

September 3, 2008

Peter Taylor
Water Resources Supervisor
Eastern Region Technical Support Section
Ontario Ministry of the Environment
P.O. Box 22032
1259 Gardiners Road, Unit 3
Kingston, ON K7M 8S5

Dear Mr. Taylor:

**RE: Permit to Take Water
EBR Registry Number: 010-4134**

1. On behalf of the Greenspace Alliance of Canada's Capital (the Alliance) and The Sierra Club of Canada (Sierra), we make the following submissions in respect of the application by Golder, on behalf of Findley Creek Properties Ltd. and 1374537 Ontario Ltd. in respect of this proposal.
2. This proposal is for a permit to take water from a trench sump, for the purpose of construction dewatering, up to 17,020,800.00 litres per day for 10 years.
3. In considering this proposal, your deliberations are governed by the following requirements:
 1. Ontario Water Resources Act (OWRA) Section 1 provides that the purpose of this Act is to provide for the conservation, protection and management of Ontario's waters and for their efficient and **sustainable** use in order to promote Ontario's long-term environmental, social and economic well being.
 2. The Environmental Bill of Rights (EBR) Section 2(1) provides that the purposes of this Act are,
 - (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act.
 - (b) To provide sustainability of the environment by the means provided in this Act.

3. More specific guidance in respect of these purposes is set out in Section 2(2) including:
 2. The protection and conservation of biological, ecological and genetic diversity.
 3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
 5. The identification, protection and conservation of ecologically sensitive areas or processes.

4. In order to fulfill these purposes, the Act provides as noted in section 2(3) for:
 - (a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario,
 - (b) increased accountability of the Government of Ontario for its environmental decision-making.

5. Pursuant to Sections 7 to 11 of the EBR, the Ministry was required to develop a Statement of Environmental Values (SEV) and required to take every reasonable step to ensure that the SEV is considered whenever decisions that might significantly affect the environment are made in the Ministry.

4. In *Dawber v. Ontario* (Ministry of the Environment) [2007] O.E.R.T.D. No. 25 the Environmental Review Tribunal (ERT) inquired whether as to what extent the Director's decisions considered, incorporated and reflected relevant laws and policies. The ERT stated that proposals for Class 1 instruments are decisions that could have a significant effect upon the environment. Decisions which fail to give effect to laws and policies that are applicable to the decision are unreasonable.

5. It is not sufficient to pay lip service to the SEV. It must be considered and applied in decision making in a meaningful way. It follows that the guiding principles set out in the legislation must also be considered and applied in dealing with this proposal.

6. The SEV specifically refers to the founding principles of the ERB, which it seeks to implement through specific policies.

7. The guiding principles of the Ministry, as set out in the SEV are the following:
 1. The ecosystem approach: When making decisions, the Ministry will consider the cumulative effects on the environment, the interdependence of air, land, water and living organisms; and the interrelations among the environment, the economy and society.
 2. Environmental Protection: The Ministry will exercise a precautionary approach in its decision making.

3. Public Participation: The Ministry is committed to public participation and will foster an open and consultative process in the implementation of the SEV.
4. Integration with Other Considerations: The Ministry will use science that meets the demanding standards of the scientific community.

Decisions on instruments are to reflect these principles.

Public Participation

8. The Ministry has failed, once again, to demonstrate a meaningful commitment to public participation. In the application for Leave to Appeal Instrument No. 010-1607 dated March 11, 2008, which you have, this issue was raised.
9. For over a year now, The Alliance and Sierra have repeatedly sought disclosure of all hydrogeologic data gathered by the proponent, or their consultant Golder, so that a proper assessment of the potential impact of further water taking on the wetland could be fully assessed. We specifically repeated this longstanding request in our email dated July 23, 2008. We have never received a responsive reply. Enclosed are copies of our recent disclosure correspondence dated: July 14, 2008, (2 emails), July 15, 2008, July 22, 2008, July 23, 2008, July 29, 2008.
10. Hiding data frustrates the very purpose of the EBR. The Ministry cannot make a proper assessment of the potential environmental impact of the proposal on the basis of partial data only. As Dr. Michel points out in his report, Golder has taken 1998 data as baseline. By 1998 the wetland had been substantially disturbed. And, Golder chose an abnormally dry year for its baseline, inconsistent with the protection of the wetland.

