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CONSIDER THE SOURCE: A Briefing on the Workings and Implications of Ontario's *Clean Water Act*

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CONSIDER THE SOURCE:

A Briefing on the Workings and Implications of Ontario's *Clean Water Act*

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Introduction: The Legacy of an Environmental Tragedy

This past May marked the sixteenth anniversary of one of Ontario's worst environmental catastrophes: the Walkerton tragedy that caused the death of seven people and significant health issues for 2,300 more when a municipal drinking water supply was contaminated with e-coli.

2016 also marked the beginning of a new regulatory era in Ontario. Over a decade and a half after the tragedy struck, and fourteen years after the release of the results of a two-year inquiry[1] by Mr. Justice Dennis O'Connor that proposed sweeping regulatory changes to the way the Province protects municipal drinking water, the rubber is finally hitting the road on Source Water Protection.

Many consider it the ultimate slow-motion regulatory roll-out. The *Clean Water Act, 2006* (the "Act") has been in place for over a decade, and the tools to implement the protections envisioned by the Act are only now in effect. . Nevertheless, the accomplishment is ground-breaking and it implications are far-reaching: legally enforceable Source Protection Plans (SPPs) are finally now in place to protect more than 450 municipal drinking water systems across Ontario.

A Long Incubation Period: Creating Source Protection Plans

The decade of work that preceded the full implementation of the regulatory program revolved around the creation of Source Protection Plans (SPPs). SPPs are the key legal instruments governing the new regime. They were developed in three steps summarized below.

1. Create Source Protection Authorities: Ontario's Conservation Authorities were given 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, but not all SPCs, First Nations are also represented.

[1] Report of the Walkerton Inquiry

2. Produce Assessment Reports: SPCs were required to produce an Assessment Report (AR) that identifies drinking water threats to both surface water (including the Great Lakes) and ground water sources[2]. The Act and its regulations provided specific guidance on how to carry out the assessment of drinking water threats. A number of approaches are permitted (e.g. threats based approach, issues based approach, event based approach, local threats) but the primary approach to assessing threats by SPCs is the "threats-based approach". Under the supervision of SPCs, experts mapped all municipal water intake protection zones (IPZs) and wellhead protection areas (WHPAs) and assigned them Vulnerability Scores from two to ten following the requirements set out in Technical Rules which were established by the Ministry of the Environment[3]. Then, using a list of twenty-one "prescribed drinking water threats" from the CWA regulation[4], they assigned Hazard Ratings from zero to ten 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 regulatory requirements and Technical Rules gave little room for local flexibility since the provincially established Vulnerability Scores and Hazard Ratings essentially dictated whether an activity will be deemed a significant, medium or low threat.

3. Develop the Plan: The development of a Source Protection Plan, builds on the scientific and technical assessment of risk in the Assessment Reports. Generally, the central objective of the approved SPPs is to reduce or eliminate significant threats and address moderate or low threats so that they do not become significant.

Implementation: The Rubber finally Hits the Road

All 22 of Ontario's Source Protection Plans are now approved, and in full force and effect. The SPPs themselves effectively prohibit and/or impose regulatory requirements, not only on future land uses, but also on existing approved land use activities in identified geographic areas within municipalities.

[2] *Clean Water Act*,*2006,* S.O. 2006, c. 22,("CWA"), s 15 – "Assessment Reports"
[3] Pursuant to section 107 of the Act an Ontario Ministry of the Environment and Climate Change "Director", appointed by the Minister under Section 3 of the Act, is authorized to make rules establishing requirements for identifying drinking water threats.
[4] CWA O. Reg. 287/07, s 1.1 – "Prescribed drinking water threats"

Now that SPPs are in place, the provisions of the CWA suddenly and dramatically usher municipalities to the front line to do the heavy lifting. Specifically, Part IV of the Act[5] shifts the onus to municipalities to carry out the tough job of implementing and enforcing the new source protection rules.

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[6]. Their roles are discussed further below. All 22 municipalities have now appointed RMOs and RMIs, and implementation activities, also described below are well under way and on-going.

Key Implementation Steps

The Act gives municipal officials four basic tasks to carry out to address significant drinking water threats identified in SPPs.

1. Updating Land-Use Planning Documents: Once the SPPs are approved and in effect, municipalities must ensure that their Official Plans, zoning by-laws, and other planning decisions conform with the significant threat policies and Great Lake policies (if any), and have regard to moderate and low threat policies.[7]

2. Prohibiting Activities that Threaten Drinking Water (section 57, CWA)[8]: SPPs include policies that specifically prohibit certain activities, within specified areas, that constitute a significant drinking water threat. As a consequence, Municipalities will now have ground-breaking authority 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[9].

