



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

Caroline Cosco,
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Dear Caroline Cosco,

**Regarding EBR Registry Number AA07E0001
Proposed Legislative Amendments to the Ontario Water Resources Act**

Background

The Canadian Environmental Law Association (CELA) is a public interest legal aid clinic established in 1970 to represent low income Ontarians with environmental problems and to pursue a law and policy reform to protect environmental health. CELA has a long history and involvement in efforts to improve water management in Ontario through strengthening the Permit to Take Water system in Ontario and in the Great Lakes in efforts to strengthen the Great Lakes Charter since 1985. Over the past five years we have had direct involvement in the international negotiation of the Great Lakes St. Lawrence River Basin Sustainable Water Resources Agreement (hereafter referred to as "the Agreement") and the companion U.S. Compact Agreement as a member of the Advisory Panel to the Council of Great Lakes Governors and the Premiers and since 2005 on an Advisory Panel created by the Ontario Ministry of Natural Resources to help them form their positions on drafts of these Agreements. The Ontario Panel continues to assist with the implementation of the legislation in Ontario.

In 1997 CELA with Great Lakes United published a book *The Fate of the Great Lakes – Sustaining or Draining the Sweetwater Seas?* that examined the weaknesses in Great Lake regimes to protect its water from the growing risks of global and continental water shortages, growing demands and continuing waste of water and climate change impacts. In 1998 the two organizations received standing from the Ontario Environmental Appeal Tribunal to oppose the issuance of a license to the NOVA Group to export water in bulk in tanker ships from the Great Lakes to the orient. CELA has also

commented on most large withdrawal and diversions proposals from the Great Lakes since 1985 and has been involved in attempts to improve conservation and efficiency efforts in Ontario over the last two decades. CELA was gratified when Justice O'Connor recognized the connections we stressed during the Walkerton Inquiry between water quantity and quality that have led to the Ontario Clean Water Act requirements for water budgets in Ontario watersheds.

Context

The comments we will make in this submission will draw on all of these experiences. We are acutely aware of the imperative to pass implementing legislation for the Great Lakes St. Lawrence River Basin Sustainable Water Resources Agreement (the Agreement). It will strengthen Premier McGuinty in his role as the 2007 Chair of the Regional Body set up by this Agreement. Passage of the Act in Ontario will encourage the U.S. States to follow suit and pass parallel legislation through their legislatures and senates as well as the US Congress. This could take two or three years. The early passage of implementing legislation will continue Ontario's leadership role of acting and putting in place the best programs on water management basin-wide. We support the passage of this legislation in the new session of the legislature. In an election year there is risk that a new government would not make this a priority. This could put the Great Lakes and St. Lawrence River Basin at further threat of depletion.

As part of these negotiations for five years, we understand the weaknesses of this Agreement. It contains clauses that Ontario had to compromise on in order to reach consensus. It is important that this Act reflect **all** of the language in the existing Agreement so that the Province has the powers to engage in all of activities set out in the Agreement on a level playing field with the other nine jurisdictions. In our view this Agreement is far superior to the status quo. In particular the extension of the prohibition on diversions already in Quebec and Ontario to the US States is an important protection that can be traced to concerns voiced by the Canadian public and taken back to the negotiations as essential to Ontario's continuing involvement in the negotiations. We have found the negotiation process that has led to these suggested regulatory changes exceptionally complex, politically and diplomatically challenging. It represents a huge investment of public, private and government time and resources. A loss of will at this time would likely mean another effort of this scope would not occur.

While a lot of the public attention on this Agreement has focused on its diversion provisions, other provisions are attempting to address program and information gaps and deficits that will be pivotal to our ability to protect and sustain our water resources in the future. This is work that remains to be done on conservation, defining our cumulative use of GL water, and building better understanding of the relationship between ground and surface water. Care will need to be taken to allow flexibility in changes to OWRA so actions can be taken on new understanding or in future times of scarcity. Authority should be vested in Directors and the government to take further actions to avoid and respond to water scarcity.

We urge and continue to expect Ontario to take steps in drafting language, modernization adjustments and future regulations to the *Ontario Water Resources Act* to address the weaknesses of the Agreement by improving Ontario's PTTW system and to provide us with new tools to manage this finite resource.

