Leitrim Update: Comments by the Environmental Commissioner of Ontario

The Environmental Commissioner of Ontario (ECO), in his 2009-2010 Annual Report issued September 2010, made mention of the efforts to protect Leitrim Wetland. Besides reporting that a leave to appeal to the Environmental Review Tribunal had been granted on a few narrow grounds, the Supplement to the Report describes and comments on two applications that were made by the Eco-justice Clinic, supplementary to its work on behalf of the Friends of Leitrim Wetland (nominally the Greenspace Alliance and the Sierra Club Canada).

One application requested amendments to the *Conservation Authorities Act* (*CAA*) to regulate private donations as well as a review of whether the Province's transfer payments to Conservation Authorities (CAs) are adequate. The second application sought an investigation into alleged contraventions of the Regulation governing the South Nation CA.

In Brief

Making no judgment about the case of Findlay Creek Village, the ECO is not aware of widespread conflict of interest issues related to third party donations to conservation authorities and so does not dispute the Ministry of Natural Resources' refusal to review the *Act*. He does suggest that, for greater transparency, all CAs consider separate foundations to deal with third party donations.

Be it without assistance from the Ministry, the ECO determined that South Nation did issue the necessary permits (an opaque process). He accepts the revised definition of the Provincially Significant Wetland (altered in a "deal"), glossing over the absence of a supporting revised evaluation.

Details

Application for amendments and review (section 5.4.3 of the Supplement, pp. 292-296)

The ECO had already noted in his 2006-2007 Report that CAs are not consistently regulated "because of a lack of resources or a lack of political will." Also, third parties cannot appeal any permits issued by a CA's Board of Directors and such permits need not be posted to the *Environmental Bill of Rights* Registry.

Regarding the adequacy of transfer payments, the ECO notes that the lack of resources has led several CAs to set up charitable foundations to handle donations from third parties but that South Nation is not among them.

The application asked that the *CAA* be amended to regulate private donations to CAs. It suggested that accepting private donations is incompatible with the Ministry of Natural Resources' Statement of Environmental Values. It used the example of Findlay Creek Village where the developer has promised to donate land, has made a $40,000 donation to South Nation Conservation (SNC) and is paying $200 into an SNC fund for each house sold.

Conservation Ontario (the network of 36 CAs), in its 2004 report, Now and in the Future, estimated that MNR in 2002 had shortchanged the CAs to the tune of $9 million for "eligible projects" which MNR is supposed to fund at 50%. By 2007 that shortfall had become $14.3 million.

In refusing the application, MNR pointed out that it made additional transfer payments – $5 million for repairs and studies of the CAs' dams; and $16.8 million for their source water protection work.

The ECO agreed with MNR's refusal to review the Act, commenting that, apart from this one instance of potential conflict, "the ECO is not aware of evidence to support allegations that conflicts of interest are occurring province-wide." It does suggest that MNR consider the model of separate foundations for all CAs "to better ensure a transparent process for receiving donations from third parties."

The ECO further noted that the issuance of permits by CAs is not a process necessarily open to third parties. Allowing public delegations is at the discretion of CA boards. It suggests that, at the least, a CA permit should become an instrument under the *EBR* and therefore require posting.

The ECO disagrees with MNR's decision not to review the adequacy of funding to CAs. "[D]ue to climate change, Ontario is now vulnerable to significant flooding events. With this in mind, the ECO believes that the MNR should have conducted a thorough review of the amount provided to CAs as transfer payments for flood and erosion control activities."

Application to investigate alleged contraventions of South Nation's Regulation
(section 6.2.3 of the Supplement, pp. 340-344)

The section succinctly reviews the history of development at Leitrim Wetland:

> In 1988 the Regional Municipality of Ottawa-Carleton designated the wetland area as "urban" in its official plan. In 1989, the City of Gloucester re-designated the area for development, in accordance with the Region's "Urban" designation (Official Plan Amendment #10). In that same year, MNR categorized the Leitrim Wetland as a Class 1 Provincially Significant Wetland, protecting it from development. However, a portion of the wetland area identified as provincially significant had also been the location of a proposed residential development. The municipality could not approve the development unless the boundary was changed.

