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Comments from the Ontario Professional Planners Institute on:

Source Protection Plans under the Clean Water Act, 2006:
A Discussion Paper on Requirements for the Content and Preparation of Source Protection Plans
– EBR # 010-6726

Dear Ms. Scanlon:

The Ontario Professional Planners Institute (OPPI) is pleased to provide comments on the Discussion Paper on Requirements for the Content and Preparation of Source Protection Plans.

Established in 1986, OPPI is the recognized voice of the Province's planning profession and provides vision and leadership on planning issues. Government, private industry, agencies and academic institutions employ more than 3,000 practicing planners where they help create healthy communities in the Province of Ontario.

OPPI is committed to creating and fostering healthy communities in Ontario. Launched in 2006, our "Healthy Communities, Sustainable Communities" initiative continues to emphasize the important of urban design, active transportation and green infrastructure, links between public health and land use planning and strategies for collaborating on tangible actions for healthier communities. Planners have a pivotal role to play in bringing together multiple partners and disciplines and in engaging their communities about the necessary changes to implement source protection plans.

OPPI supported the approval of the Clean Water Act and supports its implementation. These comments are organized around the implementation questions posed in the discussion paper and are intended to assist the Ministry of the Environment on the development of regulations on the content and preparation of source water plans.

Generally, we found this document difficult to review and comment upon. It is written with the premise that the reader understands many of the technical documents that have been drafted in support of the legislation. That is not a reasonable assumption.

A fuller discussion better suited to lay readers is recommended when guidance documents are drafted to implement this discussion paper. This is a key step, as unlike the Nutrient Management Act, municipal planning decisions help implement source protection plans. Constructive engagement requires complete and accessible guidance documents.

As you read through the policy approaches presented in this section, please consider and comment on what limits, if any, you feel would be appropriate to place on their use in addressing drinking water threats?

The document seems to allow for a wide range of planning responses, which is appropriate. Local authorities need flexibility to address the threats in the most appropriate locally specific manner.

When additional guidance, policies and regulations are drafted, we recommend these not be overly prescriptive. It is impossible to foresee and include every possible solution in the regulations. A goal driven approach that allows local areas to be innovative in effective ways, is preferable to Provincial prescription.

Municipal Planning Instrument Conformity to Source Protection Plans: The Clean Water Act will produce source protection plans. These will be implemented through regulatory procedures administered in the Clean Water Act and prescribed legislation including the Planning Act. Many decisions will be made in advance of decisions on Planning Act instruments. Municipal planning instruments will have to conform to significant threat policies associated with surface water intake zones and wellhead protection areas. Planning instruments will need to have regard to moderate, low and monitoring policies.

What latitude do Councils, Committees, the Ontario Municipal Board and the planners who advise others have when considering the many factors that go into reaching a decision where a significant, moderate, low threat or monitoring policy is involved? How best can they fulfill their requirements to conform and have regard to these risks?

Planning decisions are appealable to the Ontario Municipal Board. Where a decision conforms to a significant threat policy or has regard to a moderate or low threat policy, on what basis can that planning decision be appealed, if it can be appealed? Clearly decisions will have to conform and have regard to the risks. But judgment will be needed to make decisions. What are the limits of the judgment to be applied?

With respect to drinking water threat activities prescribed in Ontario Regulation 287/06 that are addressed under the Nutrient Management Act, risk management concerns will be addressed prior to any planning approval. The Nutrient Management Act precludes planning decisions where those decisions overlap the requirements of nutrient management instruments.

Will there be residual risk management issues that may require implementation through site plan control or possibly other planning tools like holding zones? Will situations like this also arise where residual risk management concerns may be addressed by these planning tools for instruments issued under other legislation such as the Mining, Crown Forests Sustainability, Oil, Gas and Salt Resources and Aggregate Resources Acts?

The following activities are threats to drinking water in Ontario Regulation 287/06:

"15. The handling and storage of fuel.

16. The handling and storage of a dense non-aqueous phase liquid.

17. The handling and storage of an organic solvent.

18. The management of runoff that contains chemicals used in the de-icing of aircraft."

These generic descriptions include many substances used in industrial processes. Planning instruments address buildings, their size and spacing and classes of uses. The determination as to whether these activities are significant, moderate or low threats may be driven by the amounts handled, the infrastructure involved and the procedures in place to manage the activities.

