

# ENVIRONMENTAL LAW

## SOURCE WATER PROTECTION

### MOE PROMISES NEW LAW WATERSHED-BASED SOURCE PROTECTION PLANS COMING

Environment Minister Dombrowsky is appointing two advisory source water protection committees—a technical committee and an implementation committee. With her announcement, the Minister emphasized that Justice O'Connor's recommendations are just a starting point.

The expert committees will build on the recommendations of the *Advisory Committee on Watershed-Based Source Protection Planning* (April 2003):

- Legally binding watershed-based source protection plans should be the cornerstone of drinking water resource protection.
- MOE should have “ultimate accountability” for source protection plans.
- The goal of source protection should be to protect human health.

It is worth noting that the Advisory Committee's stated goal is protection of health, rather than the environment. Presumably, environmental protection will benefit, but the inevitable trade-offs will be decided from a drinking water perspective.

The Advisory Committee recommended creating new stand-alone legislation, rather than amending the *Environmental Protection Act* ('EPA') and other existing legislation (as recommended by Justice O'Connor).

A new stand-alone law may complicate implementation. How will watershed plans interact with legislation such as the *Environmental Protection Act*, *Ontario Water Resources Act*, *Planning Act*, *Oak Ridges Moraine Protection Plan*, and *Nutrient Management Act*? If the new legislation is not drafted carefully, it will result in another regulatory layer that will not effectively integrate with current laws and regulations. It may be more

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effective to implement source protection by amending existing legislation.

The Advisory Committee also recommended that the government provide municipalities with new powers and funds for source protection planning.

Until the government passes new legislation, the province, municipalities and conservation authorities can use existing legal tools to control high risk activities and land uses.

### GREY V. ARTEMESIA: WATER TAKING IS LAND USE UNDER PLANNING ACT

Ontario communities that want to protect their drinking water sources by controlling water taking got a boost in early December.

Water bottler, Artemesia, abandoned its appeal of the Ontario Divisional Court decision that held that installing pipes and pumps on land for the purpose of taking water is a “land use” under the *Planning Act*.

This means that the Divisional Court decision stands as the current law of Ontario.

Now communities who want to protect their drinking water sources can control water taking through Official Plan policies and zoning by-laws. Well-drafted land use controls may exist along side, and independent of, MOE permits to take water.

## SAFE DRINKING WATER ACT

### SAFE DRINKING WATER REGULATIONS

In quick reaction to Walkerton, the government of the day enacted drinking water standards regulations under the *Ontario Water Resources Act* ('OWRA'). These have now been largely replaced by a series of regulations under the *Safe Drinking Water Act, 2002*. One of the difficult issues facing municipalities has been how to deal with small systems that are not economically viable under stringent new regulations.

The new *Drinking Water Systems Regulation* (effective June 1, 2003), establishes a new category of water systems called “Municipal Residential” for drinking water systems that serve less than 101 private residences. These systems receive some relief from the operational checks, sampling and testing requirements for municipal water systems.

The regulation also brings a measure of relief to those communities that draw from wells that are clearly not influenced by surface water.

### MOE ENFORCEMENT

The MOE's post-Walkerton commitment to inspect all municipal water systems annually has resulted in numerous charges and fines.