> In 1991, MNR reassessed and altered the provincially significant wetland (PSW) boundary by removing the one-fifth of "altered" or "unstable" land in the north-east part of the wetland. MNR's reduction was part of a deal with the developers in return for: the creation of new linked habitats along the creek and a proposed stormwater pond; and protection of the core of the wetland by turning it over to a public agency. MNR's PSW boundary reduction allowed the developers to proceed with the Findlay Creek Village project since it was no longer within a PSW.
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> As part of the deal, the developer agreed to convey 96 hectares of the core wetland to SNC for protection and to donate $40,000 for maintenance of the wetland and $200 per home sold to support programs and fund wetland education. Despite this commitment, the wetland core has not yet been transferred to SNC.

In explaining how CAs regulate wetlands, the section notes that they do regulate development within and adjacent to wetlands (120 meters for PSWs) unless "development has been approved under the *Planning Act* or other public planning or regulatory processes." [This quotes identical sections 2(1)(e) in, e.g., Regulation 170/06 of the South Nation and Regulation 174/06 of the Rideau Valley CA.] It also noted that CAs have discretion on which wetlands they regulate and that SNC only regulates those that are designated Provincially Significant Wetland in Ottawa's Official Plan. MNR, in its justification for refusing to investigate the allegations, asserted that South Nation's "permission was not required for development in or adjacent to the Leitrim Wetland", presumably because it had received *Planning Act* approvals. Further, naturally, MNR accepted the revised mapping of the PSW's boundaries. The Supplement explains:

> In 2007, some environmental groups disputed the official boundary of the provincially significant wetland in an Ontario Municipal Board (OMB) hearing. Opponents to the proposed development claimed that MNR never officially accepted the 1991 boundary change and that the original (1989) boundary remained in effect. The developers asserted that the 1991 boundary became MNR's official position and proceeded with the project. The OMB concluded that the 1991 boundary represents MNR's official position. In 2008, MNR amended its digital maps to reflect the 1991 Leitrim Wetland boundary.

The ECO finds MNR's refusal to investigate the alleged contraventions "reasonable." Permits had indeed been issued; as noted above, this is an opaque process. But he is troubled by how MNR addressed this investigation, namely by failing to review the permits (the ECO had to obtain copies directly) and without reviewing SNC's policies.

Finally, the ECO finds the reasons for denying this application valid "only because this CA has a very narrow interpretation of regulated wetlands in its watershed – only those identified as PSWs in Official Plans, within the City of Ottawa."

> Many CAs in Ontario have chosen to regulate locally significant wetlands, regardless of whether they are identified as provincially significant by MNR or designated as PSW by municipalities in official plans. Given the lack of protection the PPS provides for non-provincially significant or non-evaluated wetlands, the CA regulations are currently the primary on-the-ground tool to protect wetlands from development and site alteration in Ontario. MNR should provide additional support to CAs to ensure that the regulation of wetlands under the *CAA* is undertaken consistently across the province."

Comment:

This version of the history glosses over the fact that the revised boundary had never been documented by an amended evaluation – a fact Eco-justice finally got an MNR official to admit on the record in pre-hearing cross-examination. This would have been a key argument if the case had ever been heard in substance before the Ontario Municipal Board or Divisional Court. The report is therefore wrong saying that MNR had "reassessed" the PSW's boundary. However, this is now all water under the bridge. The "one-fifth" of the wetland sacrificed to development is upon re-assessment now sure to no longer qualify!

While the ECO's objective – better protection of wetlands even if they are not designated Provincially Significant – is laudable, his hook in this case -- what wetlands South Nation chooses to protect -- is a *non sequitur*, as Leitrim Wetland was designated a PSW. Rather, a possibly last chance to see the record set straight by an Ontario official has slipped away.

Attached are excerpts

-from the Report: title page and pp. 198-199
-from the Supplement: title page and
section 5.4.3 (pp. 292-296)
section 6.2.3 (pp. 340-344)
from section 7 (Leave to Appeal Applications), pp. 349-350.

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