

Focus on Aboriginal & Environmental Law: Options for Drinking Water

Our clients are increasingly exposed to the intersection between Aboriginal and environmental law. As a result we plan to include regular articles on this dynamic issue. This article deals with options to improve the state of drinking water in First Nations communities.

W+SEL lawyers Juli Abouchar and Annie Thuan provided legal advice to the federal Expert Panel on Safe Drinking Water for First Nations. The Panel was commissioned as a result of the findings of the Office of the Auditor General in 2005 that "When it comes to the safety of drinking water, residents of First Nations communities do not benefit from a level of protection comparable to that of people who live off reserves. This is partly because there are no laws and regulations governing the provision of drinking water in First Nations communities, unlike other communities."

Currently there are a large number of players involved: Indian and Northern Affairs Canada (INAC), Public Works and Government Services Canada, Health Canada, Environment Canada, First Nations Chiefs and Councils, Technical Service Advisory groups and Regional Councils. But there are no legally binding health and safety standards or construction approvals. As of March 2007, 121 First Nations communities had high-risk community drinking water systems and/or drinking water advisories to be addressed.

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In this issue ...

FIRST NATIONS DRINKING WATER SAFETY

BROWNFIELDS PROPOSALS

- Clean-up Standards Rewrite
- Liability Changes

WASTE & ENERGY-FROM-WASTE

- EAA reform regulations pass, easing approval of waste disposal and incineration projects
- Reg. 347 recycling amendments pass to streamline waste diversion approvals

The Panel presented options to regulate drinking water in First Nations communities to Parliament in a Report tabled on December 7, 2006 (the two-volume report can be downloaded from www.willmsshier.com).

The Panel heard from First Nations at hearings across the country. In particular:

- traditional attitudes toward water are holistic and spiritual;
- there is a continuing concern about inadequate resources for the construction and operation of drinking water systems;
- INAC policies and procurement process are cumbersome;
- First Nations capacity to operate water systems is growing;
- views on standards and enforcement vary from community to community;
- enforcement must apply to all participants (including INAC); and
- solutions need community level acceptance.

The challenges are exacerbated due to the small size and remote location of many communities. Some are 'fly-in' during the summer months and only accessible by roads in the winter. More than 65,000 people live in such communities.

Regulatory options, each with its unique advantages and disadvantages include:

- applying existing provincial water regimes as "laws of general application";
- passing regulations under existing federal statutes;
- enacting new federal legislation by

- referencing provincial water laws;
- identifying FN customary laws and enshrining them in a new federal water statute; and/or
- enacting a new federal water statute setting out uniform standards, requirements and a First Nations Water Commission and Tribunal.

The Minister of INAC promised to introduce a regulatory framework this spring, to ensure safe drinking water in First Nations communities.

Meanwhile, inadequate housing, community services and water service, in communities like Pikangikum and Kashechewan, need immediate resolution. The key to success in any regulatory or practical solution will be buy-in from the communities, the adequacy of consultation and incorporation of Aboriginal customary law.

For legal advice on Aboriginal issues or consulting with First Nations in environment, energy or resource matters, please call Juli Abouchar (416-862-4836) or Annie Thuan (416-862-4829).

Brownfields Standards: 90% of Clean-up Numbers Could Change

Ontario's MOE has completely rewritten the soil, groundwater and sediment site condition standards used for the assessment and remediation of brownfields. These regulatory remediation standards, last amended in 1996, form the backbone of Ontario's brownfields regime. They determine remediation clean-up standards required for filing of a Record of Site Condition (RSC). The proposed revisions, together with a 400+ page scientific rationale document, were recently posted for public comment by May 22, 2007.

A quick comparison reveals that some 90 percent of the values have been revised, either upward or downward. Some of the proposed amendments are relatively minor, but others would see the decimal point shift one, two or even three places to the left ... or the right. For example, the standard for the gasoline additive MTBE in potable water

would drop from 700 to 15 micrograms per litre ($\mu\text{g/L}$), while that for the chemical building block 2,4-dichlorophenol would rise from 0.3 to 900.0 $\mu\text{g/L}$. The standards for TCE and a number of petroleum hydrocarbons in potable groundwater would be tightened by an order of magnitude or more. New listings include standards for n-hexane, uranium, trichlorofluoromethane and dichlorofluoromethane.