Ecosystems Approach

11. As stated by the EBR in Dawber:
“Under an ecosystem approach, decisions are made by measuring effects on the system rather than on their constituent parts in isolation from each other. An ecosystem approach is inherently effects-based: what matters under an ecosystem approach is the overall consequence of human activity, rather than an assessment of particular human actions isolated from the effects of other actions affecting the same ecosystem. As the MOE SEV stipulates, one of the key features of an ecosystem approach is measurement of cumulative effects.”
12. Since 2000, six PTTW’s have been issued for watertakings from the Leitrim Wetland. Golder has data dating back to 1987. Notwithstanding the availability of the baseline data necessary for a cumulative impact assessment of the effect of the massive watertakings starting in 2003, that data has not been produced and the assessment has not been undertaken. It is not reasonable to issue a PTTW based on this proposal without assessing the potential cumulative ecological consequences.

Precautionary Approach

13. In *Dawber*, the ERT reiterated its previous jurisprudence in respect of the precautionary approach:

“A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be.”

14. The environmental risk that has not been adequately assessed, or has not been assessed at all is threefold.
- a) Assessment of the cumulative impact of historical water takings is inadequate,
 - b) Assessment of the short term and long term impacts is inadequate, and
 - c) the long term impact on housing on the remaining portion of the wetland has not been assessed at all.
15. In order to assess the absence of environmental harm, the instrument holders would have to provide a proper hydrogeologic assessment, together with a hydro-ecologic assessment of the impact of the cumulative and future water takings on the wetland. The hydro-ecologic assessment would include assessment by botanists of the impact of the water takings on plants, including rare, uncommon and endangered species, fish biologists, herpetologists, ornithologists and landscape ecologists. Peat wastage and its implications for the release of greenhouse gases and mercury would also have to be assessed. A decision to grant a PTTW in the absence of a precautionary assessment is not reasonable.
16. We have noted the reference to the need for biological assessment in the Groundwater Monitoring Report, Environmental Monitoring Program October 2003 to March 2008, Findlay Creek Village, Ottawa, April 2008. At page 24 of this report, Golder states:

“Observations in 2006 and 2007 by Golder biologists conducting a photo monitoring program in the wetland areas, as described in the EMP and required by the Fisheries authorization have not indicated adverse affects. Monitoring of vegetation within the wetland is ongoing as directed by the Wetlands Advisory Committee.”

What Biologists? What photographs? What did they do? When did they do it? How did they do it? Where are their field notes and report? Did these biologists notice that wiped out a stand of 120 year old cedars?

17. On August 28, 2008 Albert Dugal forwarded his comments, which you have received. The Alliance and Sierra specifically adopt Section C, Damage to Plant Communities as a Result of Issuances of PTTW's and Section 1 Destruction of Potential SARA and OESA 2007 Species Habitat. Plant communities have sustained catastrophic damage in the areas of the wetland where construction has proceeded and significant ongoing damage has been done to the remaining portion of the wetland.
18. In further communication from Mr. Dugal to us, he has confirmed that, regarding his Comments under "C. Damage to Plant Communities as a Result of Issuances of PTTW's" some of the rare plants which were restricted to the part of the wetland that was flooded which were obliterated are **Canada Rush (*Juncus canadensis*) and Dark-leaved Willow (*Salix myrsinifolia*)**. Regionally Significant plants that occurred only in the unprotected parts of the wetland that were obliterated include **Downy Willow-herb (*Epilobium strictum**)**, **Spiny Coontail (*Ceratophyllum echinatum**)**, and **Basket Willow (*Salix purpurea*)**. Several uncommon plants, restricted to the unprotected parts of the wetland, have, due to developer activities in 2007 – 2008, likely been extirpated namely **River Cyperus (*Cyperus rivularis*)**, **Strigose Cyperus (*Cyperus strigosus*)**, **Red-sheathed Bulrush (*Scirpus microcarpus*)** and **Bottle Gentian (*Gentiana andrewsii*)**.

