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File No. T977241

VIA EMAIL

Vice-Chair Muldoon
Environmental Review Tribunal
Suite 1500, 655 Bay Street
Toronto, ON M5G 1E5

Dear Vice Chair Muldoon:

Re: Case No. 09-031/09-032, Greenspace Alliance of Canada's Capital v. MOE

Further to the teleconference held on February 2, 2010, we are writing to advise that the parties in the above-referenced appeals (09-031 and 09-032) have reached a settlement agreement. This letter outlines the changes proposed to the Permit to Take Water ("PTTW") and to the Monitoring Program as a result of that agreement, and requests an order from the Environmental Review Tribunal ("Tribunal") confirming that the appeal has been withdrawn and approving the changes proposed to the PTTW and Monitoring Program.

Attached to this correspondence please find the following documents:

1. Appellants' Correspondence withdrawing the appeal on consent and without costs;
2. A copy of the PTTW showing proposed changes in redline;
3. A copy of the Monitoring Program showing proposed changes in redline; and
4. A map of the area affected by the PTTW illustrating new features referenced in the PTTW and Monitoring Program.

A brief review of the provisions in relation to which Leave was granted by the Tribunal is set out below, followed by a summary of the changes proposed on consent to the PTTW and the Monitoring Program.

Parameters of Leave Decision

The Tribunal granted partial leave in relation to three issues, as follows:

1. Surface water takings from Source 4 – Miscellaneous Pondered Areas;
2. Removal of trigger elevations from Monitors 03-10A and B;
3. Condition 4.8.

In relation to the first issue, the Appellants had raised concerns that surface water taking from “Miscellaneous Poned Areas” could negatively affect groundwater levels within the Provincially Significant Wetland. The Tribunal agreed that the assessment for Source 4 water taking to impact the PSW had not been well documented:

“...there is very little in the record about any studies that support takings from the Miscellaneous Poned Areas and nothing evident that assess their volume or potential impacts on groundwater recharge, flows in Findlay Creek or on the natural functions of the ecosystem...” (Tribunal Order Granting Partial Leave, July 29, 2009, pg. 26)

In relation to the second issue, the Appellants had objected to the removal of trigger elevations from Monitors 03-10A and B, because although they were located outside the PSW, they might be capable of providing “early warning” of potential groundwater lowering within the PSW. The Tribunal summarized the concern as follows:

“The focus has been exclusively on monitoring *in the PSW* and on trigger levels in those monitors, which is appropriate, and even if it remains so, information about the boundary areas, including reinstating triggers at Monitors 03-10A and B, might provide better information about the site. This might be a way to address the Applicants’ contentions about the impacts of future construction of the development and serve as an ‘early warning system’ of impacts in the PSW.” (Tribunal Order Granting Partial Leave, July 29, 2009, pg. 28, emphasis in the original)

The third issue addressed the lack of a definition for the term “adverse effects” in relation to which mitigation could be required by the Director. The Tribunal summarized the issue as follows:

“...there is no guidance in this condition to indicate to the Instrument Holders when it might be triggered. There is no indication of what types of adverse impacts the Director had in mind and what degree of impacts might be deemed ‘adverse’...” (Tribunal Order Granting Partial Leave, July 29, 2009, pg. 32)

The parties have reached a settlement agreement that addresses each of these issues. The basis of the agreement, and the proposed revisions to the PTTW and Monitoring Plan, are set out below.

Surface Water Taking from “Miscellaneous Poned Areas”

Over the course of extensive settlement discussions undertaken by the parties and their technical experts, it became evident that part of the Appellants’ concern over Source 4 water taking arose from a lack of precision in describing the nature and location of these takings in the PTTW. In order to address this issue, the parties have recommended that a definition be added for the term “Miscellaneous Poned Areas”, shown at pg. 2 of the proposed PTTW, as follows:

“Miscellaneous Poned Areas” means localized surface water located in any geographic area marked as a Future Stage in Figure MP1- Revision 1 that has ponded in depressions, ditches that have been isolated and excavations other than trench excavations for servicing.