We understand the Province is intending to clarify these matters presently and we encourage the Ministry to provide more clarity. It may be difficult to scale municipal planning instruments to achieve the subtlety required to implement source protection policies without that clarification.

Experimentation, education and training will be required. If possible we recommend that sample source protection policies be developed along with corollary official plan policies to test various approaches in advance in one or more municipalities to ensure implementation is effective. Sample policies should apply to regulated, restricted and prohibited activities/uses in order to provide a broad range of examples.

Document effective policy approaches in manuals that are written to provide guidance to all concerned. If there are examples the Ministry has regarding risk management measures, these should be made available to better understand how these measures will work in the context of existing as well as future uses.

On a separate matter, how does other Federal and Provincial legislation apply and do these applications have a bearing on municipal planning decisions?

We understand that risks associated with uses and activities will be controlled through the mechanisms of Part IV of the Clean Water Act. The subtlety lies in being able to flag uses that employ or store substances used in the regulated activities so that these can be regulated in the risk management process. Currently assessment reports are identifying these land uses and activities so that an inventory of existing uses/activities is established for the purposes of assigning risks through the risk management process.

For new uses, however, correlation between substances/activities/circumstances and land use categories will be necessary so that something that is a significant threat or a moderate and low threat doesn't inadvertently slip through undetected.

The discussion paper needs to be clearer on where there may be gaps where some activities have no applicable instruments or other requirements under existing legislation, and where Federal legislation may assist. If there are gaps, how should these be addressed? Are incentives a possible means by which these gaps might be addressed? For example, it would be useful to know whether fuel storage and handling issues are resolved through the requirements of the Technical Standards and Safety Authority and the application of the Gasoline Handling Act and if not the additional matters that require attention. Threats should also be subjected to a progressive screening whereby the easiest and most effective solutions are considered first, and more difficult, expensive solutions considered only where there are no alternatives.

Terminology, The Planning Act and Regulations: Where Planning Act terminology is used, care should be taken to clarify how the words are being used. If the intent is to use the terminology as it is used within the Planning Act and implementing regulations, then the document should say so. The words "conform" and "have regard to" are used often in municipal planning. Where "conform" is used in the legislation, often the planning instrument has to conform strictly. In the Clean Water Act, where a Provincial Plan has a more restrictive policy, that policy can apply. Similarly, "have regard to" can result in a wide variety of decisions, especially where multiple policies are being balanced in the decision being made.

Mention is made of Community Improvement Plans (CIPs), commonly used to offer municipal financial incentives to promote the remediation of brownfield sites. Is it the intention of the Discussion Paper to promote the use of CIP's to offer similar incentives to remediate, relocate or eliminate significant threats to drinking water sources? That may well be an appropriate suggestion, but it is not specifically mentioned in Section 28 of the Planning Act (though brownfields are not, either). Perhaps there should be a specific discussion about the ability of a municipality to utilize CIP's for that purpose prior to a Source Protection Plan making that assertion.

Terminology, The Provincial Policy Statement 2005 (PPS) and Provincial Plans: Furthermore, the Provincial Policy Statement 2005 and Provincial Plans for the Niagara Escarpment, Parkway Belt West, Oak Ridges Moraine, and the Greenbelt as well as the Growth Plan contain policies addressing water resources. Where these exist, the plan or policy that results in the greater level of protection of the drinking water source prevails. Who makes that judgment, the planner or the risk manager?

Please comment on the concept of relying on prescribed provincial instruments as the policy approach of first choice in addressing drinking water threats (in areas where they may be lawfully applied) to minimize regulatory duplication.

Are there any provincial instruments that relate to the list of prescribed drinking water threats set out in Section 1.1 of the General Regulation (O. Reg. 287/07) under the CWA that you would want to be prescribed for this purpose and why not?

Provincial instruments should be used where possible to address drinking water threats. Provincial instruments must be prescribed in regulation for use in risk management. We encourage the Ministry to put this regulation in place for the various Acts listed in definition or "prescribed instrument" in the Act. Some consideration should be given to the movement of the transport of the substances listed as activities in Ontario regulation 287/06 by rail and truck.

