



Environmental Review Tribunal

Case Nos.: 09-093/09-094

Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment

In the matter of appeals by Greenspace Alliance of Canada's Capital and Sierra Club of Canada filed August 13, 2009 for a Hearing before the Environmental Review Tribunal pursuant to section 100 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended as a result of a Decision of the Environmental Review Tribunal, dated July 29, 2009, granting Leave to Appeal in Part to Greenspace Alliance of Canada's Capital and Sierra Club of Canada under section 41 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, with respect to Permit to Take Water No. 8130-7HNPVW issued by the Director, Ministry of the Environment, on April 27, 2009 under section 34 of the *Ontario Water Resources Act*, regarding the taking of surface water from Trench Sump, Findlay Creek Extension, North-South Swale and connecting ditches, Miscellaneous Poned Areas located at Lot 18, 19 and 20, Concession IV, Geo., in the Township of Gloucester, Ottawa, Ontario; and

In the matter of status teleconferences held on February 2, 2010, at 1:00 p.m., March 9, 2010, at 10: 00 a.m. and a teleconference to review the terms of settlement held on March 23, 2010, at 10:00 a.m.

Before: Paul Muldoon, Vice-Chair

Appearances:

Linda McCaffrey	-	Counsel for the Appellants`, Greenspace Alliance of Canada's Capital and Sierra Club of Canada
Paul McCulloch	-	Counsel for the Director, Ministry of the Environment
Jennifer Mesquita	-	Counsel for the Instrument Holders, Findlay Creek Properties Ltd. and 1374537 Ontario Limited

Dated this 22nd day of April, 2010.

Reasons for Decision

Background:

On May 20, 2009, Greenspace Alliance of Canada's Capital and Sierra Club of Canada (the "Appellants") brought an application, under section 38 of the *Environmental Bill of Rights, 1993* ("EBR"), for Leave to Appeal the issuance of Permit to Take Water Number 8130-7HNPVW (the "PTTW") to Findlay Creek Properties Ltd. and 1374537 Ontario Limited (the "Instrument Holders"). The PTTW was issued on April 27, 2009, by Peter Taylor, Director, Ministry of the Environment ("MOE"), under section 34 of the *Ontario Water Resources Act* ("OWRA"). It authorizes the Instrument Holders to take water from both groundwater and surface water sources at different times within a ten-year period during construction of a primarily residential subdivision known as Findlay Creek Village (the "development") in the City of Ottawa.

In its Decision dated July 29, 2009, the Environmental Review Tribunal (the "Tribunal") granted Leave to Appeal in part, with respect only to the following provisions of the PTTW:

- surface water takings from Source 4 – Miscellaneous Poned Areas;
- the removal of trigger elevations from Monitors 10-03 A and B; and
- Condition 4.8.

Further background to this proceeding is outlined in the Tribunal's Decision *Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of the Environment)* (2009), 44 C.E.L.R. (3d) 216) and the Tribunal's Orders in the present cases dated October 5, 2009, October 29, 2009 and December 18, 2009.

On August 13, 2009, the Appellants filed an appeal with the Tribunal pursuant to the Leave to Appeal Decision issued by the Tribunal.

The Preliminary Hearing was held on October 5, 2009 at Gillespie Reporting Services, Suite 200, 130 Slater Street, Ottawa, Ontario.

In its Order dated October 23, 2009, the Tribunal granted Presenter status to Christine Murfin, Shaun Raycraft and Jeff McVeigh. The Tribunal scheduled the Hearing to commence on November 16, 2009 at 10:00 a.m. and to continue on November 17, 18, 19 and 20, 2009 at Gillespie Reporting Services, Suite 200, 130 Slater Street, Ottawa, Ontario and also set dates for the exchange of documents and witness statements and the serving and filing of documents and witness statements to be relied upon at the Hearing.

On October 27, 2009, Jennifer Mesquita, Counsel for the Instrument Holders, wrote to the Tribunal stating that the Parties had agreed to the partial lifting of the stay in this proceeding.

During a teleconference on October 28, 2009, Paul McCulloch, Counsel for the Director, stated that the Parties were in settlement negotiations and requested that all Hearing dates, dates for exchange of documents and filing dates be adjourned. Ms. Mesquita spoke to her request for a partial lifting of a stay.

On October 29, 2009, the Tribunal issued an Order adjourning the dates for the Hearing, and the exchange and filing of documents. The Tribunal also ordered a partial lifting of the stay with respect to water takings from Source 4 for the purposes of decommissioning the East-West Ditch, with an estimated total taking maximum of 500,000 litres of water. The Order further stated that water taking may be up to seven (7) days in duration and may occur at any time between November 2 and November 30, 2009.

