

**ENVIRONMENTAL REVIEW TRIBUNAL**

BETWEEN:

**THE GREENSPACE ALLIANCE OF CANADA'S CAPITAL  
and THE SIERRA CLUB CANADA**

Applicants

-and-

**PETER TAYLOR, DIRECTOR, MINISTRY OF THE ENVIRONMENT,  
FINDLAY CREEK PROPERTIES LTD. and 1374537 ONTARIO LIMITED**

Respondents

**AFFIDAVIT OF ALBERT DUGAL**

**Sworn June 11, 2009**

I, Albert Dugal, of the City of Ottawa, in the Province of Ontario, make Oath and Say:

1. I am a botanist who has specialized in the identification of vascular plants. Prior to my retirement in 1997, I was a collection specialist with the Canadian Museum of Nature (formerly known as the Canadian Museum of Natural Sciences). I did some collecting and identifying of plants in the Leitrim Wetlands in the 1970's. However, much more intensive work – inventorying of vascular plant species in various plant communities, descriptions of plant communities, collection and identification of vascular plants – took place during the period from 1989 to 1993. I recorded these findings in Field Notebooks, which I still have and in Collection Books which have remained with the museum. In the 1990 to 1993 period, I wrote three extensive articles on the Leitrim Wetland which were published in Trail & Landscape magazine. After retiring from the museum, I maintained my interest in wetlands and participated in a bioblitz of the Leitrim Wetland in 1999. The bioblitz was organized by the Biodiversity Institute. The bioblitz team consisted of a multidisciplinary group of experts assembled to gather further data to address specific gaps in the biological knowledge of the Leitrim Wetland. Vascular plants, mosses, lichens, insects, fungi, snails, amphibians, reptiles, mammals and birds were inventoried. The results of the bioblitz and inventories of vascular plants and other groups of plants and animals which were identified previously were published in Trail and Landscape magazine in 2001 (Vol. 35, No. 1, Pages 16 – 72).

2. Over the years, I have advocated for the protection of the Leitrim Wetland and have made submissions to various governmental organizations responsible for the protection of the Leitrim Wetland.

**Department of Fisheries and Oceans Authorizations**

3. One of the regulatory authorities to which I have made representations is the

Department of Fisheries and Oceans (DFO), which administers the *Fisheries Act*. It is my understanding that the *Fisheries Act* prohibits any person from carrying on any work or undertaking that results in harmful alteration, disruption or destruction of fish habitat except as authorized by the Minister of Fisheries and Oceans.

4. It is also my understanding that certain authorizations have been granted to the City of Ottawa for the harmful alteration, disruption or destruction of Findlay Creek arising from the Findlay Creek Village Stormwater Facility, and that this Authorization is conditional upon implementation of mitigation and compensation measures as specified in the authorization. The authorizations are based on an “adaptive” Environmental Management Plan (EMP) that waits for harm to happen and then requires action to be taken.

5. Attached as **Exhibits A and B** to this affidavit are true copies of authorizations granted to the City of Ottawa by DFO on October 25, 2003 and June 27, 2006. The authorization expired on October 31, 2008, but has since been extended.

6. After the 2003 DFO authorization was issued, in 2004 I submitted a petition to the Auditor General of Canada (Petition 100) pursuant to the Auditor General Act. In the petition, I raised several concerns and requested answers from the Ministers of Fisheries and Oceans and Environment Canada as well as others. A true copy of the questions and concerns in Petition 100 relating to DFO and EC are enclosed as **Exhibit C**. In 2007, a second follow-up petition was submitted to the Auditor General (Petition 100B). This petition focused solely on DFO. A copy of Petition 100B is enclosed as **Exhibit D**.

#### **Narrow view of DFO to fish habitat protection**

7. It should be noted that the self-imposed mandate of DFO is very limited. In response to the 2007 follow-up petition to the Auditor General’s Office, DFO advised that:

The destruction of plant communities, dewatering of a wetland and the state of the plugs, beyond what could be construed as fish habitat, does not constitute a harmful alteration, description or destruction of fish habitat and thus is not a contravention of the Fisheries Act.