There should also be a discussion of applicable Federal legislation as well as a discussion of how Federal/Provincial agreements and protocol might affect these substances and activities.

Please comment on the proposals above related to the use of the risk management plan approach to address drinking water threats to source water. What other limits, if any, do you think would be appropriate to place on the use of this policy approach in source protection plans and why?

Boards of Health should be the lead responsible for a team of municipal officials responsible for risk management planning and enforcement. These Boards already have somewhat comparable responsibilities under the Health Promotion and Protection Act. Team members should also include expertise and membership from the Municipal Public Works, Building and Planning Departments.

Do you agree with the concept of avoiding the use of outright prohibition to address existing threats unless there is no alternative, as outlined above? Please share your rationale for this decision. What other criteria do you think would warrant using prohibition to reduce the source water risks posed by significant threat activities?

Prohibited Uses: In the past, it was common municipal planning practice to identify obnoxious uses as prohibited uses in municipal zoning bylaws. Often the prohibitions seemed to be copied between the various municipalities applying these prohibitions. Older bylaws still contain these prohibitions.

With changing industrial technology and emission controls, our understanding of these uses has changed and often, what was prohibited is now permitted subject to controls. Or alternatively, what was once considered to be obnoxious has changed in character and may be included in industrial processes associated with other products.

Without a list of the proposed prohibitions and a discussion of their character and source protection concerns, it is difficult to be definitive in answering these questions if the threat can't be controlled through other means.

The Discussion Paper does not seem to state it explicitly, but it is assumed that "prohibition" means the elimination of an existing significant drinking water threat. If that is the case, OPPI agrees with the first *Question* posed by the Paper regarding agreement that outright prohibition would be used only as a last resort after other options were exhausted. But it should be a consideration if all other alternatives fail.

The second *Question was "what other criteria would warrant using prohibition to reduce source water risks".* A demonstrated and documented history of releases or other contamination of drinking water sources would be an appropriate criterion.

Vulnerable Areas: Vulnerable areas include protection areas/zones around surface water intake and wellhead protection areas. We understand that this discussion paper focuses on municipal drinking water source intakes and wellhead protection areas.

Vulnerable aquifers and significant recharge areas within source protection plans should also be discussed. We understand that prohibition can be used in municipal drinking water system's intake protection zones and wellhead protection areas. Depending upon the watershed, the vulnerable aquifers and significant recharge areas may require protection, for example, if these present a risk to private or public water supplies. There are probably activities for which outright prohibition is appropriate in these vulnerable areas. How would the Ministry address these threats?

Are there any provisions of the Planning Act that should be identified? Please share your rationale for your response.

Where a legal use is determined to represent a significant threat, a prohibition would eliminate the use and prevent it from re-establishing. Are there circumstances where a significant threat may not lead to its elimination? If so, variances under committee of adjustment approvals should be added.

The requirements for complete applications when planning approvals for new uses are sought will require revision in order to specify that information on the prescribed threat activities is provided in any planning application. This information is required in order to trigger the review of the application of source protection policies and regulations to ensure risk management is addressed.

Consideration should also be given to the development permit system administered under the Niagara Escarpment Planning and Development Act. Where this system is in force, there is no zoning. Development decisions are implemented through development permits issued by the Niagara Escarpment Commission.

Do you agree with the proposal under consideration to allow source protection committees the broad use of the restricted land uses approach set out in Section 59 of the CWA? Are there certain land uses that you believe do not relate to particular activities identified as prescribed drinking water threats in Section 1.1 of the General Regulation under the CWA (O. Reg. 287/07)? Please share the rationale for your response.

Agreed. With respect to the second part of this question, much more information is required before this can be answered. From planning experience, it is difficult or impossible to develop list of uses (such as permitted uses in a zone) that envisions and captures every possible eventuality, and sometimes a broad application approach provides necessary flexibility.

Please comment on the considerations related to knowledge and data gaps presented in this section. What additional content related to these gaps, if any, should be included in the source protection plan?

The approach the Ministry suggests may not be consistent with the Ministry's Statement of Environmental Values. The Ministry needs to exercise its judgment on these matters and take a precautionary approach if warranted.

