

Spills, sewers and stormwater: A legal opinion on environmental issues – Part II

In part I (June ES&E), Donna Shier discussed liability for spills and clean-up; prosecutions and defences; the Environmental Protection Act, the Ontario Water Resources Act, Fisheries Act, and municipal sewer use by-laws.

In part II, I promised to discuss some new regulatory initiatives relevant to water and wastewater and stormwater system approvals and management. The Ontario government has floated rafts of new regulatory proposals, not least being a proposed new *Municipal Act* which may be introduced in the legislature this fall. Space limitations require me to choose only two items of interest. These are: the MOE's proposals for permit-by-rule and approval exemptions (SARs and AERs); and the federal-provincial fisheries management shenanigans which our Willms & Shier newsletter dubbed the "Surf and Turf Wars".

Proposed Standardized Approval Regulations and Approval Exemption Regulations

The current provincial government and its predecessors worked on ways to reduce the approval burden on developers, municipalities and industries, as well as on MOE staff.

One way to do this is to reduce the number of activities that require certificates of approval. In 1996, the MOE introduced Bill 57 to reform the approval process by authorizing regulations that would allow wider approval exemptions. Recently MOE introduced its discussion papers on draft Standardized Approval Regulations (SARs) and draft Approval Exemption Regulations (AERs). Generally, the effect will be to transfer responsibility for regulating and monitoring many activities to municipalities. In the case of SARs, proponents will have to have designs certified by private engineering consultants in order to avoid having to go through formal certificate of approval requirements.

The proposed SARs include propos-



als to exempt the following activities from Certificate of Approval Requirements if all conditions are met:

- Modifications to existing municipal and industrial water and sewage works that currently operate under a Certificate of Approval (where environmental impact will not increase).
- Establishment or alteration of water-mains or sewers under ss. 52 and 53 of the *Ontario Water Resources Act*, but *does not apply* to works draining stormwater from industrial lands.
- Spill containment and stormwater management works at electrical transformer stations.
- Water and sewage pumping stations and forcemains, *not including* works which would be part of industrial sewage works.

Proposed Approval Exemption Regulations for sewage and water, would provide outright exemptions for listed activities including:

- Construction, alteration or replacement of watermain, storm and sanitary sewer appurtenances such as valve and meter chambers, fire hydrants, catch basins and maintenance holes.
- Replacement of approved watermains and sewers (so long as replacements are of same size and performance characteristics and at same location).
- Construction, alteration or replacement of residential/commercial stormwater management facilities in or on rooftops, parking lots or pipes which discharge to municipal sewers.

Fisheries Act: Fish Habitat Management

Effective September 18, 1997, on one month's notice, Ontario's Ministry of Natural Resources (MNR) terminated a

long-standing interim memorandum of understanding to administer and enforce *Fisheries Act* fish habitat management provisions, after its demand for compensation was refused.

In effect, responsibility for fresh water fish habitat management has been downloaded to municipalities and conservation authorities – without any corresponding transfer of money or resources. This means higher user fees for developers, increased delays in approvals, and a drastic decrease in monitoring and enforcement.

The fish habitat management provisions of the *Fisheries Act*, in s. 35, prohibit any work in or around water that will result in the "harmful alteration, disruption or destruction of fish habitat." Section 35(2) authorizes the federal Department of Fisheries and Oceans (DFO) to impose conditions on this type of work. DFO has published fish habitat management policies, to guide authorities in approving work around fish habitat. These policies are designed to avoid the loss of fish habitat, by assessing the potential impact of the damage, and imposing mitigation or compensation measures where appropriate.

For eight years MNR administered and enforced these fish habitat management provisions, in conjunction with the small local DFO contingent in Burlington and the cooperation of local conservation authorities. While final approval of compensation agreements was left to DFO officials, most of the evaluation and approval work was handled by the provincial and local authorities. As of last September, Ontario's MNR repudiated the agreement and its minister told DFO to take full responsibility for the exercise of its constitutional jurisdiction over fisheries. When MNR repudiated its delegated authority, that left conservation authorities without jurisdiction – they had been acting under authority delegated to them by MNR, with no direct link to DFO.

