Proposed Improvements to Ontario's Water Taking Permitting Process

Recommendations to the Government of Ontario

A.M.O. Water Taking Taskforce

December 19, 2002

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1. Introduction

In response to concerns from members regarding the impact of water taking in their communities, the Association of Municipalities of Ontario convened a Water Taking Taskforce in December 2001 (see Appendix A for membership list). The mandate of the Taskforce is to research and develop recommendations on changes to the water taking permitting process and related issues that could be undertaken by the Provincial Government. The Taskforce has prepared this position paper to share with the MOE and other stakeholders to generate discussion and debate on the Permit to Take Water (PTTW) process and the role of municipalities.

The Taskforce is focusing on three areas with respect to PTTWs:

1) the assessment of local and cumulative impacts of water takings, and the importance of information gathering and sharing;
2) The integration of the water taking applications process into the municipal planning function; and
3) The impact of commercial water taking operations on rural roads, and the need for compensation.

2. Current process to obtain a permit to take water

2.1 Legislative and Regulatory background

The Ministry of the Environment's authority to regulate water taking is derived from Sec. 34 of the *Ontario Water Resources Act* (OWRA). According to S.34 (3), a person is required to obtain a water taking permit from the MOE Director for water takings over 50,000 litres of water per day. S. 34 (4) of the OWRA provides the MOE director the authority to prohibit water taking that is deemed to be interfering with any public or private interest in water.
Under Regulation 285/99, the Water Taking and Transfer Regulation, further elaborates on what the Director shall consider when issuing a water taking permit, including:

- the protection of the natural functions of the ecosystem
- groundwater that may affect or be affected by a surface water taking
- surface water that may affect or be affected by ground water taking

The Director may also consider:

- existing and planned uses for water, including livestock uses, municipal water supply, agricultural uses, private domestic uses, and other uses.
- whether it is in the public interest to grant a permit.

The regulation leaves it to the Director's discretion whether he or she will require the applicant to consult with others.

2.2 Permitting Process

The process for applying for a permit to take water is outlined in the 'Guide for Applying for approval of permit to take water-interim guide June 2000', MOE.

The applicant must submit an application form with supporting technical reports to the Ministry of the Environment. This is screened for minimum information and sufficient supporting information and assessed by ministry staff. The permit terms and conditions are developed by MOE. These generally include a permit expiry date, acceptable rates and amounts of water withdrawal, and source identification and location. The permit is then posted on the Environmental Bill of Rights registry for public comment. It is left to the discretion of the MOE Director to notify relevant municipalities of the permit to take water.

3. Assessing local and cumulative impacts of multiple water takings

3.1 Current practice

Permits have traditionally been granted on a first-come, first-serve basis. MOE reviews of permit applications consider the fair sharing of riparian rights when granting a permit to take surface water, or the sustainability of the water source and non-interference when considering a permit for groundwater taking. Reg. 285/99 (see above) introduces new criteria on which to base the review of a water taking application.

The technical assessment and approvals of water taking applications are performed by MOE regional offices. In the past, there has been concern with the lack of consistency in these assessments and approvals. The Ministry now plans to centralize permit application approvals in the Environmental Assessment and Approvals Branch. This may improve this consistency, although the technical assessment on which these approvals are based will still be conducted by regional offices.

MOE is aware that due to increased permit applications and dry conditions, demand for water in some regions now exceeds supply. MOE is currently undertaking a review of water taking permitting assessment best practices. The MOE may consider setting stricter terms and conditions in permits, and increasing enforcement to ensure compliance amongst permit holders.

As a first step, the Ministry of the Environment has conducted a study of best practices for assessing water taking proposals. Gartner Lee Ltd. was contracted to undertake the study, which focuses on providing an independent review of the best methods of assessing water takings. This review includes both best practices in terms of scientific methods of assessing impacts, and best practices with respect to public participation/consultation. The review applies an interdisciplinary, ecosystem-based approach. The MOE invited Conservation Ontario and the Association of Municipalities of Ontario to sit on the steering committee for the study. The Gartner Lee report, entitled,

'Good and Acceptable Practices for Assessing Water Taking Proposals', was submitted to the Ministry in July 2002.

