believe it is a positive step towards further defining the potential impacts that the Director ought to consider when issuing permits. However, in our view, only assessing the local impact of a taking may not provide adequate information on the impact of the taking on the watershed, since an individual taking which does not cause any immediate adverse impacts, may have an adverse cumulative impact on the watershed. Furthermore, in some cases, it may be more appropriate to examine and evaluate direct, indirect and cumulative impacts on the subwatershed as opposed to the watershed.

The MoE's lack of a watershed-based method to assess cumulative impacts of takings has been the subject of considerable criticism in recent years.<sup>3</sup> Mr. Justice Dennis O'Connor, the Commissioner of the Walkerton Inquiry, in his *Part Two Report of the Walkerton Inquiry*, addressed this problem by recommending that PTTWs should be consistent with source protection plans. Justice O'Connor recommended that watershed-based source protection should include at a minimum, a water budget for the watershed or a plan for developing a water budget where sufficient data is not yet available. Justice O'Connor also recommended that the total amount of water allocated under a PTTW should not exceed the amount of water sustainably available according to the watershed-based source protection plan.<sup>4</sup>

Therefore, we recommend that a clause be added to section 2(1) of Regulation 285/99 stating that the Director will assess potential cumulative impacts of the taking on the water budget in a watershed and where appropriate the subwatershed. Furthermore, there

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<sup>3</sup> See for example *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources, Brief to the Walkerton Inquiry*, by the Environmental Commissioner of Ontario, (Toronto: ECO, 2001) at pg. i and pg. 25 and the *Final Report Best Practice for Assessing Water Taking Proposals* prepared by Gartner Lee Limited et al, (Toronto: Oglvie and Oglvie & Company, 2002) at p. 34.

<sup>4</sup> See *Part Two Report of the Walkerton Inquiry* (Toronto: Ontario Ministry of Attorney General, 2002) at pp. 104 -106.

does not appear to be a MoE document that provides MoE staff with guidance on what is meant by an "ecosystem approach" with respect to issuing permits. The EBR Notice RA03E0009 states that in order to foster a "consistent and transparent basis for assessing the impacts of proposed water takings, the Ministry will define potential impact that will be considered when reviewing permit applications." However, the EBR Notice fails to specify a timeline when this will be achieved.<sup>5</sup>

The Ministry's Statement of Environmental Values ("SEV") also stipulates that the MoE will adopt an "ecosystem approach to environmental protection and resource management." In addition, the SEV states that the Ministry will exercise a precautionary approach in its decision-making process. In his *Part Two Report of the Walkerton Inquiry*, Justice O'Connor reiterates the need for the precautionary principle to play an integral part in decisions affecting the safety of drinking water.<sup>6</sup> To date, the Ministry has failed to define and operationalize how the ecosystem approach and the precautionary principle will be incorporated into its decision-making process. We consider the MoE's failure to provide guidance to staff on these critical issues unwarranted, given that the ecosystem approach has been mandated by Regulation 285/99 for approximately four years and the SEV has been in effect for approximately nine years.

The Environmental Commissioner of Ontario ("ECO") has noted that unless the ecosystem approach mandated by regulation 285/99 is "incorporated into guidance documents, key ecosystem considerations such as the impact on the baseflow of rivers, habitat, exacerbation of droughts, turbidity and water body oxygen levels may not be incorporated into decision-making".<sup>7</sup> The ECO has also expressed a concern that the "ecosystem protection may be threatened because MoE staff are issuing permits for new water takings without access to fully complete or accurate information on existing water takings".<sup>8</sup> Consequently, we believe this is a matter that should be given priority. We recommend that the MoE prepare, within six months, a guidance document for staff on what is meant by an ecosystem approach and the precautionary principle and how it is to be applied in the permitting process.

**Recommendation #1: CELA recommends that a clause be added to Regulation 285/99 requiring the Director to assess the cumulative impact of the taking on the water budget in a watershed and where appropriate, the subwatershed. CELA also recommends that the MoE prepare within six months, a guidance document, which provides staff with guidance on how the ecosystem approach and precautionary principle is to be assessed and applied in the permitting process.**

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<sup>5</sup> EBR Registry Notice RA03E0009 at p. 3.

<sup>6</sup> *Part Two Report of the Walkerton Inquiry*, at pp.76-77.

<sup>7</sup> *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resource* at p. 23.

<sup>8</sup> *Ibid.* at p. ii.

### **(i) The Need for a Legislative Authority to Impose a Water Taking Ban**

On May 4, 1999, the former Minister of Environment, Norm Sterling, issued a moratorium on the issuance of PTTWs in the South West region which was experiencing severe drought conditions. Although such action was required, it does not appear that the Minister had jurisdiction under the *Ontario Water Resources Act* ("OWRA") to take such measures. It is thus necessary to ensure that the Minister and/or the Director have the legislative authority to impose a water-taking ban, if required in the future.

