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**SUBMISSION ON
REGULATION MADE UNDER
THE ONTARIO WATER RESOURCES ACT:
WATER TRANSFERS**

EBR Registry No. RA8E0037

Brief No. 364

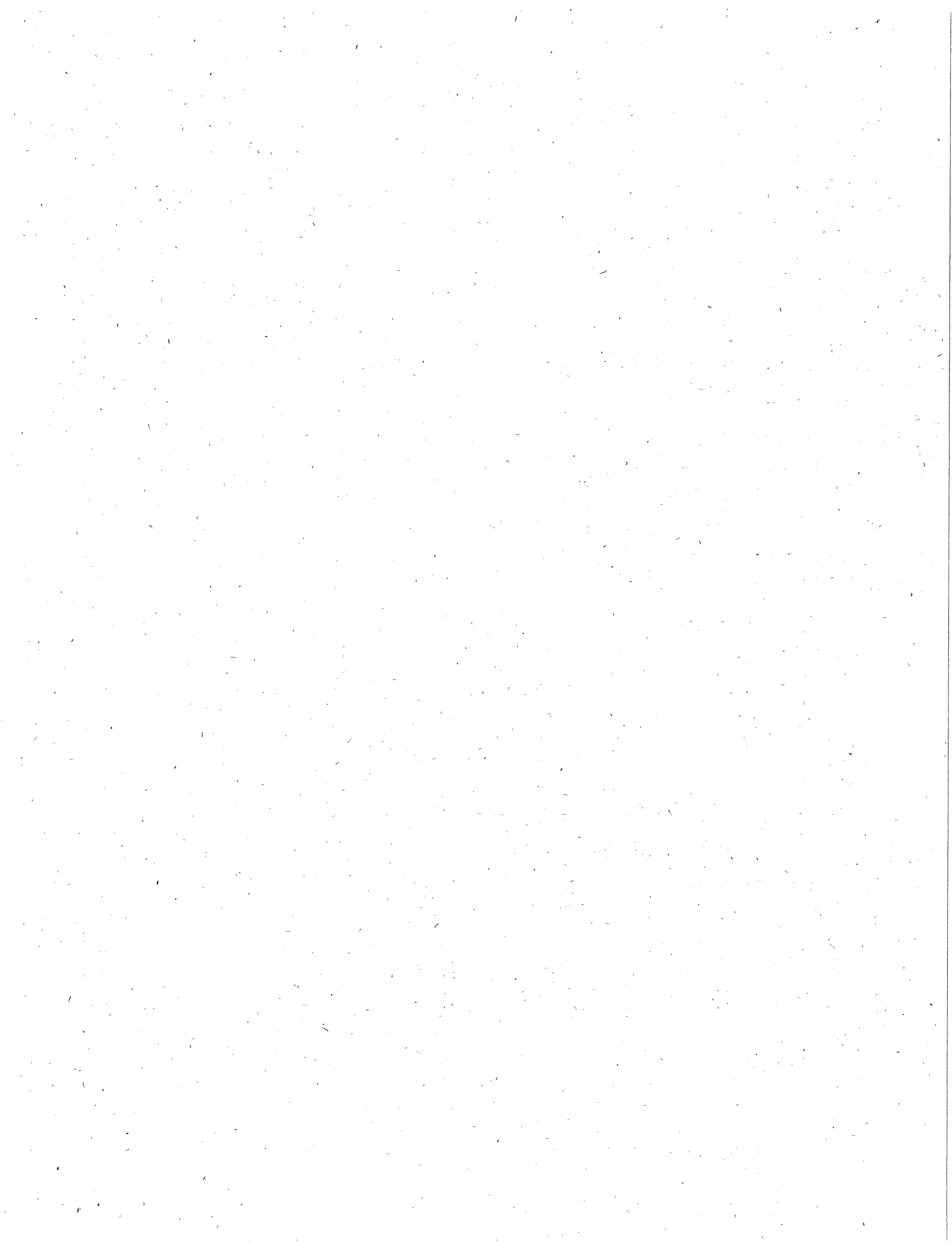
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INTRODUCTION

This submission provides comment on behalf of the Canadian Environmental Law Association (CELA) with respect to the Ministry of the Environment's draft regulation on water transfers made under the *Ontario Water Resources Act*. The proposal was posted on the Environmental Bill of Rights registry, Notice No. RA8E003, with comments due on February 16, 1999.