Figure MP 1- Revision 1 shows the Future Stage areas demarcated using a black dotted line.

Once the area and nature of the takings were clarified, the Instrument Holders made groundwater elevation data available to the Appellants’ technical advisors for approximately six weeks,

through an internet portal, for review and analysis. As a result of that data review, the Appellants' technical experts concluded that water taking from Source 4 takings did not have the potential to negatively affect the PSW. As such, all parties are in agreement in relation to this issue. The conclusion of the Appellants' technical review is set out below:

"In conclusion, the FCE will continue to be the low point as far as water levels are concerned and the pumping of the "Miscellaneous Poned Areas" will not negatively impact the groundwater elevations in the PSW." (Report on the Review of Data for the Findlay Creek Development and the Effect on the Provincially Significant Leitrim Wetland, Dr. Fred Michel and Dr. Clarke Topp, February 2010)

Triggers 03-10A and B

The same process of data review and analysis by the Appellants' technical experts, described above, was undertaken in relation to the evaluation of the question of whether well nest 03-10A and B would provide "early warning" of groundwater elevation decline within the PSW.

The Director and the Instrument Holders took the position during the Leave Application that no "early warning" or protective benefit in relation to groundwater levels within the PSW would be provided by leaving a trigger in the well nest located *outside* the PSW. Following the data review period, the Appellants' technical experts reached the same conclusion, noting that use of a trigger in well nest 03-10A and B would not provide early warning of what would happen *inside* the PSW:

"In conclusion, the 03-10 monitors generally reflect changes (rises and falls) in water levels seen simultaneously in monitors from the wetland, but there has been some divergence in the last few years. This may be due to the effect of the berm, with water levels in the wetland rising more than that seen in the 03-10 monitors. The changes in water levels in the various monitors tend to be coincident and the 03-10 monitors would not provide an 'early' warning of what will happen within the wetland."

On this basis, the revised PTTW proposed by the parties does not reinstate a trigger for well nest 03-10A and B, but rather leaves this well nest within the monitoring network for information purposes. In addition, as noted below under "Additional Measures", the Instrument Holders have agreed on a voluntary basis to examine the *rate* of groundwater elevation decline during analysis of groundwater monitoring data, in addition to the amount that elevations are higher than the trigger. This additional step is intended to address the concern that elevations could fall below the trigger between weekly site visits for data collection and analysis. If the rate of groundwater level decline indicates that the level has the potential to reach the trigger elevation in less than one week, the frequency of data collection would increase accordingly.

The Instrument Holders have also agreed on a voluntary basis to install a new well nest just inside the east boundary of the PSW, opposite the Southeastern Future Stage. Unlike well nest 03-10A and B, this new well nest will be located inside the PSW and therefore will have a groundwater elevation trigger established, and approved by the Director, against which ongoing monitoring will be measured.

Condition 4.8

In the event that any short-term impact is noted in terms of lowering of groundwater levels within the PSW, the PTTW is structured to increase frequency of groundwater elevation monitoring and, if trigger levels are reached, to require that pumping cease.

The intent of Condition 4.8, in contrast, is to capture any potential long-term impacts that become evident when pumping is not taking place. (Any impacts noted while pumping is occurring would lead to the cessation of pumping under Condition 4.5).

Condition 4.8 of the PTTW provides the Director with the authority to require reporting and mitigation in the event that the Monitoring Program required by the PTTW indicates that an adverse effect is occurring or has occurred within the PSW or Findlay Creek. The parties propose adding the term “potential” to “adverse effect”, since reporting obligations are triggered before there is certainty as to whether the effect noted is adverse or not.

