

WATER, WATER EVERYWHERE

By: Shari Elliott and C.W. Daniel Kirby

The Walkerton tragedy, which unfolded in May 2000, made it imperative to address the difficult question of how best to protect Ontario's drinking water resources from agricultural and other sources of contamination. The *Drinking Water Source Protection Act* (the "DWSPA"), the first part of which was released in draft for public consideration on June 23, represents part of the Province's plan of action to forestall any further issues in connection with the province's drinking water. The DWSPA is intended to ensure adequate protection of drinking water sources. Other provincial measures have or will ensure adequate water treatment facilities, proper maintenance and security of the distribution system and reliable early warning monitoring coupled with an effective emergency response system.

The complex problem of protecting drinking water sources cannot be easily resolved. The solution proposed in the DWSPA raises significant issues related to jurisdiction, implementation costs and enforcement that will not be easily resolved. In addition, the complex issue of potential economic impacts and compensation for losses and costs incurred by both the public and the private sector does not appear to have even been considered.

The DWSPA seeks to protect drinking water sources by dividing the Province into watersheds. For each watershed, the DWSPA requires what is effectively the local conservation authority or authorities to prepare an "Assessment Report". In order to complete these reports, each conservation authority is to extensively study, among other things, the watershed, the surface and groundwater water resources in the watershed, the current and likely surface and groundwater drinking water sources and the drinking water risks (e.g. potential sources of contaminant discharges) that exist in the watershed. These studies will be used to identify source protection areas ("SPAs") where measures will be taken to ensure appropriate protection of surface and groundwater drinking water sources.

Source protection plans ("SPPs") will be developed for each SPA. These plans will specify the appropriate measures to be implemented with respect to, for example, wellhead protection zones and surface water intake protection zones. The measures appear likely to require that future development in such areas be controlled through restrictions imposed in official plans and zoning by-laws. In addition, it appears likely that controls will be imposed on existing development/drinking water risks although no details on the nature of the measures that might be imposed have yet been disclosed. It seems reasonable to anticipate that at least some form of enhanced spill prevention and protection measures are likely for water risks located in SPAs.

On paper, this appears to be a noble strategy. However, its practicality and fairness, in terms of the broader public interest, may be seriously questioned. Consider that, under the DWSPA, while some form of public consultation during the development phase of the Assessment Report is contemplated, affected parties will not have any clear right to appeal decisions approving Assessment Reports, even though such reports appear likely to conclusively determine the location and extent of SPAs, and that this, in turn, could have a substantial negative economic impact (e.g. restrictions on use, requirements to implement enhanced spill protection measures) on owners of properties and businesses within a SPA.

A defined, although very limited, right of appeal to the Environmental Review Tribunal (“ERT”) is available with respect to SPPs. The right to appeal is available only to persons who are directly or adversely affected by an SPP and persons residing in SPAs who have previously made submissions to the Minister on the draft SPP prior to its approval. The power of the ERT to require a change in an overreaching SPP that imposes unnecessarily restrictive requirements is extremely limited.

The Province does not appear to have undertaken a review of the likely economic impacts of the development of SPAs or SPPs, even though the economic costs are potentially very high. Businesses could be forced to close (either due to explicit requirements to do so or as a result of the costs of complying with spill prevention and control measures) and owners could be prevented or curtailed from developing their properties. Such impacts will impact on the property tax base for the municipalities where SPAs are located. The lack of consideration of the potential economic costs is troubling.

The regime should require that all costs be identified and appropriately considered in developing the measures required to protect drinking water resources. It should be backed by a realistic, clearly defined funding mechanism that covers the costs of planning, implementation and enforcement and that provides for adequate compensation to parties that are negatively affected. Finally, a comprehensive appeals process should be put into place to protect the interests of all stakeholders.

C.W. Daniel Kirby is a partner and Shari Elliott is an associate in the Environmental Group of Osler, Hoskin & Harcourt LLP. The authors wish to thank Ken Hogue for his editorial assistance.