

October 16th, 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: 010-4670 (amending 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. for the PTW as amended.
2. This proposal, together with 010-4134 is for an amended permit to take water from a trench sump, drainage ditch modification area and the Findlay Creek extension area for the purpose of construction dewatering up to 30,020,800.00 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.

4. 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.
 4. The identification, protection and conservation of ecologically sensitive areas or processes.
5. 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,
 - (c) Increased accountability of the Government of Ontario for its environmental decision-making.
6. 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.
7. The particular principles at play in this proposal are the following:
 - (a) **Principle #1: The Ministry will use an ecosystem approach that considers both water takers' reasonable needs for water and the natural functions of the ecosystem.** The ecosystem approach recognizes the physical, chemical and biological components of water resources and their interrelationships. Water takings will be managed to protect the natural functions of the ecosystem.
 - (b) **Principle #3: The Ministry will employ adaptive management to better respond to evolving environmental conditions.** ... Applied to the PTTW program, it comprises evaluating permit applications in light of available information on potential impacts, setting of permit conditions, monitoring, evaluating, and adjusting of water taking and permit conditions, as necessary.
 - (c) **Principle #4: The Ministry will consider the cumulative impacts of water takings.** Where relevant information about watershed/aquifer conditions exists, (e.g. water availability and potential impacts to the

environment and other uses) the Ministry will take this into account when reviewing individual permit applications.

(d) **Principle #6: The Ministry will promote public and local agency involvement.** The Ministry values public and local agency involvement in the process of managing water takings at the local level.

8. Section 4 of the Water Taking and Transfer Regulation is applicable. In particular it provides:

(a) “In evaluating an application, the Director must consider the following matters....:

1. Natural functions of the ecosystem, including: potential impact on: the natural variability of water flow or water levels, minimum stream flow, and habitat that depends on water flow or water levels; and interrelationships between groundwater and surface water, including impact or potential impact on water quality and quantity.

(b) The above requirements apply to all water takings to the extent that they are relevant and information is available to the Director. Typical information sources are:

1. Data and information submitted by the applicant including scientific evaluation and studies prepared by a qualified person.

2. Data and information provided by other agencies that were notified and consulted.

9. In *Dawber v. Ontario* (Ministry of the Environment) [2007] O.E.R.T.D. No. 25 the Environmental Review Tribunal (ERT) inquired whether and to what extent the Director’s decisions considered, incorporated and reflected relevant laws and policies. The ERT stated that proposals for Class 3 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.

10. 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.

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

12. 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.

Ecosystem Approach

13. 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.”

14. 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 water takings starting in 2003, that data has not been produced and the assessment has not been undertaken. Moreover, it has come to our attention that another permit to take water amounting up to 32, 400, 000 Litres/ total over a period of 274 days was issued on the 14th of July 2008 without a prior consideration of the cumulative impact thus far. Given Dr. Michel's conclusions, this only aggravates the already serious cumulative harm caused to the ecosystem and it is not reasonable to issue yet another PTTW based on this proposal without assessing the present and potential cumulative ecological consequences.

Precautionary Approach

15. 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.”

16. Environment Canada (http://www.ec.gc.ca/econom/booklet_e.htm) provides guidelines as to the interpretation of the precautionary principle:

- (a) Sound scientific information and its evaluation must be the basis for applying the precautionary approach, particularly with regard to (i) the decision to act or not to act (i.e., to implement precautionary measures or not), and (ii) the measures taken once a decision is made.
- (b) A valid and reasonable scientific information base underpins the application of the precautionary approach. Before the precautionary approach can be applied, scientific data relevant to the risk must be evaluated through a sound, credible, transparent and inclusive mechanism leading to a conclusion that expresses the possibility of occurrence of harm and the magnitude of that harm (including the extent of possible damage, persistency, reversibility and delayed effect).
- (c) Scientific advice should be drawn from a variety of sources and from experts in relevant disciplines in order to capture the full diversity of scientific schools of thought and opinion. Scientific advisors should give weight to peer-reviewed science and aim at sound and reasonable evidence on which to base their judgments.
- (d) A greater degree of transparency, clearer accountability and increased public involvement are appropriate. Public involvement should be structured into the scientific review and advisory process, as well as the decision-making process.