8. This statement was made in the Minister of Fisheries and Oceans’ response to my questions about why DFO had not taken steps to enforce the adaptive EMP when it was obvious that there had been breaches of the conditions resulting in harm to the wetland. I posed the questions in a supplement to my 2004 petition to the Auditor General (Petition 100B). **Exhibit E** is a true copy of the response of the Minister. This response is dated October 12, 2007. The response to which I refer is Response B5 which can be found at the bottom of page 6.

9. This narrow view explains, in part, the failure of DFO to protect Findlay Creek. Dr. Lean points out in his report, a true copy of which is in Tab 23 of the Application for

Leave to Appeal Permit, that dewatering the wetland will profoundly and adversely impact Findlay Creek by releasing stored nutrients and toxic metals, and will result in highly eutrophic conditions with elevated algal blooms. I have seen algal blooms in Findlay Creek. It appears that DFO has not considered any of the adverse effects that dewatering the wetland will inevitably have on fish habitat.

10. It should also be noted that the above answer is markedly different from the answer given by DFO in 2004 to a similar question: “In spite of the enormous uncertainty, why did DFO accept the inadequate Adaptive Environmental Management Plan put forth by the proponent?” The response at that time was:

Regarding the Adaptive Environmental Management Plan: In the context of the Environmental Assessment conducted for this project, Adaptive Environmental Management applies to mitigation measures which are implemented to protect fish habitat and the environment, specifically to protect the Leitrim Wetland and Findlay Creek. It allows flexibility for, and provides assurance of, the implementation of corrective measures should there be a failure of those mitigation measures initially put into practice to protect the wetland and creek. This process has been supported by the Federal Authorities and the City of Ottawa will monitor its implementation.

The above quote can be found as the response to question 5 on page 4 of DFO’s response in **Exhibit C**. The difference between these answers – and particularly the recognition in 2004 of a duty to protect the wetland – suggests that later DFO purposefully limited the scope of its mandate in regards to the Leitrim Wetland.

**DFO has received and ignored input from other government departments and citizens cautioning against an authorization**

11. Since 1994, DFO has received expert evidence from independent experts, government departments, and civil society suggesting that developments in the Leitrim area will have a major permanent impact on the Leitrim Wetland. I have summarized the salient aspects of this advice below.

Concerns of Environment Canada, Independent Experts, and Experts from Civil Society

*Recommendations of Environment Canada - 1993 Letter*

12. Prior to authorizing destruction of fish habitat in 2003, I sent DFO the expert recommendations made by Environment Canada (EC) to the National Capital Commission (NCC) in the context of an environmental assessment of the proposal to develop portions of the Leitrim Wetland.

13. In the letter, EC takes the position that development in and near the Leitrim Wetland is ill advised. Most tellingly, the letter states EC’s position on the expected impacts:

The development will destroy several wetland communities, and displace their associated plant and animal populations. We consider the resultant loss of wetland area and function to be a **MAJOR PERMANENT NEGATIVE IMPACT** and recommend that the entire wetland be protected and that an adjacent zone of 120 m be secured around the wetland. (emphasis in the original)

Later on in the letter, EC writes:

In summary, the CWS considers that the net environmental effects of the proposed development on Leitrim Wetland are unacceptable.

**Exhibit F** is a true copy of this letter. The above quotes can be found on pages 2 and 3 respectively.

14. To the best of my knowledge, no significant changes were made to the proposed development plan on Leitrim Wetland to meet Environment Canada's concerns.

15. In my 2004 petition to the Auditor General, I asked the Minister of the Environment why EC had changed its stance on protecting the Leitrim Wetland. In response, the Minister was careful not to say that their position has changed. Instead the Minister stated that:

It was incumbent on the NCC, as the responsible federal agency, to consider EC's advice in making its decision. Although EC is responsible for providing advice within the federal government on ways and means of addressing the requirements of the Policy, it has no authority to ensure compliance with the Policy.

**Exhibit C** is a true copy of the Minister's response. The above quote is on page 2, of the Ministry of Environments response, answer 1.

