"The Devil Is In the Details"

ONTARIO PROPERTY AND ENVIRONMENTAL RIGHTS ALLIANCE

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January 24, 2006

Mr. Rob Messervey, Manager, Water Resources Section
Ministry of Natural Resources
5th Floor, Robinson Place, South Tower
300 Water Street, P.O. Box 7000
Peterborough, ON., K9J 8M5

(By Fax and Hard Copy by Surface mail)

Dear Mr. Messervey:

Re: Generic Regulations Pursuant to Section 28 (1) of the Conservation Authorities Act and Wetlands

Your January 12, 2006 Letter Refers

Thank you for the above-noted letter the contents of which have been carefully reviewed. We're now pleased to quote specific sections of that communication and to provide relevant comment in italics for each as follows:

Page 1, Paragraph 2:

There may be some misunderstanding regarding the relationship between the Generic Regulations currently being developed by individual Conservation Authorities (CAs) and their relationship to municipal Official Plans and Zoning By-laws. As you will recall, the intent of the Red Tape Review Commission related to Conservation Authority Regulations was to provide consistency among individual CAs and to ensure coordination between CA Regulations and the Natural Hazard and Natural Heritage (Wetlands) components of the Provincial Policy under the Planning Act.

We thought the intent of the Red Tape Review Commission was to examine departmental proposals and make recommendations to the government designed to reduce "red tape", not enhance it. This, you will recall, resulted in Bill 25 and the Red Tape Reduction Act proclaimed October 28, 1998. I*n neither of those documents is there any mention whatsoever about CA's assuming regulatory control over the Natural Heritage (wetlands) component of the Provincial Policy Statement under the Planning Act. The objective of the generic Regulation has been, and is, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land. Obviously, some wetlands play a role in such control. We quote MNR Decision (EBR # RB03E6007):*

> *"the CA Act was amended (Bill 25) to provide consistency in key terminology and policy intent between the Provincial Policy Statement (PPS: 1996) governing natural hazards, development control and site alteration under the Planning Act"*

Historically there are many references to "natural hazards" in terms of public health and safety in the MNR Decision noted above and in our consultations with you in Toronto leading to the "generic" Ontario Regulation 97/04. But no mention of "Natural Heritage (wetlands)"was made in that document or in those conversations. For OPERA it would be difficult to conceive that a parallel but covert intention was to surreptitiously utilize the Red Tape Reduction Act in order to award CAs substantially extended regulatory powers and, at the same time, silence public debate and comment.

Page 1, Paragraph 3, Line 1:

Our review of the individual CA Regulation submissions to date show that they are attempting to coordinate Regulation with the Provincial Policy criteria for wetlands.

OPERA contends there is no mandate whatsoever in the amended Act nor in 97/04 to "coordinate their new regulations governing regulatory control with the Provincial Policy criteria for wetlands." If, in fact, such a mandate existed the definition of a "wetland" in the amended CA Act for the purposes of that legislation would be redundant and make no sense. The MNR Decision with respect to 97/04 comments as follows:

> *"All wetlands that conform to the wetland definition in the Conservation Authorities Act are subject to the Regulation. The Act establishes the acceptable definition of a wetland – consequently, the enabling Regulation cannot be at variance with the Act."*

OPERA's contention is that the manner in which MNR and Conservation Ontario are developing proposed regulations under the "generic" process is indeed at variance with Act and should not be approved by the Minister.

Page 1, Paragraph 3, Line 2:

That criterion requires a 120-meter "adjacent area" around all provincially significant wetlands.

OPERA agrees that the PPS criteria specifies a 120-meter "adjacent area" around all PPS wetlands under the Planning Act as it pertains to municipal Official Plans. But we contend this criterion does not and should not apply to "wetlands" as defined in the CA Act for the purpose of controlling natural hazards such as flooding.

Page 1, Paragraph 3, Line 3 and 4:

That does not mean they are necessarily taking the municipal wetland mapping and using it for Regulation purposes. In a lot of municipalities, the Conservation Authority will have provided original mapping for wetlands in the municipal Official Plans and Zoning By-Laws and the current exercise will be an update to that previous mapping.