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ONTARIO REGULATORY INITIATIVES	
<i>Limitations Act, 2002</i>	Proclaimed in force effective January 1, 2004. Municipalities will lose their right to sue polluters two years after the contamination is discovered, or reasonably should have been discovered. There is no ultimate limitation on environmental claims such as those for leaking landfills.
<i>Safe Drinking Water Act, 2002</i> , O. Reg. 169, 170, 171, 172, 173/03 and O. Reg. 248/03	Regulations and many parts of the Act are now in effect. Accountability provisions (standard of care, accreditation, quality management standards) are not yet in effect. Replaces <i>Safe Drinking Water Regulations</i> (OWRA). Many regulations with complex schedules. MOE has established a Drinking Water Management Division. The Division head is Assistant Deputy Minister Jim Smith, who has also been designated as the Chief Drinking Water Inspector of Ontario. Download regulations from <a href="http://www.willmsshier.com/compliance">www.willmsshier.com/compliance</a> or <a href="http://www.e-laws.gov.on.ca">www.e-laws.gov.on.ca</a>
<i>Nutrient Management Act, 2002</i> , O. Reg. 267/03 and Protocols	Phase-in began on September 30, 2003. The Act is accompanied by a lengthy regulation plus protocols for Construction and Siting, Local Advisory Committees; Nutrient Management; Sampling and Analysis for Soil and Land Applied Materials. Only new farms and large farms will be subject to the requirement for Nutrient Management Plans and Strategies. Municipal by-laws (where in effect) will continue to apply to farms that are not subject to the regulation. MOE Minister Dombrowski announced in November 2003 that MOE will take responsibility for enforcement. Download regulations and protocols from <a href="http://www.willmsshier.com/compliance">www.willmsshier.com/compliance</a> .
<i>Sustainable Water and Sewage Systems Act, 2002</i>	Passed but not proclaimed. Cannot come into effect until regulations are passed. Costs of source protection are to be included in full cost accounting for drinking water systems.
<i>Ontario Water Resources Act, Permit to Take Water Regulation</i> O. Reg. 99/99 - Proposed Amendments	Proposed amendments would require applicants to notify municipalities, conservation authorities, and adjacent landowners about proposed water takings; require reporting of water use by permit holders; and define potential impacts that will be considered when reviewing permit applications.
<i>Ontario Water Resources Act, Wells Regulation</i> Reg. 309 Amended - O. Reg. 128/03	In effect August 1, 2003 - mandatory training and continuing education for well drillers, tougher standards for well construction and decommissioning, placement of well tags on all new wells. New requirements for the construction and decommissioning of test holes and de-watering wells.
<i>Environmental Protection Act, Brownfields Amendments</i>	Record of Site Condition – clean-up provisions and regulations undergoing MOE review pending Cabinet approval. Municipal and Secured Creditor amendments took effect December 1, 2003.
<i>Municipal Act, 2001, Municipal Business Corporations Regulation</i> , O. Reg. 168/03	Now in effect under <i>Municipal Act, 2001</i> . See article in this newsletter.
<i>Environmental Protection Act, O.Reg 347 amendments— Banning Spreading of Untreated Portable Toilet Waste</i>	Effective October 30, 2003, amendments to EPA Regulation 347 prohibit spreading of untreated waste from portable toilets except where the site approval specifically allows it.
<i>Smart Transportation Act (Bill 25)</i>	This Bill died with the election. The McGuinty government has not announced any plans to revive it.

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Recent charges relate to failure to sample and analyse, failure to notify MOE about exceedances of water quality parameters, failure to comply with permits, Ministry Orders and Directions, and failure to provide sufficient training.

Fines for these charges have been as high as \$8,000 per count. One municipality was fined a total of \$40,000. Fines and charges are published on the MOE

Website, [www.ene.gov.on.ca](http://www.ene.gov.on.ca).

The MOE has also issued mandatory orders requiring a number of municipalities to comply with the drinking-water systems regulations.

Despite this activity, the MOE's monitoring and management of municipal drinking-water systems were criticized by the Provincial Auditor General's 2003 Annual Report. The Auditor reported that 27% of municipal

water works have not submitted samples for e-coli bacteria and fecal coliform, although legally required to do so. Many of the reported exceedances related to human health, which the MOE did not follow up.

Responding to the Auditor's report, the MOE has committed to using its electronic system to strengthen inspection and enforcement.



