

October 20, 2004

## **ADDENDUM - POLICY INTERPRETATION REPORT**

**RE: COMMERCIAL WATER TAKING AND ITS REGULATION IN THE AREA OF THE NIAGARA ESCARPMENT PLAN - INTERPRETATION AS A PERMITTED USE RESULTS FOLLOWING PERIOD OF CONSULTATION**

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### **ISSUE:**

The Niagara Escarpment Commission (NEC) is being asked to make a determination on whether or not commercial water taking is a permitted use under the Niagara Escarpment Plan (NEP).

### **SUMMARY RECOMMENDATION:**

*Commercial water taking is not a permitted use under the NEP. Such an undertaking requires a Plan Amendment.*

### **TOPIC REVIEW:**

Various types of water taking occur throughout the area of the NEP. The majority of these relate to the taking or use of water, which can be considered accessory, or incidental, to a permitted use listed in the Plan. For example, this includes water for rural residences and farms and home businesses, and pumping related to mineral resource extraction, irrigation for golf courses, snow making for ski resorts, and municipal supplies servicing urban, minor urban and recreation areas.

The Plan also has a limited number of "existing" commercial wells used by the water bottling and beverage industry. These would be recognized as existing uses under the NEP. As well, numbers of local naturally occurring springs are also used informally by the public for drinking water.

In addition, the Plan allows utility facilities. These are defined as including (amongst other utilities) a water supply, or any other similar works or systems, necessary to the public interest.

The Plan is, however, not explicit on whether privately operated commercial wells or similar types of water taking is a permitted use. For the most part this would relate to new applications by the “bottled” water industry.

The catalyst for this topic was the application to the NEC for the use of wells on a property in the Town of Mono for commercial purposes (Genuine Springs Inc.). The water would be trucked off site and used for the purposes of bottling (public consumption), food manufacturing (bakeries, breweries, etc.) and local use (e.g., swimming pools, drinking water). As well, at about the same time, the province introduced a moratorium which precluded the taking of water for commercial purposes in the Niagara Escarpment Planning Area and on the Oak Ridges Moraine while it undertook regulatory and legislative review based on the findings from the O'Connor Report on Walkerton and the Report of the Advisory Committee on Watershed-Based Source Protection Planning. The Association of Municipalities of Ontario also convened a water taking Task Force and reported to the government with a number of recommendations on the state of the permitting process (December 2002). Concurrent with all of these activities was a municipally sponsored campaign which saw local councils and conservation authorities passing resolutions requesting that the province prohibit commercial water taking until such time as a proper permit monitoring and evaluation processes were in place and comprehensive source water protection plans for watersheds were created.

## **BACKGROUND:**

The Commission originally received the Commercial Water Taking Policy Interpretation Paper for information and discussion on September 17, 2003. The Commission then posted the Paper on the NEC website on October 3, 2003, and comments were invited from the public. Comments were initially requested for November 19<sup>th</sup>, but were extended to December 31, 2003 in response to requests for additional time for input. Comments continued to come in, and were accepted, after that date.

The report was also sent directly to ministries, municipalities, agencies, stakeholders and interested parties on October 6, 2003 for their review and comment.

The NEC Paper recommended:

1. That commercial water taking/bottling is not a permitted use under the Niagara Escarpment Plan.
2. That such an undertaking will require an Amendment to the Plan pursuant to Section 6.1 of the *Niagara Escarpment Planning and Development Act*.
3. That the issue of whether or not commercial water taking should be a permitted use in the Niagara Escarpment Plan should be dealt with fully through a comprehensive policy review, taking into consideration any future Provincial strategy on water taking.

4. That the current water taking moratorium in the Niagara Escarpment Planning Area be extended beyond March 1, 2004 if the Provincial strategy on water management has not been completed by that date.

#### **Overview of Consultation Period:**

From October 3 to March 31, 2004 the Policy Interpretation Paper was downloaded from the website 748 times (statistics not available after that time).

A summary of the comments received is attached as Appendix 1 to this addendum report, along with some representative responses (those not included in the original package).

Overall, only a limited number of written submissions were received from the general public specifically on the proposed commercial water taking policy interpretation. The public in and around the "Genuine Springs" application commented negatively on this proposal through the Policy Interpretation Paper or as part of a larger write-in petition to the province and Premier (the NEC was copied on these).

