

COMMENTARY FOR AN ACT TO CONSERVE ONTARIO WATERS

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INTRODUCTION

The preamble to this Act identifies the importance of water to the long-term well-being of the province, the responsibility of the Province to protect, conserve, and restore the water supply; the growing industrial, commercial, and other developmental pressures on the water supply; the risks posed by climate change to the water supply; the importance of efficient water use to protecting the natural environment and watersheds, lowering demand for new water supply facilities and associated capital, operating, and energy costs, and reducing corresponding greenhouse gas emissions; and recognizes the right of the public to a significant role in the decision-making process.

The definitions used for this Act are based on a wide range of source documents including various provincial policies promulgated under the Planning Act of Ontario; other Ontario statutes, regulations, policies, guidelines, and bills; the statutes, regulations, guidelines, policies, programs, and bills of other provinces; federal statutes, bills, and Parliamentary materials in Canada; federal and state laws, policies, guidelines, and bills in the United States; European Community law; the laws of other foreign states; international treaties and related documents; and scientific, technical, and economic treatises.

The purposes of the Act focus on protecting the water regime from activities that negatively impact the hydrologic regime such as diversions, water removals, and development; encouraging reduction in water use on a watershed basis; and restoring and enhancing the water regime from past damage.

The duties of the Government Ontario are to ensure that the purposes and requirements of the Act are met by persons, governments, and other agencies; to ensure that water conservation plans and remedial plans authorized under the Act are undertaken; to review the adequacy of existing laws and undertake appropriate research to assist those undertaking water conservation and remedial planning; to apply the precautionary principle in decisions under the Act; and to protect the public trust in water for the benefit of present and future generations.

PART I - WATER PLANNING BOARDS

The purpose of Part I of the Act is to establish water planning boards in Ontario. Under the Act these bodies - who may be conservation authorities, upper-tier municipalities, or other bodies - will be responsible for water conservation planning and implementation of water conservation measures as described in the Act for watersheds across the province. Part I also authorizes the creation of additional watershed areas and boards for those parts of Ontario - primarily the north - where there currently are no conservation authorities. Part I also sets out the process for appointments to water planning boards, the term of office, and the obligations of these bodies to undertake the tasks, duties, responsibilities, and meet the requirements of this Act.

PART I.I - PROTECTION OF ONTARIO WATERS

Part I.I of the Act is designed to address impacts to the water regime from projects (e.g. diversions of water) between watersheds and within a single watershed (watersheds are defined under the Act and listed in Schedule 2) largely by prohibiting such projects if they are of a certain size. (The project size concept and watershed-based approach are derived from the British Columbia Water Protection Act). The Act would only allow smaller projects within a single watershed to proceed if water-focused information required to be submitted demonstrated that the purposes and duties of the Act will be met. Similar information requirements also are imposed on water removal activities (e.g. consumptive and non-consumptive uses of the type currently regulated as water takings under section 34 of the Ontario Water Resources Act and regulations - which requirements would be rolled into this Act). Both projects and water removals are subject to potential hearings at the request of any person and decisions by the Director, Ministry of the Environment (if there is no hearing) or the Environmental Review Tribunal - a body that anticipates proposed legislative amendments by the province to merge the current Environmental Assessment Board with the Environmental Appeal Board - (if there is a hearing). Appeals from decisions under Part I.I are dealt with under Part V.

Part I.I imposes further obligations on those proposing land use changes, other development, or infrastructure (e.g. sewage or water facilities to facilitate development) under the Planning Act to provide the same water-based information requirements as for projects and water removals. The information must be provided to the water planning board who is required by this Act to issue water impact permits (if there is no request for a hearing) or the Joint Board who may make the decision (if there is a request for a hearing). These decisions must be consistent with the purposes and duties of this Act. The Act also authorizes the designation, including potential emergency designation, of special areas that provide unique benefits to the water regime over a wide geographic area (e.g. Oak Ridges Moraine). The Niagara Escarpment also is designated a special area under this Act. Designation of special areas provides protections similar to those available under the Niagara Escarpment Planning and Development Act and proposed under recent private members' bills proposed in the Ontario Legislative Assembly in the last quarter of 1999-first quarter of 2000 (Bills 12, 71, and 78).

