

Staff Report #2924/17

September 1, 2017

Memorandum

To: The Chair and Members of the Board of Directors
Mississippi Valley Conservation

From: Paul Lehman, P.Eng.
General Manager

Re: Proposed Wetland Regulation Policy Revisions

Background

In 2004 the Province of Ontario passed Ontario Regulation 97/04 (also known as the Generic Regulation) which required all individual Conservation Authority regulations, made under Section 28 of the *Conservation Authorities Act*, to conform to the content of the Generic Regulation (97/04). This Generic Regulation required all conservation authorities to amend their regulations to include areas within 120 metres of provincially significant wetlands and areas within 30 metres of other wetlands. The amended MVCA Regulation was subsequently adopted by the Board of Directors in 2005 and approved by the Minister of Natural Resources effective May 4th, 2006. As “*wetlands*” was a new addition to MVCA’s regulation and due to concerns with limited mapping and uncertainty with the resources required to administer the regulation across a broader area, the Board of Directors decided to apply the regulation only to wetlands which were classified as provincially significant. The Environmental Commissioner for Ontario noted in his 2006/07 Annual Report this departure from the Provinces expectations.

In 2012, the Board of Directors instructed staff to investigate the feasibility of applying the regulation to non-provincially significant wetlands as specified in the 2006 Regulation. Following a staff report in 2015, the Board of Directors adopted an implementation strategy and directed that the Regulation Policies be amended for consideration and approval by the Board.

In late 2016 and early 2017, five member municipalities passed Council resolutions opposing the proposal to apply the current Regulation (Ont. Regulation 153/06) to non-provincially significant wetlands. Similarly, letters of opposition were received from M.P.P.’s Randy Hillier and Jack MacLaren. Staff have continued to consult with individuals and organizations and respond to inquiries as requested by the Board and have provided on-going update reports.

As the Province was in the process of finalizing a Wetland Conservation Strategy for Ontario, the Board of Directors directed staff at the February 15, 2017 meeting to bring this matter to the Board for further consideration in September of 2017.

Current Status

Over the past several months, the Ontario Ministry of Natural Resources and Forestry (MNRF) has released two significant reports which are relevant to the Boards consideration of this matter.

A Wetland Conservation Strategy for Ontario 2017 – 2030

The Wetland Conservation Strategy identifies two overarching provincial targets concerning wetland area and functions using 2010 as a baseline:

1. By 2025, the net loss of wetland area and function is halted where wetland loss has been the greatest.
2. By 2030, a net gain in wetland area and function is achieved where wetland loss has been the greatest.

Note: Wetland loss is considered to be greatest in areas south and east of the Canadian Shield which includes MVCA (A Wetland Conservation Strategy for Ontario 2017 - 2030).

To achieve these targets, the Strategy focusses on four strategic directions including Awareness, Knowledge, Partnership and Conservation. The first of these is to raise awareness and appreciation of the important functions which wetlands perform and the services and benefits they provide. The second is to improve understanding of the role which wetlands provide at the landscape scale for habitat connectivity as well as their influence between ground and surface waters, which are important for source water protection. The third strategic direction is to clarify roles and responsibilities and to encourage improved communication, cooperation and coordination between the many partners involved in wetland conservation. The fourth direction will involve reviewing the effectiveness of existing provincial laws, regulations and policies to ensure the conservation of wetlands, identifying gaps and proposing improvements to better conserve Ontario's wetlands.

The Strategy describes twelve existing provincial instruments that restrict certain activities in wetlands along with an additional nine instruments which facilitate wetland conservation. It is understood that these are the legislative instruments with which the Strategy's strategic directions #3 and #4 will be primarily focused. It should be noted that with the exception of the Conservation Authorities Act Regulations, which *"Regulates development in and around wetlands for effects on the control of natural hazards (e.g., flooding) as well as activities that may interfere with a wetland"*, the remaining eleven instruments that restrict certain activities in wetlands, are largely limited in terms of their geographic scope and application.

Conserving our Future – A Modernized Conservation Authorities Act

In June, MNRF released *"Conserving our Future – A Modernized Conservation Authorities Act"* which accompanies proposed legislative changes to the Conservation Authorities Act contained in Bill 139 – *"The Building Better Communities and Conserving Watersheds Act, 2017"*. The proposed legislative changes are the culmination of two years of consultation with multiple stakeholders across Ontario in reviewing the *Conservation Authorities Act* to identify opportunities for improving the legislative, regulatory and policy framework that currently governs the creation, operation and activities of conservation authorities. The Bill is currently under second reading.

While many of the proposed amendments are administrative in nature there are several significant amendments which relate directly to the *"Wetland Conservation Strategy for Ontario 2017 – 2030"*. These include:

1. Enabling the Lieutenant Governor in Council (LGIC) to make regulations outlining the programs and services conservation authorities are *required* to provide and requiring conservation authorities to

provide such provincially-mandated programs and services in accordance with any standards or requirements outlined in the regulation.

2. Transferring the prohibitions and corresponding requirements to obtain conservation authority approval for certain development activities and interference with watercourses or *wetlands* from individual regulations to the *Act*.
3. Increasing the maximum fines that can be imposed by a court upon convicting an individual or a corporation for undertaking a prohibited activity or failing to comply with the conditions of a permit.
4. Enabling officers appointed under the act to issue stop work orders.
5. Potential for creating a new regulation outlining the roles and responsibilities of conservation authorities in supporting Ontario's Wetland Conservation Strategy and Provincial commitments to stopping the net loss of wetlands in Ontario.

