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Re: Regulatory amendments to support implementation of the Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement – Regulation Proposal Notice (EBR Registry Number 012-1607)

We write today in response to the above noted Regulation Proposal Notice. Many of the signatory organizations and individuals are or have been members of the Annex Advisory Panel, providing input both before and after the signing of the Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement (the Agreement). We hope our submissions are helpful in ensuring full implementation of a sustainable water management program for all Ontarians.

We strongly encourage the Ministry to make it a priority to ensure a decision regarding the Regulation Proposal is made and fully implemented quickly. Ontario's prompt actions are critical for all Great Lakes Governments because the Agreement will not be in full force until all parties have acted to implement their obligations. The city of Waukesha, WI is in the final stages of requesting a permit to take Lake Michigan water outside the Great Lakes Basin. This proposal will set a precedent and there are many US communities waiting to request a similar diversion. As a result, it will make it increasingly difficult to ensure sustainable water management throughout the Great Lakes—St. Lawrence River Basin. We have already been waiting more than 8 years since Ontario signed the Agreement for Ontario to follow through completely on the commitments made. At the time, Ontario was lauded for its role in ensuring the strength of the Agreement and for our existing water programs. Since then, we have lagged behind and watched our credibility wane. If other jurisdictions propose projects that put the ecological integrity of the Great Lakes—St. Lawrence River Basin at risk, what moral authority will Ontario have to object if our own programs and policies are not protective of ecological health? For these reasons, we strongly encourage the Ministry to regain the province's authority in the Basin by demonstrating leadership and striving to employ standards that support the goal stated in Ontario's Great Lakes Strategy: "to protect and restore the ecological health of the Great Lakes and St. Lawrence River Basin." (p.30) As well, the Ministry should be ensuring that this Regulation Proposal is developed through meaningful consultations with First Nation and Metis governments. We support mechanisms that ensure their voices are heard and respected.

We make the seven following specific recommendations.

Recommendation 1: Ensure swift implementation of Ontario’s remaining commitments under the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement

Amendments were made to the *Ontario Water Resources Act* and the *Safe Drinking Water Act, 2002* in 2007 to enable fulfillment of the commitments made under the Agreement. The amendments have not yet been brought into force (see further details under Recommendation 4 below). Further, the Ministries of the Environment and Natural Resources consulted with the Annex Advisory Panel and the public on proposals for intra-basin transfers management before and after signing of the Agreement and again in 2009. We have consistently opposed any regulation that would increase or allow new intra-basin transfers without strict environmental standards being met and have also opposed re-defining the Great Lakes watersheds. Ontario is the only party to the Agreement that has not fulfilled commitments necessary to bring crucial articles intended to improve water management in the entire Great Lakes—St. Lawrence River Basin into force. We strongly encourage the Ministry to swiftly follow through with the proposed regulation and associated activities, including bringing into force the *Safeguarding and Sustaining Ontario’s Water Act, 2007*.

As many of the undersigned groups stated in submissions in 2009, we strongly encourage the Ministry to embrace the principled leadership and commitment to transparency and accountability that was demonstrated in the negotiations that led to the *Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement (2005)*. In those negotiations, Ontario did not submit to political pressure to reduce the agreement to less than what was already required in Ontario’s water protection laws and policies. During the negotiation of the Agreement, Ontario took the direct advice from their Annex Advisory Panel. This bold approach strengthened the Agreement by compelling US States to reconsider options to ban diversions. Such leadership contributed to the negotiation of a better Agreement for the whole Great Lakes – St. Lawrence River Basin. Consequently, we encourage the Ministry to continue to take such a principled stand in implementation of the Agreement. Ontario need not simply implement the Agreement to the letter. Ontario can and should strive to do better, including specifically ensuring that (i) a hydrologically valid definition of “watershed” be used to determine intra-basin transfers and (ii) return flow requirements **do not** “short circuit” the needs of watersheds.

