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PASSING the TORCH

*Tough job of implementing the
Clean Water Act, 2006 is now
handed over to Ontario's
municipalities*

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Passing the Torch

Tough job of implementing the Clean Water Act, 2006 is now handed over to Ontario's municipalities

This year marks the 15th anniversary of the Walkerton drinking water tragedy – a black mark in Ontario's environmental protection history that caused the death of seven people and significant health problems for thousands more when a municipal drinking water supply was contaminated with e-coli.

In addition, 2015 also promises to be the year that the most important recommendations from the public inquiry into the tragedy, the source protection program under the *Clean Water Act, 2006* (the CWA or the Act), are, finally, fully implemented. Many consider it the ultimate slow-motion regulatory roll-out. But, by the end of 2015, Ontario is scheduled to have in place legally enforceable Source Protection Plans (SPPs) to protect more than 450 municipal drinking water systems across the province – a groundbreaking accomplishment.

Following approval of the SPPs, much of the hard work of implementation will be handed over to municipalities. Part IV of the Act gives municipalities the challenging task of implementing and enforcing the environmental protection restrictions and prohibitions that will flow from SPPs. This article outlines the scope of these challenges and offers guidance to meet them head on.

The First Nine Years – Creating Source Protection Plans

The nine-year incubation period for the SPP initiative was built around three procedural milestones to identify and address threats to drinking water quantity and quality at the watershed level. The first step gave conservation authorities the role of source protection authorities

and required them to establish source protection committees (SPCs) in each of the 19 source protection areas/regions. The SPCs include municipal representatives, agricultural representatives, environmental and public interest stakeholders, business and industry, landowners, and the public at large. In some SPCs, representatives from the First Nations are present.

The second step required the SPCs to produce an assessment report that identifies drinking water threats (including threats to Great Lakes targets). There are several approaches under the CWA to identify drinking water threats (e.g., threats-based approach, issues-based approach, event-based approach, and local threats). For the threats-based approach, SPCs mapped all municipal water intake protection zones (IPZs) and wellhead protection areas (WHPAs) and assigned them vulnerability scores from two to 10, as set out in the technical rules under the Act. Then, using a list of 21 "prescribed drinking water threats" from the CWA regulation, they assigned hazard ratings from zero to 10 to each activity. The technical rules then call for the hazard rating and vulnerability scores to be multiplied. If the total is between 80 and 100, the risk is deemed "significant"; if it is between 60 and 79, it is considered "moderate"; and if it is between 40 and 59, it is deemed to be "low." The assessment report's regulatory requirements and technical rules have little room for local flexibility, since the provincially-established vulnerability scores and hazard ratings essentially dictate whether an activity will be deemed a significant, medium, or low threat.

The third step, the development of SPPs, builds on the scientific and technical

assessment of risk in the assessment reports. The objective of the SPPs is to reduce or eliminate significant threats and address moderate or low threats so that they do not become significant.

Implementation: Municipalities Get the Heavy Lifting

Once SPPs are approved, the provisions of the Act suddenly and dramatically usher municipalities to the front line. Part IV of the CWA sets out the enforcement responsibilities and, in most cases, municipalities are assigned a primary role.

While arguably a natural extension of their responsibility for both municipal drinking water systems and land use planning, overseeing the implementation and enforcement of SPPs comes with significant additional responsibilities. First, once the SPPs are approved and in effect, municipalities must ensure that their official plans, by-laws, and other



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planning decisions conform with the significant threat policies and Great Lakes policies (if any), and also have regard to moderate and low threat policies.

Second, Part IV of the Act introduces the following three new areas of responsibilities for municipalities to administer.

Prohibitions under section 57 –

Municipalities will have ground-breaking power to enforce prohibitions on specific land uses – including existing, otherwise legally-operating, long-standing businesses – in vulnerable areas where the SPP deems them a significant threat to source water. Shutting down existing businesses that are zoned and otherwise approved to operate in a particular location is a powerful, seemingly draconian measure. It is likely for this reason that the regulations make it clear that the prohibition of an existing use may only be used as a last resort where no other less impactful method is adequate to address the risk. For existing activities, the SPP can set a date for phasing out the activity; but, it cannot be less than 180 days after the SPP comes

into effect. For new proposed activities, the prohibition has immediate effect.