The MoE has taken some steps in this direction by enacting Ontario Regulation 153/03, which prohibits new water taking within the Niagara Escarpment Planning Area and the Oak Ridges Moraine for a period of six months, for certain types of takings, including water bottling. During the six-month period, the Ministry intends to consult and to put in place regulatory and program improvements.<sup>9</sup> We are supportive of this measure, but fail to see why the moratorium should be limited to water takings in the Niagara Escarpment Planning Area and the Oak Ridges Moraine.

We would recommend that the MoE amend the OWRA to provide the Director with authority to issue a water-taking ban in any areas within the Province, which are identified by the Province to be an ecologically sensitive water body or facing other water quantity or quality issues. We also recommend a ban on large commercial or industrial takings until such time as the recommendations made by the Advisory Committee on Watershed - based Source Protection Planning, and the regulatory and programme improvements outlined in EBR Registry Notice RA030009, are in effect.

**Recommendation # 2: CELA recommends that the OWRA be amended to provide the Director with authority to issue a water taking ban in any areas within the Province, which are identified by the Province to be an ecologically sensitive water body or facing other water quantity or quality issues. CELA also recommends a ban on all large scale commercial or industrial takings until the recommendations made by the Advisory Committee on Watershed - based Source Protection Planning and the regulatory and programme improvements outlined in EBR Registry Notice RA030009, are in effect.**

### **(ii) Phased Permits**

It has been our experience that the MoE has issued PTTWs even in cases where there is a lack of information, or inadequate information, on flow levels in streams. It is our position that where there is a lack of data to adequately assess the impact of the taking, the MoE should request an applicant to undertake monitoring for an extended period of time, to assess stream flows during the hydrologic cycle, prior to issuing the PTTW.

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<sup>9</sup> See EBR Registry RAO3E90014.

A related concern has been the use of "Phased Permits" to address situations where there is a lack of empirical data on stream flows. We are aware of at least one instance where the MoE has issued a "Phased Permit." Under the "Phased Permit" approach the Ministry allowed water taking for approximately 1,483 cubic metres per day for three years to provide the applicant with time to collect data and assess the environmental impacts of the taking. In the event that there were no discernable adverse impacts, the Director indicated in the PTTW that he would increase the taking to 4,500 cubic metres per day by an "official written notification" to the applicant. Under the terms of the "Phased Permit", the Director required the company to hire a consultant to conduct an investigation on a number of environmental factors, including aquatic habitat, the identification of fish spawning areas and the range of minimum stream flows, critical flows and water levels that had to be maintained to protect the aquatic habitat and the natural functions of the Tay River.<sup>10</sup>

The use of a "Phased Permit" has serious implications on the notification requirements under Regulation 285/99, and public consultation and participation rights under the *Environmental Bill of Rights* ("EBR"). Under normal circumstances, an applicant who is seeking an increase in taking over ten percent of the current authorized rate of taking, has to make a new application for a PTTW.<sup>11</sup> This triggers section 2(2) of Regulation 285/99 and requires the Director to consider the interests of other users in the taking. However, the "Phased Permit" would eliminate this requirement, since a PTTW holder would not be required to seek a new PTTW, and in turn, section 2 (2) would not apply. The "Phased Permit" also circumvents the public notice and comment provisions under the EBR. Furthermore, it would also prevent the public from exercising their right to seek leave to appeal under the EBR.

The MoE should immediately halt the practice of issuing "Phased Permits" given that it fundamentally undermines the notification requirements under Regulation 285/99 and the public participation rights, and leave to appeal provisions, provided under the EBR.

**Recommendation # 3: The MoE should immediately halt the issuance of "Phased Permits" for water takings.**

## **2. NOTIFICATION REQUIREMENTS**

### **(i) Increased Notification Requirements**

Section 2(5.1) has been added to Regulation 285/99 and will now require the applicant to provide notification to the applicable municipality, or if the water taking is not located

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<sup>10</sup> The PTTW is now the subject of a judicial review application in the Ontario Superior Court of Justice (Divisional Court) and a number of legal issues have been raised regarding this PTTW, including the jurisdiction of the Minister and Director to issue a Phased Permit under the OWRA.

<sup>11</sup> See section 4.8(9) of the MoE Permit to Take Water, Guidelines and Procedures Manual, 1999.

within a municipality, the local services board, if one has been established. Furthermore, the applicant is required to notify any conservation authority in which the taking is located, and any adjacent landowners.

