

# CONSIDER THE SOURCE:

A Briefing on Ontario's *Clean Water Act*

Ontario Bar Association

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# Introduction

- Legacy of an Environmental Tragedy
- A regulatory regime to protect drinking water sources from significant threats
- Overview of Presentation
  - Briefing on key components of CWA (four parts to this)
  - Status report on implementation phase
  - Implications for municipal and planning lawyers and their clients



# CWA Briefing: Overview of Components

1. Source Protection Plans
2. Implementations Mechanisms
3. Enforcement Powers
4. Appeal Rights

# CWA Briefing: 1) Source Protection Plans

## 1. Source Protection Authorities

### 1. Assessment Reports

### 2. Development and Approval of SPPs

### 3. Key Content of SPPs

- Identifies Drinking Water Threats
- Policies to address drinking water threats
- Mapping of Groundwater Vulnerability areas and wellhead protection areas
- Designations of areas/activities that are prohibited
- Designation of areas/activities requiring RSPs
- Designation of areas/restricted land uses requiring approval before development can proceed

# CWA Briefing: 2) Implementation Mechanisms

1. **Updating Land Use Planning Policies**
2. **Prohibiting Activities that Threaten Drinking Water (s. 57, CWA)**
3. **Regulating Existing Activities – Risk Management Plans (s. 58, CWA)**
  - By Agreement with RMO- s. 58 (5)
  - By Application to RMO– s.58 (11)
  - By Order of RMO – s. 58 (10)
4. **Restrictions on New Land Uses – s. 59**

# CWA Briefing: 3) Enforcement Powers

1. Order to Report – s. 61
2. Inspections/Investigations – s. 62
3. Enforcement Orders – s.63
4. “Causing the Thing to be Done”
  - ❑ RMO power to take action – s. 64
  - ❑ Order to Pay (Cost Recovery) – s. 67

# CWA Briefing: 4) Appeal Rights

1. **No Appeal of SPPs or their amendment**
2. **Appeal rights for:**
  - Risk Management Plans
  - Enforcement Orders
  - Orders to Pay
3. **Appeal to Environmental Review Tribunal (none to date)**

# CWA Status Report: 1) Source Protection Plans

1. All SPPs in Place: 25 Plans across 19 Source Protection Regions
  
2. First Round of SPP Amendments: 15 SPPs
  
3. More changes coming: Drinking Water Quantity Threats (GRSPP)
  - Tier 3 Water Budget and Risk Assessment
  
  - Changes to SPP- new policies, prohibitions and RMPs to protect municipal drinking water systems from competing water demands/climate change



## CWA Status Report: 2) Implementation Measures

- Updating Official Plans, zoning by-laws: process is on-going
  
- Risk Management Plans
  - Notices issued to property owners
  - RMOs taking collaborative approach to developing RMPs
  - Generally by Agreement not Order
  - Process is on-going
  
- New Planning Applications/Building Permits: Municipal Screening Procedures
  
- RMOs: protocols, procedures and forms to implement measures

## CWA Status Report: 3) Enforcements/ Appeals

- **Most RMOs have not yet tested investigation and enforcement powers**
- **Focus on voluntary compliance and agreement**
- **No appeals have ever been made to Environmental Review Tribunal under CWA**
- **Possible Reasons:**
  - Voluntary compliance is working
  - Early implementation priorities
  - Resource Limitations
  - Haven't reached the tough case yet

# Implications for Clients:

## 1) Existing Businesses/Property owners

- **SPP Prohibitions (s. 57)** - No clear mechanism to challenge
  
- **Risk Management Plans (s. 58)**
  - 120 day compliance period when notice received
  - Triggers dialogue with RMO
  - Task will be to developing workable of risk management measures and reach agreement with RMO
  - Clients may need to retain experts and legal support
  - Experience so far: RMOs have been responsive to reasonable business concerns
  - Potential legal role in drafting agreements, risk management measures
  
- **If content of RMP cannot be resolved, RMO could issue an order imposing** - Trigger appeal rights.

# Implications for Clients:

## 2) Developers/Clients Seeking Land Use Approvals

### ■ **Section 59, CWA: New set of approvals requirements applies to:**

- Proposed land use changes for regulated activities within areas designated under SPP for protection
- Includes Planning Act application for regulated activity
- Includes Building Code applications involving a regulated activities

### ■ **If section 59 requirement triggered:**

- Proponent cannot apply under Planning Act or obtain building permit until RMO issues notice allowing it to proceed
- RMO may require Risk Management Plan to be put in place first
- May require clients to obtain expertise
- Requires working with RMO to determine what if any risk management measures will need to be put in place

# Implications for Clients:

## 3) Municipal Clients

### ■ **Watersheds versus political boundaries**

- Need to consider planning decisions in multiple planning areas
- Need for collaboration between municipalities

### ■ **Advising Risk Management Officials**

- Challenge of multiple SPPs/municipal masters
- Negotiating skills needed with businesses/ property owners
- When is enforcement action needed?

### ■ **Impacts on Municipal staff/resources**

- Planning Staff – OP changes/ section 59 requirements
- CBOs and building departments
  - Section 59 Requirements
  - OBC Sewage System Mandatory Inspections Program

### ■ **Financial Challenges**

- Administration and enforcement costs not covered by Province
- Funding options: development application fees; CWA Fee for Service; charge to water rates

# Conclusions:

## 1. **Implementation has gone better than expected**

- RMOs seem to managing workload
- Major conflicts and legal challenges avoided
- Enforcement powers not required
- No appeals

## 2. **Challenges may lie ahead**

- Toughest cases involving existing businesses not get tackled
- Enforcement powers may be needed – triggering appeals
- Program expansion – water quantity threats

## 3. **Clients may need your help**

- Businesses faced with new source protection requirements
- Developers facing new restrictions new development
- Municipalities need legal advice and advocacy



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