

Legal Implications of Source Water Protection: Selected Issues

A Conservation Ontario Webinar for the
RMO Provincial Working Group

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Peter Pickfield, LL.B, LL.M, Partner, Garrod Pickfield, LLP.

pickfield@garrodpickfield.ca

Overview: RMO Challenges of Implementation

- A New Role for Municipalities
- No Precedents
- Conflict Potential - Affects Existing Rights
- Overlap with *Planning Act* Approvals
- Decisions can be Appealed
- Uncertain resource needs

The RMO's Implementation Tool Box

1. Prohibitions – s. 57
2. Regulating Existing Activities
 - By Agreement with RMO- s. 58 (5)
 - By Application to RMO– s.58 (11)
 - By Order of RMO – s. 58 (10)
3. Restrictions on New Land Uses – s. 59
4. Other – Education and Voluntary Advice

Prohibitions (RMPs, s. 57)

Selected Issue 1: Refining a Blunt Instrument

Issue: Section 57 prohibitions can have harsh consequences for existing businesses and new development that could be avoided through risk management measures. Are there options to refine this tool?

- Sample Problem: Road salt prohibition on new subdivision roads
 - SPP Prohibition – the drinking water threat defined
 - The Practical Dilemma: risk management options off the table
 - No appeal options

Prohibitions (RMPs, s. 57)

Selected Issue 1: Refining a Blunt Instrument

Options:

- ❑ Finding a replacement activity
- ❑ Amendment to SPP
- ❑ Court challenge: “significant drinking water threat” and risk assessment requirement
- ❑ Section 60 Applications

Prohibitions (RMPs, s. 57)

Selected Issue 1: Refining a Blunt Instrument

Section 60 Applications – Uncharted Territory

- ❑ What is a Section 60 Application?
- ❑ What happens if a RMO receives a section 60 Application?
- ❑ The challenging unanswered questions:
 - What is a “risk assessment”? (The rules are not yet available)
 - What is the test for accepting a risk assessment (The rules are not available)
 - What should the rules be? What will they look like? When will they be available?

Regulating Existing Businesses

Selected Issue 2: Going Above and Beyond

Issue: Should RMPs cover risk which are not Significant Drinking Water Threats (SDWTs) ?

Limitations on RMPs:

- Activity and area designated in SPP
- Cannot be designated unless “area that is identified in the assessment report as an area where the activity is or would be a SWDT.
- Opinion: Any measure to address a threat covered by RMPs that is not a SDWT would not withstand appeal and is not enforceable.

Regulating Existing Businesses

Selected Issue 2: Going Above and Beyond

Why go beyond SDWTs in RMPs?

- ❑ Benefits for regulated individual:
 - Due diligence defence in environmental prosecution
 - Reduce risk of public environmental liability (MOECC Orders)
 - Reduce risk of private/civil environmental liability
 - Operational efficiencies achieved

- ❑ Benefits to Regulators/RMOs
 - Preventative - improve source protection effectiveness
 - Potential tool for harmonizing CWA and MOECC regulatory programs
 - Getting ahead of curve on SPP upgrades/tougher standards

Regulating Existing Businesses

Selected Issue 2: Going Above and Beyond

What are the risks?

- ❑ Municipality/RMO exposure to liability
 - When: if individual subject to MOECC orders or civil liability
 - How: based on argument of reliance on expertise/advice of RMO
 - Will discuss this item later when discussion civil liability issues

- ❑ Complicating Enforcement of RMP Requirements
 - Blurred distinction between requirements within RMO's statutory authority (SDWTs) and other parts of RMP
 - Defense could be built around confusion between which standards apply to a regulated activity

- ❑ Complicating MOECC Prosecutions
 - Defence of "officially induced error"

Regulating Existing Businesses

Selected Issue 2: Going Above and Beyond

Managing the risks

- ❑ Clarity in drafting RMPs and section 58(6) Notices
 - Clearly indicate which components of RMP are enforceable and which are voluntary

- ❑ Disclaimer clauses in RMPs and s. 58(6) Notices
 - Indicating that RMO and Municipality make no warranties as to public and private liability or protection from prosecution
 - Only to be relied upon for matters within ambit of CWA requirements i.e. “significant drinking water threats”

- ❑ Obtain Legal Advice/Review of RMPs and s 58(6) Notices

Restricting New Land Uses (s. 59)

Selected Issue 3: Managing the flood

Issue: How to deal with the fall-out from Source Protection Plans that cast too broad a net?

