

December 21, 2015

Mr. Ben Hatcher
Senior Program Advisor
Ministry of Environment and Climate Change
Environmental Programs Division
Modernization of Approvals
135 St. Clair Avenue West, Floor 12
Toronto, Ontario
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Dear Mr. Hatcher:

**Re: Public Comment on Proposal EBR Registry Number: 012-5724.
Proposal Title: Regulations prescribing certain short term water takings as EASR activities**

BACKGROUND

The Canadian Environmental Law Association (CELA) is a legal aid clinic with a mandate to use and improve laws to protect the environment and public health and safety. CELA has extensive expertise on Permits to Take Water (PTTW) and on issues relating to the protection and resource management of Ontario's waters. CELA has previously provided comments on the Ministry of Environment and Climate Change's (MOECC) proposals in relation to water taking and PTTWs.¹ CELA lawyers were involved in both phases of the Walkerton Inquiry and a CELA counsel was subsequently appointed to serve on the Source Protection Advisory Committee and Implementation Committee. CELA lawyers have also represented numerous clients and citizens groups in leave to appeal applications under the *Environmental Bill of Rights, 1993* in relation to PTTWs.

GENERAL COMMENTS

CELA submits that there are a number of inherent problems with the MOECC's proposed regulations with respect to short term water taking. In particular, CELA is very concerned with the proposal to exempt (i) the natural flow of a watercourse or lake for the purpose of isolating, creating or maintaining a construction site, and; (ii) the pumping of water from a watercourse for

¹ Canadian Environmental Law Association, Comments regarding Permit to Take Water Manual, EBR Registry # PA04E0036, (Toronto, Ontario) February 5, 2005, Canadian Environmental Law Association, Submission to the Ministry of Environment on Water Takings and Transfer Regulation (O.Reg 285/99) EBR Registry No RA04001, (Toronto, Ontario) August 17, 2004; Canadian Environmental Law Association, Submission on the proposed amendments to the water taking and transfer regulation, (Toronto, Ontario) May 20, 2003;

the purpose of creating and maintaining a dewatered construction site, from the requirements of subsection 34(1) of the *Ontario Water Resources Act (OWRA)*.

CELA is also concerned with the MOECC's proposal to prescribe under the Environmental Activity Sector Registry (EASR) process, water taking for construction dewatering purposes which would subsequently be discharged to land.

SPECIFIC COMMENTS

(1) Proposal to Exempt Water Diverted from Construction Site from Subsection 34 (1) Of the *OWRA*

The MOECC's proposal would allow the diversion of the natural flow of a watercourse or lake for the purpose of isolating, creating, or maintaining a construction site located wholly or partially within the water body where the water is returned to, or remains in the same water body to be exempt from subsection 34(1) of the *OWRA*. The proposal, if implemented, would mean that a person who engages in such activity would no longer be required to apply for a PTTW and would not be subject to regulatory oversight by MOECC.

In the *Technical Discussion Paper on the Proposed Regulatory Changes and Environmental Activity and Sector Registry (EASR) Requirements: Short Term Water Taking Activities (Technical Discussion Paper)*, the MOECC does not provide any upper limit on the size of the diversion of water flow nor does it define the scale or magnitude of the construction project. Furthermore, there does not appear to be any limit on the duration of this activity. The MOECC's proposal could ostensibly allow large-scale construction projects which divert very significant amounts of water flow from a watercourse or lake over an extended period of time to be exempt from Ministry oversight. The proposal thus has the potential to cause a broad range of adverse impacts on the ecosystem given that the diversion of water flow has the potential to alter the natural characteristics of a watercourse or lake and cause impacts on water quality, water quantity, aquatic habitat, and biodiversity.

In the *Technical Discussion Paper* the MOECC states that the proposal to allow "in stream construction" is a well established practice and is controlled by approvals that allow the construction work."² However, the Ministry fails to specify the other approvals which would govern this activity and whether they would adequately address the matters within the MOECC's regulatory mandate. The proposal is of particular concern given that there has been extensive deregulation of environmental laws at the federal level in recent years. The protection afforded to fisheries and fish habitat under the *Fisheries Act*, for example, has been dramatically reduced in scope as a result of revisions made by two federal omnibus bills, Bill C-38³ and Bill C-45.⁴

² Ontario Ministry of Environment and Climate Change, *Technical Discussion Paper on Proposed Regulatory Changes and Environmental Activity and Sector (Registry) (EASR) Requirements: Short Term water takings activities*, pp.3-4.