The response from ministries, municipalities, stakeholders and agencies was also limited.

With the exception of the agents representing "Genuine Springs" and the Canadian Bottled Water Association, there was no support for commercial water taking in the NEP. The Coalition on the Niagara Escarpment (CONE) supported the Policy Interpretation Paper and also requested a change to the Plan to provide a prohibition on commercial water taking, as opposed to a finding which would see water taking by amendment only.

#### **Update to Background Information:**

The following is an update of the related background information contained in the September 17, 2003 Paper:

1. The Regulation filed under the *Ontario Water Resources Act* providing for a moratorium on most new applications to take water in the Niagara Escarpment Planning Area (NEPA) and the area of the Oak Ridges Moraine Conservation Plan (including water bottling) was extended a third time to December 31, 2004. The moratorium was to have ended on March 1, 2004. The Ministry of Environment had not completed its work/consultation on the water taking issue, which formed part of a larger provincial initiative on protection of ground water resources. Amongst other matters, such work and review involves the following existing or proposed Acts and their associated regulations; *Ontario Water Resources Act*, *Water Transfer Control Act*, *Ontario Safe Water Drinking Act*, *Nutrient Management Act*, *Sustainable*

*Water and Sewage Systems Act, Conservation Authorities Act, and the proposed Drinking Water Source Protection Act.*

2. Commercial water taking is now a land use which can be regulated under the *Planning Act* (PA). The matter, at the time of the writing of the original Paper, was under appeal before the courts (i.e., in the matter of Artemesia Waters, Grey County). The court decision, which had been challenged, found that water taking was subject to the PA. The leave to appeal was withdrawn and, therefore, the court judgment stands.
3. No new Development Permit Applications have been filed for commercial water taking since the September 17, 2004 meeting. Genuine Springs remains the only active file.
4. The Greenbelt Legislation has been passed. This may result in policies that impact water taking. The NEP forms part of the proposed Greenbelt, along with the Oak Ridges Moraine Conservation Plan. Therefore, there may be implications for the NEP (e.g., harmonization with any new policies/strategies).

As noted in the original Policy Interpretation Paper, on several occasions since the approval of the Oak Ridges Moraine Conservation Plan (ORMCP), the Coalition on the Niagara Escarpment (CONE) has asked that the NEC review its water taking policy interpretation with the goal of updating the NEP to incorporate the more environmentally rigorous provisions of the ORMCP into the NEP. Staff had felt that this type of major amendment was premature until the changes proposed under the most recent Plan Review had been finalized.

The Plan Review has still not been finalized. Recently, CONE has prepared a much more detailed "Water Policy for the Niagara Escarpment" that goes beyond the narrow scope set out in this Policy Interpretation Paper. This strategy will be presented to the NEC for its information and consideration at a future meeting.

The NEC has also been waiting for the Province to produce/finalize its comprehensive water strategy before considering major changes to the NEP. Part of the Province's considerations is charging "full cost recovery" for public resources like water that are now taken without fees or royalties.

#### **The Niagara Escarpment Plan (1994):**

The NEC received an application for the use of wells on a property in the Town of Mono for commercial purposes (Genuine Springs Inc.). The water would be trucked off site and used for the purposes of bottling (public consumption), food manufacturing (bakeries, breweries, etc.) and local use (e.g., swimming pools, drinking water).

The question raised by this application is whether or not commercial water taking is a permitted use under the NEP. If the answer is yes, then the Development Permit Application could be processed. If the answer is no, then a Plan Amendment must be submitted for consideration.

The initial well drilling for water testing and subsequent application to the NEC was very controversial locally, and has resulted in legal action, petitions to the Province, council resolutions, letters to the NEC, etc.

The merits of the proposal are, at this point, secondary to the question with larger implications on whether commercial water taking is a permitted use. The Plan already contains Development Criteria dealing specifically with water taking, related to its environmental sustainability, that must be addressed if the use is permitted. If not, and an Amendment to the NEP is required, then the underlying purpose and objectives of the *Niagara Escarpment Planning and Development Act* (NEPDA) and the NEP must be dealt with first. In the case of a Plan Amendment, the principle of commercial water taking would be at issue, not whether or not the technical criteria and policies of the Plan could be met.