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 individual 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 quantity issues in Canada and particularly in the Great Lakes region. It has undertaken research, published material and conducted litigation in the field. Most recently, it is a co-founder of a national coalition of public interest groups, "Water Watch," to monitor government action or inaction with respect to the protection of the nation's water resources. CELA also commented on the 1998 "Surface Water Transfer Policy." Further, CELA received standing as a party in the Environmental Appeal Board hearing (the hearing was eventually cancelled when the proponent withdrew the appeal) concerning the appeal of the Nova Group permit to export water by tanker from Lake Superior.

EVALUATING THE DRAFT REGULATION - WILL THE PROPOSAL PROHIBIT WATER EXPORT?

Water is emerging as one of most important environmental and natural resource issues for the new millennium. Canadians want their water resources protected to further the goals of ecosystem integrity as well as to ensure the preservation of the resource for generations to come. It is of little surprise, therefore, that water quantity issues have taken on an increased urgency with proposals by the private sector to export Ontario water to Asia and other places.

Despite the urgency of the situation, governments have been slow to respond to the challenge. The recent federal strategy² intended "to prohibit the bulk removal of water" in fact raises more questions than it answers. More particular, a close reading of the strategy suggests in fact that bulk removals are not banned federally. Instead, the provinces are relying on the provinces to act. One component of these initiatives relays a reference to the International Joint Commission

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to examine and report on "the use, diversion and removal of waters along common border."³ The Canadian public will have to wait to read what the recommendations are emanating from the reference and then to hear from the Canadian government's response as to whether it accepts those recommendations.

The lack of a definitive response from the federal government speaks to the need for clear, definitive actions by the province on the topic. Certainly, if the polls are correct, Ontarians are expecting strong provincial action in this regard. Hence, when reviewing the provincial response to the water removal issue, namely, the draft regulation, "Water Taking and Transfer, the question to determine the ultimate effectiveness of the initiative is this: will this initiative prohibit the transfer, sale or removal of water from the province? A related question is: will the principles in the initiative ensure that water will not be transferred out of the provinces and between provincial watersheds in an unsustainable manner?

GENERAL COMMENTS

Overall, CELA is disappointed with the draft regulation "Water Taking and Transfer." In response to the questions posed to evaluate the draft regulation, there are a number of serious legal and policy issues raised questioning the effectiveness of the proposal.

Need for a New Sustainable Water Act for the Province

In CELA's submission pertaining to the proposed Surface Water Transfers Policy, CELA discussed at length that the environmental community has long been calling for a long time for a more comprehensive and detailed regulatory framework designed to protect Ontario's water resources. This need emanates from the threat to these resources from the free trade agreements, multi-national water companies ready to take advantage of regulatory gaps in Ontario and long-term crises facing Ontario's water resources from population growth, unsustainable water practices and climate change.

The submission also noted that the *Ontario Water Resources Act* OWRA is not designed to deal with inter-basin transfers and water diversion projects. It is primarily intended to deal with allocations of water between municipalities and between neighbouring landowners. The primary mechanism for water allocation under the Act is the issuance of water taking permits. However, there is little consideration of larger scale and cumulative impacts of water takings in Ontario on a particular aquifer as a whole, an entire watershed or on the ecosystem in general.

CELA's position remains that the OWRA is neither designed for, nor capable of dealing with, the demands being placed on Ontario's waters. As in its earlier submission, CELA recommends that the province introduce a new law that enshrines in legislation the principle that Ontario's waters must be conserved and managed appropriately. This new law, a new Sustainable Waters

Act, would entail creating a hierarchy of needs, with preservation of ecosystem functions being the foremost priority.⁴

The details of this proposed new law are laid out in detail in CELA's previous submission. Suffice to say that the new Act would apply to both surface and ground waters and specifically ban out-of-basin transfers. Ontario's present law on this topic, the *Water Transfer Control Act*, has never been proclaimed. While some components of this law should be transferred to the new law, that law has a number of systemic problems.