Finally, Part I.I authorizes private or public entities to grant or hold easements to protect, conserve, restore, or enhance water. (These provisions are based on the New Brunswick Conservation Easements Act).

PART II - CONSERVATION OF ONTARIO WATERS

Part II of the Act is designed to establish a regime of water conservation planning and implementation for every watershed in Ontario. The Act designates water planning boards - established under Part I.I of the Act - to undertake such planning and implementation at the watershed level, which also is described as a water planning and management area under the Act. The process must begin with an assessment consisting of water use data collection and demand forecasting regarding existing and prospective water supply, use, and demand in the watershed.

Following the completion of the assessment and the opportunity for public consultation in regard to the preparation of the assessment, each water planning board must submit a water conservation plan for its water planning and management area for the approval of the Director, Ministry of the Environment. The plan must achieve certain goals and objectives set out in the Act such as efficient water use, reduction in per capita, peak daily, monthly, and yearly water consumption rates and related conservation benchmarks.

Part II also requires the plan to contain certain water conservation measures to achieve the Act's goals and objectives. These measures must include water rates that operate on the principle of the more you use, the more you pay - subject to protecting certain disadvantaged groups from genuine hardship from rate increases; water use audits of the public system to identify how much water is used and how usage might be reduced; retrofits of fixtures, faucets, showerheads, and other facilities to increase water-use efficiency; implementation of a system for accounting for, detecting, and preventing water loss through leaks, etc.; enactment of water-use regulations or by-laws to restrict non-essential uses of water during conditions of drought, and other emergency situations; and related measures.

The water conservation planning and measures proposed under the Act are derived from a variety of sources. These sources include the United States Environmental Protection Agency Guidelines for Water Conservation Plans, the State of Washington water rights law (Title 90), the British Columbia Water Conservation Strategy, the Manitoba Water Efficiency Program, and the Quebec Water Commission (BAPE) Report. The concept of planning for protection of water resources on a watershed basis also is derived from the Ontario Conservation Authorities Act.

Part II also permits two or more water planning boards to enter into master water planning and management area conservation plan agreements for the watersheds under their collective responsibility.

Water conservation plans are subject to potential hearings at the request of any person and decisions by the Director, Ministry of the Environment (if there is no hearing) or the Environmental Review Tribunal (if there is a hearing). Appeals from decisions under Part II are dealt with under Part V.

Finally, Part II also requires the private sector and certain provincial activities to undertake, complete, and submit to the Director, and periodically update, water use audits and water use reduction plans. Such plans must be consistent with water conservation plans, remedial plans (discussed below) and the purposes and duties of this Act. These requirements are conceptually analogous to the waste audits and waste reduction plans currently required under Ontario law (Environmental Protection Act - O. Regs. 102/94, 103/94, 104/95).

PART III - RESTORATION AND ENHANCEMENT OF ONTARIO WATERS

Part III imposes obligations on water planning boards and the province where, for what ever reasons the former cannot act, to prepare remedial plans to restore and enhance the water regime in a water planning and management area (i.e. watershed) where it has been diminished or damaged

by past human activities. Remedial plans must define the nature and extent of the problem and its causes, evaluate existing and alternative measures, and implement, monitor, and evaluate the effectiveness of the measures in restoring and enhancing water productive capacity, features, and functions.

These requirements are conceptually analogous to the remedial action plans that form part of Annex 2 of the Canada-United States Great Lakes Water Quality Agreement.

Part III also permits two or more water planning boards to enter into master water planning and management area remedial plan agreements for the watersheds under their collective responsibility.

Remedial plans are subject to potential hearings at the request of any person and decisions by the Director, Ministry of the Environment (if there is no hearing) or the Environmental Review Tribunal (if there is a hearing). Appeals from decisions under Part III are dealt with under Part V.