Provincial Policy Statement, 2005

19. In *Dawber*, the ERT held that a director must consider all laws in making a decision on a proposal for an instrument. In that case, the Director failed to consider the common law rights of the landowners. The ERT found that this was not reasonable.
20. With respect to the submission made in relation to proposal 010-1607, the Planning Act requires that the decisions of all Ministries in respect of any authority that affects a planning matter shall be consistent with the provincial policy statements that are in effect on the date of the decision. Provincial Policy Statement 2005 prohibits development within a wetland or within 100 metres of a wetland. This PTTW is intended to permit residential development within a wetland. Permitting what is expressly prohibited is not consistent with the prohibition.
21. We understand that the proponent has told you that the Ministry of Natural Resources (MNR) and the South Nation Conservation Authority have written off the portion of the Leitrim wetland which is being developed.
22. We enclose for your assistance copies of the cross-examination of Anda Rungis of the MNR Kemptville office. It has been clearly established that while Ms. Rungis and others in the Kemptville office of the MNR may have been compliant in the development plan, MNR corporately has continued to represent that the boundaries of the wetland are as evaluated in 1989 and 1991. Development is taking place within

these evaluated boundaries. We enclose a copy of the transcript of this cross-examination and exhibit # 14 for your review.

23. We also rely on the affidavit of Erwin Dreesen sworn April 29, 2008 and filed with the ERT. This affidavit explains, in paragraphs 6 and exhibit B the motive for the complicity of the SNC. You have this affidavit as you were a party to this proceeding.

Bad Science

24. According to the SEV, the Ministry will use science that meets the demanding standards of the scientific community.
25. We are enclosing a copy of the Report of Dr. Fred Michel, P. GEO for your review. This report establishes that the hydrogeological reports of Mr. Smolkin are biased and replete with significant errors and omissions. Pumping has drawn down the water level in the wetland, more pumping will continue to draw down the water level in the wetland, the drawdowns have not been temporary, significant damage to the hydrogeology of the wetland has already occurred and further significant damage to the wetland will inevitably result from the issuance of a new permit.
26. While adverse effects upon wetland ecology can be predicted as a result of the drawdown to date, no hydro-ecological report has been provided by Golder to define the nature and extent of the damage to wetland ecology. No report on the effect of the PTTW's to date on surface water has been prepared. No prediction with respect to the effect of further water taking on surface water (Findlay Creek) has been made.

PTTW Manual

27. We have reviewed the PTTW Manual. We are in agreement with Golder that this proposal falls into Category 3, within the meaning of this policy document. Although we are not aware that the ERT has specifically considered this manual, it is evident from the Dawber decision that Ministry policies are not just window dressing. Decisions must reflect their requirements.
28. This manual requires that in a Category 3 proposal, the applicant must proceed with a detailed hydrogeological study prepared by a qualified person which will undergo a full scientific review by the Ministry. Clearly Mr. Smolkin is not a qualified person. It is clear from Dr. Michel's report that his work is severely flawed.
29. The manual also states that if data are insufficient to predict the extent and amount of interference, but the potential for interference exists, appropriate conditions can be required. The trigger mechanism is one way of addressing this issue. The manipulation of the trigger mechanism by Golder has been documented by Dr. Michel. No such condition can be effective in this case.

30. We enclose for your review, the affidavit of Erwin Dreessen sworn June 13, 2008. The proponents have not cross-examined Mr. Dreessen on this affidavit or filed responding materials. Your attention is directed to paragraphs 33 to 42 which deal with the proponent's record of compliance with environmental laws, to the extent that it is known to us. This proponent is ungovernable. We enclose the text of the affidavit and exhibits X, Y, Z, and AA to GG which are the documents relevant to compliance.
32. It is not reasonable to issue a PTTW to an applicant who has repeatedly demonstrated flagrant defiance of environmental laws.

Conclusion

32. For all of these reasons, the Alliance and Sierra submit that this permit application should be denied.

Linda McCaffrey Q.C.