Risk management plans under section 58 – RMPs are negotiated documents that establish site-specific terms and conditions to mitigate the significant threat(s) identified on the property. If a policy under section 58 applies to an activity, a person cannot engage in that activity unless they have an RMP. The CWA establishes a collaborative approach to the design of RMPs; but, if negotiations fail to produce an adequate RMP, one can be imposed through an order from the risk management official, as discussed below. RMPs can include requirements to remediate conditions that exacerbate the threat posed by an action, and can also require financial assurances. An RMP cannot be transferred without the consent of an RMO; and, if the RMP is not complied with, the person engaged in the threat activity can be subject to notices, orders, and prosecution.

Restricted land use policies under section 59 – These policies support either

RMPs under section 58 or prohibition of activities under section 57 by ensuring that activities in the designated area are assessed for compliance with these policies before the municipality issues a building permit or planning approval (e.g., official plan or zoning amendments or plans of subdivisions). The SPP must specifically identify the policies to which section 59 applies.

The Act also creates two new types of municipal officials to exercise these new municipal powers: a risk management official (RMO) whose responsibilities include negotiating or establishing RMPs; and a risk management inspector (RMI) to inspect and enforce the RMPs.

Challenges for Municipalities

For municipalities, the new responsibilities will bring with them a number of challenges.

Technical expertise

The RMO and RMI positions are new to municipalities. Many municipalities are choosing to add these additional



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responsibilities to existing full-time positions. Others have rationalized the appointment of a new, dedicated, full-time position. In all cases, there is a considerable amount of capacity building required within the municipality to administer and deliver the required duties. The positions require a specialized set of skills and competencies. The Ministry of the Environment and Climate Change has developed a mandatory five-day training program that all RMOs and RMIs must complete to comply with the CWA. Additionally, RMOs and RMIs must be officially appointed by their respective councils.

Legal expertise

The new responsibilities imposed on municipalities also come with a new set of legal challenges. There are at least three areas where legal services might need to be enlisted. First, the negotiation and development of RMPs for complex industrial development activities will very likely see the involvement of lawyers on the other side of the negotiating table. Second, the CWA allows individual property owners to appeal RMPs and orders to the Environmental Review Tribunal (ERT); and the tribunal has the power to confirm, alter, or revoke the decisions of the RMO or RMI. Municipalities will require legal services to defend decisions on RMPs that are appealed to the ERT. Third, anytime a

government decision maker takes an action that affects the rights, privileges, or interests of an individual, they are susceptible to an application to Divisional Court for a judicial review of the legality, reasonableness, and fairness of the decision. Accordingly, to minimize issues and disputes, municipalities may want to consult with legal counsel early in the overall process.

Funding

Funding source water protection has been a challenge from the beginning. Provincial funding has been reduced in the last number of years, forcing municipalities to cover the administrative costs of the program. The CWA enables municipalities to charge fees for services associated with the program (similar to provisions under the *Building Code Act*); however, many municipalities are sensitive to burdening their constituents with additional fees. Some municipalities are considering imposing charges for new developments only, while others are covering entire program costs through their water rates. Consultation with a municipal finance specialist could assist municipalities in identifying financing options.

Other challenges

The source protection program has introduced a number of implementation challenges for municipalities. One challenge arises from the reality that the

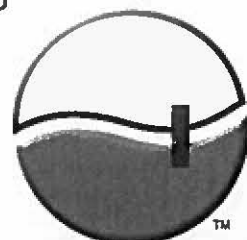
source protection program is designed on a watershed basis, and watersheds do not align with jurisdictional boundaries. This means that some municipalities will have to conform to more than one SPP. This can add complexity to the work of planning departments, who will need to consider the planning decisions in the context of multiple SPPs and policy areas. Second, if vulnerable areas requiring protection extend from one municipality into another, there will be a need for collaborative efforts, as one municipality is effectively relying on a neighbouring municipality to protect its water supply.

