

**DRAFT**

**Updated Research Proposal**  
**Water Pipelines, Regional Municipality of York**

Submitted to: Canadian Environmental Defence Fund

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## **Introduction**

As water use continues to rise and underground aquifers such as the Oglala in the U.S. are being tapped dry, shortages of drinking water in parts of North America are looking ever more probable. Massive water diversion plans may not be far behind.<sup>1</sup> Current regional diversion proposals may provide a glimpse into the larger continental struggles to come.

### ***The York Region Proposals***

The Regional Municipality of York ("York Region") is currently studying four water pipeline options. One option is to pipe in water from Georgian Bay (the three other options would use Lake Ontario as a source). York Region sewage flows into Lake Ontario through a treatment plant in Durham Region. Therefore, the Georgian Bay option would, in effect, divert water from Lake Huron into lake Ontario, bypassing all the lakes and rivers in between.

This proposal raises serious questions of municipal, provincial, federal and international environmental law. It could be an early precedent-setter for the environmental battles to come in the 21st century.

### ***Environmental Concerns***

The York Region Long Term Water Supply Task Force claims that the piped in water would improve the environment because it would preserve local groundwater resources (including the Oak Ridges Moraine), allowing them to emerge into local and regional surface streams and rivers. The Task Force also claims that it will comply with all applicable environmental laws.<sup>2</sup>

But there are also serious concerns that the Region has not addressed to date. **Impacts on the source region (Georgian Bay or Lake Ontario) and any selected pipeline route may include:**

- disruption of the near-shore aquatic environment
- disruption of the shoreline
- disruption of wildlife habitat along the pipeline route
- changes in land-use and ownership along the pipeline corridor
- changes in water levels and/or currents

- aesthetic disruption of the landscape by a major pipeline development

**Other possible impacts are:**

- Sewage treatment capacity and the impacts from increased effluents on Lake Ontario
- Unsustainable population levels in York Region due to the high levels of development made possible by the water pipeline
- Lost opportunities for significant water and energy conservation due to questionable assumptions in water demand forecasts<sup>3</sup>

Moreover, the water would bypass the Saint Clair River, Lake Saint Clair, the Detroit River, Lake Erie and the Niagara River. There could be potential impacts on these bodies of water due to reduced water levels. Therefore, this diversion could have international environmental implications for the Great Lakes Basin.

All of these impacts may be aggravated if neighbouring municipalities “buy into” one of the options and the volume of water in question grows.

York Region’s approach to water supply policy was questioned in both in the report of the Crombie Commission<sup>4</sup> and the Golden Task Force on the future of the GTA.<sup>5</sup> Unfortunately, these reports dealt with the York Region proposals only in passing. Therefore, there is still a need for detailed, independent technical and legal review.

***Organisations Who Would Challenge York Region’s Plans***

The Georgian Bay Association should be interested because of the potential environmental impacts of the Georgian Bay Pipeline Option, as discussed above.

Sarah Miller, a member of Great Lakes United (GLU) who works for the Canadian Environmental Law Association (CELA), has told me that GLU has already filed a request for Environmental Assessment hearings on York Region’s plans. Ms. Miller has also expressed an interest in discussing this Research Proposal.

The local press in York Region has expressed doubts about the wisdom of the public/private water-supply partnership.<sup>6</sup> There may be other groups or individuals *within* York Region who would also support a challenge to the pipeline plans. I will continue to explore these networking opportunities.

### ***Historical Background***

York Region, located just north of Metro Toronto, has been among the fastest growing population centres in Canada. York Region's Official Plan (O.P.) predicts another doubling of the population from 505,000 in 1991 to 1,100,000 in 2021.<sup>7</sup> The O.P. policy is to encourage production of about 8,000 new housing units per year.<sup>8</sup>

The current main sources of water are Lake Ontario for the southern part of York Region (via an agreement with Metro Toronto), groundwater, and Lake Simcoe for some northern townships.<sup>9</sup>

In 1991, some land-owners complained that their wells were running dry because of new municipal well operations; the province rejected a plan for a new town of 30,000 people due partly to water shortage concerns; and York Region's consultants suggested that a Georgian Bay pipeline would be needed to supply future water needs.<sup>10</sup>

