

# Source Protection Planning Bulletin – Threat Policies and Aboriginal and Treaty Rights



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## Introduction

The purpose of the Clean Water Act (“the act” or “CWA”) is to protect Ontario’s existing and future drinking water sources, as part of an overall commitment to safeguard human health and the environment. A key focus of the legislation is the preparation of locally developed terms of reference, science-based assessment reports and source protection plans. For additional information on the CWA and how the terms of reference and assessment reports were developed, readers may refer to the Ministry of the Environment’s website [www.Ontario.ca/cleanwater](http://www.Ontario.ca/cleanwater).

The source protection plans will consist of a range of policies that together will reduce the risks posed by threats to water quality and quantity. This document is one in a series of planning bulletins intended to assist local source protection committees (SPCs) in preparing source protection plans and policies.

## Purpose

This bulletin provides information about Aboriginal and treaty rights, to assist source protection committees with the development of drinking water threat policies for source protection plans.

Together, the act and its regulations (“the legislation”), in particular the General Regulation - Ontario Regulation 287/07 (“the Regulation”), establish a legal framework for drinking water source protection in Ontario. Amendments to the Regulation setting out some of these requirements took effect on July 1, 2010. All section references relate to the Regulation unless otherwise stated.

While every effort has been made to ensure the accuracy of the information in this document, it should not be construed as legal advice or relied on as a substitute for the legislation.

## Aboriginal Rights

Aboriginal rights are collective rights. For an activity to be an Aboriginal right, it must be a practice, custom or tradition that is integral to the distinctive culture of the Aboriginal community claiming the right.

For First Nations, the activity must have existed at the time of first contact with Europeans. For Métis, the activity must have existed prior to the time of effective European control.

The current practice, custom or tradition must have continuity with the historic practice,

custom or tradition, and it must remain integral to the community's culture. Present-day activities may be the modern form of a historical practice, custom or tradition, for example, hunting with a gun or fishing in a motorized boat.

Aboriginal rights can exist both on and off reserve.

Existing Aboriginal rights are protected under section 35 of the Constitution Act, 1982.

Certain Provincial laws, decisions, and activities have the potential to adversely impact Aboriginal rights. Therefore, it is important to be mindful of the potential adverse impact a provincial law, decision, or activity may have on Aboriginal rights, such as the gathering of medicinal plants in a particular location.

## Treaty Rights

Treaty rights are the specific rights of Aboriginal peoples set out in treaties, and arise from agreements reached between the Crown and Aboriginal peoples.

Historic treaties were often set out in writing. However, the courts have found that oral promises can also form part of a treaty and give rise to treaty rights.

Matters that treaty rights often relate to include, but are not limited to:

- the creation of reserves
- the payment of money
- the right of Aboriginal communities to hunt, fish and trap subject to the terms of the treaty.

Nearly all of the land in Ontario is the subject of treaties.

Treaty rights can exist both on and off reserve.

Existing treaty rights are protected under section 35 of the Constitution Act, 1982.

Certain Provincial laws, decisions, or activities have the potential to adversely impact treaty rights. Therefore, it is important to be mindful of the potential adverse impact of a provincial law, decision, or activity on treaty rights, such as hunting, fishing and trapping treaty rights.

## Threat Policies and Aboriginal and Treaty Rights

It is possible that some source protection plan threat policies could have the potential to adversely impact Aboriginal and treaty rights. SPCs should be mindful of how threat policies may adversely impact Aboriginal and treaty rights when developing threat policies. Please see the section "Steps for Developing Threat Policies" which provides guidance on determining whether the threat policy may adversely impact Aboriginal and treaty rights and what to do in case it does.

Where threat policies are being considered for areas that are subject to Aboriginal land claims and/or addition to reserve processes, additional engagement with Aboriginal communities may be required.

## **Threat Policies and the Risk of Potential Adverse Impact on Aboriginal and Treaty Rights**

Different threat policies will have a greater, or lesser, potential to adversely impact Aboriginal and treaty rights.

*Threat policies with a higher risk of potential adverse impact include:*

- Policies in Intake Protection Zones (IPZs) or Wellhead Protection Areas (WHPAs) that prohibit significant drinking water threat (SDWT) activities under section 57 of the CWA
- Policies in IPZs or WHPAs that require risk management plans for SDWT activities under section 58 of the CWA
- Policies that affect decisions under the Planning Act or the Condominium Act
- Policies that affect decisions to issue or amend a prescribed instrument

*Threat policies with a lower risk of potential adverse impacts include:*

- Education and outreach
- Incentives
- Stewardship programs
- Best management practices
- Pilot Projects
- Research
- Monitoring

### ***Steps for Developing Threat Policies – Consideration of Aboriginal and Treaty Rights:***

1. Is the threat policy one of the types described above that attracts a higher risk to adversely affect an aboriginal or treaty right?
2. If yes, continue to step 3. If no, continue with regular engagement and consultation as required by the act and regulations.
3. Determine (a) if the threat policy is being considered for an area subject to an aboriginal land claim and/or addition to reserve process, and (b) whether Aboriginal or treaty rights (e.g. right to fish, right to hunt, etc...) may be adversely impacted by the threat policy. To make this determination:
  - Contact the SPC First Nation representative; and
  - Contact SPPB.
4. If there may be an adverse impact to Aboriginal or treaty rights, or there is a risk that the threat policy could adversely impact Aboriginal or treaty rights:
  - Contact SPPB; and
  - Engage the Aboriginal communities whose rights may be adversely impacted to

discuss the proposed threat policy. (Have any Aboriginal communities expressed concern that their rights may be adversely impacted by the threat policy? If so, have they expressed how the threat policy will adversely impact their rights?); and

- Consider revising the threat policy to one that adequately manages the threat but at the same time has no impact or a minimal risk of impact on Aboriginal and/or treaty rights.
5. If an adverse impact or risk of a potential adverse impact to Aboriginal and/or treaty rights still exists, contact SPPB immediately so that additional consultation with the affected community can be undertaken.

## Summary

This Bulletin has provided an overview of Aboriginal and treaty rights, how threat policies may have a potential impact on those rights, and the steps source protection committees should take when developing threat policies to ensure Aboriginal and treaty rights are considered.

## Additional Sources of Information

Ministry of the Environment's Clean Water Act Website – [www.Ontario.ca/cleanwater](http://www.Ontario.ca/cleanwater)

Clean Water Act, 2006 and O. Reg. 287/07 "General" on the e-Laws Website

[www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)

Maps of Treaty Areas

[firstnation.ca/maptreaties](http://firstnation.ca/maptreaties)

[www.ainc-inac.gc.ca/](http://www.ainc-inac.gc.ca/)

Métis Nation of Ontario [www.metisnation.org](http://www.metisnation.org)

Political Territory Organizations [chiefs-of-ontario.org](http://chiefs-of-ontario.org)