

## Clean Water Act, 2005 Regulations Coming 2007- 8

*Watershed-based source protection will have significant impacts on land development, industrial activities, water-taking and municipalities. The planning process is going to take several years, and is going to involve a lot of hard bargaining and compromise amongst the many stakeholders. We believe that prudent stakeholders should get involved early in the process to ensure that their rights are protected in the assessments and Source Protection Plans.*

Ontario's *Clean Water Act, 2005* received Royal Assent on October 18th, 2006. The legislation establishes Ontario's watershed-based drinking-water source protection regime. However, regulations are required for implementation. In the meantime, MOE continues to eke out funding to offset potential compliance costs.

MOE is considering 16 different "topic areas" for regulations, to be released in four separate waves over the next 18 months.

**The First Wave:** Four regulations would take effect in late March or early April of 2007. They will establish or alter the boundaries of source protection areas; combine areas to make source protection regions; cover the composition and terms of reference for the multi-stakeholder source protection committees; and address imminent health hazard notification.

The MOE will begin consultations on these regulations with key stakeholders, including municipalities, health units and conservation authorities, in late 2006. A wide-ranging

discussion paper, designed to stimulate debate, should be posted on the EBR Registry sometime in November.

**The Second Wave:** Draft regulations to be posted in September or October of 2007 will address the preparation of source water assessment reports; risk assessments and interim risk management plans; certification and training; and the Ontario Drinking Water Stewardship Fund.

**The Third Wave:** These regulations will set the ground rules for Source Protection Plans. MOE intends to release a discussion paper in May 2007, followed by a draft regulation in early 2008. MOE plans extensive consultations on the planning process.

**The Fourth Wave:** Draft regulations would be published in July or August of 2008 to cover "everything left over." This includes provincial assumption of planning responsibilities in certain circumstances, dealing with conflicts, and general operational matters.

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### Funding remains a concern

MOE insists that "neither local taxpayers nor industry will bear the burden of source water protection planning costs." (Does MOE think provincial revenue comes from somewhere else?)

In September, the province allocated \$5 million so that farmers and small rural businesses could take "early action to protect drinking water." Another \$2 million is earmarked for education. This money is in addition to the \$120 million set aside from 2004 through 2008 for assessing watersheds

and undertaking water budgets.

A new advisory panel, with 11 members from agricultural groups, municipalities, NGOs, and conservation authorities, will provide feedback on funding administration and allocation.

The province has promised additional funding as the planning process proceeds.

## Odours Deemed Public Nuisance, Newmarket Granted Injunction

W+SEL lawyers Marc McAree and Vivienne Ball represented the Town of Newmarket in winning a significant legal judgment this fall. The decision ensures the reduction of composting odours that had distressed Newmarket workers and residents for two years. Ontario Superior Court Justice Bryant found that the defendant company, Halton Recycling, had caused a public nuisance by emitting odours that caused extensive disturbance for its neighbours. Justice Bryant ordered Halton Recycling to shut down its composting operations if it fails to implement its proposed plan to eliminate off-site odours within 90 days. The shut-down order would last for nine months.

The nine-day hearing resulted in the first court decision under section 433 of the *Municipal Act, 2001*. The provision allows a municipality to apply to the court for an order closing a business. The court must make a finding that a public nuisance has had detrimental impact on the use and enjoyment of property in the vicinity. Where the owner fails to take adequate steps to eliminate the nuisance the court can order the business to stay closed for up to two years.

Justice Bryant found that the Town had received over 1,000 complaints over the past two years from people who worked or lived around the composting facility. He found that the odours were so unpleasant as to constitute an adverse effect and a public nuisance.

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The decision is significant for both businesses and municipalities. Although the defendant was working with MOE to obtain approvals for new equipment and processes, Justice Bryant was not satisfied with the progress. Businesses (and municipal operations) that are subject to nuisance complaints from neighbours will need to show efforts to abate. Odour and noise generators need to identify and oppose incompatible land development proposals within their impact zones.

Municipalities will be encouraged by this affirmation of their power to regulate environmental and health-related nuisances to protect the people who work and live in their communities.

Download the decision from our website: [www.willmsshier.com](http://www.willmsshier.com). (Documents and Downloads: Cases: *Newmarket v. Halton Recycling* (Ont. S.C.J.)).

