

# Four Years Later...

An Update on the Legal Challenges of  
Implementing  
Source Water Protection  
Ontario Water Works Association  
March 4, 2020

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

[pickfield@garrodpickfield.ca](mailto:pickfield@garrodpickfield.ca)

## Flashback to March 2016:

### Predicting the Implementation Challenges

- 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

# The RMO's Enforcement Tool Box

1. Order to Report – s. 61
2. Inspection Powers – 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



## Flashback 2016: Predicted Regulatory Challenges- Risk Management Plans

1. Resistance and lack of knowledge – Existing businesses
2. Potential for Appeals/legal challenges
3. Lack of in-house Resource/ Expertise

# Flashback 2016: Predicted Regulatory Challenges Restrictions on New Land Uses

## 1. **Planning Application Stage**

- ❑ Potential disconnect between RMO Review Function into Planning Act application process
- ❑ Confusion/ overlap between *Planning Act* and SPP requirements

## 2. **Potential Conflicts**

- ❑ Potential Conflict with Development industry
- ❑ Unclear delineation of roles - land use planners (municipal staff and private consultants)

## 3. **Overlapping Statutory Requirements**

- ❑ Potential confusion in interpretation of language: land use change versus activity
- ❑ Potential involvement in OMB (now Local Planning Appeal Tribunal) appeals

## 4. **Resource/Expertise Needs**

- ❑ Review of Planning applications
- ❑ Review of Risk Management Plans Applications
- ❑ Involvement in Hearings: ERT Appeals/LPAT hearing



# Flash Forward March 2020 Some Emerging Challenges

1. Prohibitions – Taming a Blunt Instrument
2. Regulating Existing Businesses – Orders/Enforcement?
3. RMPs- Going Beyond Safe Drinking Water Threats
4. Restricting New Land Uses – Managing the Flood
5. RMO Advisory Role – The Risk of Being Helpful

## 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

# Regulating Existing Businesses

## Selected Issue 2: When to use Enforcement Tools

Issue: When should RMOs use Enforcement Tools?

### Experience to date

- RMOs have experienced challenges in implementing Risk Management Plans through Agreement – lack of cooperation/voluntary compliance
- RMOs have generally not used Orders or other enforcement mechanism (therefore zero appeals or orders or enforcement decisions to Environmental Review Tribunal);
- Reason: conflicts with positive outreach function; lack of available expertise, expense, and lack of enforcement budget/resources; once an order is issued, it triggers potential appeals and other enforcement obligations
- Due to lack of voluntary compliance, RMOs are now considering use of orders and enforcement measures

# Regulating Existing Businesses

## Issue 2: Addressing Enforcement Challenges

### ■ **Conflicting Mandates/Political Pressure**

- In house separation of investigation/enforcement function from regulatory outreach efforts to business
- Policies to separate enforcement function from political influence

### ■ **Lack of in-house Experience/Expertise**

- Tapping Provincial Enforcement Expertise (in all stages of enforcement)
- Sharing municipal expertise and experience

### ■ **Addressing Resource Needs**

- Assess resource needs for enforcement functions
- Seek provincial assistance/advise/expertise
- Pooling resources amongst municipalities for enforcement/Appeal functions

# Regulating Existing Businesses

## Issue 3: 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 in an Order 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 3: 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 3: 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"

## Restricting New Land Uses (s. 59)

### Selected Issue 4: 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 4: 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
- 
- 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)
- 
- SPP Scoping Amendment (the best option)



## Restricting New Land Uses (s. 59)

### Selected Issue 4: 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 5: 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 5: 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 5: 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 5: 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 5: 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

- ❑ **RMOs are front lines for:**
  - ❑ A challenging interface with potential resistance: existing businesses being hit with unprecedented new regulatory demands
  - ❑ New laws, regulations and policies – still early days on interpretations (because no court or tribunal have reviewed yet)
  - ❑ 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
- ❑ **Regulatory Program still expanding**
  - ❑ SPPs expanding to address Significant Drinking water quantity threats
- ❑ **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](mailto:info@garrodpickfield.ca)

**Website:** [www.garrodpickfield.ca](http://www.garrodpickfield.ca)

Peter Pickfield: [pickfield@garrodpickfield.ca](mailto:pickfield@garrodpickfield.ca)