A 1993 consultants' report predicted an increase in water consumption in York Region from 48 MIG (million imperial gallons) per day in 1991 to about 148 MIG in 2031. The consultants forecast a shortage of water supplies by early next century.<sup>11</sup> The main reasons cited were the projected population growth; shortage of sustainably usable groundwater capacity; Lake Simcoe water quantity and quality problems; and insufficient allocation of water from the current main source, Metro Toronto.<sup>12</sup>

Water conservation was predicted to reduce expected demand by only 10 per cent. Moreover, even with water conservation measures in place, *per-capita water consumption was still predicted to increase.*<sup>13</sup> (All this, despite a trend towards *lower* per-capita water consumption since 1987!)<sup>14</sup>

Based on these forecasts, York Region, located north of Metro Toronto, and its private partners are studying four long-term water supply options:

1. New pipeline from Georgian Bay via Simcoe County;
2. New Pipeline from Lake Ontario via Peel Region;
3. New Pipeline from Lake Ontario via Durham Region; or
4. Increasing the existing supply from Lake Ontario via Metro Toronto

"[P]ipeline route selection is now beginning and the preliminary work of defining corridors... is underway."<sup>15</sup>

In August, 1996, the provincial government approved expansion of the York-Durham sewer network (which flows into Lake Ontario).<sup>16</sup> This removed a serious bottleneck for the projected real-estate development and water supply pipelines in York Region.<sup>17</sup>

### ***Precedent Value***

York Region is among the fastest-growing population centres in Canada. Therefore, water supply technology used here would set the tone for other rapidly urbanizing areas, as fresh water becomes an ever scarcer resource in the 21st century. As the pace of the York Region study picks up, it is important to monitor the situation.

Legally, all four proposals raise significant issues:

#### **Planning and Municipal Law**

Will the eventual water supply system for York Region comply with the Region's Official Plan, and have regard for provincial water conservation policies, as required by the *Planning Act*?<sup>18</sup> Would the chosen system comply with the region's obligations as the regional water supplier under the *Regional Municipality of York Act*?

#### **Provincial Law**

Will the option eventually chosen by York Region comply with the *Ontario Water Resources Act*<sup>19</sup> the *Environmental Protection Act*<sup>20</sup> and the *Lakes and Rivers Improvement Act*<sup>21</sup>?

Will it be possible to challenge the York Region proposals under the *Environmental Assessment Act*<sup>22</sup> and/or the *Environmental Bill of Rights*<sup>23</sup>? Specifically, what opportunities exist within the Class Environmental Assessments for Municipal Water and Wastewater projects which the York Region Task Force is committed to following?<sup>24</sup>

If a Georgian Bay pipeline is selected, would it not require more extensive Environmental Assessment hearings than the other options, which look more like run-of-the-mill municipal water works?

Would the route for any of these new pipelines, especially the Georgian Bay one, require expropriation of private property, and create the potential for hearings under the *Expropriations Act*?

#### **Federal Law**

Since the proponent of the project would be a private/municipal consortium, the *Canadian Environmental Assessment Act*<sup>25</sup> would not apply. But will the York Region Proposal Comply with the *Navigable Waters Protection Act*<sup>26</sup> and the *Fisheries Act*<sup>27</sup> (or whatever replaces the latter statute)?

## International Law

Under the Canada-U.S. *Boundary Waters Treaty* of 1909<sup>28</sup>, any diversion of boundary waters from their natural channel requires approval of the International Joint Commission (ICJ). But the same Treaty also states that

“The foregoing provisions are not intended to... interfere with the ordinary use of such waters for domestic and sanitary purposes.”<sup>29</sup>

Would a Georgian Bay pipeline require ICJ approval or would it be exempt as an “ordinary use of water for domestic purposes” under the Treaty? If ICJ approval is required, what opportunities exist for public participation in the ICJ process? What powers would the ICJ have to remedy any deficiencies in the proposal or to refuse approval altogether?