On December 18, 2009, the Tribunal issued an Order, on consent of the Parties, granting a limited lifting of the stay in relation to Source 4 in relation to "Miscellaneous Pondered Areas," pending further settlement negotiations and withdrawal of the appeal, or a decision on the merits. Teleconferences were also held on February 2, 2010 and March 9, 2010 for the purposes of updating the Tribunal on the status of negotiations with respect to resolving the issues in the proceeding.

On March 19, 2010, Ms. Mesquita wrote to the Tribunal stating that the Parties had arrived at a settlement and outlining the terms of settlement in the letter.

During a teleconference on March 23, 2010, the Parties presented the terms of settlement with respect to this proceeding and requested that the Tribunal make a finding that the settlement is consistent with the relevant legislation and is in the public interest.

Relevant Rule:

Rule 193 of the Rules of Practice of the Environmental Review Tribunal provides as follows:

193. Where there has been a proposed withdrawal of an appeal as part of a settlement agreement reached by all Parties that alters the decision under appeal, the Tribunal shall review the settlement agreement and consider whether the agreement is consistent with the purpose and provisions of the relevant legislation and whether the agreement is in the public interest. The Tribunal shall also consider the interests of Participants and Presenters. After consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.

Issue:

Whether the terms of the settlement agreed to by the Parties are consistent with the purpose and provisions of the relevant legislation and are in the public interest.

Discussion and Analysis:

During the teleconference on March 23, 2010, and in her letter dated March 19, 2010, Ms. Mesquita provided an overview of the terms of settlement in this matter. In her letter of March 19, 2010, she also included a copy of the PTTW showing the proposed changes to the PTTW that have been agreed upon in accordance with the terms of settlement. This document is appended to this Decision as Appendix B. Also attached to that document was a document entitled: "Revised Permit to Take Water Monitoring Program" dated November 19, 2009. This document is appended to this Decision as Appendix C. On March 23, 2010, she also sent to the Tribunal a map of the area affected by the PTTW illustrating new features referenced in the PTTW and Monitoring Program. That map is included in this Decision as Appendix D.

Surface Water Taking from "Miscellaneous Poned Areas"

In their application for Leave to Appeal, the Appellants expressed concerns that water takings from "Miscellaneous Poned Areas" could negatively affect groundwater levels with the Leitrim Provincially Significant Wetland ("PSW"). In her letter dated March 19, 2010, Ms. Mesquita notes: "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 PTTW."

To address this issue, the Parties are proposing that a definition be added for the term "Miscellaneous Poned Areas" to be included in the PTTW under the definition section to read 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.

Triggers 03-10A and B

Another area of concern raised by the Appellants in relation to which Leave to Appeal was granted relates to the question of whether well nest 03-10A and B would provide "early warning" of groundwater elevation decline within the PSW. Ms. Mesquita noted in her letter of March 19,

2010, and during the March 23, 2010 teleconference, that the Parties agreed that the use of a trigger in well nest 03-10A and B would not provide early warning of what would happen inside the PSW. She stated in her letter:

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.

Accordingly, the Parties agree to a new paragraph in Condition 4.5 of the PTTW, namely:

Monitoring of new groundwater monitoring wells 09-11A and 09-11B shall initially be for purposes of obtaining baseline information, which will be used to establish their trigger elevations. The baseline monitoring will commence at least one year prior to water takings in the Southeastern Future Stage as shown on Figure MP-1, Revision 1. The Instrument Holder will submit, sufficiently in advance of the need to commence water takings in the Southeastern Future Stage, an assessment of the baseline data and proposed trigger elevations to the Director for approval. Conditions 4.5 (b), (c) and (d) do not include monitors 09-11A and 09-11B until the Director provides written notice to the Instrument Holder of the approved trigger elevations, at which time these conditions will apply.

Condition 4.8

In her letter dated March 19, 2010, Ms. Mesquita notes that in the event any short-term impact is noted with respect to the lowering of groundwater levels within the PSW, the PTTW requires increased monitoring of groundwater elevation and, in the event that trigger levels are reached, that pumping cease. She further notes that Condition 4.8 is meant to capture any long-term impacts when pumping is not taking place within the PSW or Findlay Creek. The Condition provides the Director with authority to require reporting and mitigation in the event that the Monitoring Program required under the PTTW indicates that an adverse effect is occurring or has occurred within the PSW or Findlay Creek. Ms. Mesquita notes in her letter that the term

“potential” is added to the term “adverse effect” since reporting obligations are triggered before there is certainty as to whether the effect is adverse or not.