3.2 Assessing Local Impacts

The assessment of local impacts is meant to determine whether the proposed water taking will interfere with the other water uses. Tests to determine local impacts of water taking is often limited to a single 72 hour pump test conducted by the water taking applicant's engineer. The test is designed to provide evidence of the sustainability of the well and possible evidence of the lowering of the groundwater or surface water flow to adjacent areas.

The assessment of local impacts does not necessarily include consideration of municipal official plans or Conservation Authority watershed plans that may identify the need for the special protection measures for sensitive areas. Conservation Authorities have also undertaken considerable work in identifying sensitive water sources, both surface and groundwater, that require special protection. While Reg. 285 suggests that part of the assessment may include planned uses for water, including livestock uses, municipal water supply, agricultural uses, private domestic uses, and other uses, it is not a requirement. This information should be integrated into the MOE's technical review.

The legislation allows the MOE director to revoke water taking rights based on interference with another water user, however, the criteria on which this judgment is based is not defined.

Recommendations:

1. The MOE should introduce more rigorous methodology for assessing local impacts.

2. If tests to determine local impacts are conducted by the applicants, random audits of these tests should be conducted by the MOE or a third party to ensure quality control.

3. MOE should develop clear criteria on which to base an assessment of local impacts, and on the nature of 'interference', which would warrant a reduction in the permitted water taking, or withdrawal of the permit altogether.

4. Guidelines should be developed for MOE staff undertaking the technical assessment to draw upon local information sources and policies, including Conservation Authority information and municipal information and policy direction as set out in Official plans. If municipal or Conservation Authority interest in the water sources in question is established, MOE staff should be required to consult with the relevant municipality or C.A. (see 'Municipal Role', below).

5. Reg. 285 should be amended to ensure that existing and planned uses of water must be considered in the review of a water taking application.

3.3 Assessing Cumulative impacts

The assessment of cumulative impacts is challenging for all jurisdictions, in part due to the lack of consensus on the best methodology to assess these impacts. The Gartner Lee report will assist the MOE in developing more effective methods of assessing water taking impacts and with the MOE's overall review of its water taking policy.

Another hurdle for many jurisdictions is the lack of information that is needed to assess cumulative impacts. Ontario has the advantage of having considerable information on water quality and quantity, and is gathering more information, on the state of groundwater- through groundwater studies that are currently being conducted.

This type of information is essential to determine the cumulative impacts of water takings. This information is also crucial for municipalities in determining where to locate their wells, and to establish protection zones around these wells.

While it is encouraging to see this information being compiled, there is neither agreement regarding who is responsible for gathering and maintaining the information, nor agreement on who is going to pay for it.

Recommendations:

6. Information gathering and maintenance of water quantity and water quality information by surface and subterranean watershed must be made a priority. An inter-agency protocol is required to ensure a coordinated effort to gather information, to keep the information up to date, and to share it amongst relevant agencies, eg. municipalities, conservation authorities, DFO, MOE, MMAH, MNR and OMAFRA.

7. An agreement on cost-sharing amongst relevant agencies to ensure sustained funding for information management activities is also required.

8. Primary responsibility for determining cumulative impacts, and maintaining watershed information must rest with the Province, with the assistance of municipalities and conservation authorities.

9. The methodology for assessing cumulative impacts should be standardized, and should be based on establishing high standards for watershed stewardship, reflected in transparent criteria and rules.

10. Much like the Provincial policy to protect significant wetlands, if there are particularly sensitive water bodies, either subterranean or surface water, these areas should be identified and designated by the Province as requiring particularly stringent protection, and if necessary, should be subject to a water taking ban.