PART IV - FUND FOR THE CONSERVATION, RESTORATION AND ENHANCEMENT OF ONTARIO WATERS

Part IV does not contain statutory text. Rather it recommends the establishment of, and some of the principles surrounding, a Fund to ensure that water conservation and remedial planning, implementation, research and related activities to be undertaken by water planning boards or the province, required by the Act can be financed. The Fund could be financed by those that apply for or retain permits or other approvals from the province for water diversions, water removals, land use changes, development, and infrastructure related activities.

Support for some of what is recommended is similar to that contained in the British Columbia Waste Management Act (B.C. Reg. 299/92 - Waste Management Permit Fees Regulation regarding application and annual permit fees). One could also draw on the fund approach contained in the Comprehensive Environmental Response, Compensation and Liability Act - Superfund - and related federal laws in the United States. Still other provisions establishing the Fund could be developed specifically for the unique problems to water caused by development and related activities.

The Fund also should be used to provide rebates to farmers, low income, and disabled customers experiencing genuine hardship in paying water bills that may increase as a result of the requirements of this Act. This approach is consistent with practices that have developed in a number of countries and been reported upon by the Organization for Economic Co-Operation and Development (The Price of Water: Trends in OECD Countries; 1999).

PART V - PUBLIC PARTICIPATION

Part V recognizes a public right to participate in the decision-making processes established under the Act. Part V establishes rights to create - or continue - a registry of information concerning matters under this Act; to notice and comment on projects, water removals, developments, water

conservation and remedial plans; to hearings, if necessary, regarding these matters; to funding to participate in such hearings; to appeals; and to independent rights of action in the courts, to ensure that the purposes and duties under the Act are fulfilled.

The provisions establishing the registry and the notice and comment provisions rely on those under the Ontario Environmental Bill of Rights, 1993 ("EBR"). However, the requirements under this Act should be more specific and extensive than the EBR as to the information to be placed on the registry, the types of activities for which the public must be notified, what constitutes minimum notice periods and minimum notice methods.

The provisions establishing a right to object and a right to request a hearing relate to applications for permits for diversions or water removals, approvals for development, approvals of water conservation and remedial plans, orders, and proposed policies and regulations. Depending on the matter at issue referrals are made to the Environmental Review Tribunal or the Joint Board. Many, but not all, of these matters would be subject to some type of hearing requirement under current law. However, this Act supplements those requirements, or creates new obligations where a hearing might currently not be required, or could be dispensed with, under existing laws.

Part V also recommends funding for persons requesting or seeking to intervene in a hearing. Again statutory text is not provided, but the principles surrounding establishment of such a regime are set out. Funding requirements could be based on the Intervenor Funding Project Act that was allowed to sunset in 1996.

The appeal scheme established under Part V consists of different paths depending on the matter at issue. First, projects, water removals, developments, water conservation plans, and remedial plans are subject to appeal from the Environmental Review Tribunal or the joint board as the case may be to the Divisional Court of Ontario. The appeal may be based on questions of law or fact or both and the Court may substitute its opinion for that of the board in question. Second, orders, and decisions on policies and regulations are subject to appeal to the Environmental Review Tribunal, which may substitute its opinion for that of the body appealed from (e.g. the Director or the Minister). An appeal from the Environmental Review Tribunal may go to the Divisional Court on a question of law only. An appeal from the Environmental Review Tribunal may go to the Minister, or the Ontario Cabinet if the matter originated with the Minister, on any other question.

Part V also establishes the right of any Ontario resident to bring an action in the Superior Court of Justice to compel compliance with a variety of duties set out under the Act (e.g. the requirement to adopt and implement water conservation or remedial plans), and authorizes certain remedies (e.g. injunction, declaration, etc., but not damages).

The Court also is given certain direction regarding the awarding of costs where a plaintiff is not successful in an action brought under this Act. In particular, the Court is directed by the Act to not award costs against, and potentially to award costs to, a losing plaintiff if the Court finds certain circumstances to apply. These circumstances include that the action is a test case or raises a novel point of law, the plaintiff contributed substantially to the Court's understanding of the matters in

issue, etc. However, the Court retains its discretion to award costs against a losing plaintiff where the Court finds a circumstance such as the plaintiff disputed a fact, issue, or opinion when it was unreasonable to have done so, unreasonably delayed the matter by its conduct, failed to comply with the Rules of Civil Procedure or any directions of the Court, etc. The concept of not awarding costs against, and potentially awarding costs to, a losing plaintiff is based on the notion of whether a party has substantively contributed in a responsible manner to the decision-maker's understanding of the issues and is derived from the rules of practice before a number of administrative tribunals in Ontario. (See, e.g. Rules of Practice of Environmental Appeal Board and the Environmental Assessment Board - Appendix G - Guidelines on Cost Awards, 1998, as amended).

