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PROVINCIAL AND MUNICIPAL WATER REGULATION – ONTARIO

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Applicable Legislation

Following the tragic events of Walkerton, the Ontario Government immediately became extremely active in the regulation of these areas. The Government was assisted by a lengthy inquiry which laid out a number of recommendations, most of which have been implemented since that time.

The Clean Water Act

In 2006, Ontario enacted *The Clean Water Act*, 2006 (CWA). This legislation has as its aim the protection of potential and actual sources of drinking water. The legislation starts at the watershed level and ensures protection of this watershed by local stake holders under the supervision of the Ministry of the Environment Regulations and Guidance Documents.

The key tool in this legislation is the Source Protection Area which often have similar boundaries with one or more conservation areas. The body empowered with the task of protecting the watershed is the Source Protection Committee for each of the source protection areas. These committees are typically staffed with representatives of municipalities and various public interest groups including agricultural, industrial, commercial, first nations, academics, non-government organizations and miscellaneous members of the public.

The first task to be undertaken once the Source Protection Committees are empaneled is the

preparation of Assessment Reports that, under Ontario Regulation 287/07 are required to:

(a) describe the water resources in the source protection area;

(b) identify vulnerable areas; and

(c) identify activities and conditions that are or could be "drinking water threats" or "significant drinking water threats".

The regulation itself describes what constitutes these threats and includes items such as agricultural activities and chemicals used therein, road salts, petroleum hydrocarbons and general farming and livestock activities. The committees, in developing their assessment reports, are required to undertake extensive public consultation with notices being given to prescribed individuals. There is an ongoing requirement to update assessment reports in accordance with changing conditions in the protection area.

Once the assessment report has been prepared, the committees then must proceed and develop a plan to protect the sources and these plans are known as the Source Protection Plan. Once again, the Regulation provides the requirement for posting of notification of the committees intention to develop the protection plan with notices being given to prescribed groups as set out in the Regulations. The form and content of the Source Protection Plan is again regulated by the Regulation and must comply with the requirements of O. Reg. 287/07. Once the Source Protection Plan is approved by the Ministry of the Environment, a number of important legal results ensue as a result of the provisions of the CWA:

(a) decisions made by municipalities with respect to matters such as zoning, official plans, and by-laws must conform with the plan;

(b) decisions of other branches of Government including applicable agencies and

commissions must conform to the significant threat policies; and

(c) all instruments even if created before the Source Protection Plan must be amended so as to comply with the Plan.

The *Act* also provides [1] for an annual report by the committee, describing measures that have been taken to implement the plan, monitoring results, extent of objective achievement and other matters required to be dealt with by virtue of the Regulation.

The *Act* also requires existing "instruments" to be retroactively amended so as to conform with the significant threat policies as set out in the Source Protection Plan.

As a result of this *Act* and the Regulations, even existing commercial, industrial and municipal operations that are identified as drinking water threats may be required to amend their Certificates of Approval or to take protective measures to reduce or alter discharges, to change practices with respect to chemical storage and handling or to otherwise reduce the risk of contaminating water supplies by reducing or altering farming or other activity. All instruments created before the Source Protection Plan are required to be amended to conform with the significant threat policies.

The power of Source Protection Committees is extremely wide. Sections 57 and 58 of the *Act* allow the committees to designate activities that will harm the watershed and the people carrying on such activities have 180 days to cease such activity. Similarity, short of an all out prohibition, the committee can require a Risk Management Plan be filed and dealt with to allow activities that are potentially harmful.

As you can appreciate, a great number of Source Protection Committees have yet to finalize all the tasks imposed on them but there are some committees that have had their terms of reference

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[1] Section 46(1) CWA

approved by the MOE and have also completed their assessment reports.

After enacting this legislation in 2010, the Ontario Government affected a wide range of amendments to the 2007 Regulations by virtue of O. Reg 59/10, and O. Reg 246/210. These amendments further tightened up the requirements of O. Reg 287/07 by expanding the categories of threats from drinking water threats and significant drinking water threats to "low drinking water threats" and "modest drinking water threats".

These regulations now list more clearly the "prescribed instruments" that must either comply with or have regard to the policies set out in enacted Source Protection Plans. There was wide spread debate and dispute over the extent of instruments to be included in the list but at the end of the day the Ministry honed the list down somewhat but preserved the right to alter the field of "prescribed instruments" in the future. A few of the key prescribed instruments are as follows:

1. Under the *Environmental Protection Act*

    (a) Certificates of Approval for Waste Disposal Sites;
    (b) Certificates of Approval for Waste Management Systems; and
    (c) Renewable Energy Approvals.

2. Under the *Ontario Water Resources Act*

    (a) Permits to take water; and
    (b) Certificates of Approval for sewage works.

3. Under the *Safe Drinking Water Act*
    (a) Drinking Water Permits; and
    (b) Municipal Drinking Water Licence.

4. Under the *Pesticides Act*
   (a) Permits for land extermination, structural exterminations and water exterminations.

5. Under the *Aggregate Resources Act*
   (a) Licences for pits and quarries and associated plans; and
   (b) Aggregate Permits and associated site plans.