To avoid disrupting clean-up and redevelopment work already underway, MOE is proposing that the new standards not take effect for 18 months. RSCs using the current standards and filed within the period will be valid. Thereafter, all RSCs will have to be based on the new standards. Developing site specific, risk-based standards, or using formal risk assessments remain as options. We expect to see developers increasingly resort to risk-based RSCs where more stringent parameters make traditional remediation too costly. For legal advice call John Willms (416) 862-4821.

Ontario Fast Tracks New EAA Eggs for Waste Projects

The province suddenly got serious about cutting the EA-related red tape for approving new waste management projects. MOE proposed regulations in December 2006 to exempt or streamline approvals for waste management options, including energy from waste (EFW) and “thermal treatment” sites.

In March, the Waste Management Projects Regulation (O. Reg. 101/07) was promulgated under the *Environmental Assessment Act* (EAA). The fast-tracked regulation could significantly increase the amount of waste that goes “up the stack” rather than “into the ground” in Ontario.

The new regulation, along with its 80-page companion **Guide to Environmental Assessment Requirements for Waste Management Projects**, establishes three classes of projects, each based on its potential for significant environmental impact. Those projects, both public and private, with the highest impact are designated for the full EAA process.

A new Environmental Screening process applies to projects with predictable effects that can be “readily mitigated.” Projects classified as having minimal impacts, such

as some transfer stations and on-site industrial thermal treatment facilities, are completely exempt from the EAA. Disposal sites that are exempt from EAA will also be exempt from mandatory EPA approval hearings.

The Guide sets out the facilities subject to the three classes. It also details the requirements for the Environmental Screening process. (The Guide can be downloaded from www.willmsshier.com. Documents & Downloads— Waste).

Incinerators and other thermal treatment plants that produce EFW and do not use coal or coke as fuel, can take advantage of the less onerous Environmental Screening process. However, incineration and other high-tech thermal technologies, if used for waste disposal, rather than EFW, will require a full EAA process.

Commercial, industrial or manufacturing EFW sites of up to 100 tpd, are exempt from EAA. On-site thermal treatment for disposal of the facility’s own waste is also exempt from EAA. A landfill site or dump with a volume of less than 100,000 m^3 is subject to Environmental Screening. Larger landfills and dumps are subject to full EAA process. For legal advice call Paul Manning (416) 862-4843 or Jennifer Agnolin (416) 862-4830.

Stringent Approvals Process Simplified for Recycling Projects

Amendments to Ontario’s General Waste Regulation 347 took effect in March. They are designed to simplify approvals for recycling and EFW projects that were deemed “too stringent.” O. Reg. 102/07, for Waste Recycling, Use of Alternative Fuels and New and Emerging Waste Management Technologies, was accompanied by a series of short regulations to implement the changes in other regulations affecting the waste regime.

The final wording of the regulation closely follows the draft version posted last summer, although several substantive changes were made to the final text. We described the proposed changes in detail in our September 2006 e-flash “Regulatory Amendments Proposed For Recycling, Alternative Fuels, New Waste Technologies.”

The term “thermal degradation” is replaced by the more politically neutral (and less

evocative) term “thermal treatment” - which includes incineration, gasification, pyrolysis or plasma arc treatment. This definition flows through into the new Waste Management Projects regulation under the *Environmental Assessment Act*.

Other changes include:

- exemptions were dropped for waste batteries and common mercury waste, and an for sites that process waste electrical and electronic equipment and printed circuit boards
- waste biomass exemptions were extended to include intermediate storage or processing sites; and
- sites using woodwaste as alternative fuels or to make beneficial products will have more flexibility for transportation and storage. For legal advice call Doug Petrie (416) 862-4835.

MOE Brownfields Liability Amendments Introduced

Several long-awaited Brownfields liability amendments to the EPA and OWRA will come into force on the passing of Ontario’s Bill 187, the *Budget Measures and Interim Apportionment Act, 2007*. Some of the changes will be phased-in later.

Several of the changes will clarify and expand the protection for innocent owners when RSCs liability to MOE orders is reopened as a result of contraventions. There will be more clarity and protection for RSC owners when contamination moves off-site.

Civil liability protection continues unchanged for property owners. However, the legislation would confer immunity on municipalities and conservation authorities from civil liability for planning and building approvals, where problems arise from inaccuracies in an RSC.

MOE is going to phase in a new system for reviewing and acknowledging RSCs before allowing them to be filed on the Environmental Site Registry. Property owners and consultants will be obliged to obtain and keep RSC reports for 7 years after the RSC is filed. For legal advice call Donna Shier (416-862-4822 or Marc McAree (416) 862-4820.

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