



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

**CELA's Preliminary Analysis of the Proposed Amendments  
to the Water Taking and Transfer Regulation  
( O. Reg 285/99)  
EBR Registry Number: RA04E0011**

**Prepared by Ramani Nadarajah and Sarah Miller**

**July 15, 2004**

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<b>O. Reg. 285/99</b>	<b>Multi-Stakeholder Consultation Process<sup>1</sup></b>	<b>Proposed Amendments to O. Reg 285/99</b>	<b>CELA's further recommendations</b>
<p><b>Eco-system approach-Factors Director should consider</b></p> <p>ss. 2(1) Natural functions of the ecosystem</p> <p>ss. 2(2) groundwater that may be affected by a PTTW</p> <p>ss. 2(3) surface water that may be affected by a Permit to Take Water ("PTTW")</p>	<p>CELA had recommended that the eco-system approach be refined to include natural variability of stream flows, minimum stream flows and a water budget.<sup>1</sup> Concerns were also raised about lack of a methodology to guide MoE staff in assessing impacts from water taking. This has led to inadequate and inconsistent reviews of PTTWs.</p>	<p>ss. 3(2)1 (i) A, ss.3 (2)1 (i)B and ss. 3(2)1 (i)C require the Director to consider the natural variability of water-flows and water levels, minimum stream flow and habitat that depend on water flow or water levels.</p> <p>ss. 3(2) 2 (i) A requires the Director to also consider impacts on water balance and sustainable aquifer yield</p>	<p>CELA supports these proposed amendments. CELA will also recommend that the MoE prepare a manual for staff outlining a rigorous methodology to guide staff in assessing impacts from water takings and to ensure consistent implementation of ecosystem approach for PTTWs.</p>

<sup>1</sup> Multi-Stakeholder Consultation refers to comments provided by multi-stakeholders during both the formal stakeholder consultation undertaken by MoE in March of 2004 on the proposed amendments to Regulation 285/99 as well as submissions/briefs made by CELA and other stakeholders both before and after the formal stakeholder consultation on PTTWs.