The Planning Act provides for periodic reviews of planning instruments and amendments, where appropriate. Beyond that, no further qualification seems warranted.

Would including information about the specific areas to which a threat policy is intended to apply be useful to you? Why or why not? Please comment on the concept of including documented rationale in support of threat policies in the source protection plan. What additional details, if any, should be considered for inclusion in the regulations governing threat policies and why?

Source protection plans and their supporting documentation should contain the policy rationales. These documents serve an educative function and others need to know why municipal planning instruments are being amended to either conform to or have regard to the various policies. It isn't reasonable to expect that less than a full explanation will suffice where municipal councils are accountable to their communities and where decisions can be appealed to the Ontario Municipal Board.

Is the proposed content for inclusion in policies governing monitoring appropriate or too onerous? What additional information or changes, if any, regarding the content of monitoring policies do you propose and why?

Do you have any comments on the proposed reporting requirements described above with respect to Great Lakes targets? Please share the rationale for your response.

Some watersheds involve Remedial Action Plans that have been prepared in the past and which are being implemented with specific delisting dates in mind. There needs to be a clearer relationship between the documentation being produced in these watershed plans and the implementation of these plans.

Are the proposed requirements appropriate? Too onerous? Why? What additional details, if any, should be included in the source protection plan regarding the content of Great Lakes target policies?

Without further discussion as to what these requirements may be, we cannot answer this question.

What other details, if any, should be included in the source protection plan in association with designated Great Lakes policies?

See the comment above with respect to Remedial Action Plans.

Is the proposed content for inclusion in policies governing the monitoring of Great Lakes policies appropriate? Too onerous? What additional information or changes, if any, do you propose and why?

Monitoring requirements should address the complexity and risks associated with the issues at hand. A fuller explanation is required on how Provincial Great Lakes commitments apply before we can answer this question.

To what extent should the government regulate early engagement efforts? What do you think is the right level of early engagement? Without the information gathered from early engagement efforts, how else could a policy developer determine the appropriate details (e.g., implementation approach, risk reduction measures), to include in plan policies? Please share your rationale for your response.

Our concern is practical engagement will occur when planning instruments are amended to conform to significant threat policies and to have regard to moderate and low threat policies and monitoring policies. At that time, a land owner and community will realize the full implications of what has transpired and become engaged.

Do you agree with the proposed consultation topics for the source protection plan? What additional consultation topics, if any, should be included? What is your opinion on identifying certain consultation topics as discretionary versus required? Are the proposed regulatory requirements associated with each consultation topic appropriate, too onerous, or missing any key requirements? Please share your suggested changes and supporting rationale.

See the above concern on practical engagement where vulnerability of 8 or greater occurs.

What other actions should be taken to ensure First Nation concerns and aboriginal rights and treaty rights are considered in the policy development process and that policies do not have a deleterious effect on these rights? Please share your rationale for your response.

These are matters for the Provincial Crown to address directly with First Nations and Metis communities. There may be procedural matters associated with consultation mechanics that municipalities may conduct. But the Constitutional obligations to consult and accommodate are Provincial responsibilities.

Substantive consideration should be given to the protection of water surface water intake zones and well head protection areas for Reserve water supplies and where these zones and protection areas overlap Reserve lands and waters. The sections of the Provincial Policy Statement 2005 addressing co-ordination between governments also apply where Chiefs and Councils of First Nations situated on Reserves throughout Ontario.

Are the proposed regulatory requirements associated with the annual reports appropriate, too onerous, or missing any key requirements? If so, please indicate which items should or should not be included in the reports with your response.

Experience gained from the implementation of Remedial Action Plans should be drawn upon with respect to these requirements.

What other circumstances, if any, should trigger the ability of the source protection authority to initiate an amendment to the approved source protection plan?

The circumstances appear to be complete.

Do you agree with the proposed requirements related to amended source protection plans, as outlined above? Please share your rationale for your response.

Subject to the comments made previously, these requirements appear to be complete.

The Institute would be pleased to discuss our comments further. For further information or to schedule a meeting, please contact Loretta Ryan, MCIP, RPP, Manager, Policy and Communications at 416-483-1873, x226.

Yours truly,

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