

Legal and Policy Tools for Source Water Protection in Indigenous Communities

Legal Tool: Protecting Source Waters Under the *Clean Water Act*

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IX. Legal Tool: Protecting Source Waters Under the *Clean Water Act*

A final legal tool evaluated for its potential of advancing source water protection was the role of Ontario's *Clean Water Act*. Ontario mandates that Source Protection Committees (SPC) consult with First Nation communities in their source protection areas and solicit their participation in the process, either through working groups or as members of the SPC. Mechanisms for source water protection, available to First Nation communities under the *CWA* are discussed in this chapter.

1. Background

Some First Nation communities have opted-in to the Ontario *Clean Water Act* program – an option that is entirely at the discretion of eligible First Nations. However, as the *CWA* does provide measures to protect source water, it is included in this report for consideration.

After the Walkerton *E. Coli* outbreak that caused the deaths of 7 people and more than 2300 falling ill in the summer of 2000, a judicial inquiry was launched to investigate the cause of the fatal outbreak. The inquiry culminated in a report that listed 121 recommendations for ensuring the safety of drinking water throughout the Province, including protection of the sources of water, and improvements to the treatment, distribution, testing and monitoring of drinking water. In response to the recommendations, the Province of Ontario implemented policies to develop Source Water Protection plans for sources of municipal drinking water and enacted the *Clean Water Act, 2006* and its regulations.⁸⁷

2. Purpose and Process

The purpose of the *CWA* is to protect existing and future sources of drinking water.⁸⁸ To achieve this purpose, the *CWA* establishes a source protection planning process that is locally driven, science-based, and consultative in nature.⁸⁹ The *CWA* creates obligations for four main groups to develop and implement source protection plans: The Provincial Government, source protection authorities, source protection committees (SPC), and municipalities. The Province establishes the framework, provides guidance, approves plans, and is responsible for implementation and enforcement related to provincial instruments such as permits and approvals.

The Source Protection Authority, in most cases the conservation authority, initially helps to establish the source protection process and establishes the Source Protection Committee. The Source Protection Committee brings together the key stakeholders in each watershed and is responsible for preparing the main products in the process – the Terms of Reference, the Assessment Report, and the Source

⁸⁷ Collins L, McGregor D, Allen S, Murray C, Metcalfe C., Source Water Protection Planning for Ontario First Nations Communities: Case Studies Identifying Challenges and Outcomes. *Water*. 2017; 9(7):550; <https://doi.org/10.3390/w9070550>.

⁸⁸ *Clean Water Act, 2006*, SO 2006, c 22, s. 1. Online: <http://canlii.ca/t/52wrb>

⁸⁹ Ontario's *Clean Water Act, 2006*: CELA FAQ #2. Online: http://www.cela.ca/sites/cela.ca/files/CWA%20FAQ_2_0.pdf

Protection Plan. Municipalities are the owners of the drinking water system that draw on source water, and are the implementers, and the enforcers of local measures to limit threats to their drinking water.⁹⁰

The CWA requires Communities in Ontario to develop source protection plans in order to protect their sources of drinking water. These plans identify risks to local drinking water sources and develop strategies to reduce or eliminate these risks. Because it is everyone's responsibility to protect Ontario's water resources, broad consultation throughout the development of the source protection plans is important and involves municipalities, Conservation Authorities, property owners, farmers, industry, businesses, community groups, public health officials, and First Nations.

The CWA sets out a basic framework for communities to follow in developing an approach to protecting their water supplies that works for them:

- **Identify and assess risks** to the quality and quantity of drinking water sources and decide which risks are significant and need immediate action, which need monitoring to ensure they do not become significant, or which pose a low or negligible risk.
- **Develop a source protection plan** that sets out how the risks will be addressed. Broad consultation will involve municipalities, conservation authorities, property owners, farmers, industry, businesses, community groups, public health officials, First Nations and the public in coming up with workable, effective solutions.
- **Carry out the plan** through existing land use planning and regulatory requirements or approvals, or voluntary initiatives. Activities that pose a significant risk to drinking water sources may be prohibited or may require a site-specific risk management plan. This plan will set out the measures that a property owner will take to ensure the activity is no longer a threat.
- **Stay vigilant** through ongoing monitoring and reporting to measure the effectiveness of the actions taken to protect drinking water sources and ensure they are protected in the future.