<p><b>Interests of Other Citizens</b></p> <p>s.2 – The Director when considering application for PPTW <i>shall</i> consider the interests of persons who have an interest in taking, to the extent that those interests are relevant</p>	<p>CELA raised concerns about a lack of input from the public early on in the permitting process. <sup>ii</sup>The norm has been for MoE staff to deal only with the Applicant, while citizens have to resort to Freedom Of Information requests to obtain documentation about the proposed taking. <sup>iii</sup></p>	<p>ss. 3(4) provides that the Director shall consider the interests of other persons who have an interest in the water taking or proposed water taking, "to the extent that the Director is made aware of those interests."</p>	<p>The problem with the wording of ss. 3(4) is that the public may not have input into the permitting process at the very early stage of the permitting process. The EBR registry remains the primary means of soliciting public input but the 30-day comment period does not always provide sufficient time to review and obtain information about an application. In certain cases, e.g. where the taking is for a large amount, or in ecologically sensitive areas, public consultation should commence at an earlier stage, with information provided to public on where they can obtain information on technical documents and any supporting documents, and how to contact the Applicant/MoE if there are specific questions about the proposal. The MoE should ensure that the onus on undertaking a consultation rests with the Applicant. See comments below under heading "<b>Public Consultation by Applicant</b>"</p>
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<p><b>Existing and Planned Uses of Water</b></p> <p>ss.2(3) The Director when considering an application for a PTTW <i>may</i> consider the existing and planned uses of water for the following: livestock, municipal water supply and sewage disposal, agricultural purposes and private domestic needs. The Director may also consider whether it is in the public interest to grant the PTTW and any other matters the Director considers relevant</p>	<p>Both CELA<sup>iv</sup> and AMO<sup>v</sup> have recommended that there is a need to ensure that there is a clear linkage between the PTTW process and the municipal planning process.</p>	<p>ss.3 (2)2 i B. requires the Director to consider the existing uses of water for municipal water supply and sewage disposal, livestock and other agricultural purposes, private domestic purposes and other purposes.</p> <p>ss. 3(2) 2 iii (A) and (B) states that the Director shall consider any planned municipal use of water that has been approved under a municipal official plan in accordance with Part III of the <i>Planning Act</i> or under the <i>Environmental Assessment Act</i>.</p>	<p>CELA supports this recommendation. The change from the use of the word "may" to "shall" makes this provision mandatory.</p>
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<p><b>Public Consultation By MoE</b></p> <p>ss. 2(5) states that the Director <i>may</i> require governmental authorities in other jurisdictions be consulted, (even if notification is not required by Great Lakes Charter).</p>	<p>CELA <sup>vi</sup>, AMO <sup>vii</sup> as well as other stakeholders raised concerns about the lack of adequate consultation by MoE on applications for PTTW.</p>	<p>s.6 requires a Director who is considering an application <i>shall</i> give notice to upper-tier and lower-tier municipalities or a single-tier municipality as well as conservation authorities where the water-taking is located .The notice requirements are subject to certain exceptions outlined in s. 6(2)</p>	<p>The use of the word "shall" in s. 6 makes it mandatory for the Director to consult with affected municipalities and conservation authorities. CELA supports these recommendations.</p> <p>CELA will also recommend that MoE obtain sign-off from all municipalities and Conservation Authorities in a watershed before issuing a PTTW.</p>
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<p><b>Public Consultation by Applicant</b></p> <p>ss.2 (6) The Director when considering an PTTW application may require the Applicant to consult with (a) persons who have an interest in the taking (b) provide the Director with information on the interests and responses of persons consulted under (a) and provide the Director with such other information as specified by the Director.</p>	<p>CELA has recommended the need for MoE to provide a guidance document to Applicants on how to undertake broader consultation. CELA also recommended where an application will be contentious, Applicants should be required to submit a stakeholder consultation plan for approval by MoE outlining how consultation will be undertaken. <sup>viii</sup></p>	<p>ss. 6 (4) is essentially the same as former ss. 2(6).</p>	<p>CELA should reiterate the comments we made during the consultation process. MoE must provide guidance to the Applicant in terms of the manner and scope of consultation.</p> <p>In cases where a PTTW may be controversial, e.g. involving a large amount of water or a taking in an ecologically sensitive area, MoE should require early notification and consultation by the Applicant. The MoE should ensure permits take into account watershed plans for drinking water source protection, particularly for sensitive and vulnerable areas. The MoE should also give notice to watershed planning groups.</p>
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<p><b>Water Transfer</b></p> <p>s. 3(2) No person shall use water by transferring it out of a water basin, subject to certain exceptions found in sections (3) 3, 3(4), 3(5), 3(6), 3(7) and (3) 8.</p>	<p>CELA has expressed concerns about the exemption provided to the bottled water industry under ss. 3 (6).<sup>ix</sup></p>	<p>The proposed amendments to O.Reg 285/99 retain the exemption for bottled water.</p>	<p>CELA should reiterate the concerns it had expressed earlier about the exemption provided to the water bottling industry. In 1990 over 95 million liters of water were exported from Ontario, worth an estimated 58 million dollars. This figure is estimated to have substantially increased since then. Given that Ontario does not currently impose any fees for water bottling, the exemption granted to the water bottling industry is not warranted. Appropriate limits need to be placed on all applicants including the bottled water industry and other beverage manufacturers as opposed to granting them an outright exemption.</p>
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**Additional Amendments recommended by CELA but not included in the current version of Regulation O.Reg. 285/99 but which will be included by the proposed Amendments to O. Reg 285/99**

**(1) Water budgets**

Subsection 3(2) 2 (i)A of proposed Reg. Amendments to Reg. 285/99 require the Director to consider water balance and sustainable aquifer yield when considering an application for PTTW.

CELA should recommend that information about water balance and sustainable aquifer yield is included in an electronically accessible database, so that other government agencies as well as the public can have access to information about the state of Ontario's water resources. <sup>x</sup> The database should also include information about minimum flow levels in watersheds and sub-watersheds beyond which no further water allocation would be allowed. <sup>2</sup> Cumulative data should be made available both by watershed and by sector of use. Seasonal reports (spring, summer, fall and winter) should be required for individual applicants, by watershed, and by the Province on use by sector.

**(2) Water Conservation**

Subsection 3 (3) of the proposed amendments allow the Director when considering a PTTW application to consider whether water conservation in accordance with sectoral standards is being implemented or is proposed to be implemented.