4. Municipal role in water taking review process

4.1 Municipal and public notification/consultation

Currently, it is at the MOE Director's discretion whether she or he notifies relevant municipalities of a permit to take water. MOE Directors will share this information with municipalities upon request. Permits to take water applications are posted on the Environmental Bill of Rights website, however, there is no formal notification process for municipalities.

Pressure has been building to amend the *Ontario Water Resources Act* and/or Reg. 285/99 to make municipal notification of PTTWs in their area a mandatory requirement rather than a discretionary consideration of the MOE Director.

A number of municipalities have expressed their frustration with the lack of notification regarding PTTWs. In March of 2000, the Municipality of Centre Hastings passed and circulated a resolution that called on ' the Province of Ontario and the Ministry of the Environment to change the Regulations so that the Director MUST consult local municipalities and conservation authorities before issuing these [water taking] permits'. A number of municipalities expressed their support for the resolution.

In response, AMO President Michael Power sent a letter to the Minister of the Environment Dan Newman in May of 2000 asking that a Ministerial directive be sent to MOE Directors requiring consultation with relevant municipalities regarding PTTW applications in all instances. In response to this request, Minister Newman wrote, ' The ministry is currently reviewing the policy and procedure manual for the PTTW program. This review will ensure that municipalities and Conservation Authorities are notified and consulted with when the ministry receives any significant PTTW applications.' However, the Minister distinguished between those PTTWs that may not be significant enough to warrant notification, " For example, many applications for PTTWs are renewals of existing permits, or proposals for small water takings from large bodies of water, that pose no threat of interference to other water users or the environment".

In 2001, Liberal MPP Leona Dombrowsky introduced a private member's bill, Bill 79, the *Water Source Protection Amendment Act.* If passed, Bill 79 would have amended Sec. 34 of the OWRA to require that municipalities be notified by the MOE Director of a permit to take water application, if the PTTW ' will affect or is likely to affect the water source or supply of a municipality or conservation authority'. Municipalities and C.A.'s would then have at least 30 days to comment.

The Province of Québec has gone further. All water takers applying for a permit must present a certificate of non-objection, which certifies that no one in the region has any objections to the proposed water taking. If a municipality objects to a proposed water taking, the Minister must undertake an investigation to determine if the municipal concerns justify refusal of the permit. Only two such objections have been filed to date.

There is also a lack of public awareness of proposed water takings. Currently, there are no public notification requirements for water taking applicants beyond posting their water taking applications on the EBR website.

Recommendations:

11. Whether by Director's directive or regulation, the MOE should make it a mandatory requirement that either the MOE or the water taking applicant must notify relevant municipalities immediately once a water taking application is submitted, and that the relevant municipalities be given an adequate period of time to comment on the application. Municipal comments must be taken into account before a decision on issuing the permit is reached.

12. The MOE should also require the applicant to notify the public through local newspaper advertisement of any new water takings or request for substantial increases in the allowed maximum water taking.

13. If the municipality hears of considerable public concern over the application, the municipality reserves the right to hold a public meeting to solicit public views on the application.

5. Water taking and municipal planning

5.1 Planning and Source Water Protection

There is an obvious connection between the municipal planning function and source water protection that is clearly acknowledged in key statutes and policies. Sec. 2 of the *Planning Act* states,

" The Minister, the council of a municipality, ...and the Municipal Board, in carrying out responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest, such as,
(a) the protection of ecological systems, including natural areas, features and functions
(e) ... the supply, efficient use and conservation of ...water.