## Summary of Expected Research Outcomes

### ***CEDF Water Policy Experts:***

1. A critique of the policy choices leading York Region towards large-scale water pipeline construction, including issues of limits to growth.
2. CEDF Technical Experts: A critique of the technical merits of the 1993 consultants' report and the current Task Force review, especially re: water demand forecasting techniques, lack of real conservation effort, and splitting off water supply planning from sewage treatment planning. Also, a detailed critique of the pipeline option eventually chosen by York Region.

### ***Y. D. Zabelishensky:***

1. A list of confirmed clients ready to engage CEDF's help on this issue.
2. A legal report outlining strategies for the client group(s) to challenge the pipeline proposal eventually chosen by York Region under municipal, provincial, federal and international law (in consultation with CEDF legal experts).

### NOTE:

The **Municipal and Provincial Law** aspects would be the basis for a paper for the “Environmental Regulation and Advocacy” course at the University of Toronto, Faculty of Law (Fall 1996 term). The paper would be supervised by Rod Northey, one of the course's co-instructors. The **Federal and International Law** aspects would form the basis for a Directed Research Project (Winter 1997 term). This Project would be supervised by Prof. Craig Scott.

## Endnotes

<sup>1</sup> A growing body of literature is devoted to the water diversion debate in general. I will use the sources listed in Prof. Craig Scott's International Environmental Law course materials, and find additional sources on my own: cf. T. L. Anderson, Ed. (1994) *Continental Water Marketing* (San Francisco: Pacific Research Institute for Public Policy); J. C. Day (1992) *Water Diversion and Export: Learning from Canadian Experience* (Waterloo, Ont.: University of Waterloo, Dept. of Geography); J.E. Windsor, Ed. (1992) *Water Export: Should Canada's Water Be For Sale?* [Proceedings of a Conference held in Vancouver, British Columbia on May 7-8, 1992] (Cambridge, Ont.: Canadian Water Resources Association); D. Johansen (1991) *Water Exports* (Ottawa: Library of Parliament, Research Branch); G. N. Golubev and A.K. Biswas (1985) *Large Scale Water Transfers: Emerging Environmental and Social Experiences* (Oxford, England: Tycooly Publishing for the United Nations Environment Programme); A. Scott, J. Olynyk and S. Renzetti (1985) *The Economics of Water Export Policy* (Ottawa: Environment Canada); and B. Russell (1984) *Water Diversion Law in the Prairie Provinces* (Edmonton: Environmental Law Centre, Alberta Law Foundation).

There is also a related debate about whether FTA and NAFTA pave the way to large-scale water exports from Canada: cf. R. Robinson "Canada Took a Bath on Water Exports" *Toronto Star* (30 December 1992); A.L.C. de Mestral and D.M. Leith (1989) *Canadian Water Exports and Free Trade* (Ottawa: Rawson Academy of Aquatic Science); and W. Holm, Ed. (1988) *Water and Free Trade: The Mulroney Government's Agenda for Canada's Most Precious Resource* (Toronto: J. Lorimer).

<sup>2</sup> York Region Long Term Water Supply Task Force (28 March 1996) "Questions and Answers" (attached to Task force Report No. 2), Questions 2, 32 and 33.

<sup>3</sup> See below, text accompanying notes 13 and 14.

<sup>4</sup> After reviewing the water supply shortage in York Region and mentioning the proposed pipeline solutions, the Crombie Report states: "Even in the areas supplied by Lake Ontario water, it is becoming evident that we need to *reduce total consumption* – not because of any lack of water... but there are the mounting costs of treating water before it is used and of treating large volumes of sewage....": *Regeneration: The Report of the Royal Commission on the Future of the Toronto Waterfront* at pp. 24-25 [emphasis added].

<sup>5</sup> "York Region is considering obtaining its long term water supply from Durham, Peel and/or Georgian Bay, even though the practical and economic solution would seem to be to work with Metro": *Report of the GTA Task Force*, January 1996, p. 160, footnote 7. The same source also mentions, without elaborating, that there are "[s]ewage disagreements between York and Durham Regions".

<sup>6</sup> D. Devine, "Privatizing region's water is risky business" *The [York Region] Liberal-The Era-Banner* (22 February 1996); and [Editorial] "England's water woes a timely reminder" *ibid.* (28 February 1996). The articles are available on the Internet at <http://www.yorkregion.com/colddfeb22.html> and <http://www.yorkregion.com/editfeb5.html>.