Recommendations

Wherever possible we will try to provide context for our recommendations. The release of this notice of Proposal for Act has come at a time when the York Region Proposal has pointed out weaknesses in Ontario's current water management regimes. In discussions held by the Ontario Great Lakes Charter Annex Advisory Panel several of these concerns have been raised by panel members including CELA. Ministry of Natural Resources Assistant Deputy Minister Kevin Wilson has responded to these concerns with a letter on January 30th, 2007. I have appended that letter to this submission as we will refer to it as it addresses further actions following on this proposal, needs for further regulations and government actions.

The background statement and modernization of section 34 of OWRA

One factor that infuses all our thinking about sustainability in 2007 is the reality of climate change and its current and future impacts on resource management and ecological integrity. First drafts of this Agreement included numerous references to climate change. Regrettably all but one of those references was expunged from the final agreement for political reasons. The Chair of the US congressional subcommittee that will likely consider the US Compact Agreement was vocal that he considered that "climate change is one of the biggest hoaxes perpetrated on the American public". Consequently references in the final Agreement were couched and paraphrased. This should not stop Ontario from infusing climate change provisions into their water management programs. Since this Act is also undertaking to modernize aspects of the programs in section 34 it is an opportune time to include references to climate change the issue of greatest concern to Canadians. Since our knowledge of climate change impacts is rapidly growing the Director should have the flexibility to take these impacts into account.

It is extremely important to make it explicit that the Agreement does not supersede other Acts and regulations in place. This means that Ontario can strengthen their own PTTW laws in order that they will apply to Ontario scrutiny of all future proposals.

Recommendation 1.

- a. That Ontario infuse language in the OWRA and section s.34 in the general purpose statement section, and in sections outlining the Director's authorities to explicitly state that climate change impacts be part of Ontario's decision-making framework, science and research strategies and as an additional basis for authority of the Director to impose special conditions.**

- b. That the Act explicitly state that this Agreement is in addition to provisions of the OWRA section 34 that already apply to PTTW in such a way that Ontario can bring all facets of the Act into consideration of a proposal that would also be subject to the Agreement.**

It is not entirely clear if an application that would trigger this Agreement would be processed in Ontario and by the regional body simultaneously or sequentially. It should be made clear in the Act that Ontario would do the initial evaluation using all of the PTTW provisions of the OWRA. Our assumption is that if an application were to come forward in the Great Lakes watershed of Ontario, it would not only be subject to the Agreement but also to the same scrutiny as all other applicants over 50,000 litres and subject to the same notification, comment and appeal provisions as other PTTW applications. This would be the one opportunity for public involvement in such an application as the Regional Body review is done by the jurisdictions. Care will be needed in the wording of the Act to ensure that the public role in all of the components of the domestic evaluation of an application is retained and made clear. Care should also be taken to inform an applicant as soon as possible if their application would also be subject to regional review. In the past in Ontario the prospect of regional review has acted as a deterrent to large proposals and has led to the consideration of more sustainable alternatives. There should be sections on the Agreement added to the Green Facts educational materials on the PTTW and to the Guide to Permit to take Water Application Form.

Recommendation 2.

- a. The components of the Agreement need to be integrated into the OWRA in such a way that the existing provisions of the Act as regards public notice, rights to comment, reasonable comment periods and rights to appeal are still clearly applicable to ALL proposals. To allow for this it would be preferable for applications to be considered first in Ontario before they go onto Regional Review. This does not preclude notification early in the process to the applicant that their proposal would be subject to regional review.**
- b. There should be sections on the Agreement added to the Green Facts educational materials on the PTTW and to the Guide to Permit to take Water Application Form.**

Inter-Basin Diversion

We are relieved that the 1999 section 10 of the O. Reg. 387/04 will now become law by incorporating its provisions into the OWRA. This will make it much harder for future governments to alter the ban on diversions. It is important to do this to drive further policy. This provision will be much stronger in Ontario than in other jurisdictions because it does not allow exceptions for straddling counties as it does in the other jurisdictions.

