

DELIVERED VIA EMAIL

Procedures Update Team
c/o Great Lakes St. Lawrence Governors and Premiers
20 N. Wacker Drive, Suite 2700
Chicago, Illinois, 60606

June 21, 2018

Re: Enhancement of public participation in the diversion application process

Thank you for the opportunity to submit comments on the Joint Great Lakes–St. Lawrence River Basin Water Resources Regional Body and Compact Council Procedures Update Team’s draft Guidance and Rules of Practice and Procedure and Sequence of Events dated May 22, 2018.

The Canadian Environmental Law Association (“CELA”) is writing to express an overarching concern that the procedures being put in place will not adequately facilitate public participation in diversion reviews. As the Rules and Sequence of Events are finalized, the enhancement of public participation should be prioritized.

Background on CELA

CELA is an Ontario specialty legal aid clinic. It was founded in 1970 to use laws, and to advocate for improvement to laws, that protect the environment and human health. Water sustainability is one of CELA’s core priorities. CELA was a member of the Annex Advisory Panel and provided input to the Ontario government both before and after the signing of the *Great Lakes–St. Lawrence River Basin Water Resources Agreement* (“Agreement”).

CELA participated in the meeting of the Procedures Update Team in Toronto on March 14-15, 2018 and submitted written recommendations along with the National Wildlife Federation and the Alliance for the Great Lakes following that meeting.

Recommendations to Improve Public Participation

Regional Body and Compact Council Review

Section 200.4(1) of the Rules provides that only an Originating Party may submit an application to divert water to the Regional Body for review. However, Article 502(2) of the Agreement allows a majority of the members of the Regional Body to determine that a proposal to divert water may be reviewed because it is “regionally significant or potentially precedent setting”. In other situations, there may be a dispute about the Originating Party’s assessment of the applicability of the Compact or Agreement review provisions. The Rules should be amended to allow a member of the public or another member of the Regional Body to bring a proposed

diversion proposal to the attention of the Compact Council or Regional Body for consideration and decision on whether a review is appropriate.

Section 200.8(1) contemplates providing notice to the public of a review through its website and to identified interested parties.¹ Especially given the short timeline for review and the restrictions on appeals by groups or individuals who do not participate in the review process, the Regional Body should also reach out to communities around the Great Lakes basin to ensure that the public is aware of upcoming decisions. First Nations, environmental organizations, municipalities and community service providers may be appropriate partners to help ensure an informed public can participate in any diversion review process.

The Regional Body should host a public hearing in each Great Lakes jurisdiction. The Agreement recognizes that the Great Lakes are an interconnected, single hydrologic system.² The public should not be dependent on its government's determination of sufficient interest in the diversion proposal to have an opportunity to participate in a local public hearing.³

It should be mandatory pursuant to section 201.1(2) for members of the Regional Body and Compact Council to record and summarize public comments at its public hearing, and to forward the comments to the Regional Body for consideration and incorporation into the administrative record.⁴

CELA supports the establishment of a separate, specific meeting for consultation with First Nations, Métis and federally recognized Tribes, and urges the Procedures Update Team to consult with those communities to determine the most appropriate way to conduct those hearings.⁵

The Compact Council and Regional Body should commit to remote participation at hearings.⁶

Written public comments should not be due until 15 days after the Technical Reviews are submitted, so that the public has a thorough understanding of the proposal and an opportunity to comment on the technical concerns raised by members of the Regional Body.⁷

A process needs to be developed to monitor the Originating Party's compliance with the Compact Council and Regional Body's decision. Once a decision has been made, a member of the public should be able to raise concerns to the Regional Body and Compact Council regarding the Originating Party's compliance with the terms of an approval.⁸

¹ *Great Lakes – St. Lawrence River Basin Water Resources Compact Guidance and Rules of Practice and Procedure*, May 22, 2018 (“*Rules of Procedure*”), s 200.8(1)

² *Great Lakes- St. Lawrence River Basin Sustainable Water Resources Agreement*, December 13, 2005

³ *Rules of Procedure*, Section 200.8(5), *Sequence of Events for Consideration of Proposals for Exceptions to the Prohibition on Diversions that are subject to Regional Review*, May 22, 2018 (“*Sequence of Events*”), s 16

⁴ *Rules of Procedure*, s 201.1(2)

⁵ *Rules of Procedure*, s 201.1(3), *Sequence of Events*, s 15(e)

⁶ *Sequence of Events*, s 15

⁷ *Sequence of Events*, ss 12, 17 and 18

⁸ *Rules of Procedure*, s 202(5)

Appeal Hearing by Compact Council

Section 302(2) should be amended to allow members of the public to appeal a Compact Council decision if they can demonstrate that they are aggrieved by the decision and that they have a reasonable explanation for why they did not participate in the original review process.⁹

CELA supports the right of any federally recognized Tribe or First Nation community to file an amicus brief. It should be made clear that representatives of Métis Nations also have a right to file an amicus brief.¹⁰ Federally recognized Tribes, First Nations and Métis Nations should also be able to participate as of right as a hearing participant.¹¹

Section 309(h)(a) should be amended to allow potential intervenors to file their motion thirty days after the party they support has filed their materials.¹² An intervenor should be able to assess whether their position is adequately represented by other parties before determining whether to intervene.

The administrative record should include all documents submitted or created as part of the review process.¹³

CELA strenuously objects to the Section 323 assessment of costs provisions, which are a totally inappropriate barrier to public participation in crucial decisions about diversion proposals.¹⁴ Filing a petition for review under the Compact Council Rules is a precondition to seeking judicial review.¹⁵ It should not be the norm that appellants must bear the costs of the Council in holding an appeal, including to pay for a court reporter, fees and costs of the Council's legal counsel, rental of a hearing room, transportation expenses of Council Members and Secretariat staff, and lodging.¹⁶ The risk of such costs will significantly chill public participation. Low-income and disadvantaged communities will be disproportionately affected. The Great Lakes states and provinces should instead contribute to an appeal fund to deal with the rare appeals that will take place under this scheme. CELA strongly urges the Procedures Update Team to remove these inequitable costs provisions.

Conclusion

The Compact and Agreement were created because of the public outcry in both the United States and Canada after the Ontario Environment Ministry provided a permit to Nova Group Ltd. to export and sell Great Lakes water without notification to other Great Lakes states and provinces.

⁹ *Rules of Procedure*, s 302(2)

¹⁰ *Rules of Procedure*, s 307(1)

¹¹ *Rules of Procedure*, s 309(h)(b)

¹² *Rules of Procedure*, s 309(h)(a)

¹³ *Rules of Procedure*, s 308(1), *Sequence of Events*, s 28

¹⁴ *Rules of Procedure*, s 323

¹⁵ *Rules of Procedure*, s 314(1)

¹⁶ *Rules of Procedure*, s 323 (1)

The Nova Group incident makes clear that the public has a significant and important interest in protecting our shared Great Lakes. The proposed Rules and Sequence of Events should be amended to ensure that the public is appropriately engaged and consulted in any future diversion decision.

Yours Truly,

A handwritten signature in black ink, appearing to read "Jacqueline Wilson". The signature is fluid and cursive, with the first name being the most prominent.

Jacqueline Wilson
Counsel
Canadian Environmental Law Association