³ *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c.19, (Bill C-38 also known as the "First Omnibus Budget Bill").

In the provincial context, the Ontario Ministry of Natural Resources and Forestry (MNRF) *Lakes and Rivers Improvement Act (LRIA) Administrative Guide (Administrative Guide)* states that an *LRIA* approval is not required for temporary or seasonal partial diversion, where no dam of any type is proposed on the lake or river channel. Therefore, if the construction project utilized a structure other than a dam to divert the water, it would not be subject to the *LRIA*. According to the MNRF's *Administrative Guide*, this type of diversion may require a Permit to Take Water under the *Ontario Water Resources Act*. The *Administrative Guide* states that if this is the case, MNRF staff is to refer the applicant to the local MOECC office.

The ability of Conservation Authorities to regulate this activity is also subject to question given their lack of resources and capacity, an issue which has been highlighted by MNRF in its recent discussion paper reviewing the roles, funding and governance of conservation authorities under the *Conservation Authorities Act*.⁵ The Environmental Commissioner of Ontario (ECO) has also commented on the lack of adequate funding for the Conservation Authorities and stated that inadequate funding for flood control and prevention measures has created a situation where, due to climate change, "Ontario is now vulnerable to significant flooding events."⁶ In the 2010/2011 Annual Report, the ECO encouraged the MNRF to "continue to support conservation authorities in their plan review and permitting activities and to ensure that conservation authorities are adequately funded."⁷ CELA, therefore, is concerned that the MOECC is abdicating its responsibility over water management in Ontario to other agencies which do not have the mandate or the capacity and resources to address the adverse environmental impacts which may be caused by the diversion of water flow from a watercourse or lake. CELA, therefore, strongly recommends that the diversion of the natural flow of a watercourse or lake for the purpose of isolating, creating or maintaining a construction site remain subject to the requirements under subsection 34(1) of the *OWRA*.

The MOECC's *Technical Discussion Paper* states that pumping of water from a watercourse for the purpose of creating and maintaining a dewatered construction site located wholly or partially within a watercourse would also be exempt from subsection 34(1) of the *OWRA*, if the following conditions are met:

- (i) water pumped from the watercourse must be returned to the same watercourse;
- ii) water that is discharged shall not contain or produce visible oil sheen;

⁴ *Jobs and Growth Act, 2012*, S.C. 2012, c. 31 (Bill C-45 also known as the "Second Omnibus Bill" introduced in Parliament on October 18, 2012). See Ecojustice, Legal Backgrounder, *Fisheries Act*, available online at <http://www.ecojustice.ca/wp-content/uploads/2015/03/Ecojustice-Fisheries-Act-Feb-2013.pdf>

⁵ See Ontario Ministry of Natural Resources and Forestry, Conservation Authorities Act; A review of roles, responsibilities, funding and governance of conservation authorities under the *Conservation Authorities Act*, Discussion Paper, available online at http://apps.mnr.gov.on.ca/public/files/er/Discussion_Paper_2015.pdf.

⁶ Environmental Commissioner of Ontario, *Redefining Conservation*, Annual Report Supplement, 2009/2010 (Toronto: Ontario) p. 294.

⁷ Environmental Commissioner of Ontario, *Engaging Solutions*, Annual Report Supplement 2010/2011, Toronto, Ontario), pp. 130-131.

iii) prior to any water being discharged to the watercourse, flow rate controls (to control erosion, sedimentation, and total suspended solids) must be installed and all required control measures must be implemented;

iv) all erosion and sediment control measures must be installed, used, operated, and maintained in accordance with recommendations provided by the manufacturers of the control measures; and

v) all control measures must be removed and waste material collected or trapped by the control measures recovered and appropriately disposed of once the need to pump water for the activity is no longer necessary.

In the *Technical Discussion Paper*, the MOECC indicates that it may revise the current proposed requirements for implementing control measures upon receiving further comments. The proposed revisions include placing further limits on various water quality criteria, such as total suspended solids or requiring control measures that satisfy specified design or performance criteria.

The conditions the MOECC is proposing to impose, noted above, clearly contemplate that the diversion and subsequent return of water to the same water body has the potential to cause adverse impacts. These include oil sheen, sedimentation and erosion and an increase in total suspended solids. The degree and extent of the adverse impacts is subject to a number of variables including the scale of the construction project, the amount of diversion, the size of the water body, the rate of stream flow, and the contaminants that may be discharged from the construction work as well as a host of other site-specific considerations. Consequently, the erosion and sedimentation control measures that are necessary for this activity cannot be simply based on a manufacturer's recommended control measures but will likely require consideration of the unique site-specific conditions and features of a water body.