16. On pages 2 and 3 of the 1993 letter, EC also highlighted that the headwaters of Findlay Creek are in the wetland and that the creek is dependent on cold groundwater discharge from the wetland to provide coldwater fish habitat. This is particularly significant since Findlay Creek is one of the few cold water streams in the area that can support a trout population.

*Environment Canada's Recommendations – 1994 Letters*

17. In 1994, EC sent several letters to the NCC (with copies to DFO) advising that reports prepared by Golder Associates (and the associated company of Cummings Cockburn Ltd. (CCL)) were inadequate. In particular, the assessment of water table drawdowns in the wetland were deemed to be flawed. The letter also highlighted the important fact that the fringe of wetlands are as ecologically significant as the core. In fact, it was said that the fringe might be more ecologically significant than the core.

These statements can be found on page 4 of both of Dr. Nuttle's reports in **Exhibit G** which contains true copies of the letters sent by EC on October 27<sup>th</sup>, 1994 and December 14<sup>th</sup>, 1994.

18. EC's 1994 criticisms of Golder's methodology and their inadequate data base has been echoed ever since. The lack of credibility, inadequacy, and unfounded statements in work conducted by Golder Associates and CCL are consistent themes in the assessments of work conducted regarding the Leitrim Wetland, a fact that seems to have been overlooked by DFO.

19. EC's concerns regarding Golder's assessment and those raised by the independent reviewer that EC hired (Dr. Nuttle), were confirmed for me by Dr. Fred Michel of Carleton University and Dr. Clarke Topp of Agriculture Canada in letters from the year 2000. Both scientists challenged the hydraulic conductivity assessment made by the consultants and challenged the consultant's position that draining water for construction would not lower the water table in the wetland. **Exhibit H** is a true copy of the letters provided by both Dr. Michel and Dr. Topp.

20. Dr. Michel provided an additional assessment of CCL's report. In it, Dr. Michel concluded that CCL did not fully understand the surface and groundwater systems in the Leitrim Wetland. Specifically, the instrument holder's contractor did not adequately assess the bedrock and the possibility that it would be fractured and pervious to water. **Exhibit I** is a true copy of this letter from September 20<sup>th</sup>, 2000.

21. Michael Woodley, P.Geo. provided an assessment that came to very similar conclusions. Mr. Woodley highlighted that there are not enough data on the characteristics of the bedrock in the area or its hydraulic conductivity. In his opinion, there was also insufficient data on the groundwater flows in the area. **Exhibit J** is a true copy of this letter.

22. All these letters were sent to DFO prior to their decision to authorize destruction of fish habitat in 2003.

23. In 1995, the NCC, the lead agency in the environmental screening report, sided with the proponent's consultants, essentially ignoring the 1994 express concerns of EC.

#### Explicit and direct advice from NRCan, Agriculture Canada, and Independent Experts

24. In 2002 and 2003, Natural Resources Canada (NRCan) provided direct and explicit advice to DFO regarding the plan to develop the Leitrim Wetland. Much of the advice provided by NRCan echoed the negative assessments made by Environment Canada and other experts as outlined above.

25. From the letters sent by NRCan to DFO it is obvious that neither Golder nor DFO provided answers to NRCan's questions about the inadequacies of the development plan. In fact, it seems as though they acted to frustrate NRCan's ability to provide fully

informed advice.

26. The first letter sent by NRCan to DFO, on February 27, 2002, is the most instructive. Amongst other things, this letter lists the following deficiencies:

- the Golder report does not provide crucial calculations for the “finite element seepage model” which is key for assessing the report (p. 2)
- the Golder report uses inadequate measurements and does not take variations into account (p. 2)
- The reporting is flawed; there is improper documentation (p.2), the baseflow estimates are inadequate (p.3), and the values provided for water monitoring are misleading (p. 3)
- There are discrepancies and possible overestimates of baseflow (p.4)
- An improper model was used to calculate baseflow, and insufficient and improper data was used to calibrate the model (p.5)
- The hydraulic conductivity measures were insufficient (p.5)

**Exhibit K** is a true copy of this letter.

27. It would appear that these concerns were never addressed by DFO or Golder. Throughout 2002, NRCan sent two additional letters to DFO stating that the concerns outlined in the above letter were still outstanding. **Exhibit L** contains true copies of these letters.