Northern municipalities, where Conservation Authorities are not present, will protect their drinking water supplies through a locally-driven, scoped planning process that focuses on specific drinking water threats in specific areas.

A Source Protection Plan is a strategic document for a SPA that outlines policies and procedures to ensure that all significant and potential threats to the sources of Municipal residential drinking water systems are managed in a way that will prevent them from becoming significant drinking water risks. Municipalities play a central role in the implementation and enforcement of the Source Protection Plan which will be monitored and revised as required by the Source Protection Committee.

In brief, the source protection process involves the Source Protection Authority, in most cases the conservation authority, establishing the Source Protection Committee. The Source Protection Committees are made up of a mix of stakeholders in the watershed. They have between 10-20 members depending on the size of the source protection region. Membership includes proportional

⁹⁰ The Clean Water Act A Plain Language Guide. online: https://www.sourcewater.ca/en/how-it-works/resources/Documents/CWA_PlainLanguageGuide.pdf

representation, a third each, from the municipal sector; the commercial, agriculture or industry sector; and the academic, professional, non-government organization sectors or the general public. If there are one or more First Nation communities in the source protection area/region, committees of 10, 16 or 22 members have to include one, two or three First Nation representatives, respectively.⁹¹ It should be noted that even if there is more than one First Nation community in a source protection region that requires a 10 member committee, there is still only one seat available on the committee.⁹² As noted above, the Source Protection Committee is responsible for preparing the Terms of Reference, the Assessment Report and the Source Protection Plan. The Source Protection Committee may propose amendments to the Terms of Reference in circumstances expected to be set out in regulation, in consultation with affected municipalities, and updates to the Assessment Report. The Source Protection Committee is also responsible for ensuring that stakeholders and the public in the watershed are consulted.

Where a source protection plan has taken effect in a source protection area, the CWA requires municipalities, local boards and source protection authorities to comply with any obligation imposed upon them by significant threat policies or designated Great Lakes policies set out in the source protection plan.

3. Enforcement

Enforcement obligations for the CWA is given to municipalities with the authority to make by-laws for the production, treatment and storage of water. This enforcement authority may be delegated to other specific public bodies by agreement, such as boards of health and source protection authorities. The body responsible for enforcement must appoint a risk management official. Municipalities are required to cooperate with the Source Protection Committee, the Source Protection Authority, other municipalities in the source protection area, and of course the Provincial Government. This includes providing documents, records, technical or scientific studies that relate to sources of drinking water quality or quantity, and helping to obtain such information.⁹³ Municipalities ensure mandatory policies under the source protection plans (i.e., those addressing significant threats) are implemented using planning tools such as by-laws and Official Plan policies.⁹⁴ The Province is responsible for enforcement of the CWA in unorganized territories and with respect to activities prescribed by regulations.⁹⁵

4. Prohibitions

Once a source protection plan is in effect, regulations, restrictions, and prohibitions may come into force under the enforcement sections of the CWA. If an activity that is a prescribed activity under the CWA is

⁹¹ Minnes S. Ontario's *Clean Water Act* and Capacity Building: Implications for Serviced Rural Municipalities. *Water*. 2017; 9(7):538. <https://doi.org/10.3390/w9070538>

⁹² Walters, D., Spence, N., Kuikman, K., Singh, B. (2012). Multi-Barrier Protection of Drinking Water Systems in Ontario: A Comparison of First Nation and Non-First Nation Communities. *The International Indigenous Policy Journal*, 3(3). Retrieved from: <https://ir.lib.uwo.ca/iipj/vol3/iss3/8> DOI: 10.18584/iipj.2012.3.3.8

⁹³ *Supra*, note 89.

⁹⁴ *Supra*, note 90.