FEDERAL REGULATORY INITIATIVES

<i>Canadian Environmental Protection Act, 1999—Part 8 Environmental Emergency (E2) Regulations</i>	E2 Regulation took effect November 18, 2003. Regulates 174 substances (including chlorine, ammonia) with concentration and quantity filing thresholds. Municipalities and companies that annually store amounts exceeding threshold must notify Environment Canada, prepare, test, implement and maintain E2 Plans. Spills of any listed substance are now reportable under CEPA 1999 section 201—requires both an oral report to Spills Action Centre plus a written report to federal authorities. Download the regulation including substances list from <a href="http://www.willmsshier.com/compliance">www.willmsshier.com/compliance</a> .
<i>Canadian Environmental Protection Act, 1999 Pollution Prevention (P2) Plans - Proposed Notice: ammonia, chloramines, chlorinated wastewater effluent</i>	Consultation ended August 7, 2003. Final Notice will require P2 plans for owners of wastewater collection or treatment systems discharging 5000 m <sup>3</sup> per day (annual avg.), and where: TRC exceeds 0.02 mg/l; ammonia nitrogen exceeds 16 mg/l in a shallow pipe scenario or upstream pH >7.5. Plans will be required within 24 months of Final Notice and must be implemented within 5 years. Proposed Notice - <a href="http://www.ec.gc.ca/Ceparegistry/documents/notices/gl-13723_n1.pdf">www.ec.gc.ca/Ceparegistry/documents/notices/gl-13723_n1.pdf</a>
<i>Canadian Environmental Protection Act, 1999, Code of Practice to Reduce Environmental Impact of Road Salts (Canada Gazette Part 1, September 20, 2003)</i>	Road salt was declared to be a toxic substance added to CEPA Schedule I. Environment Canada published the proposed Code of Practice for 60 days of public consultation. The proposed Code focuses on road authorities using >500 tonnes of salt over a winter season, and those with vulnerable areas. Recommends salt management plans incorporating best management practices for salt storage, snow disposal and salt application.
<i>Criminal Code Amendments: Criminal liability for corporations and organizations</i>	Federal Royal Assent was given on November 7, 2003 to amendments to the Criminal Code making organizations (corporations plus other organizations) criminally liable for acts of their employees, contractors and agents that cause harm to workers or the public. The organization can be convicted as a result of the acts or failure to act of “senior officers” - those who oversee day-to-day operations but who may not be directors or executives. The legislation also imposes a legal duty on employers or others who direct work to take reasonable measures to protect employee and public safety. Wanton or reckless disregard of this duty resulting in death or bodily harm would result in a charge of criminal negligence.

RECENT CASES

**TORONTO PESTICIDE BY-LAW UPHELD**

Croplife Canada lost its court challenge of the City of Toronto’s by-law restricting pesticide use by residents. The by-law restricts pesticide use to situations of “infestation.”

On December 7, 2003, Superior Court Judge Somers dismissed Croplife’s application to quash the by-law. The Court followed the Supreme Court of Canada’s decision in *Spraytech v. Hudson*, which upheld a pesticide by-law in Hudson, Quebec.

Croplife challenged the City’s right to enact the restrictive by-law, claiming that adequate federal and provincial legislation protects health and safety of residents and the environment. Croplife argued that the Supreme Court of Canada’s historic judgment in *Spraytech v. Hudson* would not apply in Ontario because of minor changes to the public welfare provision in the *Municipal Act, 2001*. Judge Somers found that the change was so minor and technical that it had no impact on municipalities’ rights to pass anti-pesticide by-laws.

At time of publication, pest control industry representatives were considering whether to appeal.

**NUTRIENT MANAGEMENT BY-LAW APPLIED**

The Court in *Ottawa v. Chief Building Official (Ottawa)* considered legal non-conforming uses, and “other applicable law” in the context of livestock farms.

A dairy farmer applied for a building permit to change from dairy to hog farming, and to significantly increase the size of the livestock load (from about 209 cows to about 3,000 sows).

After the hog farmer applied for the building permit, the City passed an interim control by-law, limiting livestock operations in the City to no more than 750 sows.

The farmer argued that the hog farm was a legal non-conforming use, and that the equivalent of 209 cows was 1,045 sows. He applied for a new permit to convert to a hog farm for 1,045 sows – about 300 more than permitted under the interim control by-law. The farmer prepared and obtained approval of a Nutrient Management Plan for the 1,045 sow farm.

The Chief Building Official issued the permit. The City appealed.

The Divisional Court held that the City had to issue a building permit, but amended the permit to reduce the number of hogs to comply with the interim control by-law. The Court found that the change from a dairy farm to hog farm meant that the hog farm would not be a legal non-conforming use.

The Court also found that environmental statutes (EPA, OWRA and *Fisheries Act*) are not always considered to be part of “other applicable law”.

The Court held that there must be a clear nexus with the purposes of the *Building Code Act* - namely with the construction or demolition of structures, for environmental statutes to constitute other applicable law.