## Ontario: Spill Report and Plan Regulations, EPs Proposed

**Bill 133:** Ontario has published draft regulatory tools and supporting guidance documents to implement the environmental penalties (EPs) and spill prevention and reporting provisions authorized by Bill 133 changes to the EPA and OWRA.

While EPs have hogged the Bill 133 spotlight, the impact of the spill prevention and reporting regulations will likely be more pervasive and significant.

Public comment expires January 12, 2007.

**Spill Planning:** The Spill Prevention and Contingency Plans Regulation will become the *de facto* standard for due diligence planning for everyone who makes, handles or uses toxic materials. Only MISA sector companies will be legally required to comply. It details the planning criteria and information that must be included in a plan. All reasonably foreseeable spills must be listed, with assessments of likelihood, potential adverse effects and prevention options described. A plan must include record keeping, annual testing and updating requirements. As of February 2008 this regulation will replace the CSA emergency planning standard for companies establishing thresholds for “non-reportable” spills.

**Spill Reporting:** Significant amendments are proposed to the Classification and Ex-

emption of Spills Regulation (O. Reg. 675/98). These would significantly expand the information that employees must provide in telephone reports to the Spills Action Centre. (All calls to SAC are recorded). The expanded requirements for the employees who must make these first contact reports requires them to provide speculative and incriminating information to MOE. This goes far beyond what first responders need to contain spills and mitigate potential damage. Failure to report “forthwith” is an offence under the EPA and OWRA. We think it is important to comment to MOE on the potential impact of this proposal.

**Environmental Penalties:** Draft EP regulations were published under the EPA and OWRA. These determine who is a “regulated person” subject to EPs (MISA sector companies that are direct dischargers) and identify the violations that will be subject to EPs. Complex rules will determine how the penalties would be assessed, calculated and applied, and the process by which an EP could be reviewed or amended. EPs are administrative penalties that are imposed by MOE Director’s order. Maximum per day amount is \$100,000, with no specified ultimate cap.

MOE also published several draft guidance documents to help interpret the complex EP regime; a guideline for implementing environmental penalties: a procedure for determining whether a contaminant is a “toxic substance” for EP purposes; and a procedure for calculating the monetary benefit component of EPs.

### Preventative action can reduce EPs

The amount of an EP would be contingent on two major factors. The first is the gravity or seriousness of the violation. This is based on potential impacts on human health or the natural environment, and the toxicity of the substances involved. The second factor is the financial benefit the regulated person secured by failing to comply.

The gravity component of the EP can be reduced by a Director based on prevention or mitigation efforts, or the presence of an Environmental Management System at the time of the violation.

Penalties can be reduced by up to 75% by entering into a settlement agreement with the Director, and agreeing to a pollution prevention or reduction “beyond compliance project” (BCP).

### EPs Not Limited To Spills

Implementation of the EP regulations would take place in two phases. During Phase 1 (anticipated to begin May 1, 2007), only violations for discharges to water or land would result in an EP order. Phase 2 (18 months later) would include violations related to constructing works, conditions of operation, sampling, reporting and record keeping.

### New Compliance Guideline

MOE also posted a revised draft **Compliance Policy (F-2)**. The F-2 guideline will now contain the “Informed Judgment Matrix” that will be used by Provincial Officers to determine whether to recommend orders, EPs or investigation by prosecutors.

## Small Renewable Energy Projects: Standard Offer

Many small renewable energy generating projects have been derailed by administrative red tape. The Ontario Power Authority’s Renewable Energy Standard Offer Program (RESOP) will streamline and simplify that process and make it less costly for operators to connect to Ontario’s electricity supply system. While the application process is still under development, draft RESOP rules were published for comment in September. OPA expects to roll out the final RESOP initiative in early November.

The draft rules provide a standard pricing regime. In plain language it will describe eligibility, contracting, application and submission conditions, and related requirements. The rules would apply to renewable energy projects, including wind, thermal electric solar, photovoltaic, renewable biomass, biogas, biofuel, land-fill gas, or mini-hydro that can be connected to the distribution system in Ontario. Project size is capped at a maximum capacity of 10,000 kW.

Generators will have to pay the costs of connection to the distribution system. Other generator costs and responsibilities include metering, designated ongoing costs of operation and maintenance, and committing to a 20-year contract with the OPA.