Submissions on both sides of the issue were received by the NEC; in part, as a consequence of the application in the Town of Mono, the Policy Interpretation Paper, and also because of a municipally sponsored resolution calling for government action to prohibit or limit commercial water taking throughout the rural areas of southern Ontario. The petition to the Province received widespread municipal and public support.

#### **ANALYSIS:**

The comments received do not break any new ground on the pros and cons and policy implications of permitting, or not permitting, commercial water taking in the area of the NEP. The arguments were presented when the September 17, 2003 Paper was discussed. These will not be set out in detail again although the submissions, both past and present, are attached for the NEC's consideration.

Those favoring commercial water taking believe that the Development Criteria of the Plan are rigorous enough to address the environmental issues related to the commercial pumping of water. It is also their view that the definition of utility in the NEP is broad enough to include the use. Studies required through the Development permit process must prove that the use is sustainable and would cause minimal environmental and public impact, otherwise the use cannot be introduced.

Those against the use read the definition as excluding commercial water taking, indicating, that unlike other types of water taking allowed under the Plan, commercial water taking is not associated with another permitted use (e.g., aggregate extraction, agriculture). Nor is it, in the broad public interest, like municipal pumping for settlement and urban areas. Therefore, in principle, the

use is not permitted and must be fully tested through the amendment process. Unlike CONE, other opponents did not ask for the Plan to establish a prohibition. A prohibition would require an explicit Plan Amendment. An example of a Plan prohibition is the unacceptability of establishing any new landfills (waste disposal sites) within the Escarpment area.

An alternate opinion, as set out by many members of the public, is emotionally based and personal since there is deep seated concern for a resource that is relied upon and considered essential in the rural area. The mining of the resource for consumption outside the municipality is seen as unsustainable and inappropriate. In the "Genuine Springs" case there are a numerous anecdotal stories about the impact of test pumping on nearby private wells and groundwater. Proven or not, there is a fear of the loss of a reliable water source that up until recently was taken for granted and assumed protected.

The Escarpment's importance as a source area for ground and surface water cannot be underestimated. The Escarpment constitutes a height of land across southern Ontario containing some of the most significant aquifers and recharge areas for natural streams and water supplies in the Province. The Escarpment is the headwater, or starting point, for many of these natural streams and water supplies. This importance, as it relates to water and the natural environment, is borne out in numerous environmental studies, inventories and assessments.

The NEPDA's and the NEP's purpose and objectives specifically require the maintenance, protection, and enhancement of natural water supplies.

Therefore, in dealing with water, the NEC should apply the principle of utmost caution to ensure that any environmental risks associated with commercial water taking are fully weighed before any extraction of the resource is approved. In staffs' view, the best way to ensure that the policy interpretation errs on the side of caution is to require a Plan Amendment. Amendments require justification and broader public consultation when a new use is being considered. It is more than just a risk assessment.

"Utility" is defined as:

*A water supply, storm or sanitary sewage, gas or oil pipeline, the generation, transmission and distribution of electric power, steam or hot water, towers, telegraph and telephone lines and other cabled services, a public transportation system, licensed broadcasting, receiving and transmitting facilities, or any other works or systems necessary to the public interest, but does not include:*

- *The establishment of a new waste disposal site;*
- *Any expansion or alteration to an existing waste disposal site from what has been approved under the applicable legislation (including any expansion in area or height of the landfill or change in the type of the waste materials being disposed);*

- *Incineration facilities (including energy from waste facilities);*
- *Large scale packer and/or recycling plants or similar uses.*

The definition encompasses a number of other uses under the umbrella term "utility".

The term "a water supply" was not intended, nor can it be reasonably interpreted, to include water taking undertaken for private commercial purposes, since a prerequisite in the definition is the statement, "or any other works or systems necessary to the public interest". In staff's view, this is a clear indication that the drafters of the definition were making a distinction between uses that could be considered utilities that were primarily private in nature and those that served the good of the broader general public.

Although the public requires water, the public does not rely on bottled spring water for its domestic supply. Bottled water is a life style choice and, except in emergencies where a municipal supply has been disrupted, bottled water is not essential. In this respect, the taking of water for bottling is not a utility as defined by the NEP.

