



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

CELA Publication #500
ISBN # 1-897043-28-7

February 4, 2005

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Re: Permit to Take Water Manual
EBR Registry Number: PA04E0036
Proposal Loaded December 14, 2004

INTRODUCTION

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

CELA has had a long history with water issues both at the provincial and federal level. It has undertaken research, published briefs,¹ and conducted litigation in the field. CELA was involved

¹ See *Submissions by the Canadian Environmental Law Association to the Ministry of Environment on the Surface Water Transfers Policy*, EBR Registry Number PA8E0027, P.McCulloch, S.Miller, K.Cooper and P.Muldoon, (CELA: Toronto) June 1998; *Submission on Regulation made under the Ontario Water Resources Act: Water Transfers*, EBR Registry Number RA8E0037, P.Muldoon and S.Miller, (CELA: Toronto) February, 1999; *Commentary for an Act to Conserve Ontario Waters*, (CELA: Toronto), J.F. Castrilli, May 2001; *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act Volume I - An Overview*, (CELA: Toronto) A.Wordsworth, May 2001; *Tragedy on Tap: Why Ontario needs a Safe Drinking Water Act, Volume II*, (CELA: Toronto) R.Lindgren, L.McShane, G.Patterson and A.Wordsworth May, 2001, 480, *Ontario Source Water Protection Statement of Expectation*, Supported by CELA and a number of organizations, August 16, 2004, *Drinking Water Source Protection Act, 2004 (CELA Draft #1 - For discussion purposes only) Supplementary document to Safeguarding Ontario's Drinking Water Sources: Essential Elements of Source Protection Legislation*, R. Lindgren, August 18, 2004, *Safeguarding Ontario's Drinking Water Sources: Essential Elements of Source Protection Legislation, Submission to the Ministry of the Environment regarding the Proposed Drinking Water Source Protection Act*, EBR Registry No. AA04E0002. August 18, 2004, *Submission to the Ministry of the Environment on Water Taking and Transfer Regulation (O.Reg.285/99) Draft 2004*, EBR Registry No RA04E001, R. Nadarajah, S. Miller, August 17, 2004.

in both phases of the Walkerton Inquiry and a CELA counsel sat on the Advisory Committee for Watershed-based Source Protection Planning and the Implementation Committee for Watershed-Based Source Protection Planning. A CELA staff member has also been serving on the Advisory Committee to the Great Lakes Water Initiative of the Council of Great Lakes Governors and the Premiers of Ontario and Quebec. CELA has represented clients in relation to a number of controversial water taking permit applications, including a taking by a Swiss multinational company in Perth, Ontario, a taking by a water bottling company in Grey County and the appeal of the Nova Group permit to export water by tanker from Lake Superior (the hearing was eventually cancelled when the applicant withdrew the appeal). Consequently, the organization has considerable experience and insight into public concerns regarding water taking in the province.

The purpose of this brief is to respond to EBR Registry PA04E0036, the proposed Permit to Take Water Manual.

The Permit to Take Water Manual provides guidance to Directors of the Ontario Ministry of the Environment in deciding on applications for Permits to Take Water under the Ontario Water Resources Act, and to applicants for Permits to Take Water in determining what information must be provided to the Ministry in support of their applications.

CELA has carefully reviewed the Draft Permit to Take Water Manual. While there are some improvements proposed that will assist in better managing Ontario's water resources with respect to takings, CELA also has a number of concerns with the Draft Manual as presently proposed.

I. PLACE-HOLDER COMMENTS FOR IMPENDING WATERSHED BASED DRINKING WATER SOURCE PROTECTION PLANNING

There is no reference in the draft Manual to the impending watershed-based drinking water source protection planning legislation that is expected to be introduced in the spring of 2005. It should be noted in the Manual that its provisions will be subject to revision once the government proceeds with source protection legislation and implementation.

There are many recommendations contained in the reports of both the Implementation Committee on Watershed-Based Source Protection and of the Technical Experts Committee report, "Science-based Decision-making for Protecting Ontario's Drinking Water Resources: A Threats Assessment Framework" which must be implemented in the permit to take water system.

Furthermore, drinking water source protection watershed boundary considerations must inform the permit to take water program in many details, such as data gathering and reporting, and with respect to integration with other water protection and management programs.

II. NEED FOR A WATER POLICY FOR ONTARIO

CELA has advocated for some time the need for a broad and comprehensive approach to managing water resources in Ontario and specifically the need for a comprehensive water policy for Ontario. Justice O'Connor made a similar recommendation in his report on the Walkerton Inquiry. The Technical Experts Committee made two such recommendations.

Their Guiding Principle 4 stated:

“The provincial government should adopt an integrated and coordinated strategy for overall water protection and management across all provincial ministries and agencies.”

And TEC’s Recommendation 113 stated:

“The Permit to Take Water program should be re-oriented to be a component of a larger and more comprehensive government-wide initiative to manage and protect Ontario’s water resources, such as through a Provincial Policy Statement for water.”