⁹⁵ *Supra*, note 89.

identified as a “significant drinking water threat”⁹⁶ within an area within a “wellhead protection area” or “surface water intake protection zone” in the assessment report, is also designated in the source protection plan as an activity to which section 57 of the CWA should apply, a person is prohibited from engaging in that activity in that area. This prohibition does not apply to an activity if the activity was engaged in immediately before the source protection plan took effect until 180 days after the plan has taken effect or the date set out in the plan.

For existing and future activities that are prescribed activities and identified as “significant drinking water threats” within an area within a “wellhead protection area” or “surface water intake protection zone” in the assessment report and are designated by the source protection plan as activities to which section 58 should apply, no person may engage in such activities in that area unless the person engages in the activity in accordance with a risk management plan. Finally, for land uses that are prescribed land uses and identified as “significant drinking water threats” within an area within a “wellhead protection area” or “surface water intake protection zone” in the assessment report and are designated in the source protection plan as an activity to which section 59 of the CWA should apply, no person shall engage in such use of the land at any location within the area unless the risk management official issues a notice to the person.

To clarify by way of an example, where a particular activity (e.g. waste disposal) within a wellhead protection zone or surface water intake protection zone may create significant risk to source water, the CWA requires that the Source Protection Plan include policies to ensure that the activity “never becomes a significant drinking water threat,” or that the activity, if already underway, “ceases to be a significant drinking water threat.” To implement such policies, the Source Protection Plan may designate lands upon which prescribed activities are prohibited under section 58, restricted under section 59, or regulated through risk management plans under section 58.

In addition, under sections 40-42 of the CWA, municipalities that have jurisdiction in areas to which the source protection plan applies are required to amend their official plans and zoning by-laws in order to bring them into conformity with the significant threat policies contained in the source protection plan.

5. Status of Protection of First Nation’s Source Waters under the CWA

Ontario mandates that Source Protection Committees consult with First Nation communities in their source protection areas and solicit their participation in the process, either through working groups or as members of the SPC. The CWA allows a First Nation’s drinking water system located within or adjacent to a source protection region to be considered as part of the SWPP process. It also allows First Nations to request the Crown designate a First Nation drinking water system for protection under the

⁹⁶ “Drinking water threat” is defined under the CWA as “an activity or condition that adversely affects, or has the potential to adversely affect, the quality or quantity of any water that is or may be used as a source of drinking water, and includes an activity or condition that is prescribed by the regulations as a drinking water threat.”

CWA through a Band Council resolution, so that the watershed-based planning process can incorporate the protection of the First Nation system along with the municipal ones being addressed.

The process of including a First Nation system would be initiated, as mentioned, by a resolution of a First Nation band council. The Province would then have the authority to include, as part of the source protection plan, a drinking water system that serves a First Nation reserve, as long as the First Nation has requested the system be included in the process.³¹ Some First Nations see this as an abrogation of inherent and Treaty rights and choose not to participate under the provincial regime, while other Nations are excluded because they are outside the geographical jurisdiction covered by the provincial framework. Furthermore, First Nations within a source protection area may not have similar expectations and views on source water protection, and needs between their own communities.⁹⁷

Currently, of the 133 First Nations communities in Ontario, only 27 are within the boundaries of a watershed managed by an existing Conservation Authority and only three First Nations have opted into the Ontario source water protection framework.⁹⁸ Each of the three First Nations have enacted Band Council Resolutions through Chief and Council to have their water treatment plant intakes included in the provincially approved regional source protection plans through amendments to Ontario Regulation 287/07 of the CWA. These First Nations include Six Nations of the Grand River, Chippewas of Kettle and Stony Point First Nation, and Chippewas of Rama First Nation.⁹⁹

It is important to note that, the CWA includes a ‘non-derogation’ clause in relation to protection provided for existing aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*. The CWA provision is not intended to have any added legal effect beyond what is already enshrined in the Constitution.¹⁰⁰

⁹⁷ *Supra*, note 85.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Supra*, note 89.