**LANDFILL EAA DECISION UNDER APPEAL: MOE DUCKS OUT, AG TO INTERVENE**

On November 3, 2003 the Ontario Court of Appeal granted leave to appeal the Richmond Landfill decision in *Sutcliffe v. MOE and Canadian Waste*. The controversial two-to-one Divisional

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Court decision has halted the environmental assessment process for most major Ontario projects in the *Environmental Assessment Act* ('EAA') pipeline. One result will be further delays in bringing new landfill capacity online.

The MOE abandoned its appeal – Minister Dombrowsky vigorously opposed the Richmond Landfill expansion as local MPP. However, the Attorney General has applied to intervene and argue that the majority decision was wrong, and the EAA permits scoping. Canadian Waste is also appealing the decision.

The two majority judges in the Divisional Court interpreted the 1997 EAA amendments that were intended to streamline the complex and uncertain Ontario EAA process. One objective of the amendments was to make the process more manageable for private sector proponents.

The MOE and most proponents believed that the amendments allowed significant scoping of the EA in the Terms of Reference. This meant, for example, that the Minister could limit the range of alternatives that a private or public sector proponent had to study and consider. However, the Divisional Court majority said that interpretation was wrong. According to the majority, every individual EA must include a full review of need and alternatives, as was clearly required by the EAA before the 1997

amendments. However, the third Divisional Court Judge wrote a strong dissent.

If this decision stands on appeal, proponents in the middle of the EA process will have to revisit their scoped Terms of Reference, and may need to redo their EA. We expect the Court of Appeal to hear the appeal and release a decision in early to mid-2004.

**WILL SCC POLLUTER PAY DECISION HELP MUNICIPALITIES?**

On October 30, 2003 the Supreme Court of Canada ('SCC') unanimously upheld a Quebec environment minister's order requiring Imperial Oil to clean up contamination in a residential subdivision built on a former Imperial petroleum products depot. The decision is notable because Imperial sold the property "as is" in 1979, and the Quebec government approved a clean-up around 1987. Imperial was not involved in the clean-up, and the environment ministry ultimately issued a "certificate of authorization" that led to the eventual redevelopment of the property as residential subdivision. The decision supports the application of the polluter-pays principle as implemented by provincial law in Canada.

Municipalities are eager to redevelop brownfields sites, but resources are scarce. Given the new spirit of cooperation between the Ontario government and municipalities, will the MOE step forward to use its clean-up order powers to raise clean-up resources and capital from polluters?

The SCC decision in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* makes it clear that a provincial ministry is not prevented by conflict of interest from ordering a former polluter to clean-up, even if the order might save the ministry from its own potential liability.

In *Imperial* it took a lawsuit against the Quebec environment ministry to spur it to make the order against Imperial. Lawsuits against the government should not be necessary to trigger remedial action. Perhaps this decision will persuade the MOE to put its powers to work for municipalities in the interests of redevelopment.

**MUNICIPAL ACT, 2001**

**BUSINESS CORPORATION REGULATIONS**

A new regulation under s. 203 of the *Municipal Act, 2001* set out municipalities' powers and limits on establishing or investing in business corporations. Municipalities had eagerly awaited these regulations, considering the potential advantages.

The Regulation has disappointed expectations. It limits the purposes for which a municipality can establish a corporation: public transportation systems; waste management systems; nursing homes, recreational and cultural facilities (excluding libraries), parking facilities; promoting the municipality; providing administrative services; and operating municipal capital facilities. The regulation does not permit a municipality to establish a corporation to operate water or sewage systems.

A municipality must undertake a business case study and provide opportunities for public participation before it takes a number of specified steps towards establishing a corporation.

**ENGAGEMENTS OF NOTE**

**Marc McAree** and **Juli Abouchar** will be speaking on *From Spills to Landfills: Overcoming New Environmental Liabilities* at the Canadian Institute's 10<sup>th</sup> Annual Provincial/Municipal Government Liability Conference, on February 20, 2004.

**Juli Abouchar** will be speaking on *Manure: Unraveling the New Regulatory Regime* at the Integrated Solutions to Manure Management II Conference, on March 8, 2004.

**Juli Abouchar** will be speaking on *Watershed Management - Small Community Issues* at the 33rd Annual WEAO Conference, on April 19, 2004.

**Donna Shier** will be speaking on *Understanding the Legal Framework for Redeveloping Brownfields* at the Strategy Institute's 2nd Annual Developing Toronto's Waterfront Conference, on February 20, 2004.

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