The wording of this provision is not sufficiently strong enough to ensure conservation measures are implemented. The Director should consider taking proactive measures to ensure conservation of water by requiring applicants to assess mechanisms for water conservation in their operations/facilities. The MoE should prepare a document on the best practices in water conservation for all sectors on how to conserve and reduce water use. This information should be provided to MoE staff in evaluating permits applications and should also be provided to applicants for permits. CELA has previously recommended that the *Ontario Water Resources Act* should establish explicit goals/targets for water conservation /efficiency (i.e. reduced per capita use of water in Ontario by 30% within five years) which should be reflected in the PTTW decision making process. This recommendation should be reiterated to MoE.

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<sup>2</sup> CELA had also recommend that this information also be part of the source water protection plans. See Lindgren, R. Muloon, P. Nadarajah R. McClenaghan T, and Miller, S. *Final Submissions of the Canadian Environmental Law Association to the Ministry of Environment regarding the White Paper on Watershed-Based Source Protection Planning* at p.15.

### **(3) Consistency with Annex 2001**

Additional concerns raised by CELA include the need to ensure regulation 285/99 is consistent with Annex 2001. (Annex 2001 is an undertaking to draft a Supplementary Agreement to the Great Lakes Charter by 2004. The Agreement sets up a legally binding system to review large withdrawal and diversion proposals from the Great Lakes Basin, develop a decision-support system, and develop systems for monitoring dispute resolution and defining trigger levels for international review and generate data on water use and allocations in the region.) CELA also recommended that the MoE should ensure that it has the staff and budget to implement both regulation 285/99 and Annex 2001.

With respect to Annex 2001 CELA recommendations were adopted. Section 5 of proposed amendments to O. Regulation 285/99 requires that a Director who is considering an application for a PTTW shall ensure that Ontario's obligations under the Great Lakes Charter with respect to the application are adequately addressed.

### **(4) Reporting of Water-takings**

Section 7(1) requires every person who obtains a permit after July 1, 2005 to record the volume of water taken daily.

This section is only subject to the takings listed in subsection 7 (2). These cover: municipal water supply, beverage manufacturing, fruit or vegetable canning (except water taken only for washing in course of canning or pickling), and Municipal Industrial Strategy for Abatement (MISA) regulations. This section also covers aggregate processing (if the aggregate and the water that is taken are incorporated into a product in the form of a slurry) and production manufacturing (if in the normal course of manufacturing or production, more than 50,000 liters of water may be incorporated in a single day into the product).

CELA should express concern that the limits placed by this sectoral approach will not capture the full takings, which are taking place in the Province. MoE should also phase in other sectors into the monitoring and reporting requirements to ensure that it has an accurate picture on water takings in the province. One way to do this would be to review all water taking permits every five years, including permits already issued. The MoE should evaluate seasonal use through this review. The MoE should also consider expanding the reporting requirements to users who withdraw less than the regulated amount of 50,000 litres. This would be the most effective means of ensuring that the MoE has an accurate account of the amount of water that is being withdrawn in the Province.

CELA will also request that monitoring and reporting requirements should be included in a publicly accessible web site and should include the following additional information at a minimum: (i) the source of the taking (i.e. groundwater or surface water); (ii) the location of the taking, and the name of the watershed and local level conservation authority; (iii) purpose of the taking; (iv) whether the taking is consumptive or non-consumptive; (v) the amount of taking,

including the hours of taking and the maximum taking per day;(vi) the purpose of the taking (communal water, irrigation etc.) (vii) the applicant's need for the taking and the planned use of the taking; (viii) the water budget in the watershed or sub-watershed; (ix) cumulative takings in the watershed or sub-watershed; and (x) the permit expiry or cancellation date (xi) the applicants use of best conservation practices to reduce volume requested.

The MoE should ensure that Applicants comply with the terms and conditions of their PTTW and take prompt enforcement action to address any non-compliance. In addition, the MoE should ensure that it has sufficient resources, both in terms of budget and staff to undertake the additional work that will result from the more in-depth analysis of information which will result from the proposed amendments to O. Reg 285/99 and for enforcement purposes.

**Additional Amendments, which will be recommended by CELA but are not yet, included in the Proposed Amendments to O. Reg. 285/99 or MoE Permit to Take Water Manual**

**(1) Fees for PTTW**

In December 2003 the government announced its intention to charge companies and other permit holders that remove water from watersheds. The MoE has noted during multi-stakeholder consultations that other jurisdictions including most Canadian Provinces charge a fee for water taking. <sup>xi</sup>

CELA supports the proposal for charges to water taking and has recommended that the MoE proceed with this initiative. However, the proposed amendments do not address the issue of fees for water takings. The EBR Registry posting for the proposed amendments to Regulation 285/99 states that "The MoE is proposing to develop a service cost recovery fee structure to recover costs associated with the Permit to Take Water Program. However, no details or time frame have been provided about this initiative.