In this respect the experience of most OPERA members is that MNR has supplied evaluated and unevaluated wetland mapping data to County Planning Offices as well as to CAs and that consultants hired by municipalities to produce Official Plans rely on those Offices to furnish required mapping under the Planning Act. If CAs have provided "original" wetland mapping it is mapping that has been approved and supplied to them by MNR.

Page 1, Paragraph 4:

Where MNR has evaluated and mapped a provincially significant wetland, this information can be used in both municipal planning document schedules and Conservation Authority regulation schedules. Conservation Authority regulation of wetlands that have not been designated provincially significant wetlands by MNR must meet the definition of wetlands set out in the Conservation Authorities Act.

OPERA believes regulation schedules should pertain only to those wetlands that meet the wetland definition as set out in the CA Act and that "provincially significant" wetlands are those specially evaluated for their social, economic or academic values, not their significance in terms of control of natural hazards such as flooding.

Page 2, Paragraph 1:

You are correct in stating that there is an additional criterion in Section 28(25) of the CA Act defining wetlands which requires that the wetland be connected to a surface watercourse. This does not change the classification of Provincially Significant wetlands between the Provincial Policy and the Generic Regulation. All wetlands are connected to a surface watercourse (everything is connected to everything else). A wetland is either an aquifer recharge or aquifer discharge area.

In OPERA's view the above statement lacks credibility: Provincially Significant wetlands are "classified" while "generic" wetlands are not. Further, not all wetlands are connected to a surface watercourse or to each other. For some the only connection is the 750-meter "complexing" criteria used with respect to wetlands evaluated as Provincially Significant. Some wetlands are "palustrine" or "lacustrine" or "isolated" or "riverine" or some combination of these types. Obviously, some are more important or "significant" for a CA in controlling natural hazards such as flooding.

Page 2, Paragraph 2:

If it is an aquifer recharge area, rainwater drains into the wetland, infiltrates to the groundwater system and eventually enters a stream through "upwellings". If it is an aquifer discharge wetland, the water table intersects with ground surface (water) in the wetland and forms the headwaters of a stream. In both cases there is a connection to a surface watercourse and the policies of an official plan will be the same as the regulated area within a CA Generic Regulation.

The wetland definition in the CA Act states:

> *"(b) directly contributes to the hydrological function of a watershed through connection with a surface watercourse."*

The operative word in the first instance is "directly". It does not state "directly or indirectly" as expressed in the Federal Fish Habitat Act. OPERA understands that recharge areas are unlikely to affect a CA's control of natural hazards such as flooding since, as you point out, these types of wetland infiltrate into the ground and it may be years before the effects of a rain event appear, if ever, in any stream or even in the same watershed.

The operative words in the second instance are "through connection with a surface watercourse". Clearly, some wetlands, like those found in the headwaters, will serve to attenuate down stream flooding. All of these may not have been properly considered in terms of their contribution to the hydrological function of the watershed over which the CA has or seeks to have regulatory jurisdiction. The hydrological function in terms of the CA Act must certainly pertain to a wetland function from a standpoint of its importance to the CA in controlling natural hazards such as flooding.

Page 2, Paragraph 3 and 4:

With respect to Section 28 (5)(e) related to "other areas", our Legal Services Branch has advised that the CA Act is silent on the definition of "other areas", subject to the reminder of that subsection which concludes "….where, in the opinion of the Minister, development should be prohibited or regulated or should require the permission of the Authority". It would appear that "other areas" might be defined as any activity which can be scientifically proven to impact or potentially impact on a wetland within a specified distance of that wetland.