And in the Provincial Policy Statement, the provincial interest is explained in sec. 2.4.1,

> *The quality and quantity of ground water and surface water and the function of sensitive ground water recharge/discharge areas, aquifers, and headwaters will be protected or enhanced.*

Furthermore, in a recent OMB decision, it was ruled that while the OWRA is the main legislation dealing with ground water, the *Planning Act* actually supersedes the OWRA. In Sec 71 of the *Planning Act*, it is stated, "*In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act prevail.*"

The *Oak Ridges Moraine Conservation Act* underlines the importance of the municipal role in protecting water resources. The Walkerton Inquiry recommendations also highlighted the connection between municipal planning and source water protection.

Despite the clear municipal interest in water taking as it relates to source protection, there is little connection between the water taking permit application process, and municipal planning policy with respect to water protection, including protection of sensitive areas and future water availability. Official plans, details on water demand based on growth projections, and other relevant policy are not necessarily included in the provincial technical assessment of cumulative impacts of water takings in specific regions.

These municipal documents are an important element of the overall assessment of the impacts of water takings, as they provide the context to understand the compatibility of surrounding land use with the water taking operation. It is a municipal responsibility to plan in such a way that roads, traffic, and the location of neighbourhoods are compatible with surrounding agricultural, commercial or industrial activity.

Recommendations:

14. The *OWRA* and the *Planning Act* should be amended, to require that MOE include municipal official plans, zoning by-laws and other relevant policy in their technical assessment of water taking applications, in order to assess the compatibility of the water taking activity with the surrounding community and infrastructure.

5.2 Water taking is a Land Use

As explained above, the legislative and policy context suggests that municipalities have a significant obligation to protect source water. Municipalities exercise this authority through their official plans and zoning by-laws.

However, municipal authority to prohibit or restrict commercial water taking operations through planning instruments has been challenged because water taking is not specifically identified as a use of land pursuant to Section 34 of the *Planning Act* in the same manner as the extraction of mineral aggregates resources from pits and quarries.

Mineral aggregate extraction, a similar type of site-specific natural resource extraction activity, is clearly addressed under Section 34 (2) of the *Planning Act.* Furthermore, within the *Aggregate Resources Act (ARA)*, it is made clear that aggregate extraction permitting must be integrated into the local municipal planning process. Section 12.2 (1) of the ARA states that "*No license shall be issued for a pit or quarry if a zoning by-law prohibits the site from being used for the making, establishment or operation of pits and quarries.".* This ensures that a license to extract is not issued until appropriate municipal zoning is in place. It is not clear why water taking is treated differently.

Recent OMB hearings underscore the peculiar jurisdictional limitations of planning authorities over water taking activities.

In OMB Decision # 0287, Gold Mountain Springs v. Township of Oro-Medonte, municipal authority to control water bottling operations related to water taking activity was reconfirmed. In a challenge to a municipal zoning by-law, the OMB agreed that a water bottling operation was an industrial activity that should not be allowed in land zoned as agricultural. However, the OMB did not have the legislative authority to comment on the water taking activity itself, as it was not considered a land use, and was therefore deemed to be beyond the scope of the OMB as defined in the *Planning Act*.

This OMB decision is notable in that the Board did comment on the issue of compatibility, that is, the possible effect of a water taking activity, including the bottling operations, on the character of the community. The Board decision reads,

> *" The proposed water bottling plant will involve substantial additional heavy truck movements and a considerable increase in automobile movements... the Board finds that there will be a significant change to, and loss of, the rural character in this part of the community".* (OMB Decision # 0287)

Although this comment was directed at truck activity associated with a water bottling plant, a similar effect can be observed from water taking activity that does not involve a bottling plant.

And in a landmark Divisional Court decision (Grey Association for Better Planning v. Artemesia Waters Ltd. and Douglas Hatch in Trust, Court File No. 504/02), the Court has affirmed that water taking (in this case bulk water export) is a land use within the meaning of the Planning Act. The Court ruled "that the installation of piping and pumps and other apparatus on land for the purpose of extracting water is a 'use of land' not only in common parlance but under the Planning Act as well". This decision means that the OMB does have authority to determine the appropriateness of water taking as a use of land in the local context.