CELA has in the past recommended that fees be imposed for water taking and should request MoE make this issue a priority.

**(2) Guidance Manual for staff**

The MoE's *Permit To Take Water Guidelines and Procedures Manual* (Revised April 14, 1999) and the *Guide for Applying for Approval of Permit To Take Water*, (Interim Guide) June 2000 should also be amended to ensure consistency with the amendments made to Reg.285/99 .

### **(3) Empower Director under the OWRA to Impose Moratorium**

The Ontario Water Resources Act should be amended to empower the Director to impose water-taking prohibitions for prescribed timeframes in areas designated as ecologically sensitive or facing serious water quantity/quality issues.

### **(4) Publicly Accessible Data Base**

CELA also recommended that this data should be stored in a publicly accessible web site together with a layer of analysis that can be readily interpreted by the general public. See page comments under heading Reporting water-takings on page 6.

### **Proposed Amendments to O. Reg. 285/99 by MoE and which are of Concern to CELA**

Subsection 3. (2) 3 (iii) of the proposed amendments to O.Reg 285/99 allow the Director when considering water availability to consider if the water is not currently being used, whether there is a reasonable prospect that the person will actually use the water in the “near future.”

This wording of this subsection could be problematic and appears to be at odds with the MoE guideline which state quite explicitly that "an Applicant can not reserve additional water for future use but must request an amendment to the Permit as the additional need arises."  
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The term “near future” is broad and ill defined and could mean anywhere from a few months to a few years. This section should be amended to authorize the Director to amend a PTTW to reduce the amount of taking if a person is currently not using the water and there is no reasonable prospect that the person will use it within a specified period of time. (e.g. one year).

### **(5) Tracking of return flows**

Efforts will need to be made to determine actual volumes of water consumed and not returned to the watershed. Over time, the most accurate way to do this is to require the applicants to meter the return flows rather than estimate them. However, this could be expensive, so CELA should recommend that the MoE devise ways to facilitate and assist with the installation of meters to measure return flow.

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<sup>i</sup> Lindgren, R. Muldoon, P. Nadarajah, R. McClenaghan, T. ,and Miller S., *Final Submissions of the Canadian Law Association to the Ministry of Environment Regarding the White Paper on Watershed –Based Source Protection Planning*. (CELA:Toronto) April 5, 2004 at p.15.

<sup>ii</sup>Nadarajah, R. and Miller, S., *Submission on the Proposed Amendments to the Water-Taking and Transfer Regulation (Regulation 285/99 under the Ontario Water Resources Act*, (CELA:Toronto) (May 21, 2003) at pp7-8.

<sup>iii</sup> Ibid at p. 7.

<sup>iv</sup> *Final Submission of the Canadian Law Association to the Ministry of Environment Regarding the White Paper on Watershed Based Source Protection Planning* , at p. 5.

<sup>v</sup> A.M.O. Water Taking Task Force, *Proposed Improvements to Ontario’s Water Taking Permitting Process, Recommendations to the Government of Ontario*, December 19, 2002 at p. 7.

<sup>vi</sup> *Submission on the Proposed Amendments to the Water-Taking and Transfer Regulation* at pp. 6-8.

<sup>vii</sup> *Proposed Improvements to Ontario’s Water Taking Permitting Process, Recommendations to the Government of Ontario*, at pp. 5-6.

<sup>viii</sup> *Final Submissions of the Canadian Environmental Law Association to the Ministry of Environment Regarding the White Paper on Watershed-Based Source Protection Planning* at p. 16.

<sup>ix</sup> McCulloch, P. Miller, S. Cooper, K, Muldoon, P., *Submissions by the Canadian Environmental Law Association to the Ministry of Environment on the Surface Water Transfers Policy (EBR Registry Number PA8E00270*, June 11, 1998.

<sup>x</sup> Ibid. at p. 15.

<sup>xi</sup> Ontario Ministry of Environment, slide presentation made on April 2, 2004 at the Permit to Take Water Consultation.

<sup>xii</sup> Ontario Ministry of Environment, *Guide for Applying for Approval of Permit to Take Water*, (Interim Guide) June 2000, p. 3 paragraph 14.