6. Ministry of Agriculture Food and Rural Affairs
   (a) Nutrient Management Strategies and Plans; and
   (b) Non-Agricultural source material plans.

As can readily be seen, the *Clean Water Act* and the developing Regulations under it, there will be severe impacts on a broad range of activities carried on within the delineated protection area as the Source Protection Plans begins to develop.

The *Act* employs a number of tools to enforce its provisions. The severe requirements are as follows:

1. mandatory compliance of planning decisions such as official plan amendments, zoning by-laws, site plan agreements and other planning issues with significant threats policies;

2. all prescribed instruments must now comply with significant threat policies and be amended even if they were created before the policy came into force so as to respect the significant threat policies; and

3. The outright prohibition of certain activities or a mandatory risk management plan for activities in certain areas.

The Province has undertaken a number of softer measures to ensure compliance with the general philosophy of the *Act* and these include:

1. Stewardship Programs;
2. Best Management Practices;
3. Pilot Programs and other research and initiatives;
4. Incentive Programs for Compliance with the *Act*;
5. Education and Outreach Programs;
6. Meteorological and Climatic Data Collection Requirements; and
7. Mandatory updating of spill prevention and contingency plans.

Exemptions Under The Clean Water Act

The Regulations exempt the following activities from the regulatory tools under the *Act*:

1. Waste disposal sites with approvals obtained under the *Environmental Protection Act*;
2. Sewage systems with approvals under the *Ontario Water Resources Act*; and
3. Sewage systems regulated under the Ontario Building Code.

Safe Drinking Water Act

While *The Clean Water Act* regulates the protection of drinking water and potential drinking water areas, this *Act* dovetails with the *Ontario Safe Water Drinking Act*, 2002 (SDWA) which aims to stipulate drinking water standards and regulate, review, licence and accredit individuals involved in the delivery of this service. The SDWA also provides for enforcement and transparency through annual reports issued by the Ministry of the Environment and the Chief Drinking Water Inspector.

The Ministry of the Environment (MOE) is responsible to monitor compliance with the SOWA

and it continues to diligently investigate and prosecute municipalities and non-municipal corporations and other individuals responsible for the operation, installation and handling of drinking water systems.

The *Act* clearly provides that its purpose is to recognize that the people of Ontario are entitled to expect their drinking water to be safe and to make provisions for the protection of human health and the prevention of drinking water health hazards through stringent control and regulation of drinking water systems and related testing.

The *Act* incorporates a municipal drinking water licence under s. 44. Rather than the previous system of Certificates of Approval, the new licencing provisions came into force on February 24, 2011. Section 44 of the SDWA laid out five requirements necessary in order to obtain a licence under the new legislation:

1. Drinking Water Works Permit must have been issued for the system;

2. The operational plans for the system must satisfy the requirements in the Directors Direction under part 3 of the *Act* for the specific type of system involved;

3. The system must be operated by an "accredited operating authority";

4. The financial plans for the system must satisfy the requirements of the *Act*; and

5. A permit to take water must have been issued under s. 34 of the *Ontario Water Resources Act* if the licence relates to a part of a system that takes water from a well water supply.

The *Act* envisions further requirements in the future. The plans currently provide that on January 1, 2013, s. 14 will provide that an owner of a drinking water system can be separate from the accredited operating authority and can enter into an agreement with the authority to operate the

system. The owner may delegate its duties imposed under the SDWA to the accredited operating authority but it cannot contract it out of its requirements to ensure that the accredited operating authority complies with the *Act*.

Similarity, s. 19 will provide that the owner and every officer and director of the corporation and every person in the municipality who oversees the accredited operating authority must exercise a level of care, diligence and skill in respect of a municipal drinking water system that a reasonably prudent person would be expected to exercise in a similar situation and all of these individuals are required to act honestly, competently, with integrity and with a view to ensuring the protection and safety of the users of the municipal water system. How this turns out will be interesting to see.

In the meanwhile, penalties for breaches of SDWA provisions are at least theoretically onerous. Corporations with previous convictions can face penalties of up to $200,000.00 a day and individuals can face fines of up to $50,000.00 a day or imprisonment for up to one year or both. For serious offences fines can be up to $10 Million per day and for individuals maximum penalties for serious offences can be up to $7 Million per day and five years imprisonment. However, in practice so far the Courts have levied significantly lower penalties with first convictions carrying a maximum penalty of $3,000.00 and municipalities fined $1,500.00 per charge. Non-municipality corporations have faced maximum fines approaching $70,000.00.

The Ministry of the Environment often brings several charges at the same time and while these amounts are low, a number of charges can arise out of the same facts and circumstance resulting in penalties for one instance that could approach $100,000.00 to $200,000.00.