[5] CWA Part IV – "Regulation of Drinking Water Threats"
[6] CWA s 52 – "Ontario risk management official and inspectors", s 47(6) – "Risk management official, risk management inspectors"
[7] CWA s 40 – "Official plan and conformity"; s 42 – "Zoning by-law conformity"; s 43 – "Prescribed instruments and conformity"
[8] CWA s 57 – "Prohibited activities"
[9] CWA s 59 – "Restricted land uses"; s 22(3) – "Source protection plan – preparation – Contents relating to ss. 57 to 59"; s 22(8) – "Source protection plan – preparation – Prohibition and regulation of activity"

Shutting down existing businesses that are zoned and otherwise approved to operate a particular location is a powerful, seemingly draconian measure. It is likely for this reason that the regulations make it clear that a SPP may only prohibit a pre-existing use as a last resort "*where the source protection committee is of the opinion that the activity must be prohibited to ensure that it ceases to be a drinking water threat*." Also, 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.

3. Establishing Risk Management Plans (Section 58, CWA)[10]: Risk Management Plans are the key implementation document under the CWA. They are legally enforceable instruments that establish site-specific terms and conditions to mitigate activities that have been identified in SPPs as significant threat. Again, these can be established for both existing businesses and future proposed business activities. If the SPP identifies an activity in a specified geographic area as a significant drinking water threat, no person can engage in that activity unless they have a RMP[11]. The CWA establishes a collaborative approach to the creating the content of RMPs. RMPs are to be developed through agreement. If, however, negotiations fail to produce an adequate RMP, one can be imposed through an Order from the RMO[12]. RMPs can include requirements to remediate conditions that exacerbate the threat posed by an action, and can also require the person carrying out the activity to put up financial assurances to address on-going risk management measures or monitoring requirements. An RMP cannot be transferred without the consent of a RMO and as outlined below, if the RMP is not complied with, the person engaged in the threat activity can be subject to notices, orders and prosecution.

4. New Approval Requirements (Section 59, CWA)[13]: SPP policies also impose new approval requirements on persons seeking to establish an identified activity in designated areas vulnerable to drinking water threats. Specifically for activities within areas designated under the SPP, no person may apply for an otherwise required planning approval (official plan amendment, zoning amendment etc.) or obtain a building permit, unless a RMO issues a

[10] CWA s 58 – "Regulated Activities"
[11] CWA s 58(1)
[12] CWA s 56(6) – "Interim risk management plans – Order establishing risk management plan"; s 58(10) – "Regulated activities – Order establishing risk management plan"
[13] CWA s 59 – "Restricted land uses"

notice either confirming that the activity is not prohibit and does not require a RMP, or if a RMP is required, that the RMP has been established.

In many municipalities implementing activities are well under way:

- Municipalities are updating their official plans and zoning by-law to conform to/comply with SPPs;

- Risk Management Officials are issuing notices to property owners who are subject to the requirement to establish Risk Management Plans for their existing activities;

- Planning Departments and Building Departments have instituted screening procedures to identify applications which could require the approval of a Risk Management Official or a Risk Management Plan before obtaining planning approvals or building permits; and

- Risk Management Officials are establishing protocols, directions, procedures and forms (for formal notices and orders) to implement administrative and enforcement measures under the Act.

Key Enforcement Powers

The Act also arms municipalities with a range of investigation and enforcement tools to ensure compliance with Risk Management Plans are fully implemented. These have been modelled after, and closely resemble, the broad range of powers available to the Ontario Ministry of the Environment and Climate Change to investigate and enforce compliance with environmental orders issued under the *Environmental Protection Act* ("EPA")[14] and *Ontario Water Resources Act* ("OWRA")[15].

Orders to Report: Risk management officials are empowered to require persons who engage in, or propose to engage in, an activity that could require a Risk Management Plan to provide to the RMO a report that describes the details of the activity in question including any risk

[14] EPA, R.S.O. 1990, c. E.19, as amended, Part XV
[15] OWRA, R.S.O. 1990, c. O.40, as amended

management measures proposed to be taken to protect drinking water sources.[16] This reporting requirement gives RMO's the ability to obtain the information it needs to determine either the adequacy of an existing RMP or the need for and content of a new RMP for a particular activity which poses a significant drinking water threat.

