

February 5, 2021

By email: waterpolicy@ontario.ca

Brent Taylor, Senior Policy Analyst, Water Policy
Environmental Policy Division
Ministry of the Environment, Conservation, and Parks
Foster Building, 10th Floor
40 St Clair Avenue West
Toronto, ON
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Dear Mr Taylor,

Re: Proposed Implementation of Updates to Ontario’s Water Quantity Management Framework (ERO Number 019-2017)

The Canadian Environmental Law Association (CELA) provides the following general and specific comments in response to the Environmental Registry proposal: Proposed Implementation of Updates to Ontario’s Water Quantity Management Framework¹ (ERO Number 019-2017).

Over the past several decades, CELA has been actively involved in water protection and conservation matters at the international, national, provincial, regional, and local levels. For example, CELA has been engaged in Ontario’s Water Quantity Protection External Working Group, established by the Ministry of the Environment, Conservation, and Parks, to assist with the groundwater management review. CELA has made submissions related to the moratorium on new or expanded groundwater permits for water bottling and the most recent related Environment Registry notice (ERO Number 019-1340) – Updating Ontario’s Water Quantity Management Framework. In addition, CELA has provided public legal information, summary advice and client representation in relation to permits to take water issued under the *Ontario Water Resources Act* for industrial or commercial purposes (i.e. water bottling, golf course irrigation, de-watering of aggregate quarries and landfills, etc.).

CELA stresses, as we have in past submissions, that the amount of water that is available based on long term sustainability and other goals – such as meeting population growth targets, ensuring climate change resiliency, and realizing benefits to future generations – is finite. The management and prioritization of uses, therefore, needs to first and foremost recognize this reality. Ontario has yet to implement a cross-ministerial consideration of how inter-related policy

¹ See <https://ero.ontario.ca/notice/019-2017>.

decisions in, for example, land use decision-making, are impacting watercourses and wetlands. Further, there is no clear integration with Ontario’s flood strategy and Ontario’s wetland conservation strategy. Recent legislative changes to conservation authorities’ roles and responsibilities are likely to make water use management an even bigger challenge in the future. As such, **CELA recommends that the government undertake a full, meaningful, and public review of Ontario’s water policy framework before continuing to move forward.**

Failing a fulsome review of Ontario’s overall water policy framework, CELA recommends that several factors (as detailed below) be addressed before moving forward with proposed regulatory changes. This may require a further extension of the current moratorium on new or expanded groundwater takings for water bottling.

I. General comments about ERO proposal notice and public consultation effort

CELA commends the Ministry for including the full, draft text associated with the proposed regulatory changes². Further, CELA appreciates that the Ministry provided a 60-day public comment period and that, promptly after posting the proposal notice, the Ministry hosted webinars for the Water Quantity Protection External Working Group to provide details and answer questions. Similar measures ought to be implemented in all situations, as they create the conditions for a more meaningful public engagement process, in keeping with the purpose of Ontario’s *Environmental Bill of Rights, 1993*.

To further improve the public consultation process, **CELA recommends that: (i) longer comment periods be provided more generally, (ii) webinars also be provided for the interested public, and, when public comment periods overlap with holidays (be they during the winter season or otherwise), the comment periods be further extended.**

II. Background and general comments about Ontario’s water management framework

In 2004, the Ontario government undertook a review of the water management framework, as part of an overall “commitment to meet the recommendations of the O’Connor inquiry in strengthening rules on water-taking”³.

An outcome was O Reg 387/04⁴, the Water Taking and Transfer regulation, made in December 2004 with this purpose (subsequently revoked by O Reg 451/07):

² See Ontario Ministry of the Environment, Conservation, and Parks, Consultation Draft – proposed amendments to O Reg 387/04 (attached).

³ Environmental Registry Notice (EBR Registry Number: RA04E0011): Amendments to the Water Taking and Transfer Regulation (posted June 18, 2004).

⁴ See <https://www.ontario.ca/laws/regulation/r04387>.

The purpose of this Regulation is to provide for the conservation, protection and wise use and management of Ontario's waters, because Ontario's water resources are essential to the long-term environmental, social and economic well-being of Ontario.

At the time, CELA made detailed comments in support of the regulatory changes and provided additional recommendations about how the permit to take water program ought to be enhanced⁵. At least three of these remain particularly relevant in today's context:

- (i) that "minimum flow levels in watersheds and sub-watersheds beyond which no further water allocation would be allowed" be determined,
- (ii) that a "precautionary approach be operationalized in the government's decision-making process regarding the state of the Province's water resources" to ensure sustainability for current and future generations, and
- (iii) that the Director be given the "authority to impose water-taking prohibition for a prescribed time frame in areas designated as ecologically sensitive or facing serious water quality/quantity issues".