17. 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 of housing on the remaining portion of the wetland has not been assessed at all, and

(d) The significance of further disturbance of the core wetland has not been assessed.

18. 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.

19. 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 the catastrophic damage to the wetland due to flooding?

Public Participation

20. 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.

21. 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 by our experts. 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. It is

evident from the above that the Ministry has clearly allowed the proponent to contravene both parts of section 2(3) of the EBR s set forth in our para. # 5 above.

22. 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. Furthermore, as stated below, the precautionary principle demands transparent public participation, which only enhances the obligation "to promote public and local agency involvement" imposed by principle 6 of the PTTW manual.

Other Considerations - Bad Science

23. According to the SEV, the Ministry will use science that meets the demanding standards of the scientific community.
24. We reiterate that Mr. Dugal has already reported on damage to rare and uncommon plants. Several rare and regionally significant species have been extirpated by development that has already taken place in the wetland and flooding in the northeast section of the wetland.
25. Dr. Clarke Topp, P. Ag., a leading Canadian soil scientist, has reported that:
- (a) devastating groundwater drawdown causing degradation of the core portion of the wetland that was supposed to be protected, has occurred.
 - (b) at a site 50 metres inside the core portion of the wetland, peat and vegetation are subject to adverse environmental stress caused by construction drainage.
 - (c) any further watertaking along the Findlay Creek Extension at the northern boundary of the protected portion of the wetland is likely to initiate rapid consequential drainage.
 - (d) because the soils all along the Findlay Creek extension are highly permeable, there will be ongoing drawdown of groundwater as a result of the construction of the extension.
 - (e) Golder has misinterpreted its own data in concluding that the protected portion of the wetland has not been adversely affected by historical water taking and will not be adversely affected by future significant water taking. Dr. Topp has concluded that further degradation will occur if further watertaking is permitted.

26. Enclosed is a copy of the affidavit of Dr. Topp with respect to his qualifications. We have included this affidavit because Tartan has disputed Dr. Topp's qualifications and accreditation.

27. Dr. Fred Michel, P. Geo has reported that:

- (a) Golder has failed to develop an overall long term plan despite repeated takings over the years.
- (b) Surface water diversion seems to have been undertaken without a permit.
- (c) Sedimentation ponds have been constructed in the core wetland.
- (d) Monitoring data is missing for boreholes that might trigger alarms.
- (e) The revised permit would increase water taking for 10 years even though the new construction would reportedly be completed by the end of 2009.
- (f) The monitoring network has been altered to eliminate monitoring points that have triggered alarms in the past.

Provincial Policy Statement, 2005

28. 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.

29. 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 adjacent to a wetland. This PTTW is intended to permit residential development within a wetland. Permitting what is expressly prohibited is not consistent with the prohibition.

30. 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 Leitim wetland which is being developed.

31. 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, the MNR has never undertaken a re-evaluation of the scientifically

determined boundaries of the Leitrim Wetland that were established by them in 1989 and 1991. Development is now taking place within these evaluated boundaries. We enclose a copy of the transcript of this cross-examination and exhibit # 14 for your review.

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

Other considerations – PTTW Manual

33. We have reviewed the PTTW Manual. We are in agreement with Golder that this proposal falls into Category 3, designated as being one of “relative higher risk” 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.

34. 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.

35. The PTTW manual 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 and Dr. Topp. Trigger mechanisms are inadequate and have failed to protect the wetland to date.

36. 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.

37. It is not reasonable to issue a PTTW to an applicant who has repeatedly demonstrated flagrant defiance of environmental laws.

Conclusion

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

Linda McCaffrey Q.C.

Enclosures :