CELA supports the increased notification requirements proposed by section 2(5.1). However, the timing and content of the notification procedure remains unclear. We would recommend that the MoE provide guidance to applicants with respect to both of these matters. EBR Registry Posting RA03E0009, states that the MoE will be preparing a stakeholder consultation guide to assist applicants through the consultation process. The guide will detail specific requirements for consultation, and assist applicants in determining the level of consultation required for the proposed water taking. We are encouraged that the MoE is intending to prepare a consultation guide and recommend that the MoE ensure that applicants engage in consultation as early as possible in the permitting process.

## **(ii) The Need to Provide Public with Access to Information**

The current MoE practice is to provide draft copies of PTTWs to the applicant prior to issuing the permit. It has been our experience that draft copies of PTTWs are not shared with other interested parties, such as citizens' groups and their consultants prior to issuance of the permit. In fact, the experience of our clients has been that the MoE's exchange of data, reports and other information has been generally with the applicant, while citizens' groups have to resort to requests under the *Freedom of Information and Protection of Privacy Act*. These requests are often costly and time consuming, and prevent citizens from having an opportunity to provide comments early in the decision-making process, before MoE has finalized its course of action.

It is CELA's experience, that the lack of input into the decision-making process prior to the Director's issuance of the PTTW means citizens have to resort to the leave to appeal provisions under the EBR in order to have their concerns addressed. The ECO has also commented that problems with the PTTW administration may be promoting conflict about PTTWs, and are contributing to the growing number of leave to appeal applications related to PTTWs under the EBR.<sup>12</sup>

We believe that many contentious issues may, in fact, be satisfactorily resolved if the MoE ensures that citizens are provided the opportunity to make submissions to the Director and review draft PTTWs at an early stage of the permitting process. We therefore, recommend that the MoE ensure that all relevant documents including draft PTTWs are provided upon request to the public.

Section 2(5.2) states that the notification requirement under section 2(5.1) will not apply if the application is for a new permit to take the same or lesser volume of water. There may be circumstances however, where there are ongoing concerns about a water taking,

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<sup>12</sup> See *Ontario's Permit to Take Water Programme and the Protection of Ontario's Water Resources, Brief to the Walkerton Inquiry*, January 2001, at p ii and p.7.



which the public may want an opportunity to comment on when a PTTW comes up for renewal. For example, there may be situations in which the renewal of a permit for the same or lesser amount of water should be subject to greater scrutiny due to drought conditions or because additional information has come to light. In these situations, we believe the applicant must provide information to the public, if requested, about the renewal of the PTTW. We recommend that the MoE stipulate in the Manual that it will require the applicant to provide notification for renewals of a PTTW for the same or lesser amount of water in the same location and for the same amount, if a request is made by the public.

**Recommendation # 4: CELA recommends that the MoE ensure that all relevant documents including draft PTTWs are provided upon request to the public. CELA also recommends that the Manual stipulate that the applicant will be required to provide notification regarding a PTTW to take the same or lesser amount of water in the same location and for the same use, if the public makes a request.**

### **3. DATA AND REPORTING**

#### **(i) The Need for a Publicly Accessible Database**

Section 2.1 of the proposed amendments requires every person to whom a PTTW has been issued, to collect and record data on the volume of water withdrawn daily and to submit the data to the Director in a form and manner approved by the Director.

We support this measure, but would recommend that the MoE keep a more comprehensive database accessible to MoE staff and the public. For example, takings which are not subject to the permit requirements, such as agricultural takings, should still be subject to reporting requirements so that the MoE has a more complete account of the water consumption in a given area. In addition, domestic consumption for smaller takings should also be subject to reporting requirements with regard to quantity and location of the taking.<sup>13</sup> The MoE should also obtain and record, at a minimum, additional information regarding water takings including:

- 1) the source of the taking (i.e. groundwater or surface water);
- 2) the location of the taking;
- 3) information related to quantity, including the hours of taking, and maximum taking per day;
- 4) location of the taking in relation to other physical features such as streams, lakes, and watersheds or subwatersheds;
- 5) purpose of the taking (communal water, irrigation etc);
- 6) the applicant's need for the taking and the planned use of the taking;

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<sup>13</sup> *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources, Brief to the Walkerton Inquiry* at pp. 23-24.

- 7) conservation measures which may be implemented to reduce the need for the taking;
- 8) cumulative takings in the watershed or subwatershed;
- 9) the water budget in a watershed or subwatershed, in order to assess the direct, indirect and cumulative impact of the taking; and,
- 10) the permit expiry or cancellation date.