As detailed in the next section, CELA believes additional recommendations will improve the water use management program.

As questions raised at Ministry's webinars demonstrated, the proposed amendments to O Reg 387/04 are limited to just one aspect of the Director's considerations when assessing an application regarding a permit to take water. As such, the proposed amendments, in and of themselves, are failing to address the need for an overall, holistic assessment of the water use management framework in Ontario.

CELA stresses, as we have in past submissions, that the amount of water that is available based on long term sustainability and other goals – such as meeting population growth targets, ensuring climate change resiliency, and realizing benefits to future generations – is finite. The management and prioritization of uses, therefore, needs to first and foremost recognize this reality.

CELA recommends that a full, meaningful, and public review of Ontario's water policy framework be undertaken, aiming to:

- employ a water sustainability lens across all policies and programs that impact watercourses and wetlands and seek to provide overall protection for human and ecological health
- consider consolidating into one Ministry (or determine more effective means by which fragmented responsibilities for water will be integrated)
- ensure principles including precautionary approach, ecosystem approach, accountability, adaptive management, collaboration and engagement, and recognition for First Nation and Métis rights are applied, and ecologically relevant scales are used, for assessing and adapting water takings

⁵ See <https://cela.ca/wp-content/uploads/2019/06/477watertaking.pdf>.

- ensure that water uses are effectively and equitably managed across all sectors, and adaptive – nimbly apply conservation measures when low water (drought) and resilient to high water (flood)
- fully implementing the water charges program⁶

III. Specific comments about the proposed amendments to O Reg 387/04

As part of the Proposed Implementation of Updates to Ontario’s Water Quantity Management Framework, specific amendments to O Reg 387/04 are being contemplated to: (i) revoke two definitions and the current limitations in “high use watersheds”, and (ii) substitute new provisions to enable a new “priorities of use” and “stressed water sources” scheme and enable publication of water data⁷.

While CELA agrees in principle that a “priorities of use” approach is potentially more effective than the frozen-in-time “high use watersheds” approach, we make the following observations and recommendations for consideration before Ontario moves forward with its proposal.

i. Transition provisions are needed

As currently drafted, there are no transition provisions for moving from the “high use watersheds” approach to the proposed “priorities of use” approach. There could be unintended consequences of removing the existing limitations (eg, no new/expanded takings related with specific types of “highly consumptive” uses) to an new approach that may not commence until a “stressed water source” is identified at some future point in time.

CELA noted in our submission last summer⁸:

BluMetric found that municipal water supply is vulnerable in the future due to growth, land-use changes, drought and climate change. In fact, in certain areas of the province such as Guelph-Wellington County and Orangeville it is anticipated

⁶ The former Environmental Commissioner of Ontario (ECO) has repeatedly encouraged the provincial government to make “full-cost water pricing a priority” — in the ECO’s 2007/2008 Annual Report (Part 3.3), 2011/2012 Annual Report (Part 4.2), and 2014/2015 Annual Report (Part 3.3). Further, in 2012, the Drummond Commission on the Reform of Ontario’s Public Services recommended that “[t]he Water Charges initiative should be expanded beyond high users to medium- and low-consumption industries and put on a full user-pay basis”. Finally, in the 2014 Annual Report, Ontario’s Auditor General recommended the provincial government charge an appropriate fee to industrial and commercial water users. The government’s own assessment of the water charges program in 2012 found that only \$200,000 was being recovered from the phase one water charges. The costs directly related to industrial and commercial water users was \$9.5million. This amounts to just 2% cost recovery. In the 2016 update, Ontario’s Auditor General found that there had been little to no progress toward improving cost recovery in the water charges program.

⁷ See Ontario Ministry of the Environment, Conservation, and Parks, Consultation Draft – proposed amendments to O Reg 387/04 (attached).

⁸ See CELA’s letter dated July 23, 2020, available here: <https://cela.ca/proposed-changes-to-water-taking-framework-in-ontario/>.

that there will be challenges meeting future municipal supply needs. In those areas, future reliance on groundwater as a municipal water supply was uncertain while surface water resources are expected to become unsustainable. The consulting firm also found that in other areas, such as Innisfil and Quinte, surface water resources will be unsustainable in the future.