28. Agriculture Canada also sent a letter to DFO in 2002 advising that the deficiencies in Golder’s testing and reporting had not been corrected and that information was still lacking. **Exhibit M** is a true copy of this letter.

29. Dr. Frederick W. Schueler, a herpetologist and specialist in molluscs, sent the Minister of Fisheries and Oceans a detailed letter outlining that the headwaters of Findlay Creek were home to a unique and easily disturbed form of mussel. There is no indication that his concerns were addressed by Golder or DFO. **Exhibit N** is a true copy of this letter.

30. Dr. Michel sent the Minister of Fisheries and Oceans a letter outlining deficiencies in the environmental assessment of the Leitrim Wetland development plan. The letter, from 11 July 2003, highlighted that proper baseline studies had not been conducted because they were attempting to establish a baseline at the same time as the environment was being altered by construction.

31. In his letter, Dr. Michel criticized the adaptive EMP which is supposed to work on a good faith, ad hoc, and reactive basis. An adaptive EMP waits for harm to happen and then requires action to be taken. It does not work with an instrument holder who is ungovernable and who provides false information. **Exhibit O** is a true copy of this letter.

32. I personally sent a letter to the Minister on 13 July 2003. It listed a number of errors in the environmental assessment screening report. **Exhibit P** is a true copy of this letter.

33. In 2003, I also wrote to EC and DFO, warning of the dangers of back flooding in the wetland. A copy of this letter is enclosed as **Exhibit Q**. As it turns out, my warning was justified, as the back flooding has resulted in significant damage to the wetland. Moreover, it would appear that back flooding via the control structure -- the method of choice for the developer to control table dropping -- does not work. As far as I can recall, I have not seen any mitigation suggestion that can effectively counter the expected water table lowering.

34. Finally, DFO, EC, MOE, and OMNR have all been sent copies of a very pertinent journal article about cumulative impacts on wetlands by Dr. T.C. Winter. **Exhibit R** contains a copy of this article.

35. The Winter article speaks of sloped and discharge wetlands, which are highly sensitive to drainage. The Leitrim wetland is both a sloped and a discharge wetland (a wetland whose existence is dependent on seepage and/or upwelling of ground water) and consequently very sensitive to drainage. In fact, one of the proponent's consultants, Cumming Cockburn, in a 1991 report, cited an instance of dramatic lowering of the water table in the wetland about 85 years ago. This was based on cores they had extracted from old Larch trees - one hundred and eighty years of tiny annual rings were followed by substantially larger ones indicating drier conditions (i.e. drop in soil water levels). They had some inkling as to the cause for they remark: "One possible scenario might have involved surrounding drainage efforts connected with agricultural activities -- for example changes to local groundwater table elevations, and the nature of groundwater upwelling". As no major climatic changes occurred at that time, the most plausible explanation for a drop in the overall water table is the deepening of Findlay Creek and various drainage enhancements completed ca. 1920. The water table lowering extended for at least 300 metres south of Findlay Creek.

36. The article also highlights how interconnected wetland systems are:

Because the hydrologic system is a continuum, any modification of the continuum will impact contiguous parts. Therefore, modification of the hydrologic system is a self-perpetuating process, because the solution to one problem generally creates a problem for the contiguous area, which in turn must be modified. The seriousness of the impact commonly is related to scale. One well or one landscape modification generally has only local effects, but multiple modifications or development can have extensive impacts.

As well as the effect on groundwater from surface features:

Draining water from groundwater discharge areas initially increases groundwater discharge because the hydraulic head gradients are increased. A detrimental impact that is likely to result is that the increased gradients could

increase seepage rates from nearby wetlands, and, ultimately, cause a regional lowering of the water table. It is also probable that the plant communities would change in a groundwater discharge wetland that is drained.