Intra-Basin Diversions

There is often confusion between the terms of inter-basin diversion and intra-basin diversion as it applies to the Great Lakes. We recommend that an additional Map be added to the new version of the OWRA illustrating the boundaries of each Great Lake watershed. This would help make the distinction between the Great Lakes as one of three watersheds in Ontario and the sub-basins of the Great Lakes within Ontario.

Recommendation 3.

An additional Map should be added to the OWRA to illustrate the individual watershed boundaries of each Great Lake in Ontario to promote understanding of both inter-basin and intra-basin provisions in the Act.

CELA supported the definition of diversion contained in the Agreement to mean “a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into another...” This definition equates diversions out of the Great Lakes with intra-basin diversions because there was general acceptance by the jurisdictions that both could be equally harmful to the integrity of the Basin ecosystem. Areas bypassed by intra-basin diversions will likely suffer impacts associated with lower flows, on habitat, water quality, fisheries, biodiversity and hydro-power generation. All of these uses could be impaired in by-passed areas.

Intra-basin concerns grew during Agreement negotiations

Geography means that three Great Lakes jurisdictions have the capacity for intra-basin transfers. They are Michigan, Wisconsin and Ontario. Because Ontario has four of the five Great Lakes and all of the connecting channels within its boundaries this Province has more “opportunity” to carry out Great Lakes intra-basin diversions and has allowed intra-basin diversions in the past. A London, Ontario pipeline takes water from Lake Huron and discharges waste water into Lake Erie and Lake St. Clair. At the time these Agreements were being negotiated several important factors came into play. It was found that over-pumping of groundwater in Eastern Wisconsin had reversed the flows of groundwater away from Lake Michigan to such a degree that drops in Lake levels could be detected. The estimations of the flows out of Lakes Michigan and Huron were found to be far greater than authorities were aware of exacerbating other impacts of climate impacts of low spring runoff and higher trans-evaporation rates to dramatically lower Lake levels in the mid-Lakes.

New drinking water regulations have meant that groundwater in some US communities such as Waukesha and New Berlin, Wisconsin is no longer potable. These communities have indicated that they would like to seek water from the Great Lakes. New Berlin has indicated they would go through the process as if the Agreement were in place applying all of the Agreement terms to its application for a new source of drinking water. Ontario and other jurisdictions expressed concerns about these precedents going forward. Consequently, there was an expectation built that Ontario would expect anyone

proposing an intra-basin diversion to honour the spirit and terms of the Agreement. When the straddling county options were put on the negotiating table by US jurisdictions late in the negotiations in 2005, Ontario and their Advisory Panel hoped that the public consultations that followed that summer would cause this exception to the Agreement diversion provisions to be withdrawn. This did not happen. Consequently, the exception standards that Ontario discussed with their Advisory panel and other jurisdictions were introduced so that few of these exceptions would gain approval. All of the exception standards must be met primarily the return flow requirement would act as the strongest deterrent because of its cost. Ontario efforts to lower the high trigger levels placed on these exceptions were unsuccessful. Ontario chose to opt out of the Straddling County option because counties and districts in Ontario extend far from the watershed and it went against their prohibition against diversions out of the Great Lakes.

While people were generally aware that the Kitchener Waterloo Region and London, Ontario have, for some time, been considering new pipelines for future water supplies, it was expected that the Agreement would come into force prior to those requests. When the York Region proposal came to the attention of the Ontario Advisory Panel, concerns were raised that it was occurring outside the Agreement under the class environmental assessment process for water and sewage infrastructure and that some of the options under consideration would result in an intra-basin diversion of wastewater flow out of the Lake Huron Basin to the Lake Ontario Basin. The attached letter from Kevin Wilson has set out responses to public concerns voiced about that proposal and undertakes to address over all concerns about intra-basin "opportunities" in dialogue on further regulations pending once this Agreement is passed. Kevin Wilson has also committed the government to consider a moratorium on further intra-basin diversions until the Agreement is fully implemented.

We would urge the Ontario government to consider an interim moratorium on intra-basin diversions as a follow-up to the passage of this legislation. It is clear that the public would like a made-in-Ontario solution to applications for intra-basin diversions in Ontario that is more protective of the integrity of the Great Lakes and its watersheds. Furthermore CELA feels other Agreement obligations have potential to avert the need for intra-basin diversions. For instance the pending conservation program could avert a considerable amount of the demand for water in the future.