CELA strongly endorses both of these recommendations and encourages the Ontario government to adopt them as quickly as possible. Among others, it is imperative that the permit to take water program, watershed based source water protection, the Great Lakes Charter and Annex, land use initiatives of the province, and nutrient management and farm water planning, along with habitat and ecosystem programs be integrated in an overall water strategy for the province.

III. THE PROPOSED PRINCIPLES AND PRACTICES OF THE PERMIT TO TAKE WATER PROGRAM

Proposed principles 3 and 4 speak to “encouraging” water takers to take all reasonable and practical measures to conserve water and to “engaging” water takers to collectively reduce the burden on the watershed and better manage the demand for water. CELA submits that the principles and the practices should be amended such that the Ministry will “**require**” conservation measures for each and every permit to take water issued by the Ministry. Further, CELA submits that the Ministry of the Environment should immediately institute a pro-active mechanism to have existing water-takers adopt water conservation measures and to subsequently impose those measures in their respective permits to take water.

Proposed principle 5 speaks to an adaptive management approach to setting permit conditions, monitoring, evaluating and adjusting such conditions. CELA submits that there should be included specific time frames and mechanisms for collection of the relevant monitoring data and alteration of the impacted permits to take water in light of the experience recorded.

Proposed principle 4 dealing with cumulative impacts of water takings, states, “Where information about water-shed conditions exists, the Ministry will take this into account when reviewing individual permit applications.” This principle and this approach is inadequate. CELA submits that the Ministry must ensure that there is an information base for evaluation of cumulative impacts of takings. Either the Ministry must obtain this information or it must require the proponents to provide this information. It is not acceptable for individual takings decisions to be made in the absence of an analysis of the cumulative impacts in the watershed.

CELA supports proposed principle 6 in that the recent initiatives to expand direct notification and consultation with local agencies must be continued.

IV. CLASSIFICATION OF PERMITS TO TAKE WATER

CELA has significant concern with the proposed system of classification of permits to take water. The proposed classification system is inadequate and will not promote sustainable decision making with respect to water taking applications.

Firstly, it is incorrect to state that “typically permit renewals of existing takings” would be likely to “have a lower risk of causing adverse environmental impact / interference” than newly proposed takings.

The existence of a permit in itself should be an irrelevant factor in considering the application. This is not to deny the usefulness of using the information prepared for the applicant’s prior or original application and up-dating that work rather than duplicating that work. However, there are many, many cases where existing takings are in fact causing interference either with other users or with the ecosystem. The Ministry’s approval system must improve its assessment methods so that these cases are more readily identified and either denied approval or required to do further study and take additional steps to redress the problem. The current proposal will make these situations even harder to detect in the future.

Because the Ministry of the Environment’s current management of the permit to take water system is largely complaint based rather than based on objective assessment of the impacts of current takings, there is also little likelihood that there would have been a “previous request to the permit holder to submit additional studies” even where there is in fact an interference.

An additional problem with the proposal is that many current permits are granted for amounts of water far greater than could or should be justified and with this proposal there is a risk that these permitted volumes would be renewed with inadequate scrutiny.

Secondly, the proposed manual suggests that new takings of less than 1 million litres/day from the Great Lakes or their connecting channels would be likely to be category 1 takings and subject to less scrutiny in the proposed system. This quantity threshold is derived from the Great Lakes Charter. This level is completely irrelevant to and inadequate for Ontario’s reviews of applications under the provincial permit to take water regime. All takings at the 50,000 litres per day level should receive adequate scrutiny to ensure that Ontario’s water is being well managed. In addition, such takings may amount to a cumulative impact that must be thoroughly assessed.

Thirdly, CELA strongly objects to the proposed level of scrutiny for Category 1 applications in that it is proposed that they “would not require supporting technical studies, or a scientific evaluation by the Ministry.” While it might be acceptable to require differing levels of information, detail and further study depending on the size of the taking, potential for impact and other factors, it is completely inappropriate to exempt these applications from supporting technical studies and scientific evaluation by the Ministry.

V. CONSIDERATIONS FOR EVALUATING PERMITS TO TAKE WATER

The proposed Manual states that the matters the Director will consider will be “to the extent that they are relevant and information is available to the Director”. The enumerated factors affecting natural functions of the ecosystem, water availability, and use of water **must** be required to be

provided. It is not acceptable that they be considered only “to the extent that the information is available to the Director”. The Ministry’s responsibility is to require and ensure that such information is in fact available for decision making. If it is not, then the permits should not be issued. The Ministry could meet this responsibility in at least two ways: by requiring that proponents provide such information in standardized formats subject to audit; or alternatively by investing resources to gather such information itself on a watershed and smaller scale basis, again with standardized formats.

CELA also has other substantial concerns with the proposal for evaluation of the applications for permits. Category 1 permits may still potentially raise concerns that affect other agencies such as Department of Fisheries and Oceans, Ministry of Natural Resources and local Conservation Authorities. Furthermore, there may need to be site specific provisions imposed with respect to category 1 applications, and at the very least there must be consideration of the very question of whether the standardized approval terms proposed for category 1 will suffice for the particular taking in the particular watershed.