Furthermore, the proposal does not indicate whether the water would be returned to the same location from which it was removed and whether the same quantity of water would be returned to the watercourse. If this does not occur, there is the potential that the watercourse and ecosystems' functions would be debilitated.

It is CELA's submission that the Ministry's proposal does not lend itself to regulation through generic conditions such as those proposed in the draft regulation amending O.Reg 387/04. Consequently, the proposed conditions are unlikely to adequately address the broad range of adverse impacts that will result from this activity. Therefore, CELA recommends that the pumping of water from a watercourse for purpose of creating or maintaining a dewatered construction site should remain subject to subsection 34(1) of the *OWRA*.

SURFACE WATER-TAKINGS SUBJECT TO EASR

(i) Water takings related to construction of roadway or bridge

The MOECC is proposing to prescribe certain surface water takings for EASR rather than have the proponent apply for a PTTW. Under the MOECC's proposal the water that is taken shall only be used for the following activities when being done for the construction, maintenance or repair of a public roadway or bridge:

- hydrodemolition;
- cleaning;
- seeding, mulching, sodding and landscaping;
- dust suppression;
- compaction;
- on-site preparation of materials to be used in the construction, maintenance or repair of the public roadway or bridge.

The Ministry is proposing to impose operating conditions related to the refuelling of pumping equipment.⁸ The MOECC should, however, undertake a more comprehensive assessment of potential adverse impacts to water from activities related to construction maintenance or repair of a public roadway or bridge and impose appropriate conditions to address these impacts.

With respect to the requirement for proponents to have spill clean up equipment, the Ministry should also include a requirement that the workers be provided with training on the prevention and clean up of spills. Furthermore, the proponent should be required to have equipment to clean up spills which is commensurate with the nature of the contaminants and the volume of contaminants associated with the activity. The proponent should also be required to prepare and effectively implement spill prevention and clean up plan.

Subsection (4)7 of the draft regulation regarding Registration under Part II.2 of the Act –Water Takings (draft regulation on water taking), stipulates that a person notify the Ministry no later than two business days with respect to a complaint about the water taking. Environmental legislation generally requires notification forthwith in the event of adverse impacts.⁹ This is intended to ensure that MOECC staff is able to respond promptly to assess and address impacts to the natural environment. Consequently, CELA recommends that notification of a complaint under subsection 4(7) of the draft regulation on water taking be amended to require that it be done forthwith.

⁸ Technical Discussion Paper on Short-Term Water Taking Activities, p. 15, OR-2.2.

⁹ See *Environmental Protection Act*, R.S.O., 1990 c. E.19 as amended, s. 15; *Ontario Water Resources Act*, R.S.O 1990, c.40 as amended, s. 30(2).

(ii) Water-takings related to short-term construction dewatering

The MOECC is proposing to prescribe activities related to construction dewatering under the EASR process. The water taken must be:

- transferred to an approved or registered waste management system;
- discharged to an approved sewage treatment works;
- discharged to a municipal sanitary sewer; or
- discharged to the land with requirements outlined in OR-3.2 and OR-3.3 (as set out in the *Technical Discussion Paper*).

The proposal does not require a person to assess the impact that the water taking would have on the watercourse, water body, aquifer, or on other users. CELA recommends that an assessment of the impacts from the water taking be conducted by a qualified person. The MOECC should only allow water taking for construction dewatering purposes if the assessment indicates that the water taking will not have any adverse impacts on the watercourse, water body, aquifer or other users.

Subsection 9(9) of the draft regulation on water taking requires that in the event a person receives a complaint with respect to the taking or discharging of storm water or both, the person shall notify the MOECC no later than two business days after the complaint. For the reasons that were provided above (i), CELA recommends that notification regarding a complaint of water taking for construction dewatering purposes be made forthwith to the MOECC.