Water Opportunities Act

The Province enacted the *Water Opportunities Act* in 2010. Its stated purpose is to:

(a) foster innovative water waste, storm water technology services and practices in the private and public sectors;

(b) create opportunities for economic development and clean technologies jobs in Ontario; and

(c) conserve and sustain water resources for present and future generations.

While a great deal of the fleshing out of this *Act* will be left to future regulations, the WOA will eventually require municipalities and utilities to submit sustainability plans for their drinking water, waste water and storm water services. The Government and private industry is feeling the pinch of the accelerating need for water for Ontario industries. For example, a recent report by the Bloom Institute reported that the use of water by the food processing industry doubled in the last six years and the cost similarly doubled as well. It does not take a great deal of imagination to see that the spiraling costs of water use will make Ontario food producers and other producers uncompetitive unless serious plans are put forward now to embark on sustainable water practices.

The WOA will require municipalities to prepare and submit substainability plans. We're not sure what these plans will say but at present the WOA says they may contain:

1. An Asset Management Plan for the physical infrastructure;

2. A Financial Plan;

3. A Water Conservation Plan;

4. A Risk Assessment Plan and plan to deal with any risks that may interfere with the future delivery of the municipal service, including the risk posed by climate change; and

5. Strategies for maintaining and improving the municipal service including the meeting of future demand and more efficient generation of water resources.

The *Act* itself creates a corporation known as the Water Technology Acceleration Project whose objects are to assist in the goals of the *Act* in developing, testing and demonstrating innovative technologies and services for the treatment and management of water and waste water and to provide Governments and private sector information to assist them in doing the same.

Ontario Water Resources Act

Ontario Water Resources Act was designed to conserve, protect and manage Ontario's water resources for efficient and sustainable use. The *Act* focuses on both ground water and surface water. It deals with and regulates sewage disposal and sewage works and prohibits the discharge of polluting material that may impair water quality. The *Act* also is the main vehicle for the regulation of water taking permits for takings in excess of 50,000 liters a day from ground or surface water sources. The *Act* also regulates well construction, well operation and abandonment and the approval construction and operation of water works.

As we have seen from the other newer Provincial legislation introduced as a result of the Walkerton inquiry, the W*ater Resources Act* will tend to focus more on sewage systems and pollution prevention. The *Act* has its origin dating back to the 1950s and is also administered by the Ministry of the Environment. The *Act* has a number of different provisions dealings with the protection of water resources. For example, the *Ontario Water Resources Act*:

1. Prohibits the discharge of polluting material in or near water (s. 32);

2. Prohibits or regulates the discharge of sewage (s.31);

3. Provides for orders, find measures to prevent, reduce or alleviate impairment of water quality (s. 32);

4. Provides for the designation and protection of sources of public water supply;

5. Regulates well drilling and construction (s. 36-50);

6. Requires approvals for water works and sewage works (s. 52 and 53);

7. Provides the enabling legislation for the Ontario Clean Water Agency to provide or operate water works or sewage works for municipalities (s. 63-73); and

8. Provides important director and officer liability for breaches of the *Act.*

Sewer By-Laws

Most municipal waste is treated by Sewage Treatment Plants (STPs) operated or controlled by municipalities. In 2008 the MOE prepared an extensive design guideline for new sewage works being constructed. These guidelines not only provide for the design of sewage system but they contain provisions to deal with the pre-treatment of septage and leachate before they are transmitted to STPs. This document can be found under MOE #PIBS6879.

The authority for the regulation of sewer works is governed by s. 53 of OWRA. Approval of sewage works is also effected by:

1. *The Planning Act*;
2. *The Municipal Act*, 2001; and
3. *The Ontario Municipal Board Act.*

Because STPs have a limited ability to filter contaminants before the resulting treated water is re-introduced into the environment, municipal by-laws form an important service in regulating what is discharged into the municipal sewer systems. Heavy industrial users will obviously need to control what goes into the sewer system to prevent any serious contaminants from simply transferring through the STP. Municipal by-laws perform an important role by either prohibiting entirely the discharge of certain substances or requiring pre-treatment of the substances before they are discharged into municipal sewer systems.

Municipal by-laws vary in their content and thus standards are not uniform across the Province. For example, the City of Ottawa maintains an extensive sewer by-law ensuring compliance with discharge levels by way of discharge agreements, compliance programs, and best management practices. While leachate would normally be excluded from treatment at an STP, the City of Ottawa under specific circumstances and condition may allow leachate to be treated at the local Robert O. Pickard Centre. At present, both the Trail Road and Carp Road facilities are discharging leachate by way of pipelines to that facility.

This issue is going to become an even greater problem with the inability of STPs to handle a number of substances. For example, in spite of care being taken in respect of leachate from landfills, in certain cases it is impossible to determine that deleterious substances are not being passed through the local STP and discharged into the natural environment. Similarly, the extent of pharmaceutical use is such that there is growing concern that the STPs do not filter out this material and that it is being re-introduced into the natural environment in ever increasing amounts. Expect to see important news on this front in the coming months and years.