Recommendation 2: Adopt a hydrologically valid definition of Great Lakes watershed boundaries

The Ministry should not adopt an approach that merely implements the Agreement, as there were political compromises that are not grounded in ecological/hydrological realities necessary to preserve and sustain Ontario’s waters for future generations. One critically important compromise in the Agreement is the re-defining of watershed boundaries to include both upstream and downstream connecting channels. We strongly oppose a definition of “watershed” that includes the downstream connecting channel for the purpose of identifying new or increased intra-basin transfers. The Ministry should, instead, ensure that a scientifically sound definition of Great Lakes – St. Lawrence River watersheds is implemented within Ontario. We recommend that Ontario’s regulations only include the upstream connecting channel (as hydrologically being part of a watershed) and encourages Ontario to

begin persuading the signatories of the Agreement that this definition permits transfers that take water out of the watershed, at risk of harming the watershed from which the transfer originates and defeating the vision for the Basin.

Recommendation 3: Adopt return flow requirements that ensure water is returned to the same watershed, as close as possible from the point of withdrawal

We strongly encourage the Ministry to adopt return flow requirements that ensure water remains in the same watershed and is discharged as close as possible to the withdrawal/removal point. Such an approach respects (rather than short-circuits) the needs of sub-watersheds. As several of the signatory organizations stated in 2009, if there are existing municipal systems that cannot meet such criteria, they can be grandfathered. Creating a system that incorporates the exceptions as the rule is exactly what Ontario would not let happen in the negotiations regarding the Agreement. Ontario's principled stance in those negotiations contributed to an Agreement that prohibits inter-basin transfers with exceptions, rather than making the exceptions to inter-basin transfers the rule. We hope the Ontario government will continue to demonstrate such leadership in implementing regulations regarding intra-basin transfers. Specifically, as we outline below under Recommendation 4, we encourage the government to bring into force and make use of important powers to impose terms and conditions on permit holders that will ensure sustainable water management in Ontario.

Recommendation 4 – Proceed to enable proclamation of the remaining unproclaimed sections of the *Ontario Water Resources Act (OWRA)*, that were passed by the legislature in 2007 in support of the Agreement but which, as of this date, remain unproclaimed.

The *Safeguarding and Sustaining Ontario's Water Act, 2007* contained several provisions to amend the OWRA to implement the Agreement. These changes for the most part remain unproclaimed in part due to awaiting the necessary regulations. It is critical that they be proclaimed so that the Agreement will come into force across all of the signatory jurisdictions. This must be done before those amendments expire for lack of proclamation. For example, the unproclaimed new section 34.1(13) refers applications for takings that are captured by the Agreement to the Minister rather than a Director, and the new 34.1(14) requires the Minister to ensure that notice of the application is given to the Great Lakes-St. Lawrence River Water Resources Regional Body in accordance with Chapter 5 of the Agreement. Section 34.6 embodies in the OWRA the relevant provisions of the Agreement so that they are applicable in the Ontario process governing water takings. Section 34.6(4) requires the Minister to publish assessments of cumulative impacts that are prepared under Article 209 of the Agreement on the Ontario EBR Registry for comment, and subsection (5) requires that the Minister is to highlight those parts of the assessment that give consideration to climate change and other significant threats to the waters of the Great Lakes – St. Lawrence River Basin.

Any water transfers that are empowered under the Agreement and the new provisions of the OWRA are to be subject to terms and conditions provided in the permit and the new section 34.7 (2)(b) explicitly provides for terms and conditions dealing with return, after use, water quality of returned water, minimum amounts of water to be returned, and specifications as to the location or area to which water

may be returned, in addition to other matters. Subsection (2)(f) of that same section provides that terms and conditions may govern the use and conservation of transferred water, may require audits and may require preparation of water conservation plan as a condition of the permit. These and the other new provisions outlined in section 34.7 are extremely important powers to impose terms and conditions on permit holders.

Section 34.9 sets out in statute which are the reciprocating jurisdictions so that the implementation of the Agreement is embodied in Ontario law. The reciprocating jurisdictions may require a hearing before Ontario's tribunal on a decision made by the Minister by way of the as yet unproclaimed section 34.10, again an important provision to proclaim in force. Similarly the reciprocating jurisdictions are given explicit right to pursue judicial review of such decisions as if they were "a person most directly affected" by the unproclaimed section 34.11.

