



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

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Caroline Cosco,
Senior Policy Analyst
Land and Water Policy Branch
135 St. Clair Avenue West
6th floor
Toronto, Ontario
M4V 1P5

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 law and policy reform to protect environmental health. CELA has a long history and involvement in efforts to improve water management in Ontario. Our efforts have included advocating for the strengthening of the Permit to Take Water (PTTW) system in Ontario and for improved source protection legislation. We have also been involved in attempts to improve conservation and efficiency efforts in Ontario over the last two decades. As well, CELA was successful in ensuring that Walkerton Inquiry Commissioner Justice O'Connor recognized the connection between water quantity and quality that has led, among other things, to the Ontario Clean Water Act requirements for water budgets in Ontario watersheds.

Since 1985, CELA has been involved with efforts to strengthen the Great Lakes Charter. We have monitored and commented upon most large withdrawal and diversion proposals from the Great Lakes during this time. In 1997, CELA, along with Great Lakes United, published *The Fate of the Great Lakes – Sustaining or Draining the Sweetwater Seas?* This study examined the effectiveness of water management regimes in the protection of the Great Lakes. It addressed various threats to the Great Lakes from the risks of global and continental water shortages, increasing demands on water, wasteful water practices and potential climate change impacts. Furthermore, in 1998, CELA received standing from the

Ontario Environmental Appeal Tribunal to oppose the issuance of a license to the NOVA Group to export bulk water from the Great Lakes. The licence was subsequently revoked.

Over the past five years, CELA has 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. As well, since 2005, we have been a member on an Advisory Panel created by the Ontario Ministry of Natural Resources to help them form their positions on drafts of these Agreements. This Panel continues to assist the Ontario government implement the Agreement into provincial legislation and programs.

The comments we will make in this submission will draw on all of these experiences.

Context

We are acutely aware of the imperative to pass legislation for the implementation of the Great Lakes St. Lawrence River Basin Sustainable Water Resources Agreement (the Agreement) as quickly as possible. Such legislation will strengthen Premier McGuinty in his role as the 2007 Chair of the Regional Body set up by this Agreement. As well, the passage of such legislation in Ontario will encourage U.S. States to pass parallel legislation in both State legislatures and the US Congress.

It is recognized that full implementation in Canada and the US will take a number of years. The early passage of this legislation will allow Ontario to continue its leadership role in putting in place the best Great Lakes management programs basin-wide. We support the passage of this legislation in the new session of the legislature prior to the fall election.

We have found the negotiation process that has led to these suggested regulatory changes exceptionally complex, as well as politically and diplomatically challenging. This Agreement represents a huge investment of public, private and government time and resources. A loss of will at this stage would likely mean that an effort of this scope would not occur again. Finally, in an election year there is risk that a new government would not make such legislation a priority. Such a scenario could put the Great Lakes and St. Lawrence River Basin at further threat of depletion.

Because CELA has been part of the negotiations for the past five years, we recognize the Agreement contains a number of weaknesses. We recognise that many of these weaknesses are a result of the negotiators need to compromise in order to reach consensus. However, it is important that Ontario's Act reflect **all** of the language in the existing Agreement. This will ensure that the Province has the requisite powers to engage in every activity set out in the Agreement on a level playing field with the other nine jurisdictions.

Notwithstanding the aforementioned weaknesses, in our view this Agreement is far superior to the status quo. In particular the extension of the prohibition on diversions already in place in Quebec and Ontario to the US States is extremely important. This protection measure can be traced to concerns voiced by the Canadian public and taken back to the negotiations, and was essential to Ontario's continuing involvement in the negotiations.

While a lot of the public attention on this Agreement has focused on its diversion provisions, a number of other provisions attempt to address program and information gaps pivotal to our ability to protect and sustain our water resources in the future. There 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. Authority should be vested in Directors and the government, so that there is a flexibility to deal with new situations, scientific information or future scarcity.

We urge and continue to expect Ontario to ensure proper management of the Great Lakes as the finite resource that it is. Ontario should ensure such protection by amending the *Ontario Water Resources Act* to address the weaknesses of the Agreement and by improving and modernizing Ontario's PTTW system.

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 it addresses further actions and regulations which are required following on this proposal.

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 the Agreement included numerous references to climate change. Regrettably, all but one of those references was expunged from the final agreement. These references were expunged mainly for political reasons. For example, the Chair of the US congressional subcommittee that will likely consider the US Compact Agreement believes that "climate change is one of the biggest hoaxes perpetrated on the American public". Consequently references to climate change contained in the final Agreement are couched and paraphrased.