<sup>7</sup> Regional Municipality of York (1995) *Official Plan: Office Consolidation as of June 26, 1995*, s.51., Table 1 at p. 37.

<sup>8</sup> Regional Municipality of York (1995) *Official Plan: Office Consolidation as of June 26, 1995*, s.4.3.1(c) at p. 31.

<sup>9</sup> Gore & Storrie Ltd. and MacViro Consultants (1993) *The Regional Municipality of York Long Term Water Supply - Stage 1*, Vol. 1: *Summary Report*.

<sup>10</sup> J. Ferguson "Dwindling Water supplies could dampen growth" *The [Toronto] Globe and Mail* [Metro Edition] (26 September 1991) at A12.

<sup>11</sup> *Supra*, note 9, at p. 5-1.

<sup>12</sup> *Supra*, note 9.

<sup>13</sup> The increase in per-capita consumption can be easily derived from the population and consumption table in the consultants' 1993 report, *supra*, note 9, Vol. 2, at p. 5-1.

<sup>14</sup> Regional Municipality of York (1995) *Official Plan: Office Consolidation as of June 26, 1995*, s. 6.7, Graph at p. 71.

<sup>15</sup> *Report No. 4 of the Regional Water-Strategy Task Force*, for consideration by the Council of the Regional Municipality of York, July 11, 1996

<sup>16</sup> B. Dexter "'Big Pipe' Deal Seen Spurring Growth: Province To Allow Regions to Expand Sewer Network" *Toronto Star* [North York - York Region Section] 15 August 1996, at p. NY1.

<sup>17</sup> *Supra*, note 9, Vol. 2, at s. B.1, p.B-1

<sup>18</sup> R.S.O. 1990, c. P.13, s. 24(1) states that "[d]espite any other general or special Act, where an official plan is in effect, no public work shall be undertaken... for any purpose which does not conform therewith." (This section was left untouched by the recent *Planning Act* amendments in S.O. 1996, c.4). See also the region's Official Plan, *supra*, note 14, s.6.7.16, at p. 72 (pursuing water conservation and demand reduction strategies designed to improve efficiency).

Regarding Policy Statements, see S.O. 1996, c.4, s. 3 (amending R.S.O. 1990, c. P.13, s.3(5)) and Ontario (1995) *Comprehensive Set of Policy Statements*, Goal E.1 (planning for energy and water conservation opportunities), as approved by Order in Council 336-95.

<sup>19</sup> R.S.O. 1990, c. O.40, ss. 34(3)(b) (waterworks approvals), 52 (approval conditions may be imposed) and 53 (sewage works approvals).

<sup>20</sup> R.S.O. 1990, c. E.19 and regulations regarding municipal sewage treatment and water works (R.R.O. 1990, Regs. 354, 358 and 359).

<sup>21</sup> R.S.O 1990, c. L.3.

<sup>22</sup> R.S.O. 1990, c. E.18.

<sup>23</sup> S.O. 1993, c.28.

<sup>24</sup> *Supra*, note 15 at pp. 8-9.

<sup>25</sup> S.C. 1992, c. 37.

<sup>26</sup> R.S.C. 1985, c. N-22.

<sup>27</sup> R.S.C. 1985, c. F-14.

<sup>28</sup> *Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, January 11, 1909 [hereinafter *Boundary Waters Treaty*], Art. III.

<sup>29</sup> *Supra*, note 28.

**Proposed Research Budget**

**As submitted to the Canadian Environmental Defence Fund  
(CEDF)**

|                                |            |
|--------------------------------|------------|
| CEDF Experts' Expenses         | \$3,000.00 |
| Y. D. Zabelishensky's Expenses | \$1,000.00 |
| CEDF Administrative Expenses   | \$1,000.00 |
| TOTAL                          | \$5,000.00 |

This funding is to be obtained by CEDF from charitable foundations which support environmental research and advocacy. Please note that I intend to be paid no wages or honoraria for this research. I will claim only documented expenses for such things as mileage, photocopying, long-distance phone calls and *Freedom of Information Act* user fees.