These additional sections and the several others that would give full effect to the Agreement in the province's OWRA must be proclaimed as soon as possible in order to give credence to section 34.4 of the OWRA (which has been proclaimed in force already) whereby the Agreement is recognized as "one of the means by which the waters of the Great Lakes – St. Lawrence River Basin are conserved, protected and managed", and the Agreement is noted in s. 34.4(2) as recognizing the precautionary principle.

In addition to addressing our concerns about keeping water within the watersheds and ensuring that unproclaimed amendments to legislation are brought into force, we also encourage the Ministry to adopt an approach to public engagement that is consistent with ensuring transparency and accountability in our sustainable water management program. In Ontario's Great Lakes Strategy, a key goal is express as follows: "To create opportunities for individuals and communities to become involved in the protection and restoration of the ecological health of the Great Lakes-St. Lawrence River Basin." (p.30) Becoming involved is not limited to wetlands restoration and beach clean-up activities, it also means being engaged in a meaningful discussion about how our waters are managed.

Recommendation 5: Ensure any new/expanding intra-basin transfers proposals are Class 1 instruments under the *Environmental Bill of Rights, 1993*

We note that the Ministry is proposing to amend the Classification of Proposals for Instruments Regulation (O Reg 681/94 under the *Environmental Bill of Rights, 1993*) to include new and expanding intra-basin transfers. While, as we've stressed throughout this submission, we oppose intra-basin transfers without strict environmental standards being met, we do support the posting of all future proposals on the Environmental Registry to allow for full public scrutiny and disclosure. However, it is disappointing that some types of new and expanding intra-basin transfer proposals will not be posted to the Environmental Registry due to reliance on section 30 of the *Environmental Bill of Rights, 1993*. We strongly encourage the Ministry to take steps to ensure that proposals for new and expanding intra-basin transfers are subject to section 22 of the *Environmental Bill of Rights, 1993*, regardless of use to which the transfer is being made.

Finally, we encourage the Ministry to ensure that the promotion of water conservation and further involvement of the public in finalizing the decisions proposed in the Regulation Proposal Notice.

Recommendation 6: Promote water conservation in all Ontario implementation decisions

The conservation goals of the Agreement and of Ontario's water management programs should be integrated into all aspects of Ontario's implementation of the Agreement. Each proposal should be seen as an opportunity to enshrine deeper conservation and consideration should be given to mechanisms to create incentives for best conservation practices. The need for escalated water conservation is prudent in light of the potential of climate change to alter Great Lakes water supplies.

Recommendation 7: Commit to further public consultation

Because the comment period and submission deadline associated with the Regulation Proposal occurred during an election call, the Ministry has not been able to hold public consultations on these complex matters. Further, it is also possible that the outcome of the provincial election may further delay implementation. We request that the newly elected government hold consultations to report on progress and decisions on this regulation with all stakeholders and with First Nations and Metis representatives as soon as possible.

Conclusion

We are pleased that some municipalities in Ontario are striving to ensure sustainable water management. In particular, York Region's plans to reduce their existing intra-basin transfer by building a new high level sewage treatment plant with discharge to Lake Simcoe is to be lauded. We believe this type of effort should be the standard across the Basin. If, through use of the proposed definition of watershed, new or increased intra-basin transfers are actually allowed there will be little motivation for Ontario municipalities to seek to reduce existing intra-basin transfers. And, sadly, we anticipate there will be increasing amounts of intra-basin transfers across southern Ontario.

Thank you for providing an opportunity to comment on this complex issue. We hope Ontario will prioritize following through to a decision about this Regulation Proposal and will not re-define watershed boundaries in a way that permits actual increased or new intra-basin transfers. We believe our recommendations are crucially important to seeing Ontario reach the shared vision of "healthy Great Lakes for a stronger Ontario" (Ontario's Great Lakes Strategy, p.30). We would be happy to discuss any recommendations at your convenience.

Sincerely,

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