37. Despite the extensive advice provided by NRCan, Agriculture Canada, EC, independent experts, and myself, advising that the plan was severely deficient, DFO persisted in authorizing the project as proposed by the proponents. NRCan, EC, and Health Canada eventually signed off on the project. NRCan did so on the basis that the proponent (City of Ottawa) would guarantee compliance with the “adaptive” EMP. (**Exhibit O**, page 1, paragraph 2.)

### **DFO has condoned the ongoing non-compliance of the instrument holders**

38. My follow up petition to the Auditor General (Petition 100B) (**Exhibit D**), and the answers received (**Exhibit E**), provide a good overview of the ways in which the adaptive EMP has failed to protect the wetland and DFO’s condonation of non-compliance.

### **Conditions of the DFO Authorization have been breached**

39. The DFO authorization for the destruction of fish habitat has many conditions. These conditions have been breached on numerous occasions. By way of summary, I have listed some of the conditions in the 2003 permit (ongoing) (**Exhibit A**). I have also listed examples and evidence of the breach of conditions. Photographs referred to are in **Exhibit W** and **Exhibit D**.

- Condition 2.1: “Findlay Creek...shall be reconstructed using the principles of natural design... .”
  - In the section of the Findlay Creek Extension (FCE) through which Findlay Creek now flows, there are no pools, riffles, riparian edge treatments, log crib retaining systems, etc. that are characteristic of natural design. Furthermore, heat retaining stone blocks have been allowed in certain parts of the yet to be connected part of the FCE. (Exhibit W, photographs 21 – 24).
- Condition 2.2: “The construction must comply with those criteria as identified within this Authorization. Harmful alteration, disruption or destruction of fish habitat other than that specifically identified within this Authorization is not permitted.”
  - Although it is not specifically identified in the authorization, a large marsh partially in the “protected” portion of the wetland, has been altered. This marsh has fish, waterfowl, potential Threatened Spiny Softshell (nearby sighting reported 2007) and potential Threatened Blanding’s Turtle habitat. Although berm construction in the marsh is specified, it would only affect a small part of the marsh, which is also maintained by upwelling. (Exhibit



W, photographs 1 – 4.)

- Condition 3.2: “Culverts installed on Findlay creek shall be installed such that they do not pose a barrier to fish migration...”
  - According to South Nation Conservation Authority (SNCA) (personal communication) one of the culverts is a barrier to pike migration.
- Condition 3.10: “Sediment and erosion control measures shall be implemented prior to work and maintained during work phase” and Condition 3.10.1: “All sediment and erosion control measures shall be inspected daily to ensure that they are functioning properly and are maintained and/or upgraded as required.”
  - This violation continued for years and is probably ongoing. Enclosed are several photographs of missing or improperly maintained erosion control measures. (Exhibit D, photographs 12 – 22).
- Condition 3.10.2: “If the sediment and erosion control measures are not functioning properly, no further work shall occur until the sediment and/or erosion problem is addressed.”
  - This violation continued for years but work was never halted. There are several pictures enclosed that clearly show the siltation of Findlay Creek.
- Condition 3.11: “All in-water work shall be completed in the day by dewatering the work area and diverting and/or pumping flows around coffer dams placed at the limit of the work.”
  - There was no evidence of this kind of activity after October 26, 2007 when Taggart put a road and by-pass ditch through the continually inundated (fish habitat) section of the large marsh near Albion Road.
- Condition 3.11.1: “Existing stream flows shall be maintained downstream of the de-watered work area without interruption during all stages of the work. There shall be no increase in water levels upstream of the de-watered work area.”
  - This condition was violated early in 2004.
- Condition 3.11.2: “Diversion channels shall be lined with appropriate material to prevent the suspension and transport of sediment in the creek system.”
  - This condition was violated several times in 2004.
  - There were also violations of conditions 3.11.5. & 3.11.6. dealing with sediment laden discharge water and filter bags in 2006. See enclosed photos.
- Condition 3.11.9: “The earthen 'plugs' shall be maintained during all construction phases and shall be removed only after the newly constructed channel and riparian vegetative cover is established and the site stabilized before permanent flows are directed to the channel.”
  - This was not done in the first part of the Bypass ditch (now referred to as the FCE) before Findlay Creek and the Park Swale were diverted into it, a

serious violation that resulted in erosion and sediment being released into the creek.