To provide greater certainty and clarity to Condition 4.8, the parties agreed upon a definition for the term “potential adverse effect”. The definition is set out on pg. 8 of the proposed PTTW and reads as follows:

“For the purpose of this condition 4.8, “potential adverse impact” is defined as follows:

- a) Reductions in groundwater elevations below the trigger levels in any monitors located within the PSW that are sustained for a period of one month after Source 1 pumping ceases;
- b) Reductions in dissolved oxygen measurements pursuant to Condition 5.9 greater than 20%, sustained over a period of three sequential sampling events;
- c) Increases in TSS at SW-3 of greater than 20% over that at SW-2, measured pursuant to Condition 5.10, sustained over a period of three sequential sampling events, and greater than 20 mg/L.”

The addition of this definition provides guidance to the Instrument Holder in relation to what impacts will be considered “potential adverse impacts”, triggering the application of Condition 4.8.

In addition to the proposed definition, the Instrument Holders and Director have agreed that in the event that Condition 4.8 is triggered, the Director will provide notice to the Appellants and an opportunity to comment on the submissions made by the Instrument Holder regarding proposed mitigation.

Finally, the parties have also proposed to add a line to Condition 4.14, regarding reporting, to acknowledge that the reporting obligation includes an “assessment of the need for any mitigation measures for adverse impacts related to the water takings and a description of any such measures” (pg. 9, proposed PTTW revision).

Additional Voluntary Measures

In addition to the measures described above, the Instrument Holders have agreed to undertake some additional measures on a goodwill basis in order to address concerns raised by the Appellants. Notwithstanding the status of these measures as outside the scope of the Leave granted, where appropriate these measures have been added to the proposed PTTW and Monitoring Plan to provide comfort to the Appellants in relation to implementation.

These voluntary additional measures include the following:

1. Inclusion of a review of the rate of groundwater elevation decline in monitoring wells within the PSW in addition to the comparison between the groundwater elevation and the applicable triggers, as set out in section 4.5(c) of the proposed revised PTTW;
2. Installation of 5 peat posts within the PSW at locations requested by A. Dugal to monitor the Peat Surface Elevation over time, as set out in the proposed revised Monitoring Program;
3. Monitoring of Regionally Significant and Uncommon Vegetation within selected areas of the PSW, as identified by the work of A. Dugal in 2006, in addition to the monitoring of four fixed plot sampling locations as set out in the proposed revised Monitoring Program. (Mr. Dugal will be invited to join Golder in the field to identify these areas);
4. Issuance of an invitation to Mr. Dugal to participate in a site visit with the Instrument Holders and the Conservation Authority to articulate his suggestions regarding restoration of a plugged historical drainage ditch; and,
5. Collaboration on the Appellants' concept of "Safe Seasonal Water Levels" ("SSWL"). The Instrument Holders made groundwater elevation data available to the Appellants' technical experts in order to extract the natural low groundwater elevations evident when no groundwater control was taking place. The parties have agreed to hold one further meeting between Golder and an independent biological expert to be retained by the Appellants to discuss how biological information may be integrated with the groundwater data, by the Appellants, in furtherance of their concept of SSWL. The Appellants may then prepare SSWL and make submissions to the Director on the basis of the SSWL, upon receipt of annual groundwater elevation graphs and data from the Instrument Holders.

Conclusion

The parties have worked diligently to better understand each others' concerns and positions, to craft a settlement that was responsive to the Tribunals' Leave decision and at the same time practical from the perspective of implementation, environmentally protective and in the public interest. Accordingly, the parties respectfully request that the Tribunal issue an Order

confirming that the appeal has been withdrawn on consent, and approving the issuance of the PTTW and Monitoring Program as revised and appended to this correspondence.

Sincerely,

GOWLING LAFLEUR HENDERSON LLP

A handwritten signature in black ink, appearing to read "J Mesquita". The signature is fluid and cursive, with the first letter "J" being particularly large and stylized.

Jennifer Mesquita

JM:ac

cc: L. McCaffrey (for the Appellants)
P. McCulloch (for the Director, MOE)

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