Based on the results of these two initiatives, it is apparent that the Province's expectation is that conservation authorities are to regulate activities which may interfere with the function of a wetland whether provincially significant or non-provincially significant. To clarify this, Bill-139 proposes to eliminate the "discretionary power" of a conservation authority to make regulations under Section 28 of the CA Act and directly prohibit those activities within the CA Act itself. The province also proposes to mandate conservation authorities with the responsibility to manage water-related natural hazards, such as restricting activities which may interfere with a wetland, and defining the standards which are to be followed through Regulation.

It is also apparent, that the Province intends to pass Regulations requiring conservation authorities to;

1. Assist the Province achieve its stated objective of halting the loss of wetland area and function by 2025, and;
2. To mitigate climate change and provide for adaptation to a changing climate, including increasing resiliency.

While the details of the proposed Regulations are not known, the MNRF has struck a Service Delivery Review Committee to begin the process of advising MNRF on potential improvements. The Committee will consist of representatives from a broad range of sectors.

It should also be noted that regardless of the proposed amendments to the *Conservation Authorities Act*, the recent ruling by the Court of Appeal for Ontario regarding the Gilmore case reaffirms that the Conservation Authority (NVCA) regulation clearly prohibits development within hazardous lands including wetlands as required by Ont. Reg. 96/04 (Generic Regulation).

Watershed Considerations

Wetlands play a critical role on the landscape as they form a transition zone between terrestrial and aquatic environments. Wetlands temporarily retain excess runoff from rainfall or snowmelt allowing it to be released slowly as surface flow to downstream watercourses, as interflow replenishing shallow aquifers or as groundwater recharge to deeper aquifers. The vegetative communities supported by wetlands provide a source of phosphorous removal improving water quality and serving as important habitat to an array of plants, birds, insects, amphibians, fish and other animals.

Studies have concluded that wetlands can remove up to 6 kg of phosphorous per hectare each year and that wetlands less than 1 hectare in size are actually the most effective at removing nutrients from surface water. Excess phosphorous in surface water will increase the growth of algae and can result in algal blooms which can affect recreational water use and deplete dissolved oxygen levels which can be detrimental to aquatic life. In severe cases, such as has occurred over the past few of years in the Mississippi River watershed, blue-green algal blooms have been identified which can be toxic to humans and animals.

It has long been understood that wetlands provide important buffers to controlling the effects of flooding during extreme rainfall events and recent studies have concluded that the loss of this wetland function within a rural watershed in Ontario would increase flood damage by 29%

Within the Mississippi Valley Conservation Authority watersheds, it is estimated that 65% of the wetlands which originally existed have been converted to other forms of land use through either drainage or land fill. The remaining wetlands cover an area of approximately 565 km² representing 13% of the total watershed area. Of these approximately 174 km² or 4% of the watershed are rated as provincially significant under the Ontario Wetland Evaluation System with an additional 92 km² or 2.1% being located on Crown land. The proposed Policy changes would apply to an additional 174 km² or 4% of the watershed which are unevaluated or classified as non-provincially significant and which satisfy the proposed regulatory criteria. This would amount to approximately 8% of the watershed consisting of wetlands being subject to Ont. Regulation 153/06 with an additional 2.1% residing on Crown land for a total of 10.1%. On Crown land MNR is responsible for managing wetlands and is also subject to PPS. Environment Canada suggests that a minimum of 10% of a watershed or 40% of the historic wetland coverage in a watershed should be protected and restored. Based on these criteria, the Mississippi Valley Conservation Authority watersheds are at a critical point as the existing wetland coverage is at the lower limits as suggested by Environment Canada.

Recent Climate Change Vulnerability Assessments completed for the Mississippi Valley, project that severe droughts as we have experienced in 2012 and 2016 will become more pronounced and frequent. Low flow conditions are expected to become 30% to 60% lower than historically resulting in generally higher nutrient concentrations. Flood damage across Ontario and indeed in the southern United States during 2017 all confirm climate projections that storms have become more powerful and destructive. Wetlands provide important buffers to absorb the effects of climate extremes and improve the resiliency of our rivers and lakes to recover from these extreme events.

Proposed Wetland Policies

The attached Policy document was prepared in response to the Boards direction considering comments received from municipal staff, conservation authority staff and the public. The Policy is intended to guide administration of Ontario Regulation 153/06 as it pertains to non-provincially significant wetlands within the Authority's jurisdiction.

Adoption of the proposed Policy would direct staff to regulate certain activities within wetlands greater than 0.5 hectares in size and which exhibit hydraulic connectivity. It is evident that the province has provided the conservation authority with a regulatory tool to conserve the hydrologic functions which wetlands provide across the watershed as a whole regardless of the classification received under the wetland evaluation system. The provincial Wetland Conservation Strategy 2017 – 2030 has stated the Province's objective of achieving "No Net Loss" in wetland area and function relative to 2010. The proposed Policy will greatly assist in achieving that objective while at the same time providing flexibility to address local interests.

A recent decision by MNRF to reclassify a large area of wetland in the upper Poole Creek watershed from being provincially significant to non-provincially significant highlights the risk with basing protection solely on a wetland's classification. In this example the reclassification stems from continued incursion and alterations to the wetland which has impacted many of the attributes used in the evaluation system to assign scoring. Despite efforts by MVCA to curtail these alterations and a recent Court order to reinstate the wetland, the wetlands evaluation now falls below the level for it to be considered provincially significant. The hydrologic functions which the wetland continues to provide to the Poole Creek watershed remain important to the control of flooding however, without the provincially significant ranking, there is no longer any provision for its continued protection.

Recommendation:

Resolved, That the proposed Policies for administration of Ontario Regulation 153/06 associated with non-provincially significant wetlands within the jurisdiction of the Mississippi Valley Conservation Authority be approved for implementation effective October 1, 2017.