As noted in the earlier Policy Interpretation Report, at the time the NEP was written, the issue of commercial water taking and bottled water did not receive much attention. Staff recalls no submissions or NEC deliberations on the topic. It was never considered specifically as a stand-alone use and, therefore, was not reflected in the Plan approved in 1985. Two successive Plan Reviews have not altered the Plan's wording or intent in this respect.

As well, one of the topics proposed by the NEC for the 1999 Plan Review was the examination of commercial water taking on the Escarpment with respect to the role of the Escarpment as a source for this activity and the adequacy of policies to address this type of use. The topic was eventually withdrawn because the government had indicated that the entire Provincial water strategy was under study and it would be premature for the NEC to deal with the issue until investigations had been complete (e.g., Walkerton). The NEC resolution was agreement to defer the matter to a later date. The implication is, therefore, that the NEC did not consider that the Plan dealt with commercial water taking as a permitted use, nor did it contain policies to adequately deal with the use.

## **CONCLUSION:**

The conclusion of staff, after reviewing the submissions, has not changed. Water is a significant and critical ecological component of the Escarpment and land in its vicinity. Water is highlighted in the NEPDA and NEP as a protected resource that is a key component of the Escarpment's continuous natural environment. Natural water supplies are to be maintained and enhanced.

The Plan, as currently drafted and approved, does not allow commercial water taking/bottling as a permitted use. Whether it should be allowed is, therefore, a matter that should be addressed fully through a comprehensive policy review. In the interim, applicants who wish to propose commercial water taking operations can wait for such a review to occur or propose a site-specific amendment to the NEP to accommodate the use on an exception basis.

The current Provincial moratorium on water taking in the area of the NEP prevents the NEC from processing Development Permits for water taking until after December 31, 2004, assuming the moratorium is not extended.

Outside the NEP, regulatory and planning ministries/agencies are generally dealing with water in a more holistic manner. This involves the preparation of comprehensive water budgets determined on an aquifer or regional basis. This is the direction being followed in the area of the Oak Ridges Moraine where the policies require full ground water budgets as part of the implementation of the ORM Conservation Plan. These budgets are subject to review and approval by the Province. This direction may be adopted Province wide. As well, many conservation authorities (e.g., Credit Valley Conservation) have, for a number of years, been undertaking watershed and sub-watershed plans to quantify and define the function of water within their areas of jurisdiction. These plans call for ongoing monitoring to provide benchmarks and to ensure the health of the natural water systems.

Niagara Escarpment aquifers and watersheds straddle the boundary of the Plan since the area was delineated as a corridor coinciding with the physical landform of the Niagara Escarpment. In most instances, the defined area of the Plan does not include the entire natural system which also includes the watershed. Consequently, water taking outside the NEP could still have significant impacts inside.

In this respect, the NEC must also look at water taking on a comprehensive basis. Any future policy interpretation review of commercial water taking and the other policies governing water in the NEP must consider watersheds straddling the Escarpment as a key environmental factor. It is anticipated that some direction on this issue will be provided on a Provincial level when the government's comprehensive water strategy is finalized.



The additional request by CONE for an amendment to prohibit the use is not appropriate at this time, based on available information. This can be evaluated once the province has progressed to the stage where water budget analyses are prepared for the watersheds along the Escarpment.

**RECOMMENDATION:**

That the Niagara Escarpment Commission determines as follows:

1. That commercial water taking/bottling is not a permitted use under the Niagara Escarpment Plan;
2. That a commercial water taking/bottling proposal will require an Amendment to the Plan pursuant to Section 6.1 of the *Niagara Escarpment Planning and Development Act*;
3. That the proponents of the "Genuine Springs Inc." Development Permit Application be informed that their proposal to take water for commercial purposes is premature since an amendment to the Niagara Escarpment Plan is required for the use;
4. That the issue of whether or not commercial water taking should be a permitted use or a prohibited use, generally throughout the Niagara Escarpment Plan, should be dealt with through a detailed comprehensive policy review, taking into consideration any future Provincial strategy on water taking and using comprehensive water budget analysis information. Until this review occurs, commercial water taking applications will require an Amendment to the Niagara Escarpment Plan;
5. That the current water taking moratorium in the Niagara Escarpment Planning Area be extended beyond December 31, 2004 if the Provincial strategy on water management has not been completed by that date; and
6. That the Niagara Escarpment Commission comment on applications to take water near or adjacent to the Niagara Escarpment Plan where it can reasonably be determined that such taking may have an impact on the natural environment within the Plan Area.