Recommendation 4.

- a. CELA supports the passage of this Act in the upcoming session of the legislature.**
- b. Following on the passage of the Act, CELA urges the Government to consider an interim moratorium on intra-basin diversions in Ontario until there can be full public discussion of appropriate made-in-Ontario solutions, alternatives in place for Provincial consideration of these**

proposals, and the Agreement is in place in all Great Lakes jurisdictions.

- c. Priority should be placed in Ontario on drafting the Conservation programs mandated by the Agreement as they could lead to reducing the needs for intra-basin diversions and other large withdrawals.**
- d. Opportunities should be considered to further address additional terms for intra-basin diversion proposals originating in Ontario in regulation. These should be discussed with the MNR Great Lakes Charter Advisory Panel and posted on the EBR for comment. Particular attention should be paid to lowering volumes requirements for return flow.**

Additional integration of the Agreement with other Ontario acts and regulations

The York Region proposal is undergoing a Class EA for Water and Sewage Infrastructure. CELA has always been concerned about the “disconnect” between the planning and development process, the class EA process and the permit to take water sections of the OWRA. Far too often Municipalities can design new infrastructure, undergo class EA approvals that do not require proper notification, examination of need or alternatives and gain approvals for projects prior to requesting a PTTW. Once approvals are gained it is unlikely a permit would be denied. Recent consultations on EA Reform did not include a substantive review of these concerns. CELA supports the commitment made in ADM Kevin Wilson’s letter to the Advisory Panel to publicly discuss potential water proposals on the near horizon and examine EA requirements as they relate to those proposals. CELA would go further and ask for a review of the class EA process with the purpose of considering how PTTW could receive consideration earlier in the planning process. This could have significance for other law reforms under way in Ontario such as the “Places to Grow” initiative, the Green Belt Legislation, the *Planning Act* and the *Ontario Clean Water Act*.

The Province of Ontario is undergoing a profound reform of its water protection legislation. There are still changes under review and further Acts and regulation pending. Care should be taken to integrate the Great Lakes Charter Annex in all new regulations with water management components. *The Ontario Clean Water Act* regulations as they apply to the Great Lakes watersheds and to water budgeting and the *Sustainable Water and Sewage Infrastructure Act* and regulations will need to be integrated with this Agreement.

Recommendation 5.

- a. CELA recommends that consideration be given by Ontario to how the Class EA for Sewer and Water Infrastructure process can have improved integration with the PTTW process and the Agreement.**
- b. Care should be taken to integrate the Great Lakes Charter Annex in all new regulations with water management components. *The Ontario Clean Water Act* regulations as they apply to the Great Lakes**

watersheds and to water budgeting and the *Sustainable Water and Sewage Infrastructure Act* and regulations.

Judicial Review

The reciprocal Judicial Review clauses are particularly important components of the Agreement. They allow the other Great Lakes jurisdictions the opportunity to challenge water withdrawals and diversion decisions in Ontario. It is important to keep in mind we will receive comparable rights in US states and Quebec once they pass their implementing legislation. These new rights are far more powerful than the status quo where Ontario does not have these rights to Judicial Review and must hope a US governor will exercise their veto power under the US *Water Resources Development Act* (WRDA) to oppose a large proposal to withdraw water from the Great Lakes. WRDA does not cover the groundwater portion of the Great Lakes and many feel it would not stand up to a federal challenge.

Recommendation 6.

CELA urges swift passage of this Act in Ontario as it will send a strong signal to other GL Jurisdictions that we are prepared to enshrine their access to Judicial Review in Ontario. This could be an incentive for them to pass Agreement implementing legislation in the other nine jurisdictions and allow us access to Judicial Review in the other nine Great Lakes jurisdictions.

Regulation-making authority

Much of the success of this Agreement to achieve sustainable, long term protections for the Great Lakes through improved water management will be in the prescriptive terms of the regulations. This is where Ontario regulators can demonstrate leadership and vision in provision of directions for programs through regulation. The first draft of the Agreement released in July 2004 contained an implementation manual that had many prescriptive suggestions on data collection, tracking cumulative use, components of a water conservation program, and best practices, consumptive use coefficients and addressing our needs for better understanding of groundwater in the Basin. The second draft omitted this manual and a lot of the specificity and iteration based on extensive research carried out by the Great Lakes Commission on a decision support system and other valuable research was lost in this draft. It is crucial that the Province have regulation-making powers so that the specificity and program requirements can be set out in more detail.