OPERA finds this unusual and convoluted interpretation of "other areas" astonishing. Firstly, how could the drafters of the Red Tape Reduction Act leave a definition of "other areas" to the advice of legal counsel after the fact? It is precisely this kind of administrative management that serves to increase, not reduce, red tape. Further, it is contrary to assurances expressed to us by yourself and by other MNR spokespersons regarding the intent of:

> *"other areas where the Minister is of the opinion that the Authority's permission for development should be required if, in the Authority's opinion, the control of flooding ……"*

Might the term "other areas" result in a Ministerial directive that, in his/her opinion, all "adjacent land" within 120 meters of a Provincially Significant wetland under the Provincial Policy Statement shall henceforth be defined as "open areas" subject to CA's regulatory control? If so, Mr. Messervey, OPERA believes such a result would represent an abuse of political power and a very serious breach of "good faith" in official communications, even more so considering the manner in which public discussion of these matters has been, in our view ,systematically stifled. We hope and believe that assessment is, or will prove to be, incorrect.

Therefore it may or may not be the same as "adjacent lands" or "buffer zones". The buffer zones should not be confused with buffer zones under the Federal Fisheries Act which are either 15 meters or 30 meters to protect fish habitat.

OPERA would appreciate a reference concerning buffer zones under the Federal Fisheries Act. In this instance, however, we were specifically referring to:

> *"(iv) an allowance in meters inland, determined by the Authority, not to exceed 15 metes".*

as it appears in 97/04, noting this is a maximum not a minimum allowance.

Page 2, Paragraph 5:

The advice we have received to date indicates that the definition of "other areas" will be defined more clearly through appeals to the Minister and hearings by the Mining and Lands Commissioner. Both sides of the issue can argue the merits of their definition of "other areas". We therefore believe that to say at this point CAs are using the "other areas" subsection of section 28(5) in contravention of the Act would be, at best, premature.

OPERA contends as follows: The suggestion that new definitions of "open areas", should they ignore the intent of legislation (the Red Tape Reduction Act) that was aimed at reducing red tape and unnecessary expenditure of resources, can be nevertheless inserted at Ministerial direction is very disturbing. We are equally concerned about re-definition proposals under generic regulations that seek to justify Conservation Ontario and MNR views that "open areas" can be defined after the fact through appeals to the Minister and hearings by the Mining and Lands Commissioner.

If this represents an intention to initiate and enact new public policy in a manner that forestalls public access to natural justice except by substantial taxpayer expenditure, it augers poorly for good government and effective management of public resources. Such an intention is, in our view, clearly discriminatory and, if later confirmed, clearly suggests that OPERA has been seriously misled by MNR spokespersons regarding the definition of "open areas". We trust our contention in this respect is in error.

Page 2, Paragraph 6:

We also draw your attention to the last paragraph of Section 28(25) under the definition of wetland, wherein it is stated "but does not include periodically soaked or wet land that is used for agricultural purposes and no longer exhibits a wetland characteristic referred to in clause (c) or (d)". This provision in the Act permits any normal farm practice other than the construction of structures or the placement or removal of fill within the "other areas" or "adjacent lands". A CA Regulation is permissive in nature and should not be construed as a "prohibition" line for any activity. In addition, any existing land uses within a wetland or other areas is grand fathered as a permitted use.

OPERA is aware of the provisions in the Provincial Policy Statement and the CA Act regarding soaked or wet land used for agricultural purposes. We will leave for the moment the effect of potentially serious restrictions on the construction of structures or the placement or removal of fill within "other areas" or "adjacent lands" to farm groups for their review and comment. In any case, permissive or not, control measures for all wetlands, whether or not they as well as 120 meters on their perimeters are used for agricultural purposes, will simply impose on all CAs, their municipal shareholders and local taxpayers more red tape costs arising from regulatory duplication and enforcement. This is particularly unfortunate and unnecessary in view of the number and, extent of so many other controls on agricultural practices already in place.

Page 2, Paragraph 7:

I hope this information is of assistance.

Yes it is. Thank you for your response to our letter of December 19, 2005. We ask and will appreciate you further comment at an early date concerning each of the issues raised in this long overview.

Yours truly

R.A. (Bob) Fowler, Secretary
Ontario Property and Environmental Rights Alliance