

Review of Application I2009007:**6.2.3 Alleged Contraventions of O. Reg. 170/06 under the *Conservation Authorities Act*
(Investigation Denied by MNR)****Background**

In southern Ontario there is a constant struggle between protecting wetlands and building houses for the growing population. Often environmental organizations clash with developers in an effort to preserve these ecologically important areas before they are lost forever. Conservation Authorities (CAs) play a key role in protecting wetlands through regulating development and other activities in and adjacent to wetlands under the *Conservation Authorities Act* (CAA).

In July 2009, the ECO received an application requesting that the Ministry of Natural Resources (MNR) investigate alleged contraventions of O. Reg. 170/06 – South Nation River Conservation Authority: Regulation of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses, (SNC) made under the CAA. The applicants claim that SNC and the developer, Tartan Homes contravened O. Reg. 170/06 when SNC allowed Tartan Homes to construct a residential development, Findlay Creek Village, in and adjacent to the Leitrim Wetland and to alter Findlay Creek without written permission. Moreover, the applicants expressed concern that the developer's commitment to donate land and money to SNC created a conflict of interest for SNC, and may have played a role in the alleged contravention of the CAA.

In addition to this application for investigation, the applicants also submitted an application for review requesting a provision in the CAA to regulate private donations to all CAs and the amount of money provided to CAs through transfer payment grants; for more information, please see Section 5.2.12 of this Supplement.

Leitrim Wetland and Findlay Creek Village

The Leitrim Wetland is located within the City of Ottawa (formally within the City of Gloucester), south of Leitrim Road and dissected by Albion Road (see figure below). The developer owns a major portion of this area (east of Albion Road, south of Leitrim Road and west of Bank Street), including a majority of the Leitrim Wetland. Findlay Creek Village is located along the north-east border of the 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.

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.

With the boundary changed, the developers obtained the required land use planning and environmental approvals, including but not limited to:

- *Planning Act* approvals;
- two federal environmental assessments;
- *Fisheries Act* authorization;
- a provincial class environmental assessment;
- several certificates of approval for stormwater management facilities;
- certificates of approval for water works; and
- eight permits to take water.

The developer began construction of Findlay Creek Village in 2003 and by July 2009, approximately 50 per cent of the development (900 of the planned 1800 residential units) was completed.



Figure: Boundary of the Leitrim Provincially Significant Wetland and Findlay Creek Village (east of Bank Street and south of Leifrim Road), in the City of Ottawa.

How Conservation Authorities Regulate Wetlands

CAs are created under the CAA and are organized on a watershed basis. Each CA has an individual regulation under section 28 of the Act and in 1998 the Act was amended to ensure that the regulations would become consistent across the province. These amendments required all CAs to start regulating development and site alteration in and adjacent to wetlands, although some had already been regulating these areas prior to the amendment. O. Reg. 97/04 under the CAA outlines the content required for these individual regulations (the ECO reported on O. Reg. 97/04 in the Supplement to our 2005/2006 Annual Report). In 2006, MNR filed SNC's individual regulation - O. Reg. 170/06.

Each CA is governed by a Board of Directors whose members are appointed by municipalities located within the CA's watershed. The CA Board of Directors is responsible for approving (or denying) all permit applications under the CA's regulation. Board decisions are guided by Board approved policies and procedures for administering its regulation.

In addition to regulating development and activities in or adjacent to river or stream valleys, Great Lakes and large inland lakes shorelines, watercourses, and hazardous lands, CAs also regulate:

- activities within wetlands;
- development within wetlands; and
- development adjacent to a wetland (120 metres of Provincially Significant Wetlands and 30 metres of all other wetlands), unless development has been approved under the *Planning Act* or other public planning or regulatory processes.

To be regulated by a CA, a wetland must meet the definition provided in the CAA and be delineated on regulation limit maps held at the CA office. The CAs have discretion on which wetlands they regulate (e.g., include in the regulation limit maps). SNC only regulates PSWs identified in municipal Official Plans, within the city of Ottawa. Some CAs regulate and map smaller, non-provincially significant wetlands. For example the Lake Simcoe Region CA has mapped and is regulating all wetlands larger than 0.5 hectares. The ECO noted in our 2006/2007 Annual Report that CAs are not consistently regulating wetlands across the province because of a lack of resources or a lack of political will.

Protection of Wetlands under the Provincial Policy Statement

In Ontario, there is no provincial legislation that specifically requires the protection of wetlands. Land use planning legislation and policies such as the *Planning Act* and the Provincial Policy Statement (2005) (PPS) provide indirect protection for certain wetlands. For example, the PPS prohibits development and site alteration in MNR-identified PSWs in much of southern and central Ontario. However, the ECO previously reported in our 2006/2007 Annual Report on the weakness of Ontario's policy approach to protecting wetlands, including that it does not address "locally significant wetlands or wetlands that have not yet been evaluated for their significance." This is important, since many of the wetlands that remain in southern Ontario have been fragmented by development, are smaller in size and may not be considered provincially significant by MNR's standards. For example in the Credit Valley Conservation Authority watershed, the majority (approximately 1400) of wetlands are less than one hectare in size and represent 25 per cent of the total wetland area within the watershed.

Summary of Issues

The applicants claim that SNC did not issue the required written permission for either development in the wetland or the alteration of Findlay creek. In the absence of valid permission, the applicants conclude that SNC and Tartan Homes contravened O. Reg. 170/06. Furthermore, the applicants allege that SNC's allowing of the development stems not from an unbiased evaluation of the control of flooding, erosion, pollution or the conservation of land, as provided for in section 3(1) of its regulation, but rather from a conflict of interest whereby the SNC stands to benefit financially (from donations) by allowing the development.