Therefore, it is AMO's submission that commercial water taking is a land use under the *Planning Act* and municipalities can and should address such land use activities within their Official Plans. In this way, Official Plans could include policies and designations specific to water taking, such as identifying sensitive areas where water taking may or may not take place, or identifying areas where a water taking activity would conflict with the character of the surrounding community.

Accordingly, applications to establish new water taking operations that would be in contravention of a local official plan or zoning by-law would require formal amendment. It is through this public process that community concerns such as land use compatibility and the protection of groundwater resources would be properly assessed.

Given the obligation of local municipalities to protect source water, and given the apparent ability of municipalities to prohibit or regulate commercial water taking operations pursuant to the *Planning Act,* it would follow that requests for large water

takings (both bottling operations and bulk water extraction) should be circulated to the local municipality by the MOE to be reviewed based on local land use planning policy.

Furthermore, requiring the MOE to circulate PTTWs to local municipalities for confirmation of local planning conformity would also ensure that the MOE's hydrogeological assessment of the proposed water taking and the municipality's assessment of the impact of the water taking in the broader context of planning and zoning, would be integrated prior to an approval being issued.

Recommendations:

15. Given the Divisional Court decision (Grey Association for Better Planning v. Artemesia Waters Ltd. and Douglas Hatch in Trust, Court File No. 504/02) that has ruled that water taking is a land use, the Ministry of Municipal Affairs should make a clear public declaration that the Government considers water taking to be a land use under the *Planning Act*.

16. The OWRA should be amended to include a section similar to that of the *Aggregate Resources Act*, Sec. 12.2 (1), but pertaining to water taking, that requires that no permit shall be issued for a water taking if a zoning by-law prohibits the site from being used for the making, establishment, or operation of water taking.

6. Commercial water takings

6.1 Background to commercial water taking in Ontario

The amount of source water taken for all Ontario bottling operations is relatively small compared to other uses, such as municipal water supply or agricultural irrigation. Based on MOE estimates, total water bottling takings amounted to 690 million litres in 2000, less than one percent of all permitted water taking in Ontario.

The consumption of bottled water in both Canada and the U.S. has increased substantially over the last 10 years. Most water bottled in Canada is exported to the U.S. The total value of Canadian shipments is reported to have increased six times between 1987-1997, to $337 million.

There are 10 major water bottling companies and a number of smaller companies that are in operation in Ontario. Ontario has recently surpassed Quebec as the province with the largest production and net exports of bottled water in Canada. The industry is represented by the Canadian Bottled Water Association. Aberfoyle Springs, the largest company in operation in Ontario, makes up about half of total production. The industry directly employs about 1,500 people, and may indirectly employ up to 3,500 people, in packaging, trucking, environmental services, and manufacturing. Most of these jobs are in rural Ontario.

6.2 Commercial Water taking and impact on municipal roads

While water bottling companies do not make up a large share of total water takings in Ontario, their operations tend to be concentrated in certain areas with plentiful spring water sources. These tend to be in rural areas, which in many areas are serviced by unpaved roads. As a result, the increased traffic causes wear and tear on roads that were not designed for such heavy traffic.

The Ontario Municipal Board has already acknowledged the possible impact of water taking activity on rural roads, and indeed on the character of rural communities (see 5.2 above).

AMO has received a number of resolutions from its members calling for ' *implementation of a volume fee for commercial permits structured along the lines of the system currently in place for aggregate extraction, with such fee or royalty being applied to deal with the negative impact of large scale water taking.*'

There is a precedent for such a fee to assist municipalities in maintaining roads due to increased traffic. Under the *Aggregate Resources Act,* O. Reg. 244/97 outlines a fee schedule and process by which aggregate licensees must pay an annual fee based on tonnage of aggregate extracted. The current fee stands at six cents per tonne of aggregate, of which 4 cents goes to the lower tier municipality, and ½ cent goes to the upper tier municipality in which the quarry or pit is situated.