Unless or until DFO makes alternative arrangements, many developers' requests for permission to alter fish habitat, including mitigation and compensation agreements, must be processed by DFO's Burlington staff. At the time the

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MNR repudiated the agreement, DFO had no Ontario enforcement staff. MNR conservation officers, designated under the *Fisheries Act*, had enforced the fish habitat management provisions.

At that time, Gerry Swanson, Director General of Habitat Management and Environmental Science for DFO told us that the government still expected these provincial officers to enforce the *Fisheries Act*, implying a sort of designated moral obligation. By December 1997 DFO had brought a token enforcement group into Ontario and provided some interim funding for limited administrative activities.

Insiders say DFO is trying to restrict its role to salt-water fisheries, leaving the provinces to manage their own fresh water. This view skates over the Great Lakes (international waters), which receive much of Ontario's water. So far Ottawa has provided only minimal additional resources to DFO in Ontario, and has not announced any intention to transfer money to provincial or local agencies for provincial fish management. Meanwhile, Ontario has ruthlessly cut back on regulatory activities. In addition, the province is increasing responsibilities of municipalities without adequate offset funding or resources.

Some critics argue that the province was playing poker with the feds over



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transfer payments – and lost.

Up until now, impact on development, water quality and fisheries has been local. Since the MNR stepped out, conservation authorities have actively sought liaison with the DFO. In December DFO issued a "comfort letter" stating, in essence, that it will respect any delegation of authority previously made between MNR and individual conservation authorities. Many conservation authorities, with logistical support from Conservation Ontario, are negotiating individual agreements with DFO to clarify local authority and responsibility. And DFO has also allocated some funding for training programs – necessary since many of the more complex files were formerly dealt with by MNR staff.

Nonetheless, until the individual agreements have been negotiated, uncertainty reigns. Some larger, urban watersheds conservation authorities have staff resources and experience in dealing with fish habitat management issues. In many watersheds, however, fish habitat expertise remains locked inside MNR, where experienced staff are now handling other MNR business.

This wrangling runs contrary to the "one-window" planning approach that provincial and local authorities and the development industry have been working on. In some cases, stormwater management works approvals may have to undergo review by six different agencies: local municipalities, upper tier municipalities, conservation authorities, MOE, MNR (for *Public Lands Act* and *Lakes and Rivers Improvement Act* issues), and the DFO.

The extra burden on local municipali-

ties (who fund the conservation authorities) will not appear on the restructuring balance sheet. Conservation authorities' user fees for development applications will likely have to increase. Since DFO plans to enter into custom agreements with individual local authorities, administration could vary from watershed to watershed according to availability of resources and local politics.

Enforcement of fish habitat protection provisions will suffer. As many as 180 MNR officials had enforcement authority under the *Fisheries Act*. Conservation authorities have neither authority nor the resources to charge and prosecute offenders. Although their staff will be helpful in reporting some problems, it is difficult to envision a few DFO officers in Ontario having a significant enforcement presence.

I said at the outset that I was not going to discuss orders. Orders are most common under the *Environmental Protection Act* and the *Ontario Water Resources Act*. But there is one thing I want to mention. The EPA's statutory framework for orders for cleaning up contamination was expanded several years ago. It permits orders by the MOE to provide alternate water supplies where existing water supplies are damaged or endangered. There is no "reasonable foreseeability" as a precondition for liability for these orders. And I know of no legal impediment making a municipality immune from this sort of order.

This just adds to the already heavy onus on municipalities to establish and maintain the management systems they require to protect the services they deliver. ♦

New Sewer By-Law coming

Ten years after the last Model Sewer Use By-Law was published, the MOE posted a new draft for public comment. The Proposed 1998 Model Sewer Use By-Law was posted on the electronic Environmental Registry on June 16, 1998.

When finalized, the new model by-law will replace the Model Sewer Use By-Law (August 1988), itself replacing the 1975 original.

According to the MOE, improvements in the 1998 draft include: "a simplified modular format; more stringent limits for cadmium, lead and mercury; proposed new limits for ten organics; a new approach for stormwater requirements; incorporation of pollution prevention in the storm sewer section; use of a new sampling and analytical protocol based on the MISA Industrial Sampling and Analytical Protocol; and new monitoring requirements for dischargers."

The Proposed 1998 Model Sewer Use By-Law is available on the Internet at http://www.ene.gov.on.ca/envision/env_reg/documents/a/pa8e0029.pdf