Until there is a new statute that addresses the issue of water export, a moratorium on water exports should be issued.

Recommendation No. 1

The Government of Ontario should repeal the Water Transfers Control Act and substantially amend the Ontario Water Resources Act to take a proactive and comprehensive approach to water management in Ontario. It should enact a new statute, the Sustainable Water Act, that would evaluate water taking permits using an individual watershed approach based upon on a hierarchy of needs of which protection of ecosystem function is the primary need, and based upon concepts such as carrying capacity, cumulative impacts and predicted future supplies and demands and best conservation practices for key sectors of users.

Until there is a new act that addresses the issue of water export, a moratorium on water exports should be issued.

Inadequacy of the Draft Regulation - Water Transfers

Lack of Regulation-Making Power Under OWRA

As noted above, it is more appropriate that the proposed regulation be placed in the context of a more comprehensive approach to the matter through a new Sustainable Water Act. However, if the Ontario government wished to pursue the proposed type of regulation, it is unclear whether the OWRA would vest the authority in Cabinet to undertake such as regulation. Section 75 of the Act outlines the pertinent powers to make regulations. In that section, there is no specific authority to promulgate regulations pertaining to water transfers or removal. While one could interpret section 75(w) in different ways, this general power is probably not sufficient to support the proposed regulation.

Recommendation No. 2

If the government intends to address the issue of water transfers through the development of a new regulation rather than through a new comprehensive statute, the OWRA would have to be amended to give the government explicit regulation-making authority to do so.

Intra-Basin Transfers Not Addressed

The proposed regulation only addresses water removal from the three basins as defined in the proposal. The draft regulation does not cover the important issue of intra-basin diversions, that include pipelines and the shipping of water from one watershed to another within a basin. For example, several years ago, a proposal to provide water to York Region from Georgian Bay was broadly opposed because of impacts of diminished flows through the connecting rivers and portions of the Great Lakes which were by-passed.

Recommendation No. 3

The draft regulation must address the issue of intra-basin diversions.

SPECIFIC COMMENTS

Section 1 - Exclusion of Groundwater

The draft regulation states that the "purpose of this Regulation is to provide for the conservation, protection and wise use and management of Ontario's surface waters..." By definition, therefore, the regulation excludes the province's groundwaters.

There is no plausible rationale for groundwater to be excluded from the operation of the regulation. In effect, the province is willing to impose regulatory constraints on the removal of surface waters while leaving groundwaters totally at the mercy of the private sector. Indeed, there is evidence already that considerable unregulated quantities of Ontario groundwaters are being exported to the United States.

Recently, after the Nova Group withdrew its campaign to export surface waters by ocean-going tankers, a company spokesperson hinted that the company would go inland to access ground water supplies.⁵

Recommendation No. 4

The draft regulation should include protection from the transfer or removal of all waters, including groundwater.

Section 2 - Division of "Basins"

The draft regulation divides the province into three large "basins." However, there is no rationale provided as to why these three basins were defined and not more local basins that would allow watershed planning and protection to take place.

Recommendation No. 5

In order to protect ecosystem integrity, the regulation should be divided into smaller and more local watersheds rather than three large basins.

Section 3 - Data Base

While section 3 outlines considerations for the issuance of water taking permits, there are no additional provisions to track the issuance of those permits. A permanent data base is needed to track permits already granted and to examine totals from each watershed by each industrial sector (such as agriculture, manufacturing, etc.). The data base needs to distinguish between withdrawals and consumptive uses.

Recommendation No. 6

Section 3 should include the mandatory establishment of a data base to track volumes under water-taking permits from each watershed by each industrial sector.

Section 3 - Consultation

Section 3 (1) discusses the specific considerations that are required by a director in the consideration of an application under section 34 for a permit to take surface water. Section 3(2) outlines consultation requirements. However section 3(2) does not require consultation with First Nations or the public in general. While water taking permits are usually covered as a Class I approval under the *Environmental Bill of Rights*, to ensure that there is an enhanced consultation for water taking permits, these approvals should be elevated to Class II approvals.