VI. EVALUATING PERMITS TO TAKE WATER – SURFACE WATER

CELA does not agree that in general existing surface water takings should be treated as Category 1 takings for the reasons articulated in Section IV of this brief, above. As stated there, the fact that there is an existing permit should be an irrelevant factor for the question of whether the permit application meets the requirements of the program and should be re-issued at all, or on what terms and conditions.

CELA also disagrees with the proposal that takings from the Great Lakes of less than 19 million litres per day should be subject only to a scoped assessment rather than a detailed study.

The proposed Manual does not give any guidance as to how the “target amount of flow that is required to be maintained in the water-course downstream of impoundments/reservoirs” is to be determined. It is difficult, for example, to imagine a flow regime that does not provide habitat. Similarly, there is no guidance as to how and who will determine “a sustainable aquifer yield”. If such calculations have been done by the Ministry, they should be recorded in a registry and available to the public.

As stated earlier, conservation requirements should be mandatory in all cases and not discretionary as the proposal indicates.

CELA also reiterates its objection to the provisions that would see category 1 surface water applications “not required to be supported by a scientific study” and not subject to a Ministry of Environment scientific evaluation.

VII. EVALUATING PERMITS TO TAKE WATER – GROUND WATER

CELA repeats its objection to the assumption that existing groundwater takings should as a general rule be treated as Category 1 with its reduced level of scrutiny. The review should be based on the information and data that would objectively demonstrate that the application meets the requirements of the program and not subject to a short-cut in the process just because a permit has been previously issued.

CELA also queries the rationale for two proposed exemptions that would not qualify for protection from interference from water takings. Those are where the interference is “caused by an operation associated with community improvement and the affected property has community water service available” and flow from artesian wells. There is no rationale specified for these exemptions and it is CELA’s submission that these types of interference should not be permitted.

VIII. EVALUATING PERMITS TO TAKE WATER – WATER BALANCE AND SUSTAINABILITY

The premise of the proposed manual in terms of water balance and sustainability is that “where appropriate the Ministry will undertake to evaluate proposed and existing water takings on a geographic basis and consider the cumulative impacts of water takings within a watershed or aquifer.” The proposed manual states, “Where information about watershed conditions exist, the Ministry will take this into account...”

CELA submits that this proposal is inadequate. The proposal should provide criteria on which the Ministry will base a decision to gather such information and then undertake that where those factors exist, the Ministry will gather that data. Furthermore, the Ministry should not be making decisions on any individual permit to take water applications without information about watershed conditions. If the information does not exist, the Minister must cause it to be obtained.

IX. EVALUATING PERMITS TO TAKE WATER – LOW WATER

CELA generally supports the Ontario governments’ low water response policy of recent years and the developing practice under that policy. With respect to the draft Manual, CELA submits that not only applicants for new or renewed permits, but also applicants operating under current permits to take water should be required to document water efficiency and conservation practices and contingency measures and report on them annually.

X. EVALUATING PERMITS TO TAKE WATER – WATER CONSERVATION

CELA reiterates its position that water conservation measures should be routinely required of all permit holders in all sectors. The province should begin requiring conservation measures immediately and should work to refine the requirements by sector based on consultation and experience.

XI. HIGH USE WATERSHEDS

CELA observes that there is no environmental or ecosystem rationale for the exemptions provided in the proposed manual whereby the requirements to refuse applications in high use watersheds will not be applied to takings by municipalities, by agriculture, for aggregate extraction where the water taking is incidental or for manufacturing or production of pulp and paper or ethanol.

All such uses should be subject to the full rigour of a water taking permit application review, and the takings refused if they are unsustainable, or issued subject only to such terms and conditions as will render them sustainable.

XII. DATA AND REPORTING

CELA submits that the Ministry should be creating and maintaining a database of all existing and new water taking permits. Such data should be publicly accessible, and data should also be available on a watershed basis. Furthermore, data should be presented by groundwater or surface water source as well as on a provincial basis.

CELA submits that the permit to take water database should be searchable by use, by user, by watershed and by volume. As more permit holders are required to report on actual takings and on return flow, this information should also be integrated into the database.

Data should be collected and reported both on permitted volumes of water takings and on actual volumes of water takings. Again this information should be publicly available on a watershed and source basis.

With respect to all data and information compiled by either the Ministry or applicants, the Ministry must ensure that the data is provided in a standardized format and populates the Land Information Ontario database and the water specific layers of data therein.

CONCLUSION

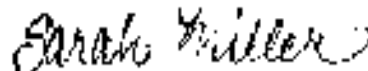
Thank you for the opportunity to provide these comments. While there are many aspects of the proposal that would advance management of the water taking program in Ontario, the need for improvements to the program are considerable. CELA recommends that another draft be prepared and further consultation undertake before this proposed Manual is adopted.

Yours very truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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