## **(ii) Annex 2001**

The Great Lakes Water Initiative of the Council of Great Lakes Governors and the Premiers of Ontario and Quebec was announced in June 18, 2001. The initiative is an undertaking to implement a Supplementary Agreement to the Great Lakes Charter by June 2004 ("Annex 2001").<sup>14</sup> The Agreement also sets up a system to review withdrawal and diversion proposals, develop a decision-support system, and systems for monitoring, dispute resolution and defining trigger levels for international review.

This means that Regulation 285/99 will need to undergo additional amendments a year from now to ensure its consistency with Annex 2001. The scope of this agreement goes well beyond provisions set out in this regulation, and will have significant implications for the MoE's staff and budget. The MoE should therefore ensure that it has the necessary staff and budget to implement Regulation 285/99 and Annex 2001.

**Recommendation # 5: CELA recommends that MoE should obtain and record, at a minimum, additional information regarding water takings including:**

- 1) the source of the taking (i.e. groundwater or surface water);**
- 2) the location of the taking;**
- 3) information related to quantity, including the hours of taking, and maximum taking per day;**
- 4) location of the taking in relation to other physical features such as streams, lakes, and watersheds or subwatersheds;**
- 5) purpose of the taking (communal water, irrigation etc);**
- 6) the applicant's need for the taking and the planned use of the taking;**
- 7) conservation measures which may be implemented to reduce the need for the taking;**
- 8) cumulative takings in the watershed or subwatershed;**
- 9) the water budget in a watershed or subwatershed, in order to assess the direct, indirect and cumulative impact of the taking; and,**
- 10) the permit expiry or cancellation date.**

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<sup>14</sup> Annex 2001 is an undertaking to:

- (i) Develop a new set of binding agreements within three years to protect, conserve, restore, improve and manage use of the waters and water-dependent natural resources of the Great Lakes Basin,
- (ii) Develop a broad-based public participation programme, and
- (iii) Establish a new decision-making standard that will prevent or minimize water loss through return flow and water conservation measures and result in improvements to the quantity or quality of the waters and water-dependent resources of the Basin, while complying with existing laws and treaties.

**The information should be maintained in a publicly accessible database. CELA also recommends that the MoE ensure it has the staff and budget to implement Regulation 285/99 and Annex 2001.**

#### **4. CONCLUSION**

We recommend that in addition to the proposed amendments, the following recommendations be adopted to improve the MoE's Permit to Take Water programme:

**Recommendation #1: CELA recommends that a clause be added to Regulation 285/99 requiring the Director to assess the cumulative impact of the taking on the water budget in a watershed and where appropriate, the subwatershed. CELA also recommends that the MoE prepare within six months, a guidance document, which provides staff with guidance on how the "ecosystem approach" and "precautionary principle" is to be assessed and applied in the permitting process.**

**Recommendation # 2: CELA recommends that the OWRA be amended to provide the Director with authority to issue a water taking ban in any areas within the Province, which are identified by the Province to be ecologically sensitive water bodies of facing other water quantity or quality issues. CELA also recommends a ban on all large scale commercial or industrial takings until the recommendations made by the Advisory Committee on Watershed- based Source Protection Planning and the regulatory and programme improvements outlined in EBR Registry Notice RA030009, are in effect.**

**Recommendation # 3: The MoE should immediately halt the issuance of issuance of "Phased Permits" for water takings.**

**Recommendation # 4 : CELA recommends the MoE ensure that all relevant documents including draft PTTWs are provided upon request to the public. CELA also recommends that the Manual stipulate that the applicant will be required to provide notification regarding a PTTW to take the same or lesser amount of water in the same location and for the same use, if the public makes a request.**

**Recommendation # 5: Recommendation # 5: CELA recommends that MoE should obtain and record, at a minimum, additional information regarding water takings including:**

- 1) the source of the taking (i.e. groundwater or surface water);**
- 2) the location of the taking;**

- 3) information related to quantity, including the hours of taking, and maximum taking per day;**
- 4) location of the taking in relation to other physical features such as streams, lakes, and watersheds or subwatersheds;**
- 5) purpose of the taking (communal water, irrigation etc);**
- 6) the applicant's need for the taking and the planned use of the taking;**
- 7) conservation measures which may be implemented to reduce the need for the taking;**
- 8) cumulative takings in the watershed or subwatershed;**
- 9) the water budget in a watershed or subwatershed, in order to assess the direct, indirect and cumulative impact of the taking; and,**
- 10) the permit expiry or cancellation date.**

**The information should be maintained in a publicly accessible database. CELA also recommends that the MoE ensure it has the staff and budget to implement Regulation 285/99 and Annex 2001.**

We note that EBR Registry Number RA03E0009 also states that the Ministry is proposing to develop a "service cost recovery fee structure to recover costs associated with the Permit to Take Water Programme. CELA welcomes this initiative and looks forward to reviewing and commenting on this proposal in the future.