Inspections/Investigations: Municipally-appointed Risk Management Inspectors (RMIs) have powers similar to provincial officers under the EPA and OWRA[17] to enter onto property for investigation/inspection purposes without the consent of the owner or occupier, where he/she has reason to believe that a regulated activity which could cause a significant threat to drinking water is being carried out[18]. Inspection powers include the authority to: make "necessary excavations; required owners or operators to run on-site equipment; take test samples; conduct tests or measurements; examine on-site documents or records and take copies of these; retain all samples and copies obtained for the purposes of enforcement; and require person to make written or oral statements.[19]

Enforcement Orders: Risk Management Inspectors are also empowered to issue orders requiring persons to comply with directions set out in the order which could range from enforcing the requirements of a risk management plan[20] to taking measures to prevent or remediate a drinking water threat[21] to ceasing operations at a business that constitutes a prohibited activity, contravenes a risk management plan or otherwise contravenes the Act[22]. Enforcement orders may also include specific directions with respect to monitoring and reporting on compliance efforts[23], or directing that a person seek an amendment to a RMP to address a compliance issue or drinking water threat.[24]

"Cause Things to be Done": Similar to the powers given to Directors under the EPA and OWRA[25], the Act also sets up mechanisms that empower Risk Management Official's to take matters into his/her own hands in cases of failure to comply.

[16] CWA, s. 61
[17] EPA, Part XV
[18] CWA, s. 62, "Inspections"
[19] CWA, s. 62(8) Inspection "Powers"
[20] CWA, s. 63(4) "Enforcement of risk management plan"
[21] CWA, s. 63(1) 1. "Enforcement Orders"
[22] CWA, s. 63(1)2.
[23] CWA, s.63 (4), (5) and (6)
[24] CWA, s.63 (4) 2.
[25] EPA, Part XIV; OWRA, ss.80-89

Specifically, where a person who is subject to enforcement order either fails, or in the Risk Management Official's opinion, is unlikely, to comply with the order, the RMO can, with notice, arrange to carry out the work required to comply with the order.[26] The RMO can then issue an order requiring the person subject to the enforcement order to pay for the cost of completing this work.[27] Further provisions of the Act allocate liability to the person or persons who are the subject of the order.[28] The Act also provides for enforcement of orders to pay through the courts.[29]

Legal Challenges: Appeals to the Environmental Review Tribunal

The Act also sets up the forum for legal challenges to the implementation of the Clean Water Act and Source Protections Plans. Importantly, there is no right to a hearing to challenge the approval of a Source Protection Plan itself, and therefore no opportunity to appeal decisions on the types of activities which are prohibited under SPPs. Once the SPP is approved by the Minister of the Environment and Climate Change, the fundamental parameters within which RMOs and RMIs must operate and the basic rules of the game within a Source Protection Area are essentially in place.

The legislative decision not to establish appeal rights for approval of SPPs is, perhaps, not surprising given that the Province, through the implementing Regulation[30] and rules set by the MOECC Director[31], and other MOECC guidance documents was provided such precise guidance on the content of SPPs. The decision to eliminate appeal possibilities is also not surprising given the extent to which the required supporting assessment reports and other studies, not to mention the complex black art of hydrogeology, that underlying the creation of SPPs lend themselves to endless technical challenges and lengthy potential hearings.

Appeal rights are provide, however, for businesses and property owners that seek to challenge decisions by Risk Management Officers to establish or amend Risk Management Plans, and for decisions to impose various types of enforcement orders. Also appealable are orders to report

[26] CWA, s. 64 "Risk management Officials may cause things to be done"
[27] CWA, s. 67 "Order to pay"
[28] CWA, s.67(7) –(11)
[29] CWA, s. 69"Collection of costs"
[30] O. Reg. 287/07 and CWA, s. 107
[31] See note 3 above

on activities, orders to pay for work "caused to be done" by a RMO, or access orders under section 80 of the CWA.[32] In all cases, the appeal is to the Environmental Review Tribunal (ERT). Over the next few years, this tribunal may have an important say in defining the nature and extent of the powers of risk management officials and inspectors to control business activities that have the potential to impact drinking water sources.

Implications of the Newly-minted CWA Legal Regime

Although Source Protection Plans were developed through multi-stakeholder committees with business, Industry and agricultural sector representation, the implementation phase has focussed these communities on the potential new financial risks and costs. Municipalities and Risk Management Officers and their staff will also be under the gun in terms of juggling implementation requirements with efforts to defend and enforce decisions on Risk Management Plans. Some specific implications for stakeholders are discussed below

For Existing Businesses and property owners: Although some prior efforts have been made by the MOECC and municipally appoint source protection officials to reach out to existing businesses and property owners who are likely to be facing new regulatory requirements and restrictions under the *Clean Water Act*, these efforts have by no means been comprehensive. Many businesses may not fully recognize the implications of the Act for their future operations until they are confronted with a notice from an RMO, issued pursuant to section 58(4) of the Act, advising that it has 120 days to agree to the terms of a Risk management Plan or it will be prohibited from continuing to carry out a regulated activity.[33] Such notices have already been widely issued in many Ontario jurisdictions. Generally, the notices trigger the commencement of a dialogue between the affected business/property owner and the risk management official on the content of a mutually agreeable set of management measures which will limit the risks that the activities pose to drinking water sources.