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Ken Whitbread  
Manager

## **Summary of Comments Received on Policy Interpretation Paper**

### **Ministries, Agencies, Municipalities, Stakeholder Groups, Public**

#### **1. Ministries**

**Agriculture and Food** - no comments or concerns.

**Environment** - no position. Note that the extent of impacts can only be determined through hydrogeologic assessments in a site specific context. Other related issues would include truck traffic if water is taken to another site or physical impacts if water is to be bottled on site.

#### **2. Agencies**

**Nottawasaga Valley Conservation Authority** - support Policy Interpretation Paper approach to commercial water taking. The Escarpment is a significant landform that provides an important hydrologic function for many river and stream within the Conservation Authority's watershed. This function is important to the overall health of the watershed. A provincial strategy on overall watershed management and planning is needed.

**Niagara Peninsula Conservation Authority** - no objection.

**Grey Sauble Conservation Authority** - no comments to offer.

**Credit Valley Conservation** - support moratorium on water taking until a provincial strategy is in place. NEC should be consulted as a stakeholder in water management and protection.

#### **3. Municipalities**

**Town of Orangeville** - support moratorium on water taking until a provincial strategy is in place. NEC should be consulted as a stakeholder in water management and protection.

**Township of Mulmur** - support moratorium on water taking until a provincial strategy is in place. NEC should be consulted as a stakeholder in water management and protection.

**Township of Georgian Bluffs** - support Policy Interpretation Paper approach to commercial water taking.

**City of Burlington** - supports the recommendation in the Policy Interpretation Paper.

**Municipality of Grey Highlands** - supports the Policy Interpretation Report.

**Town of Mono** - supports the NEP Policy Interpretation Report.

**County of Simcoe** - received for information.

**Town of Lincoln** - no objection to recommendations provided traditional users such as quarries, wineries and agricultural operations are not faced with new restrictions.

**Halton Region** - supports the approach taken. Request to be consulted further following the determination of the policy interpretation.

**Town of the Blue Mountains** - supports the Policy Interpretation Report on commercial water taking.

**Peel Region** - considers the recommendations reasonable but question the criteria/principles that will be used to evaluate commercial water taking amendments.

**Niagara Region** - support the recommendations but question what rules will be ultimately be put in place to deal with the issue. A suggested consideration is that all water taking, regardless of its nature, should be subject to the same environmental policies rather than treat some uses differently.

**Grey County** - support the position set out in the Policy Interpretation Paper. The matter could be reviewed after the province ends its moratorium.

**Town of Caledon** - support the position in the Policy Interpretation paper.

#### **4. Stakeholder Groups**

**Canadian Bottled Water Association** - Represents 85% of the bottled water industry. Contributes significantly to employment and economy. Industry already well managed and regulated. Concerned about public misconception about the water industry as a water user. Less than 1% of overall taking in Ontario. NEC should adopt practical policies that allow for use to occur in an environmentally sustainable manner. Industry has adopted a environmental stewardship code. Industry wishes to operate in the NEP and is committed to environmental protection (full letter attached to NEC package).

**MacNaughton, Hermsen, Britton, Clarkson Planning Limited (for Genuine Springs)** - The position is that the use is a utility (as defined in the NEP) and therefore commercial water taking is permitted in the Escarpment Protection and Rural areas of the NEP. Considerations should relate to the specific area of the taking and the test should be a consideration of detrimental impacts on the resources within the area of the application. The current provisions of the Plan, specifically the Development Criteria, provide a basis for a rigorous analysis. Improvements, if any, should be through changes to the Development Criteria.

Any move to revisit the issue as a permitted use should be undertaken through the normal Plan Amendment process under the NEPDA to ensure a full assessment by affected stakeholders (letters attached to NEC package).

**Robins, Appleby and Taub (solicitors for Genuine Springs)** - The position is that the use is a utility as defined by the NEP. If it was intended that all the uses were to be public the definition would have been structured in that manner. The word public is only used in reference to transportation systems in the definition. The clear wording allows a private water supply. The use is also consistent with the purpose and objectives of the NEPDA and the intent and context of the Plan. The Development Criteria is the appropriate test and groundwater monitoring and studies will address the concerns of landowner and agencies. The application is not premature and should not be delayed, in principle the use is permitted subject to a full environmental review (letter attached to NEC package).