- Condition 3.12: “A fish stranding program shall be implemented by a qualified inspector...and released alive immediately downstream of the work area.” and Condition 3.12.1: “A proposal describing the fish stranding program methodology shall be provided to Prescott District of Fisheries and Oceans Canada - Ontario Great Lakes Area for review and comment at least 7 days prior to implementation of these components of the Plan that may result in fish stranding.”
  - In response to Petition 100B (Exhibit E, 4a response), DFO states that "it is aware of the existence" of documents which reference fish stranding reports produced by the instrument holders' consultants but then states: "Please note DFO does not have copies of the documents authored by Golder Associates listed above". Not only has the proponent violated the notification requirement but DFO didn't acquire copies of the documents to see:
    - if the stranding procedures were correct,
    - if there was a qualified environmental inspector involved, and
    - if the inspector selected by the proponent was acceptable to DFO.
  - Fish strandings continue and have occurred very recently, as reported by residents of the Findlay Creek subdivision.
- Condition 3.13: “Construction debris and litter shall not be allowed to enter water or left on the shoreline.”
  - There are ongoing violations of this condition, as documented in the enclosed photos. (Exhibit W, photographs 7 – 9)
- Condition 3.17: “To limit surface and ground water seepage and maintain wetland water level in the Leitrim Wetland, a wetland berm, water control structure, [etc...] shall be installed.”
  - Despite these conditions, the water level has been altered.
- Condition 4.1.1: “The Environmental Inspector must be present on site as follows: part-time for riparian vegetation removal (at commencement and daily); full-time during in-stream works.”
  - There is no evidence of this person being present for riparian vegetation removal. Removal of riparian vegetation is evident from the photos, but, also in DFO's statement that: "To the best of DFO's knowledge there is no record in our files of notification with respect to dewatering and diversion techniques (your question 22a) or to vegetation removals (your question 25a)". (See Response to Petition 100B, Exhibit E)
- Condition 4.9: “Water levels within the Leitrim Wetland shall be monitored during construction. If water levels fall below natural levels... a plan shall be developed and implemented to restore the water level.”
  - The water level has been lowered and there has been no viable plan

developed or implemented to restore the natural water level.

40. I have notified DFO of all breaches that I am aware of, but there are doubtlessly more. To date, in spite of numerous, serious violations of the DFO authorization and some misleading monitoring reports, DFO has only issued one Occurrence Report (May 30<sup>th</sup>, 2006) to the developers. **Exhibit S** is a true copy of this report.

#### Commitments Made by DFO Minister have been Breached

41. A letter sent by DFO Minister Geoff Regan to Elizabeth May on April 22, 2004 also illustrates DFO's condonation of ongoing harm to the Leitrim Wetland. A copy of the letter can be found in **Exhibit T**. In it, the Minister made several commitments that were all reneged. Two of these commitments are highlighted below.

42. First, the Minister stated that:

Staff will be visiting the construction site to ensure that mitigation measures are being implemented and will determine if there have been any fish kills due to construction activities. Compliance monitoring will continue through the construction phase of the project.

This commitment has not been met. Construction near Findlay Creek began in late 2003. When asked, in Petition 100B, when compliance monitoring actually began, DFO responded: "the first proponent monitoring report on file is dated March 17, 2004". A copy of the report, obtained under ATIP, indicates that this was the thirteenth such report, meaning that DFO did not have the other 12. This is hardly a sign of due diligence. It would appear, from the response to Petition 100B, that: a) the first construction site visit took place on December 15, 2005, about 2 years after construction started; and b) the Minister's directive (April 22, 2004) was ignored by the Prescott Office. The first visit was initiated by complaints from environmentalists not due diligence on the part of DFO. The very infrequent site visits by DFO and its e-mails encouraging voluntary compliance did little to stem the tide of DFO Authorizations violations, which continue to this day.