A second set of practical challenges arises from the somewhat daunting roles and responsibilities given over to the newly-minted RMOs. The process of developing risk management plans, including the negotiation of RMPs with existing owners/operators, is a new responsibility for municipalities. The onus is on the person engaged in the activity to prepare the RMP for review by the RMO. In many cases, the owner/operator may not know how to prepare an RMP. Affected parties will need clear guidance and direction to understand the expectations of the municipality. Further, the *Clean Water Act, 2006* includes a provision whereby the owner/operator can simply ask the RMO to prepare the RMP on their behalf. This provision could translate into a significant burden

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to staff in municipalities that have several hundred RMPs to complete.

Finally, the RMO must weigh in on the building permit process and the planning approval process to confirm compliance with the policies in the SPP. This may be easier said than done, particularly during the planning approval stage for a new development, when even the developer may not know the ultimate activities and circumstances that will take place on the site.

Challenges for business, industry, and agriculture sectors

Although SPPs were developed through multi-stakeholder committees with business, industry, and agricultural sector representation, the implementation phase has focused these communities on the potential new financial risks and costs. Municipalities can expect that their local businesses and industries will look to them to answer questions about what this new regulatory program means on the ground. Given this, an effective communication and education outreach program to potentially impacted businesses would seem essential to successful implementation of the source water protection program.

Conclusion

The rubber is finally ready to hit the road on Ontario's ground-breaking new regulatory program to protect its sources of municipal drinking water. The province is about to pass the torch over to municipalities, to take command of implementation and enforcement – the most difficult part of an uncharted journey.

Having said that, Ontario municipalities now have a better understanding of the threats to their drinking water supply and the tools to protect it. The implementation phase will now require careful planning, resource management, and collaboration not only with the provincial government, but also amongst municipalities to share information, expertise, and experiences.

While the task may seem daunting, the societal pay-off is huge: transforming the Walkerton tragedy into a legacy of long-term source protection for Ontario's municipal drinking water. *MW*



In celebration of Municipal World's 125th year of publishing, we are offering our readers a unique look into the archives, providing quotes, stories, and snippets: some of the "best" (or at least the most interesting) parts of our first 125-year run. Each month will feature highlights from a decade of publishing, to give a sense of the issues and challenges of that particular era. This month covers the 1960s ...

"A community with 'nothing much' in the way of recreation is bound to have nothing much in the way of business expansion or general improvement. Nothing much to offer its youth, nothing much to offer the world. The community needs a shot in the arm before it dies on its feet."

– April 1960

"The difference between death and taxes is that death doesn't get worse every time parliament meets."

– May 1960

"Planning is much more than related land uses. It determines our destiny, our everyday way of life. It is as vital to living as the air we breathe, the food we eat, and the water we drink."

– August 1961

"Progress and destruction. How tragic that these two factors should go hand in hand as the development of our resources takes place. Too often we identify progress with the expedient, the immediate, the urgent. So much are we enamoured by the prospect of increased productivity due to the latest technical and mechanical innovations that we close our eyes to the negative values and depletion of resources."

– February 1962

"Sometimes it seems we have entirely lost sight of the urgency for concern, understanding, and action, in the retention and acquisition of open spaces for the welfare of all people ... for the present and for the future."

– July 1963

"A critical self examination is long overdue. The onus for better forms of local government rests squarely on our shoulders. No provincial government will long resist changes which we overwhelmingly desire."

– July 1964

"Planners are at present the main interpreter of the people's will and they have no power at all. How many times have valid, reasonable plans ... been dumped by politicians who represent wealth, not people?"

– October 1965

"How many 'elected' offices will be sacrificed on the altar of efficiency before the current compulsion towards 'Region' or 'Centralized' government is satisfied? This is often the unspoken question when such matters are discussed by municipal elected officials and it usually remains unspoken because few, if any, of these persons apparently wish to run the risk of being accused of defending the status quo."

– July 1967

"It has been sometimes said where, for example, there is only 40 percent turnout of the electors at the polls, the remaining 60 percent were apathetic towards local government ... To be apathetic about local government implies a knowledge of the subject. Before a person can intelligently reject something, it is sometimes necessary for him to have at least a modicum of understanding of that which he seeks to reject."

– September 1968