- ❑ Sample Problem: A SPP which does which does not limit the type of land uses that are subject to section 59 designation and notice requirements
 - RMO is flooded with applications involving land use changes or building permit applications
 - *de minimus* risk of SDWT but still subject to s. 59 order requirement
 - Administrative and processing resources required are significant

Restricting New Land Uses (s. 59)

Selected Issue 3: Managing the flood

Options:

Develop application screening criteria/procedures

- ❑ Performed by Planning/Building Department when applications come in
 - ❑ Develop standard templates/screening procedures
 - ❑ Borderline cases reviewed by RMO
 - ❑ Standardized s 59(2) notices
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- ❑ Section 55 By-law
 - ❑ Specifying application information requirements to streamline reviews
 - ❑ Specifying specific types of uses that are exempt, e.g. residential or agricultural uses (This option is vulnerable to legal challenge)
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- ❑ SPP Scoping Amendment (the best option)

Restricting New Land Uses (s. 59)

Selected Issue 3: Managing the flood

Options (continued):

- ❑ SPP Scoping Amendment (the best option)
 - Bring forward a technical amendment to the SPP to refine categories of uses subject to section 59 requirements.
For example
 - Exempt all residential uses/activities (Grand River SPP)
 - Exempt most residential uses/activities (Saugeen SPP)
 - Exempt some agricultural uses/activities

RMO Advisory/Spill Prevention/Education Role

Selected Issue 4: The Risks of Being Helpful

Issue: RMOs sometimes provide advise, information (such as sample spill management plans or best management practices) that go beyond Part IV regulatory powers/duties

- ❑ When are RMO's stepping beyond their regulatory authority?
- ❑ What risk of liability is incur?
- ❑ How can the risk be managed”

RMO Advisory/Spill Prevention/Education Role

Selected Issue 4: The Risks of Being Helpful

The Safe Zone (section 99, CWA)

- ❑ RMOs and RMIs and other municipal employees immunity from civil action when exercising duties/powers established under Part IV of the CWA
- ❑ No action or proceeding may be started for:
 - ❑ Any act done in good faith in execution or intended execution of duty/power
 - ❑ Any alleged neglect or default in execution in good faith of that duty or power
- ❑ Examples of Protected Activities: RMO advice, approving of RMPs and Spill Management Plans etc. if intended to address SDWTs as defined in applicable SPP

RMO Advisory/Spill Prevention/Education Role

Selected Issue 4: The Risks of Being Helpful

Where Liability Protections May/Does not Apply

- ❑ Where action being taken is not required to exercise power or duty under Part IV of CWA
- ❑ Examples: may not apply to RMO liability incurred by giving advice or providing informations not related to SDWT under a SPP such as advice/information/education efforts on:
 - ❑ Best practices to manage environmental risk,
 - ❑ Controlling and limit contaminants and
 - ❑ Spill Management Plans
- ❑ Also note Section 99(3): Does not protect employers (i.e. municipalities) against liability for employees

RMO Advisory/Spill Prevention/Education Role

Selected Issue 4: The Risks of Being Helpful

The Risks:

- ❑ Individual incurs environmental liability and claims that it relied upon advice/information from RMO/staff
- ❑ RMO or RMO/Municipal employee is named as defendant on claim by the individual
- ❑ Cross-claim against RMO if sued by individual if sued by a third party
- ❑ Can't fall back on section 99 liability protection

RMO Advisory/Spill Prevention/Education Role

Selected Issue 4: The Risks of Being Helpful

Managing the Risks – some ideas:

- ❑ Protections discussed earlier for RMPs:
 - ❑ Warning/disclaimer clauses on RMPs and Notices; and
 - ❑ Being clear about what actions are required to address SDWTs and what are over and above.
- ❑ Written warnings when provided with any advice/information or documents that go beyond SPP authorized section 58 or 59 to property owners and/or businesses or applicants

Concluding Thoughts: The Implementation challenge

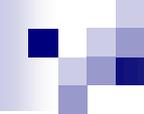
- ❑ **The rubber is still hitting the road. Trail blazing is difficult. RMOs are front lines for:**
 - ❑ A new interface with potential resistance: New stakeholders being hit with unprecedented new regulatory program
 - ❑ New laws, regulations and policies to be interpreted for first time
 - ❑ Initially fluid and evolving interpretation of the rules
 - ❑ Appeals/legal challenges \\\
- ❑ **Don't underestimate the resources and expertise required,**
 - ❑ Especially in early days as systems are being set up, while rules are being interpreted, and challenged, for the first time
- ❑ **Draw on all available resources/analogous experience**
 - ❑ MOECC experience – administrative orders and enforcement
 - ❑ Pooling resources and expertise amongst municipalities/RMOs
 - ❑ Drawing in legal and expert assistance (resource sharing for this also)

More Concluding Thoughts

- ❑ **Issues covered today: more discussion needed**
 - ❑ Tailor to specifics of SPPs and context
 - ❑ Legal advice recommended before acting
 - ❑ Consultation with MOECC Recommended

- ❑ **Other issues: we haven't scratched the surface:**
 - ❑ How to deal with appeals
 - ❑ Enforcement challenges
 - ❑ Multiple emerging challenges unique to individual SPPs and RMOs

- ❑ **Questions and Comments**
 - ❑ Were the Selected Issues Relevant for you?
 - ❑ What Legal Issues do you see coming?



GARROD ♦ PICKFIELD
Environmental, Municipal and Planning Law

Phone Number: (519) 837-0500

Email: info@garrodpickfield.ca

Website: www.garrodpickfield.ca

Peter Pickfield: pickfield@garrodpickfield.ca