**Weir Foulds (solicitors for Mono Mulmur Citizens Coalition)** - Support the analysis and recommendations in the Policy Interpretation Report. The use is not permitted for the reasons set out in August 14, 2003 letter. When the definition and objectives of the Plan are read in its entirety and in proper context the conclusion is clearly that commercial water taking are not nor was it intended to be a permitted use. Utilities must relate to the broad public interest to have such a use in the Plan area. In addition, the Development Criteria of the NEP could not be met. The application is also premature until a full water budget and watershed analysis is undertaken to deal with the long-term impacts of water taking (letter attached to NEC package).

**Mono Mulmur Citizens Coalition** - The NEC did not receive a comment directly on the Policy Interpretation Paper, except through the Coalition's solicitors. There is, however, extensive correspondence from the Coalition and its members on its opposition to the Genuine Springs Application specifically and commercial water taking on the Escarpment generally. There is strong support for a continuing moratorium. The NEC position is by extension supported.

**Coalition on the Niagara Escarpment (CONE)** - Strongly supports the Policy Interpretation Report. Commercial water taking is a private for profit use that does not satisfy the definition for utility and is not in the public interest. The Plan should comprehensively review its policies respecting the whole issue of water and water taking on the Escarpment. This should include other types of water taking unrelated to commercial water taking (e.g., quarries, golf courses). The Plan must be updated and modernized following lessons learned from Walkerton and provisions introduced into the Oak Ridges Moraine Conservation Plan (letter attached to NEC package).

**Blue Mountain Watershed Trust** - Support the finding in NEC Policy Interpretation Report.

**Burlington Sustainable Development Committee (15 member self-appointed citizen advisory committee)** - Support NEC Policy Interpretation Paper.

## **5. Public**

Although there were numerous comments and petitions received there were no submissions from the public supporting commercial water taking. Few, however, referenced the Policy Interpretation Paper specifically. The vast majority were either directed at the Genuine Springs application or to the Province/MOE/Premier requesting an immediate halt to commercial water taking (both on and off the Escarpment). Various claims were made about the undesirable impacts on local wells, the water supply and environmental impacts. There was support for the moratorium or a continuation of the moratorium until the province had finalized or introduced a comprehensive water taking/resource protection strategy.

*C/ KW/ Water Taking Summary of Comments Received 2004*

**The Niagara Escarpment Commission's October 21, 2004 resolution on the recommendations in the October 20, 2004 NEC Staff Policy Paper follow.**

***Note: this resolution will not be formally approved until the Minutes are approved at the November 18<sup>th</sup> NEC meeting.***

That the Niagara Escarpment Commission determines as follows, recognizing existing water taking rights and permits that:

1. In dealing with commercial water taking proposals in the Niagara Escarpment Plan area, the words 'commercial water taking' be replaced with the words 'water extraction/bottling industrial use'.
2. That a water extraction/bottling industrial use is not a permitted use under the Niagara Escarpment Plan.
3. That the issue of whether a water extraction/bottling industrial use should be a permitted use or a prohibited use through the Niagara Escarpment Plan be dealt with through a detailed policy review, taking into consideration any future Provincial strategy on water taking, and using comprehensive water budget analysis information.
4. That until the course of action set out in recommendation 3 is completed, applications to permit water extraction/bottling industrial uses are deemed to be premature.
5. That the provincial government's current water taking moratorium in the Niagara Escarpment Planning area be extended beyond December 31, 2004 if the Provincial strategy on water management has not been completed by that date.
6. That the Niagara Escarpment Commission comment on applications for Permits to Take Water near or adjacent to the Niagara Escarpment Plan where it can be reasonably be determined that such taking, including cumulative impacts, may have an impact on the natural environment with the Plan area.
7. That the Niagara Escarpment Commission direct staff to prepare an addendum to Policy Report P2, which should deal with what is called 'commercial water taking' as an industrial use similar to aggregate extraction, oil extraction, uranium or gold mining, etc. Influenced by such a perspective, the addendum report may be able to clarify further the difference between a public water supply utility and a private water extraction/bottling industrial use. Such clarification could be the basis for appropriate amendments to the Niagara Escarpment Plan and/or Niagara Escarpment Development Control Regulations.