Recommendation No. 7

Section 3(2) should be amended to require that First Nations are consulted with water taking permits. All water taking approvals should be elevated to Class II approvals under the *Environmental Bill of Rights*.

Section 3 - Enforcement and Monitoring

The government should ensure that existing water taking permits are adequately monitored and enforced.

Recommendation No. 8

Monitoring and enforcement should be made a priority for water taking permits.

Section 4 (2)(4) and (5) - Exceptions to the Prohibition on Export

Section 4 of the draft regulation outlines the basic thrust of regulation, namely, that "No person shall use surface water by transferring it out of a water basin." Section 4 then proceeds with a number of exceptions to this general principle. These exceptions are of concern.

Section 4(2) deals with those situations where water is used to manufacture or produce a product (such as the making of beer); Section 4(4) pertains to water being necessary for the operation of a vehicle or vessel (such as ballast); and Section 4(5) applies to water packaged in a container having a volume of 20 litres or less (such as bottled water).

All of these exceptions represent potentially major water exports. For any of these exceptions, there are no data being collected or required to inquire into how much water is being used, consumed or transported out of the basin; there is no monitoring as to the long-term cumulative effects of such withdrawals; and there is no reporting to simply identify exporters of water.

If there are to be exceptions to the general prohibition to export water, the exceptions must be within a framework to understand the extent of water exports. Hence, there must be some type of reporting regime for the exceptions where notice must be given of the water exports and estimated quantities.

Recommendation No. 9

For the exceptions 4(2)(4) and (5), it is recommended that there must be some type of reporting regime for the exceptions where notice must be given of the water exports and estimated quantities to allow for the tracking of the exported water resources.

Section 4(6) - The Grandfather Exception

Section 4(6) outlines another exception to section 4. Under this section, the general section 4 prohibition does not apply if the undertaking was transferred before January 1, 1998. It is unclear what exceptions this provision would cover and the quantities exported through those exceptions. The undertakings covered by this exception should be listed for the sake of clarity.

Recommendation No. 10

The water export undertakings that fall under section 4(6) should be listed to provide clarity as to what exceptions are allowed under this provision.

ENDNOTES

1. Canadian Environmental Law Association, Submissions by the Canadian Environmental Law Association to the Ministry of the Environment on the Surface Water Transfers Policy (EBR Registry Number PA8E0027), CELA Brief # 347, June 11, 1998.
2. Canada. News Release. "Strategy Launched to Prohibit the Bulk Removal of Canadian Water, Including Water for Export." February 10, 1999. The components of the strategy include: amendments to the Boundary Waters Treaty Act; a joint reference to the International Joint Commission; and a proposal to develop a Canada-wide Accord with the provinces on bulk water removals.
3. International Joint Commission, "IJC to Investigate Water Use, Diversion and Removal Policies" Feb. 10, 1999.
4. The provision of potable water for drinking water and agricultural need would be the next more important objective. Recreational, industrial and commercial uses should follow as lesser priorities. Short term immediate uses, such as pollution control, flood control, and fire protection, would be allowed on a temporary uses basis as long as the first priority, ecosystem function, is not compromised.
5. Karl Sepkowski, "Plan to ship lake water to Asia abandoned" Toronto Star, December 21, 1998.

Plan to ship lake water to Asia abandoned

21/12/98

BY KARL SEPKOWSKI
SPECIAL TO THE STAR

SAULT STE. MARIE — A potential international crisis between Canada and the United States has been averted.

A Sault Ste. Marie company that hoped to export Lake Superior water to Asia has abandoned its plans.

The Nova Group, a business consulting company headed by John Febbraro, was given a permit last spring to export 600 million litres of water over a five-year period.