Part V also permits any Ontario resident to seek judicial review of decisions made by the Minister or other public bodies under the Act where they have failed to comply with a purpose, duty, or requirement of the Act. Part V also sets the standard of review to be employed by the Court as one of correctness.

PART VI - ADMINISTRATION AND ENFORCEMENT

Part VI addresses a variety of administrative and enforcement matters.

This Part sets out the fee payment obligations of permittees and others under the Act, but leaves the actual quantum amount to be determined by regulations.

The Part also sets out the authority of the Minister to develop policies relating to protection, conservation, restoration, and enhancement of water, including the duty of the Minister to develop a drought policy.

Part VI also sets out the obligations of, and the minimum and maximum annual budget for, the Minister and the Minister of Natural Resources to undertake research dealing with such matters as scientific, technical, economic, legal and related matters to assist responsible authorities in preparing assessments, developing water conservation goals, objectives, measures, remedial plans, establishing surface and groundwater quality and quantity data, and integrating climate change information with water regime related information.

Part VI also sets out the circumstances under which the Director may issue an order (e.g. where person violates a prohibition under the Act), and the initial decision-making process for orders, policies, and regulations.

Part VI also sets out the offences and penalties for persons, officers and directors of corporations, or water planning board. The penalties imposed for violation of the Act are those contained in the Ontario Water Transfer Control Act. Part VI also authorizes the use of administrative penalties for violation of the Act. These requirements are comparable to those contained in the Ontario Environmental Protection Act or the Alberta Environmental Protection and Enhancement Act.

PART VII - REGULATIONS

Part VII sets out a wide array of circumstances where regulations may be promulgated under the Act (e.g. setting out contents for remedial plans or water conservation measures that are in addition to those already contained in the Act).

PART VIII - MISCELLANEOUS MATTERS

Part VIII sets out the short title of the Act.

Part VIII also makes it clear that an incidental extra-territorial effect on the protection, conservation, restoration, or enhancement of water outside Ontario's borders of a decision made under the Act will not invalidate the decision.

PART IX - CONSEQUENTIAL AMENDMENTS

Part IX lists those statutes that are of no force or effect to the extent of their inconsistency with this Act.

SCHEDULE 1 - CONSUMPTIVE AND NON-CONSUMPTIVE USES

Schedule 1 lists the primary industrial, commercial, municipal, institutional, irrigational, and recreational consumptive and non-consumptive uses of water that are subject to permit requirements under the Act. The contents of Schedule 1 are based on the Ontario Ministry of the Environment Guidelines and Procedures Manual for the Permit to Take Water Program (1999). The Manual, with some exceptions, lists these uses as being the ones that are commonly subject to the permit to take water requirements of section 34 of the Ontario Water Resources Act.

SCHEDULE 2 - WATERSHEDS

Schedule 2 sets out two alternative ways of identifying watersheds for the purpose of this Act. The first alternative would rely on the existing conservation authority watersheds but would require the development of additional northern Ontario watersheds to make the Act fully effective. The second alternative lists all rivers of Ontario and defines them, the lands that drain them, and their tributaries as watersheds for the purposes of this Act. Either approach is similar to, but far more detailed than, that used under the British Columbia Water Protection Act.

SCHEDULE 3 - ACTS

Schedule 3 lists certain, primarily planning related, laws of Ontario that are subject to the requirements of this Act.

SCHEDULE 4 - SPECIAL AREAS

Schedule 4 lists the Oak Ridges Moraine and the Niagara Escarpment as areas of Ontario that are subject to the requirements relating to protection of special areas under this Act.