

Madame Louise Arbour
United Nations High Commissioner for Human Rights

Dear Madame High Commissioner,

I have received notice that you are requesting input regarding legislation pertaining to safe water and sanitation.

Please consider the following perspectives, from the Polaris Institute, Ontario, Canada, regarding draft legislation released on April 3, 2007.

Even though a given piece of legislation has a noble-sounding name, in this case, the "Safeguarding and Sustaining Ontario's Water Act", it may contain elements which function to undermine the Human Right to Water.

Specific elements function to place private corporate 'rights' to water over human rights.

In order to give the Human Right to Water its deserved place in priority, we need to recognize and challenge elements of legislation that treat the human right to water secondarily to 'economic' concerns and private interests, under the guise of 'partnerships'.

The people of Ontario, and Canada, are still without legislation that upholds the human right to water, as are most people around the world. Where similar pieces of legislation are being developed in other countries, we are hoping that the UN can review those with an eye to eliminating mechanisms that will similarly function to transfer the human right to water over to private entities for their profit.

Thank you for your efforts in this regard.

Sincerely,

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Water Privatization by Permit:

Open Letter on the Proposed "Safeguarding and Sustaining Ontario's Water Act"

Dear friends of water,

Last week, the province of Ontario released yet another piece of legislation that fails to adequately safeguard water. This most recent attempt is called the "Safeguarding and Sustaining Ontario's Water Act" (SSOWA).

Although there was much bravado around the revelation of this new legislation, it's not really anything new. It is Ontario's implementation of what started out as the Great Lakes Charter 'Annex' a few years ago, renamed the Great Lakes St. Lawrence River Basin Sustainable Water Resources Compact and Agreement, and signed by US Great Lakes governors and Ontario and Quebec Premiers in December 2005.

Prior to and since the signing of this agreement, water activists have raised concerns largely because the agreement fails to protect our water resources from private interests and foreign expropriation. Unfortunately, Ontario's implementation version, released last week does not appear to deal with many key concerns.

The following are ways in which Ontario's SSOWA falls short of protecting Ontario water:

1. Although eliminating the diversion of water from the Great Lakes Basin is a major concern for water activists, the SSOWA allows water in containers under 20 litres to be exempt from prohibitions on diversion. This includes most of the bottled water that is being extracted from the Great Lakes Basin in Ontario by Coca-Cola, Pepsi, Nestlé, and Aquafarms 93 (which bottles for other retail outlets including Wal-Mart, Shoppers Drug Mart, and Loblaws). This industry is growing annually by 18% in Canada, and bottled water is transported outside the province and outside of Canada.
2. The SSOWA gives ultimate decision-making power on bulk water diversions to a tribunal with no assurance that the people of Ontario or the public interest are adequately represented. While the make up of the tribunal is not clarified in the SSOWA, it may very well be a tribunal appointed by the Great Lakes-St. Lawrence River Water Resources Regional Body, made up primarily of the US Great Lakes Governors, thus compromising the people of Ontario's final say in the management of our water resources.
3. The SSOWA, in keeping with the Annex Agreement, allows straddling US counties to divert water from the Great Lakes Basin. As well SSOWA continues to allow the major Chicago Diversion of Great Lakes water to the Mississippi Basin and to the water hungry US southern and western states. The pressure for increasing the volume of these diversions will only increase in coming years.
4. The SSOWA allows water to be transferred "by the operating authority of a municipal drinking-water system ...or by any other person." (34.6.2.2.ii), in and around the Great Lakes Basin, including to the US side. Once this water reaches the US side, it likely falls under article 1.8.3 of the US Constitution (the "Commerce Clause") which can be used to challenge a state's limitation on interstate water exports. It's also important that we clarify how this proposed legislation could leave Ontario's water resources open to NAFTA investor state challenges. What is clear is that loosening legislation around transfers and diversions increases the susceptibility of our water resources to NAFTA and the US Commerce Clause. As such, we need to develop stronger prohibitions on water transfers and diversions.

A return flow provision is included in article 34.6.3.1. Essentially this means that a permit holder could be required to return a portion of the water it takes from a Great Lakes watershed. While some organizations have argued that this provision will function as a deterrent to would-be diverters, private water companies that operate water and sewage systems have argued that their “sewage returns” are acceptable forms of water return.

5. The proposed bill allows for the transfer of water-taking permits between different parties, as long as they get the approval of an appointed Ministry of Environment Director. The Director’s signature will allow companies running water, hydro, and other industrial and commercial enterprises to buy and sell their water-taking permits. This could occur even between public water systems and the private sector. This opens the door to permit speculation, increasing the value of permits as corporate assets in mergers and acquisitions. The solution is not just to require Ministry approval on permit transfers, as proposed, but a complete prohibition on permit transfers altogether. New permit holders and ‘related transferors’ should be required to obtain new permits when changes in company ownership occur.