For some businesses the practical implications of a risk management plan will be relatively minor: demonstrating that a spill prevention plan is in place or that certain best environmental practices have been implemented. In many cases such plans and practices would already be part of normal business operations or best practices.

[32] CWA, s. 70
[33] CWA,s. 58(4)

In other cases, the risk management requirements may have serious economic consequences: for example establishing on-going sampling and testing requirements, installation of new pollution control measures, or remedial action to address a pollution source. If an agreement cannot be reached on a mutually acceptable RMP within 120 days, RMO's have the authority to impose the RMP, confronting the business property owner with a decision on whether or not to engage lawyers and experts, launch an appeal and litigate the matter in a potentially lengthy and expensive ERT hearing on technical matters.

For Future Businesses and Developers: Section 59 of the CWA adds a new set of approval requirements for businesses and developers seeking to establish new uses, specified in SPPs within areas designated in SPPs. The new approval requirement could be triggered by an application under the *Planning Act*, for approval of the new use.[34] Even if no planning approval is required, where proposed change in use is for an activity regulated by an SPP, a simple building code application which involves the construction or a building or change of use of a building triggers the new approval requirement.[35]

If section 59 applies to a proposed change, the proponent of the change can neither apply for the planning approval, if required, or carry out the construction of the building or change the buildings use, until a RMO issues a notice[36] either confirming that the risk management plan is not required or that an agreed-upon or approved risk management plan is in place. The Act therefore compels affected businesses and developers to retain expertise and work with RMOs at an early stage to determine whether a risk management plan is required, and if so reach agreement with the RMO on the RMP.

For Municipalities and RMOs: 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 some municipalities will have to conform to more than one SPP. This can add complexity to the work of risk management officials and planning departments who will need to consider the planning decisions in the context of multiple Source

[34] CWA, s. 59(1) (a)
[35] CWA, s. 59(1) (b)
[36] Ibid.

Protection Plans 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 arise 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 owner/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 a RMP and may not have or be prepared to obtain independent expertise. Affected parties will need clear guidance and direction to understand the expectations of the municipality. Further, the *Clean Water Act* includes a provision whereby the owner/operator can simply ask the Risk Management Official to prepare the Risk Management Plan on their behalf. This provision could translate into a significant burden to staff in municipalities that have several hundred Risk Management Plans to complete. The challenges are multiplied in cases, such as Wellington County[37] where a Risk Management Officer reports to multiple municipal councils and implements multiple SPPs, each with their own rules.

Finally, money could become an issue. 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 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.

Legal Expertise Will be Required: The new responsibilities imposed on municipalities, and businesses, property owners and other stakeholders also come with a new set of legal challenges. There are at least three areas where legal services will likely be needed. First, the negotiation and development of RMP for complex industrial development activities will very likely see the involvement of lawyers on the both sides of the negotiating table.

[37] The Risk Management Official in Wellington County is responsible for the implementation of five separate Source Protection Plans and reports to seven local municipal councils and County council.

Second, as discussed above, the CWA allows individual property owners/ businesses to appeal RMPs and Enforcement 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. Property owners and businesses subject to risk management requirements will required hearings lawyers to advise on, and potentially launch and provide representation on appeals, of RMO orders. Conversely, municipalities are likely to find themselves requiring legal services to defend decisions on Risk Management Plans, and enforcement orders that are appealed to the ERT. Third, CWA decisions, like any government decision that affects the rights, privileges or interests of an individual, are susceptible to an application to Divisional Court for a judicial review of the legality, reasonableness and fairness of the decision.

Conclusion

The rubber is finally hitting the road on Ontario's ground-breaking new regulatory program to protect its sources of drinking water. The Province has now passed the torch over to municipalities, to take command of implementation and enforcement: the most difficult part of an uncharted road. The implementation and enforcement phase will now usher in a host of new technical, financial and legal challenges and potential conflicts. For both the municipally-directed regulators and the regulated stakeholders, surmounting these challenges will require access to specialized expertise, expenditure of(limited) resources, creativity, artful collaboration and negotiation and, potentially, adjudication.

Welcome to life on the frontlines in an unprecedented journey: from an environmental tragedy toward long-term regulatory protection of Ontario's drinking water sources.

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