Such views on climate change should not stop Ontario from infusing climate change provisions into their water management programs. Climate Change is of great concern to the Canadian public. Since this proposed legislation aims to modernize aspects of the programs in section 34, it is an opportune time to incorporate references to climate change

into the OWRA. As our knowledge of climate change impacts rapidly grows, the Director should have the flexibility to take such impacts into account when making decisions.

As well, it is extremely important to explicitly state that the Agreement does not supersede other Acts and regulations already in place. This will ensure that Ontario can strengthen their PTTW system and allow Ontario to determine how best to scrutinize future proposals.

Recommendation 1.

- **Ontario should incorporate the term "climate change" into the language of the OWRA generally, and, in particular, into section s.34, into the general purpose statement section and into sections outlining the Director's authorities. This will ensure that climate change impacts become 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.**
- **That the Act explicitly state that requirements of the Agreement are in addition to provisions of the OWRA. Specifically, section 34 PTTW requirements will continue to apply so 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 requirements in 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, the prospect of regional review has acted as a deterrent to large proposals in Ontario 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.

- **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 to 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.

- **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 section 10 of 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. Ontario's ban on inter-basin diversions will be much stronger than those in other jurisdictions, as it does not allow exceptions for straddling counties.

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 so as 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 climate impacts such as low spring runoff and higher trans-evaporation rates, and causing dramatically lower water levels in the mid-Lakes.

As well, 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 that 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.

In 2005, US jurisdictions put a straddling county exception to diversions onto the negotiating table. Ontario and their Advisory Panel hoped that the public consultations that followed this proposal would lead this exception to be withdrawn. This did not happen. Instead Ontario supported a number of requirements that would limit the use of this exception. The primary deterrent which must now be met is the return flow requirement. This requirement acts as a strong deterrent because it is very costly.

Other deterrent efforts by Ontario were not as successful. For example, Ontario efforts to lower the high trigger levels placed on these exceptions in US jurisdictions were unsuccessful. Ontario chose to opt out of the Straddling County option mainly because counties and districts in Ontario extend far from the watershed and because such an exception went against Ontario's 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 the implementation of these programs. However, when the York Region proposal came to the attention of the Ontario Advisory Panel, concerns were raised that it was occurring outside the confines of the Agreement. Under the class environmental assessment process for water and sewage infrastructure, some of the options under consideration would result in an intra-basin diversion of wastewater flow out of the Lake Huron Basin into the Lake Ontario Basin. The attached letter from Kevin Wilson has set out responses to public concerns voiced about that York Region proposal and attempts to address concerns about intra-basin "opportunities" Mr. Wilson has also committed the government to consider a moratorium on further intra-basin diversions until the Agreement is fully implemented.

We 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 that ensures the protection of the integrity of the Great Lakes and its watersheds. Furthermore, CELA feels other initiatives implemented by the Ontario government have the potential to avert the

need for intra-basin diversions. For instance the pending conservation programs required by the Agreement could avert a considerable amount of the demand for water in the future.

Recommendation 4.

- **CELA supports the passage of this Act in the upcoming session of the legislature.**
- **Following on the passage of the Act, CELA urges the Government to consider an interim moratorium on intra-basin diversions in Ontario. Such a moratorium should continue until a full public discussion of appropriate made-in-Ontario solutions is undertaken, alternatives are in place for Provincial consideration of these proposals, and the Agreement is in place in all Great Lakes jurisdictions.**
- **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.**
- **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 volume 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.

- **CELA recommends that consideration be given by Ontario to how the Class EA for Sewer and Water Infrastructure and other planning initiatives can have improved integration with the PTTW process and the Agreement. PTTW should receive consideration earlier in the planning process.**
- **Care should be taken to integrate the Great Lakes Charter Annex in all new regulations with water management components including 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 in which Ontario does not have the right of Judicial Review. Currently, Ontario must rely on US governors exercising their veto power under the US *Water Resources Development Act* (WRDA) to oppose large withdrawals 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 other jurisdictions to pass reciprocal implementing legislation.

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. 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 details that come 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 draft its own stronger program early on, 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 in the information collected, and most jurisdictions do not collect data at the same level as Ontario (50,000 litres per day). Such discrepancies make it difficult for regional water managers to predict 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 permit 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