Ministry Response

MNR denied the application for investigation for the following reasons:

- SNC permission was not required for development in or adjacent to the Leitrim Wetland;
- SNC had advised MNR that it had in fact issued permission to the developer to alter Findlay Creek;
- SNC was reviewing two permit applications related to altering Findlay Creek; and
- SNC monitors the development area for compliance with permit requirements.

MNR clarified that permission was not needed for development in the wetland because:

- wetlands under O. Reg. 170/06 are areas delineated as such on SNC maps;
- the Leitrim Wetland is delineated in SNC maps as the provincially significant boundary identified by MNR; and
- since there was no development within the provincially significant wetland boundary, SNC was not required to issue any permits.

MNR also explained that Findlay Creek Village did not need permission from the CA for development adjacent to the wetland. Under O. Reg. 170/06, the CA is not required to grant permission for development within 120 metres of a provincially significant wetland if the development has been approved pursuant to an application made under the *Planning Act* or other public planning or regulatory processes. MNR stated that because the developers obtained prior approval under the *Planning Act* for Findlay Creek Village, permission from SNC was unnecessary.

As follow-up to MNR's response, the ECO requested that MNR provide copies of SNC's permits and SNC's policies and procedures for administering the regulation. MNR advised the ECO that this "background information" was not housed at MNR and the request was passed along to SNC. MNR further stated that "verbal confirmation by [SNC] of the presence of the permits was sufficient to address the allegation." Also, MNR explained that it was unnecessary for MNR to review the policies and procedures because the "alleged contravention was absence of written permission, not contravention of policies and procedures."

The ECO contacted SNC directly to obtain copies of the permits and its policies and procedures. The SNC forwarded the documents the next day. SNC issued eight permits to Tartan Homes related to the construction of Findlay Creek Village under O. Reg. 170/06, from the period of March 2006 to June 2009. SNC issued written permission for interference with a watercourse, construction of a stormwater management facility, installation of culverts, and filling a watercourse on Findlay Creek.

Other Information

For more than a decade, several environmental organizations and members of the public have opposed this particular residential development because of potential adverse impacts on the Leitrim Wetland. The controversy has included an Environmental Review Tribunal hearing and four "bump-up" requests under the *Environmental Assessment Act*. The ECO has also received a number of telephone calls, letters and emails from the public on this issue.

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.

In December 2009, the ECO was notified by MNR that it received a request under the *Freedom of Information and Protection of Privacy Act* to disclose information relating to this application for investigation. The ECO advised MNR of our consent for the ministry to disclose the requested records, provided that portions containing names, addresses, phone numbers and any other personal information were obscured (blacked out). In January 2010, MNR notified the ECO that it would release the documents in their entirety, but excluding all personal information.

Two *EBR* leave to appeal applications were submitted for permits to take water issued for the construction of the Findlay Creek Village. For a more detailed review of these appeals (Environmental Registry #010-4670 and #010-1607), please refer to Section 7 of this Supplement and to Section 8 of the Supplement to our 2008/2009 Annual Report.

ECO Comment

MNR's decision to deny this application for investigation is understandable, given that SNC had issued permission to alter Findlay Creek and that CAs are not required to issue permission to develop adjacent to a PSW when the development is already approved under the *Planning Act*, as was the case with Findlay Creek Village.

Despite our agreement with MNR's decision, the ECO is troubled by the way MNR addressed this investigation. The ECO believes it is unacceptable that MNR assessed and made a decision regarding an alleged contravention without reviewing the said permits. Verbal confirmation that SNC issued permission under O. Reg. 170/06 of the *CAA* is insufficient when reviewing an application for investigation under the *EBR*. While the ECO recognizes that MNR does not issue permits under the *CAA* and therefore does not normally house these permits, as the subject of an application for investigation, MNR should have obtained copies before making its decision. Furthermore, to determine whether O. Reg. 170/06 was contravened, MNR should have reviewed SNC's policies and procedures, since they define which wetlands SNC shall regulate.

The ECO considers MNR's reason 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.

Review of Applications I2009012 and I2009013:

6.2.4 Alleged Contraventions at a Quarry Site under the *Aggregate Resources Act (ARA)*, the *Endangered Species Act (ESA)*, the *Environmental Protection Act (EPA)* and the *Ontario Water Resources Act (OWRA)* (Investigation Denied by MNR and MOE)

Geographic Area: Nipissing, District of Parry Sound, Ontario

Background/Summary of Issues

On January 18, 2010, two applicants submitted an application for investigation regarding a licence for an aggregate quarry in Pringle Township. The applicants alleged violations of the *Environmental Protection Act (EPA)*, the *Ontario Water Resources Act (OWRA)*, the *Aggregate Resources Act (ARA)* and the *Endangered Species Act (ESA)*. In February 2008, this site had been issued an aggregate licence, after the geographical coverage of the *ARA* had been expanded to this region in January 2007. The applicants alleged that: the operation standards under the licence were not adhered to; a crushing machine was operated without a required certificate of approval (C of A); and there may have been damage to the habitat of a species at risk (the Blandings turtle) and to a local creek. The *EPA* and *OWRA* are administered by the Ministry of the Environment (MOE), while the *ARA* and *ESA* are administered by the Ministry of Natural Resources (MNR).

The ECO sent this application to both MNR and MOE.

Ministry Response

Ministry of the Environment

On March 29, 2010, MOE advised the applicants that an investigation under the *EBR* was not warranted and would be duplicative, invoking section 77(3) of the *EBR*. MOE noted that the quarry site had been inspected during a joint visit by MOE and MNR on March 24, 2009 – nine months before the *EBR*