43. Second, the Minister stated that:

The City of Ottawa is required to establish a technical advisory committee (TAC) to oversee the implementation of the environmental management plan and monitoring of water levels and associated mitigation measures. I believe that it is important that local citizens be represented on the committee and that staff provide direction to the City to ensure that there is representation from local non-government organizations. I expect the City to establish the committee this spring.

This commitment has also been breached. Condition 5.10.1. of the DFO Authorization states: "The technical advisory committee shall be established within 6 months of construction". It would appear that construction near Findlay Creek started late 2003-

early 2004. In a response to a question in Petition 100B, DFO stated that the Technical Advisory Committee (TAC) was formed in January 2007, three years late and after a great deal of damage had been done to the Leitrim Wetland. Also, the City has not approached any of the local NGO's that have a good knowledge base, about sitting on such a committee. (DFO lists the TAC members as being: "City of Ottawa, South Nation Conservation, Tartan Land Development, IBI, Golder Associates, Ontario Ministry Natural Resources, National Capital Commission, Environment Canada, Ontario Ministry of Environment, and Transport Canada".) This was another serious violation of the DFO Fisheries Act Authorization.

#### DFO staff unwilling to provide copies of Extended Authorizations

44. On December 11, 2008, I wrote to Georgina Williston, Fish Habitat Biologist in the Prescott office of DFO to apprise her of my concerns with respect to ongoing violations of the authorization and to inquire about its status. Ms Williston waited until January 20, 2009 to respond at which time she confirmed non-compliance and advised that the authorization had been amended to extend the date to December 31, 2010. She refused to provide me with a copy of the amended authorization or any of the reports or submissions provided to support it. I was told that I could request this information under the Access to Information and Privacy Act (ATIP). **Exhibit U** is a true copy of my December 11, 2008 email and the January 20, 2009 reply.

45. I have been advised by Andrew Brown, a law student working in the Ottawa office of Ecojustice this summer, that he also contacted DFO to request a copy of the current authorization on May 26, 2009. Stuart Niven, a Senior Habitat Biologist in the DFO Prescott office also declined to provide him with a copy of the DFO authorization. Mr. Brown was also told that he could request a copy of the authorization through the ATIP process. from my experience with Petitions 100 and 100B I have learned that it can take months to obtain documents that way.

46. I understand that DFO visited the site several times in 2006 and eventually issued an occurrence report, but I am not aware of any other steps that have been taken by DFO or the instrument holders in order to ensure that the authorization is complied with.

#### **Peter Taylor was informed of DFO's irresponsible stance on Protecting the Leitrim Wetland**

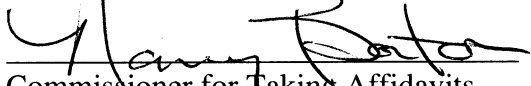
47. Peter Taylor, the Director, Ministry of Environment, is aware that there have been violations of the DFO authorization.

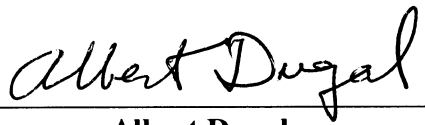
48. On August 28, 2008, I submitted extensive comments on the original proposal for a ten year permit to take water. Amongst other things, my comments included much of the information that I have set out in this affidavit. **Exhibit V** is a true copy of my comments. My comments on pages 4 – 8 and 12 – 13 are particularly relevant.

**Conclusions**

49. DFO has taken a very irresponsible stance in regards to fish habitat in the Leitrim Wetland. They have taken a narrow focus of what constitutes fish habitat and have ignored credible and ample evidence that developments in the Leitrim Wetland will harm fish and mollusc populations. They have been aware of ongoing violations and have done little about it. The adaptive EMP requires an instrument holder that operates in good faith and an agency that properly monitors them. Neither are present in this case.

50. DFO has lost all credibility on this file. The Director must not be allowed to rely on DFO's compromised position to authorize further water takings.

**AFFIRMED BEFORE ME** at the City of )  
Ottawa, in the Province of Ontario )  
this 11<sup>th</sup> day of June, 2009. )  
 )  
Commissioner for Taking Affidavits )

  
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**Albert Dugal**