CELA recommends that the existing limitations not be revoked until such time as an evaluation of existing “stressed water sources” is completed and strategies for those areas have been established. The BluMetric reports, commissioned by the Ministry, have already identified that there are areas where there are likely to be significant concerns.

ii. Ensure water used to supply domestic wells is prioritized

Within the proposed “highest category of water use”⁹, it is unclear whether private domestic wells are prioritized. Such private wells do not require permit to take water; however, the aquifers supplying such wells can certainly be depleted by the issuance of high-volume water takings that draw from the same aquifer. **CELA recommends adding a fourth item: iv. water used to supply domestic wells relied upon for drinking water purposes.**

iii. Integrated watershed management and upper limits on takings

Nothing in the proposal suggests, as noted above, that water availability is finite. **CELA strongly recommends that an integrated approach that recognizes the various water needs – to accommodate population growth targets, designing communities to be resilient to droughts and floods, and supporting Ontario’s prosperity – and sets upper limits on accommodating new/expanded water uses.**

iv. Legal standard “shall have regard” is insufficient

That the Director, ultimately, “shall have regard”¹⁰ for a water strategy prepared for a “stressed water source” is unlikely to lead to the necessary actions for ensuring water sustainability. **CELA recommends, at a minimum, that a stronger standard – such as “shall conform” or “shall be consistent with” – be applied.**

v. Immediate pause on all new/expanded water takings when “stressed water source” identified

The process of identifying, delineating, consulting, and ultimately finalizing a strategy for a “stressed water source” must ensure that there are no further stressors permitted until after the

⁹ Proposed subsection 4(4), paragraph 1 of O Reg 387/04.

¹⁰ Proposed subsection 4(8) of O Reg 387/04.

water strategy is established. **CELA recommends that the amendments clearly indicate that no new or expanded permits to take water will be permitted from the time a “stressed water source” is identified until such time as the associated strategy is established.**

vi. *Consideration of low-water declarations and source water protection assessment reports*

The draft regulation provides no details as to how other aspects of water policies and programs will be factored into the decision-making regarding a “stressed water source”. **CELA recommends that specific reference to low-water declarations issued by conservation authorities, as well as identified ground or surface waters that may experience stressed (particularly due to climate change) in source water protection are included in the amended regulation.**

vii. *Clearly articulate purpose and consistency with the precautionary principle within O Reg 387/04*

CELA recommends that the purpose statement (as quoted earlier) be re-established within the Water Taking and Transfer regulation. Alternatively, clearly stated that the Director’s decisions regarding water takings be consistent with the purpose of the *Ontario Water Resources Act*.

Further, **CELA recommends that a provision be added to the Water Taking and Transfer regulation that mandates the Director’s decisions to be consistent with the precautionary principle.**

viii. *Mandatory publication of water data*

CELA welcomes the direction that the Director make more water data publicly available. **CELA recommends that the proposed provision 9.1 ought to be made mandatory (“The Director shall ...”), rather than discretionary (“The Director may ...”).**

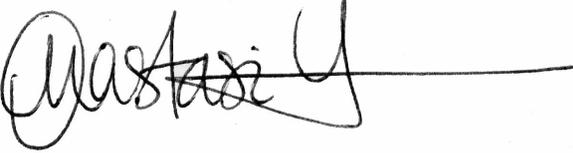
ix. *Authority to issue a prohibition order with respect to water takings in low water conditions*

In some situations, where the ecosystem is under extreme stress, it may be necessary to establish an urgent halt to lower priority water takings to ensure public health and hydrologic integrity is protected. **As CELA has recommended in the past, the *Ontario Water Resources Act* should be amended to provide authority to the Director to prohibit water takings for a prescribed time frame in ecologically sensitive area or when waters are under extreme stress.**

In summary, CELA recommends that the government undertake a full, meaningful, and public review of Ontario's water policy framework before continuing to move forward with updating the Water Taking and Transfer regulation. Failing a fulsome review of the overall water policy framework, CELA recommends that several factors be addressed before moving forward with proposed regulatory changes. This may require a further extension of the current moratorium on new or expanded groundwater takings for water bottling.

CELA would be happy to meet at your convenience to discuss any of our comments or recommendations.

Sincerely,

A handwritten signature in black ink, appearing to read "Anastasia", with a long horizontal line extending to the right.

Anastasia M. Lintner, PhD, LLB
Special Projects Counsel, Healthy Great Lakes

Cc: Tyler Schulz, Acting Assistant Auditor General, Commissioner of the Environment

Encl.