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Clean Water Act: Will New Roles and Responsibilities Mean Greater Liability Exposure?

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As the new Clean Water Act winds its way through the legislative process, many municipalities and conservation authorities are grappling with the potential implications. While the legislation is not yet in its final form, it has become apparent that both the financial implications and the potential for increased liability exposure could be significant.

On December 5, 2005, the Ontario Government tabled the Clean Water Act, 2005 in response to recommendations of the Walkerton Inquiry. The stated purpose of the Act is to protect existing and future sources of drinking water.

The Act establishes drinking water source protection areas throughout the province and requires that "source protection committees" prepare assessment reports. Since the source protection areas are watershed based, the committees will be composed of municipalities, conservation authorities and other stake holders within that area, thereby somewhat blurring the traditionally, well demarcated existing municipal, regional and conservation authority boundaries.

Once the assessment plan is complete, the source protection committee is required to develop a source protection plan, setting out how it intends to eliminate significant drinking water threats. This process will include identifying existing or future land use activities within a well head protection area which pose potential drinking water threats, then regulating land use in ways never before contemplated. The obvious financial and staffing challenge for municipalities will be identifying employees with sufficient clean water/watershed expertise combined with land use planning knowledge. From a land use planning perspective, municipalities may find themselves involved in disputes ranging from appropriate land use of the local dry cleaner to regulating discharge of contaminants from large multinational industries within their municipal or watershed boundaries. In all likelihood new "clean water" departments and specially trained employees with these additional responsibilities will have to be established by municipalities. Municipalities and conservation authorities may take some comfort from the fact that the provincial government has set aside funds over the next five years to provide grants.

Of most significant concern is the requirement that each source protection committee prepare an assessment report identifying not only all watersheds in the area but also all "vulnerable areas within the watershed" as well as "drinking water threats in each vulnerable area". While this is of course a laudable goal, and a necessary step to eliminate potential drinking water health threats, the entire process is public, including publication of the assessment plan. The difficulty with this approach from a liability perspective is that once the risks have been identified in a very public fashion, the potential for actions and the likelihood of large class actions arising also increases. While some immunity is provided to municipal employees with respect to acts done in good faith in enforcing the provisions of the Act, it is not clear to what extent municipalities or conservation authorities will be shielded from the consequences of drinking water threats they were not previously aware even existed within their boundaries.

The Bill has now received second reading and is scheduled to receive royal assent in the fall. Municipalities and conservation authorities are well advised to begin assessing their needs and exposures and consider developing risk management strategies to address these issues as the date approaches.