By instituting a similar fee collection process for non-municipal, non-agricultural water takings, municipalities would be compensated for wear and tear on roads that are used by heavy trucks to transport water.

The fees could also be used for water protection initiatives, such as establishing well protection zones, or undertaking groundwater studies. Municipal and agricultural water takers pay towards such initiatives through property taxes, and in some cases, municipal water rates.

The requirement for commercial water extractors to pay such a fee would have to be based in legislation, through an amendment to the *Ontario Water Resources Act* (OWRA) or the *Safe Drinking Water Act* (SDWA). Under the Municipal Act 2001, Sec. 394 (1) (e), municipalities are expressly prohibited from passing a by-law which imposes a fee based on the "generation, exploitation, extraction, harvesting, processing, renewal, or transportation of natural resources".

It is acknowledged that fees or charges that might be directed at the bottled water industry would add costs to Ontario bottled water products or reduce margins to the bottling companies, impacting on their competitiveness. Smaller, Ontario-based water bottlers would be most impacted. These businesses are already feeling the competitive pressure of large multinational corporations who have entered the industry. The impact of these costs would have to be carefully considered.

It is further acknowledged that any tax or fee imposed on water taking of any kind would have to be carefully considered in light of potential constitutional and international trade implications.

Recommendation:

17. The OWRA or the SDWA should be amended to require the collection of fees from non-municipal, non-agricultural water taking permit holders on a systematic, standardized basis. The fee would be calculated on a two-tier basis – first, to compensate municipalities for wear and tear on their roads and second, to provide a contribution to the protection of water resources.

18. A careful assessment of the impact of such a fee would have to be conducted to determine the impact on different sized water-extraction businesses. The fee schedule could be based on the volume of water being extracted.

7. Summary of Recommendations

1. The MOE should introduce more rigorous methodology for assessing local impacts.

2. If tests to determine local impacts are conducted by the applicants, random audits of these tests should be conducted by the MOE or a third party to ensure quality control.

3. MOE should develop clear criteria on which to base an assessment of local impacts, and on the nature of 'interference', which would warrant a reduction in the permitted water taking, or withdrawal of the permit altogether.

4. Guidelines should be developed for MOE staff undertaking the technical assessment to draw upon local information sources and policies, including Conservation Authority information and municipal information and policy direction as set out in Official plans. If municipal or Conservation Authority interest in the water sources in question is established, MOE staff should be required to consult with the relevant municipality or C.A.

5. Reg. 285 should be amended to ensure that existing and planned uses of water must be considered in the review of a water taking application.

6. Information gathering and maintenance of water quantity and water quality information by surface and subterranean watershed must be made a priority. An inter-agency protocol is required to ensure a coordinated effort to gather information, to keep the information up to date, and to share it amongst relevant agencies, eg. municipalities, conservation authorities, DFO, MOE, MMAH, MNR and OMAFRA.

7. An agreement on cost-sharing amongst relevant agencies to ensure sustained funding for information management activities is also required.

8. Primary responsibility for determining cumulative impacts, and maintaining watershed information must rest with the Province, with the assistance of municipalities and conservation authorities.

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10. Much like the Provincial policy to protect significant wetlands, if there are particularly sensitive water bodies, either subterranean or surface water, these areas should be identified and designated by the Province as requiring particularly stringent protection, and if necessary, should be subject to a water taking ban.

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16. The OWRA should be amended to include a section similar to that of the *Aggregate Resources Act*, Sec. 12.2 (1), but pertaining to water taking, that requires that no permit shall be issued for a water taking if a zoning by-law prohibits the site from being used for the making, establishment, or operation of water taking.

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18. A careful assessment of the impact of such a fee would have to be conducted to determine the impact of different sized water-extraction businesses. The fee schedule could be based on the volume of water being extracted

Appendix A – Taskforce Membership List

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