The MOECC is proposing in the event the water is discharged to land that a qualified person be retained to prepare a discharge plan which shall contain the following information:

- a description of the water chemistry testing that will be done, and the standards or guidelines that will be used to evaluate the testing results;
- an assessment of the quality and quantities of water that will be discharged;
- an assessment of whether the water is suitable for discharge to land, or needs to be transferred to an approved or registered waste management system, discharged to an approved sewage treatment works, or discharged to a municipal sanitary sewer (as outlined in OR-3.1);
- erosion and sedimentation control measures needed;
- the anticipated method of discharge or transfer; and
- the location of the point of discharge.¹⁰

Furthermore, the MOECC is proposing that if the qualified person determines that the pumped water cannot be discharged to the natural environment, then the water must be transferred to a waste management system, discharged to a sewage works that has an Environmental Compliance Approval, or discharged to a municipal sanitary sewer.

¹⁰ Technical Discussion Paper on Short-Term Water Taking Activities, pp. 18-19.

CELA is concerned that the discharge of water to land from construction dewatering has the potential to cause adverse impact that cannot be readily addressed through the generic conditions. It is CELA's submission that the discharge of groundwater on land does not meet the eligibility criteria for the EASR.

According to the Ministry, only activities which pose "minimal risk to the environment and human health" and which use equipment and processes that are standard to the industry or sector with "known environmental impacts" are eligible for inclusion under EASR.¹¹ The discharge of water from construction dewatering to land has the potential to cause adverse effects depending on the quantity and quality of the water discharged and site-specific conditions. This is clearly evident from the Ministry's proposal to require a qualified person to develop a discharge plan with detailed information about the potential impacts from the discharge. These include an assessment of the quality and quantity of water, an assessment of whether the water is suitable to discharge, erosion and sedimentation control measures needed, and the anticipated method of discharge. The factors that the qualified person needs to address in a discharge plan require an individual detailed assessment to be made within the context of site-specific conditions. The information that the qualified person is required to provide under the discharge plan cannot in any way be characterized as constituting "minimal risk to the environment" or "known environmental effects." Indeed, the rationale for the development of a discharge plan is to address the unknown and unpredictable environmental impacts that would result from the discharge into the natural environment. Consequently, discharge of water from construction dewatering to land does not meet the evaluative criteria for inclusion as an EASR activity.

CELA is also very concerned about the MOECC's proposal to delegate to the qualified person the authority of determining whether the water taking for construction dewatering can be safely discharged on land. It is CELA's position that this determination should be made by the MOECC's Director, given that it is the Director who has the responsibility under subsection 10(3) of the *OWRA* for responsibility to control the use of water and remains ultimately responsible for protection of water quality and quantity in Ontario. In view of the potential adverse impacts that could be caused by the discharge of water on land, CELA is of the firm view that the decision should not be delegated to a third party hired by the proponent. Accordingly, CELA strongly recommends that the MOECC not allow water from a construction dewatering discharged to land as a prescribed activity under the EASR process.

CONCLUSION

CELA is extremely concerned with a number of aspects of the proposal in relation to short-term water takings and makes the following recommendations:

¹¹ Ontario Ministry of Environment and Climate Change Environmental Registration; How the Ministry of Environment and Climate Change decides which Business Sectors can use the Environmental Activity and Sector Registry (EASR) available online at <http://www.ontario.ca/page/environmental-registration>.

- The diversion of the natural flow of a watercourse or lake for the purpose of isolating, creating and maintaining a construction site should remain subject to the requirements of subsection 34(1) of the *OWRA*.
- The pumping of water from a watercourse for the purpose of creating and maintaining a dewatered construction site should remain subject to the requirements of subsection 34(1) of the *OWRA*.
- With respect to surface water takings subject to EASR, the MOECC should:
 - require notification of a complaint regarding the water taking be made forthwith to the MOECC;
 - undertake a more thorough assessment of all the potential impacts associated with construction, maintenance or repair of a public roadway or bridge as opposed to simply limiting the assessment to potential impacts from refuelling of pumping equipment;
 - require employees to be trained to prevent and address spills;
 - require that equipment to clean up spills should be commensurate with the nature of contaminants that are likely to be caused by the activity and the volume of contaminants associated with the activity; and
 - require the proponent to prepare and effectively implement a spill prevention and clean-up plan.

With respect to water-taking for construction dewatering the MOECC should:

- require a qualified person to assess the impacts that the water taking would have on the watercourse, water body, aquifer or other users. The water-taking should only be allowed if the assessment establishes that the water taking will not result in adverse impacts on the watercourse, water body aquifer or other users.
- require that notification of a complaint regarding the water taking be made forthwith to the MOECC.
- not allow the short term construction dewatering of groundwater which is discharged on land to be prescribed as EASR activity under the draft regulation.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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