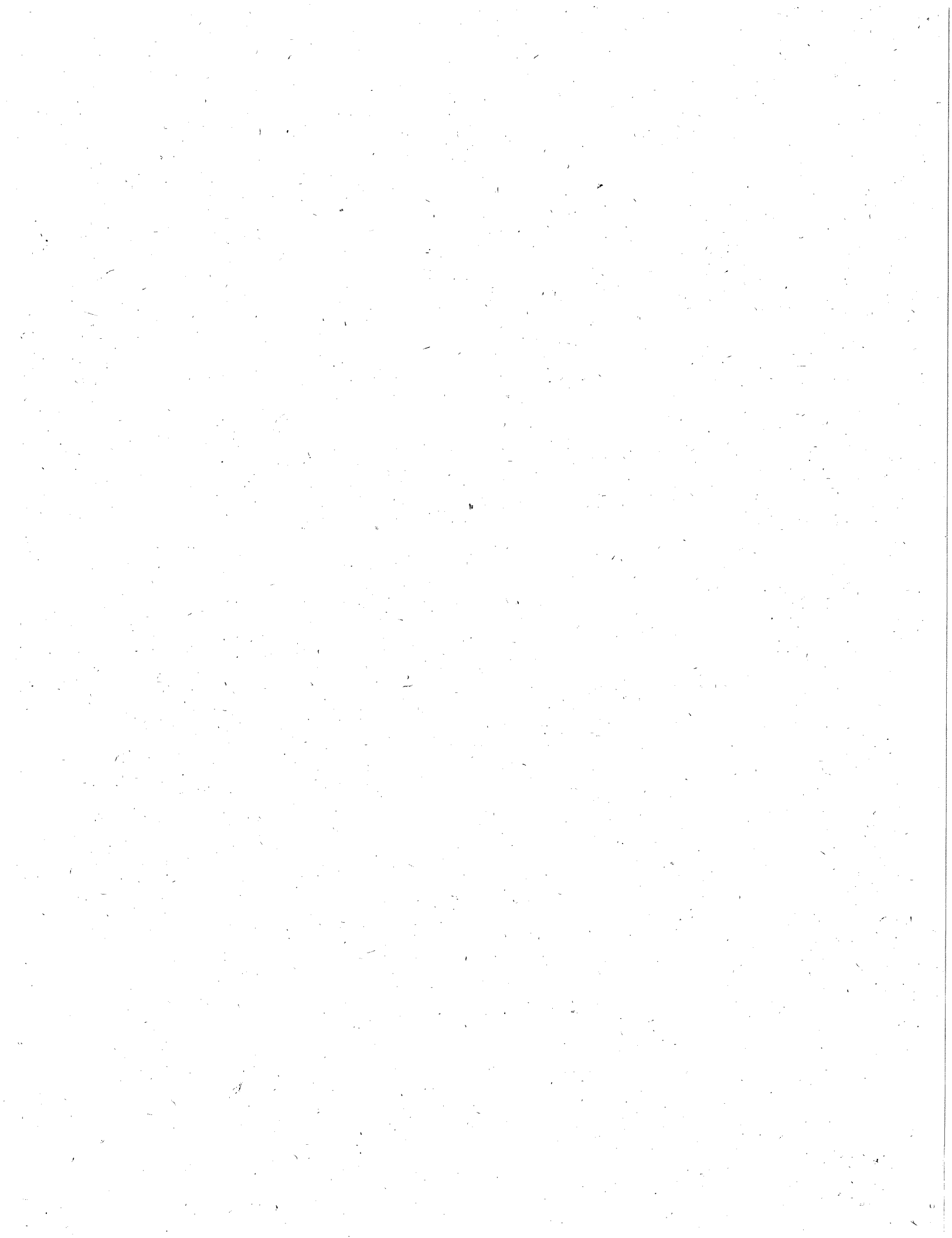
The issue touched off protests on both sides of the Canada-U.S. border and resulted in the Ontario environment ministry withdrawing the permit.

Nova appealed and hearings were scheduled to get under way in Sault Ste. Marie in two weeks time.

Yesterday, Febbraro said he was withdrawing his appeal after reaching an "understanding with the environment ministry."

He said the understanding involves assurances that no one will be allowed to export Great Lakes water.

The Sault entrepreneur said he's still interested in exporting water to Asia, "perhaps in bottles but it won't be Great Lakes water."





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