As a consequence, the Parties agreed to revise Condition 4.8 in the PTTW to define the term “potential adverse effect” 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.

According to Ms. Mesquita's letter dated March 19, 2010, the addition of this definition provides guidance in relation to what impacts will be considered “potential adverse impacts,” which in turn would trigger Condition 4.8.

The Parties have also proposed to add a line to Condition 4.14 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.”

As outlined in Ms. Mequita's letter dated March 19, 2010, and in revised Condition 4.8, 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.

Measures Agreed to Not Arising From Grounds Relating to the Leave to Appeal

In addition to the measures that were agreed to in response to the grounds upon which the Appellants' Leave to Appeal was granted, the Parties agreed to a number of other terms. These terms include:

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. The following paragraph is agreed to be added to section 4.5(c) of the PTTW:

The groundwater elevation data review shall include an assessment of the rate of groundwater level decline; if the rate of decline indicates that a trigger elevation may be reached in less than one week, the frequency of data collection and review in those monitors will be increased accordingly in order to minimize the potential length of time where the groundwater elevation in any monitor may be below its trigger elevation and may go undetected.

2. Installation of 5 peat posts within the PSW to monitor the Peat Surface Elevation over time, as set out in the proposed revised Monitoring Program dated November 19, 2009 under the title "PSW Vegetation Component."
3. Monitoring of Regionally Significant and Uncommon Vegetation within selected areas of the PSW, in addition to the monitoring of four fixed plot sampling locations as set out in the proposed revised Monitoring Program, dated November 19, 2009, under the title "PSW Vegetation Component."
4. Issuance of an invitation to Mr. A. Dugal, who has undertaken work with respect to the PSW, 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, as set out in the proposed revised Monitoring Program dated November 19, 2009 under the title "PSW Vegetation Component;" 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 evidence of the natural low groundwater elevations when no groundwater control was taking place. The Parties have agreed to 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 Appellant, in furtherance of the Appellants' concept of SSWL. The Appellants may then prepare a report setting out 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, as set out in the proposed revised Monitoring Program dated November 19, 2009 under the title "PSW Vegetation Component."

Other Terms

During the teleconference on March 23, 2010, Mr. McCulloch noted that the Parties had also agreed to a number of other revisions to the PTTW.

In the earlier draft of the PTTW, the description of the property subject to the PTTW did not include "Lot 17," and thus, "Lot 17" is now included. Further on page 3 of the Monitoring Report, a clarification is made to note that monitor 03-1 was moved and renamed 03-1R.

Findings:

Ms. Mesquita submits that the terms of settlement are consistent with the purpose of the *OWRA* and are in the public interest. She states that the terms in the settlement provide additional measures and requirements that are not in the present PTTW and the settlement requires that no other terms or conditions be removed from the PTTW. Mr. McCulloch and Ms. McCaffrey agree with Ms. Mesquita's submissions.


In reviewing the submissions of the Parties and the materials filed, the Tribunal finds that the terms of the settlement amending the terms and conditions of the PTTW and the "Revised Permit to Take Water Monitoring Program," dated November 19, 2009, are consistent with the purpose and provisions of the *OWRA* and are in the public interest. The Tribunal agrees with the submissions made by the Parties that the terms of settlement provide for greater clarity and additional protective measures in the PTTW. The Tribunal recognizes the difficulty of the issues involved and the significant efforts made by all Parties in reaching the terms of settlement.

Decision

Pursuant to Rule 193 of the Tribunal's Rules of Practice, the Tribunal confirms the terms of settlement of the Parties as articulated in Ms. Mesquita's letter to the Tribunal dated March 19, 2010, amending Permit to Take Water Number 8130-7HNPVW and as set out in the Reasons for this Decision.

The Director is ordered to issue an amended Permit to Take Water incorporating the terms agreed to and incorporating the "Revised Permit to Take Water Monitoring Program" dated November 19, 2009.

*Terms of Settlement Accepted
Director Directed to Amend Permit to Take Water
Appeal Dismissed*



Paul Muldoon, Vice-Chair

- Appendix A – List of Parties and Presenters
- Appendix B – Copy of the Permit to Take Water Showing Proposed Changes
- Appendix C – "Revised Permit to Take Water Monitoring Program" dated November 19, 2009.
- Appendix D – Map of the Area Affected by the PTTW Illustrating New Features Referenced in the PTTW and Monitoring Program

Appendix A

List of Parties and Presenters

Appellants: Greenspace Alliance of Canada's Capital
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