

SOURCE PROTECTION OPTIONS FOR INTERIM RISK MANAGEMENT

*Presented at the
Permanent Protection of Ontario Drinking Water
A Source Protection Workshop*

May 26 & 27, 2003

Publication #458



Prepared by:

Richard D. Lindgren
CELA Counsel

June 4, 2003

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

130 SPADINA AVE. • SUITE 301 • TORONTO, ONTARIO • M5V 2L4
TEL: 416/960-2284 • FAX 416/960-9392 • www.cela.ca

SOURCE PROTECTION: OPTIONS FOR INTERIM RISK MANAGEMENT

As new regulatory tools are developed to implement watershed-based source protection plans, it is necessary to undertake interim measures to protect drinking water sources against contamination or depletion.

Accordingly, the Advisory Committee recommended that “the province, municipalities, and conservation authorities use their available powers to manage potential threats to human health, and protect sources of drinking water by taking action with respect to high-risk activities and land uses until source protection plans are approved and implemented” (Final Report, Recommendation 17).

Provincial Tools

At the provincial level, the Advisory Committee identified the *Ontario Water Resources Act* (“OWRA”) as providing legal authority for designating interim drinking water sources and prohibiting certain land uses and development within such areas. For example, section 33 of the OWRA empowers the Director to define areas of “sources of public water supply” in which “no material of any kind that may impair the quality of water therein shall be placed, discharged or allowed to remain”, and in which “no act shall be done and no water shall be taken that may unduly diminish the amount of water available in such area as a public water supply”. Similarly, section 36 of the OWRA empowers the Director to control water well construction within designated areas.

In addition to the above-noted provisions, the Ontario government has other legal tools to protect water resources, including:

- investigate and enjoin sources of groundwater or surface water pollution pursuant to section 29 of the OWRA;
- issue administrative orders under section 32 of the OWRA to require measures to alleviate the effects of water quality impairment;
- enforce water pollution standards (e.g. MISA effluent standards) and ensure compliance with discharge limits prescribed under statutory approvals (e.g. certificates of approval under the *Environmental Protection Act*);
- rigorously apply the *Environmental Assessment Act* to all public and private undertakings that may pose a threat to drinking water sources; and
- refuse to issue permits to take water under section 34 of the OWRA where there is an unreasonable risk to drinking water sources.

Municipal Tools

At the municipal level, the Advisory Committee referred to *Planning Act* (“PA”) powers that can be used to control land use and development. For example, under Parts III and V of the PA, municipalities may pass or amend Official Plans and zoning by-laws that identify and protect watercourses, wetlands, riparian zones, headwater areas, and other water-related natural heritage features. Similarly, municipalities are empowered under section 38 of the PA to enact interim control by-laws that essentially freeze the status quo

for up to two years within designated areas in order to allow more detailed planning or environmental studies to occur.

In addition to the above-noted PA powers, there are other tools currently available to municipalities to protect water resources, including:

- enact and enforce sewer use by-laws and pesticide by-laws;
- enact and enforce nutrient management by-laws for the various classes of agricultural operations that will not be caught by provincial standards set under the *Nutrient Management Act*;
- undertake public education and landowner contact programs; and
- consider land acquisition options (e.g. purchase, land swap, expropriation) or other mechanisms (e.g. stewardship agreement, conservation easement, etc.) to secure vulnerable or sensitive areas.

Conservation Authority Tools

Under section 21 of the *Conservation Authorities Act* (“CAA”), conservation authorities are currently empowered to:

- develop programs to conserve, restore and manage natural resources within watersheds;
- purchase, lease or expropriate lands; and
- control surface water flow to prevent pollution.

Under section 28 of the CAA, conservation authorities may make regulations that:

- restrict surface water use;
- regulate watercourse alterations; and
- control development near or within floodplains, wetlands, and river and stream valleys.

In summary, judicious use (and timely enforcement) of existing legal tools can provide a reasonable degree of interim protection for drinking water sources while watershed-based source protection plans are being developed and implemented. Where public officials fail or refuse to take these measures, then it is open to private citizens to consider appropriate political, media or legal action (e.g. OMB appeal, private prosecution, judicial review application, EBR remedies, etc.).