Sceptics have speculated that this Agreement in its narrowest interpretation could just be protectionist to discourage outsiders from access to Great Lakes water and that little will be done to change our wasteful and excessive use within the Basin. The debunking of this view and the proof that the jurisdictions intend the Agreement to be a strong conservation and sustainability imperative will depend on the detail that comes forward in the regulations on use within as well as outside the Basin. By exercising its regulation-making powers Ontario can show leadership toward tangible sustainability

goals. CELA has been participating in the Committee set up by the Council of Great Lakes Governors to draft a framework for the conservation programs that the Agreement mandates in each Great Lake jurisdiction. We are concerned that this framework is so general that it might not result in significant reductions in demands on water use in the Basin. If Ontario were to craft its own stronger program early it could act as a yardstick for other jurisdictions. As Author Peter Annin said in his 2006 book The Great Lakes Water Wars,

"It is particularly important that this conservation ethic take hold in the Great Lakes region. The Basin will not remain credible in the eyes of the world if it denies water to outsiders and then continues to waste it with reckless abandon at home".

Recommendation 7.

CELA urges the Ontario government to begin work immediately on regulations that will define the important components of water conservation, tracking consumptive use, return flow, data collection and cumulative impacts. We encourage the continued use of the Advisory Committee to discuss and shape these components because it has broad sectoral representation in its makeup. Additional opportunities should be created to engage the public in these efforts.

Modernization of section 34 of the OWRA

The data collection required since 1985 by the Great Lakes Charter has been inadequate to determine actual water use by sector. There are inconsistencies of information collected and most jurisdictions do not collect data at the level Ontario has of 50,000 litres per day. This makes it difficult for regional water managers and a challenge to predicting trends and variances in use.

The Agreement attempts to overcome these deficits by requiring that one year after Agreement implementation by all Parties that each Party submit baseline data for determining new or increased water withdrawals, diversions, consumptive uses (list of water users, permitted or system capacity). Since water takings prior to March 29, 1961 were not required to obtain a permit it will be difficult to establish this baseline without granting the Lieutenant Governor in Council (LGIC) authority to make a regulation to require these grandfathered water takings to obtain a permit. Furthermore the Agreement grandfathers all withdrawals prior to its implementation. The Province will need to have powers to access and compile information they already have on these takings to establish a comprehensive baseline. This will be extremely important to the Province's ability to track cumulative use and to inform and develop new scientific strategies and programs in the future. CELA has always voiced their concern that we do not have adequate information on water use that allows informed water management decisions.

Furthermore, when a permit holder seeks a new permits that would trigger the Agreement the LGIC (or Director) needs to have the authority to consider their cumulative takings not just their new request. CELA has had concerns that many permit holders have been granted much more water than they use. The Province needs the authority to require all permit holders to report on their use and return flow so permitting can be more precise and unused reserves are not allocated but conserved.

Recommendation 8.

CELA applauds the modernization provisions of section 34 of the OWRA that give the LGIC or a Director additional powers to improve the effectiveness of the PTTW system, impose special conditions, require permits for grandfathered and exempted uses, evaluate the use of water volumes previously permitted, alter permitted amounts, cumulate past and present takings and require tracking of return flow. These are all enhancements that are necessary to ensure water protection and sustainability and adequate understanding of our use by sector and cumulatively.

Thank you for the opportunity to comment on this implementing legislation and on the additional provisions to modernize the Ontario Water Resources Act PTTW provisions.

We would also like to express our appreciation to Assistant Deputy Minister of the Natural Resource Management Division of the Ministry of Natural Resources Kevin Wilson for his January 30th 2007 letter clarifying the government commitments to further discussion and regulatory reforms arising from this and other related water management initiatives.

Yours truly,
Canadian Environmental Law Association

Sarah Miller

Sarah Miller
Coordinator and Water Researcher