6. The SSOWA also fails to name water as a public trust. Instead, it refers to water as a public ‘treasure’. The legal distinctions here are critical. There is a long history of public trust and common law principles pertaining to water in Canada that limits appropriation of water for private profit. Calling water a ‘treasure’ purposefully detours around these principles so that historical traditions upholding water as a commons and public trust can be disregarded. We need to retain the term ‘public trust’ within SSOWA in order to establish the direct application of these laws in protecting Ontario’s water from privatization.

7. The SSOWA shifts water use priorities. In Ontario’s earlier water-taking regulations, domestic users were given priority in water use, followed by farming, with industrial and commercial interests considered last. Under the SSOWA, water-taking and diversion permits may be approved simply because the permit seeker’s other options for accessing water are not deemed to be ‘cost effective’. ‘Cost’ is not defined in the SSOWA, and appears to be strictly limited to profit rather than a more realistic assessment that includes costs to environment, human health, and the public costs associated with diversion and trade in our water.

Further, the SSOWA in its first statement identifies ‘economic’ uses of water as a top priority. Without stating that water is a human and ecosystem right, and a public trust, the SSOWA paves the way for ‘economic rights’ to carry the field, particularly in the context of NAFTA and other trade legislation.

In short, the current draft of the SSOWA needs to be reformed to ensure it does not serve to hand the public trust in water over to private interests and further open up our water resources to foreign expropriation.

The SSOWA is particularly disconcerting when we review it in the context of other recent draft regulations tabled by the government of Ontario.

For example, this past winter the province of Ontario released its first discussion paper on the new Clean Water Act. The paper detailed the proposed makeup of the regional Source Protection Committees (SPCs) which will be responsible for watershed planning under the new Act. The

Province has proposed that industrial and commercial stakeholders make up one-third of the committees. This is the first time industry representatives and companies operating - but not necessarily residing - in a region, will be formally involved in the watershed planning: defining what activities constitute water 'threats', or not; deciding who should get water-taking and water-pollution permits; and developing long-term water management plans for each watershed in this province.

Given the proposed structure, some residents are also concerned that the SPCs will likely find it necessary to contract comprehensive planning services out to external private consulting corporations, further privatizing water resource management in Ontario.^[1]

In another example, last week - at the same time that the provincial government released the SSOWA - the Minister of the Environment announced a new charge on water takings. The amount proposed for water bottlers- \$3.71/million litres – is so minimal it will neither reduce water takings nor return any significant funds to pursue our social and environmental goals. Instead the funds will be diverted to the above-mentioned SPCs, co-managed by private interests. The deadline for comments on that proposal is in June. We will be providing a more detailed analysis of this proposal in time for you to submit comments.

What we are witnessing in Ontario is the quiet restructuring of water resource management. This includes: 1) giving private interests an equal footing with government and the community in defining watershed risk and the basis for granting water taking and water pollution permits^[2], 2) allowing for the diversion of Great Lakes water for bottled water companies and others, 3) opening the door for foreign diversion of Ontario water, used by private interests for profit, and finally 4) defining water in ways that give private interests the legal right to exploit it.

While the Minister of the Environment is proudly introducing so-called environmental legislation in time for November's election, the actual implications of these policies are the secession of water resources to domestic and foreign water privateers and the erosion of public management and control. The problematic elements in Ontario's draft SSOWA need to be changed to uphold water as a public trust, a right of humans and ecosystems, and a sacred source of life.

The SSOWA document can be found at http://www.ontla.on.ca/bills/bills-files/38_Parliament/Session2/b198.pdf

Sincerely,

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April 2007

[1] The alternative is to retain watershed planning fully within the public domain, conducted by public representatives of various levels of government along with community residents, supported by sufficient ongoing funding for research, and related management tasks. Stakeholders who profit from use and exploitation of water should provide transparent reporting to the SPCs, but should not hold direct seats on planning committees.

[2] The SPCs are tasked with the review of all available water data, making determinations about how much water is available in the ground, on surface, and through precipitation, comparing it with tallies of various sectors' existing use of water, considering which areas and functions are 'high or medium or low risk', and making plans for allocation of available water resources to various sectors, including industrial, commercial, agricultural, and domestic use, while leaving, theoretically, enough in flow to 'sustain' ecosystems. The way this could play out, given corporate financial and legal muscle, is that farmers and residents will be blamed for their consumption and pollution, given restrictions, metering, and high costs, while industry and commercial interests get off the hook, and are allowed to take inappropriate amounts, leaving very minimal flow levels (e.g. 25% of summer base flow) for other creatures in the ecosystem.