

Source Protection Planning Bulletin: Section 58 Risk Management Plans



December 22, 2010

Introduction

The purpose of the *Clean Water Act, 2006* (“the Act”) 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 Act and how the terms of reference and assessment reports were developed, readers may refer to the Ministry of the Environment’s (MOE) website 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 in preparing source protection plans and policies.

Other bulletins that are relevant to this subject matter include:

- Overview of Source Protection Plan Requirements
- Land Use Planning Approaches
- Section 57 Prohibition
- Prescribed Instruments

Purpose

This bulletin provides information and guidance to source protection committees regarding one of the new tools available for addressing drinking water threats in their source protection area – section 58 risk management plans under Part IV of the Act. This document explains **the limitations, considerations, and opportunities** for using this tool in source protection planning. Where a source protection plan does use section 58 to manage an activity, Part IV provides an additional tool, section 59 restricted land uses, and this bulletin also includes information about how committees may use the section 59 tool.

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. Section 58 of the Act sets out a process for negotiating risk management plans with persons who are engaged in significant drinking water threat activities and provides the authority to establish a risk management plan for that person if the negotiations do not succeed by a specified date.

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. The reader should refer to Section 58 of the Act (and related sections) as well as the Regulation for detailed requirements associated with the establishment of risk management plans.

What Is a Risk Management Plan?

Historically, municipalities have used their powers under the *Planning Act* protect drinking water supplies (e.g., municipal by-laws under section 34). However, the *Planning Act* provides municipalities with somewhat limited authority to regulate **existing** land uses; the *Planning Act* is forward-looking in scope and is intended to regulate new (or future) development proposals. The *Planning Act* is also not designed to regulate on-going activities on a specific parcel of land and it is often a discreet activity, rather than a “class” of land uses, which poses a significant threat to drinking water.

To address this gap, the *Clean Water Act* (under Part IV) established new powers (or “tools”) to regulate significant drinking water threats. One of these new tools is “**risk management plans**” under Section 58. The Act permits source protection committees to use Section 58 (through the policies included in the source protection plan) as a means to address significant drinking water threats, where such activities are located within intake protection zones or wellhead protection areas. This section also provides municipalities with the necessary authorities to support the regulation of identified significant drinking water threats in those areas.

Section 58 risk management plans are site-specific documents, negotiated after the approval of the source protection plan. A risk management plan will outline the actions required to address an identified significant drinking water threat, and should include and account for risk management measures that are already in place. A risk management plan can be thought of as a means of applying regulatory controls to an activity; it is a plan that regulates how a significant drinking water threat activity is undertaken – one which offers the opportunity for local agreement and negotiation.

While the intent is for risk management plans to be voluntarily negotiated wherever possible, the authority does exist within the Act for a risk management plan to be imposed on a person engaged (or proposing to engage) in an activity by a risk management official, once a set period of time has passed and agreement has not been reached (minimum 120 days after notice is given by the official). It is intended that this authority would be used only as a last resort.

Due to the negotiated nature of these plans, there is significant opportunity for discussion, flexibility and agreement with respect to how a significant drinking water threat will be regulated on that property, in such a way that reduces its potential impact to drinking water sources.

Using Risk Management Plan Policies – Limitations and Considerations

Part IV tools (including section 58 risk management plans and section 57 prohibition) may only be used for activities that are prescribed by the Regulation, or have been identified in accordance with Rule 119 of the Director's Technical Rules. There are however two notable exceptions on this list: ***Part IV tools (including section 58 risk management plans) cannot be applied to waste threats and/or sewage threats that require an instrument listed in (or "prescribed" by) the regulations, or that fall under the Building Code.*** Other available policy tools (like a certificate of approval) will need to be considered to manage these two categories of prescribed threats.

To authorize a municipality to use the tools in Part IV of the Act, a source protection committee must first (through the source protection plan) designate a significant drinking water threat activity for the purposes of section 58. With each designation, the source protection committee must also specify the areas to which section 58 applies.

Committees are bound by the following conditions when addressing a drinking water threat with this tool:

- Risk management plans may only be used for activities identified as significant threats in the assessment report, and are not applicable to moderate and low threats.
- The source protection plan policy must specify the activity (or activities) which are to be designated as subject to the application of risk management plans.
- The source protection plan policy must also identify the area(s) where the risk management plan policy applies.
- Where the significant threat is an existing activity (i.e. one that is already occurring), consideration should be given to how that activity is already regulated by another regulatory process (e.g., prescribed instruments such as Certificates of Approvals, provincial permits, etc).

- Subsection 22(11) of the Act puts another limitation on the use of the Part IV tools – section 57 and section 58 policy tools cannot both be used to deal with the same activity on a single parcel of land. This means a significant threat policy for an area cannot, for example, first require the person engaged in an activity to establish a risk management plan for a certain number of years and then prohibit that activity after that period of time has passed.
- When considering the use of a section 58 policy in a source protection plan to address one or more threats, the source protection committee is required to consult with the municipality (or municipalities) that would be responsible for implementation of the policy before the policy is put into the plan and any objections must be noted and included as part of the consultation record (see later section “Early and Pre-Consultation”).

Risk Management Plans as a Policy Choice

Risk management plans are a tool introduced by the Act to address significant threats to drinking water sources where there is an inability to do so through existing regulatory instruments (i.e., land use planning, prescribed instruments). Generally, the province encourages source protection committees to consider these existing instruments prior to considering the use of risk management plans to address identified threats, in order to avoid duplication or overlap of regulatory tools.

A key advantage of the risk management plan tool is that any risk reduction activities that are already occurring on the site can be *formally* identified and recognized in the risk management plan. As a result, the property owner receives recognition of previous efforts and good stewardship actions, and the risk management official receives formal assurance through the risk management plan that the property owner will continue to engage in effective risk reduction measures.

Another factor to consider when deciding whether to utilise risk management plans is the cost that may be associated with the administration of a Part IV enforcement authority. To make it work, municipalities will have to hire, train and maintain risk management official(s), who will agree to or establish risk management plans, and inspectors, who will be responsible for ensuring compliance through an inspection regime – much like the support systems currently in use for local building officials and inspectors. The Act does contain provisions that allow for municipalities to recover costs by applying fees for services, should this tool be utilised.

The final decision on which policy tool is the appropriate one is fundamentally a local decision and therefore should be discussed with those affected by the policy – including those subject to, as well as those implementing the policy – to determine the direction that a committee wishes to take in this regard. If a risk

management plan regime is largely supported, then committees and municipalities should feel confident using this approach.

Additional Factors to Consider

Several important factors will further contribute to the decision whether to apply a section 58 Risk management plan to a significant threat activity identified in an approved assessment report:

Local flexibility – Risk management plans are intended to be negotiated and agreed to on a site by site basis. As such, there will be a significant opportunity for input and discussion with individual property owners, which will lead to an appropriate determination around the unique risk management measures necessary for a given situation, as well as the creation of plans that will have a high level of compliance.

Existing or Future – Section 58 can be applied to existing significant threat activities found on the ground today, as well as those that may be established in the future. When policy developers are considering the use of risk management plans, they will need to decide if local circumstances deem it appropriate to rely on this approach to address both existing and future significant threat activities.

Stand-alone or Complimentary Tool: Risk management plans may be used as a standalone tool, or in combination with other tools, such as land use planning, education and outreach, *Planning Act* approaches and prescribed instruments (excluding however section 57 prohibition, as noted above).

May Address Multiple Threats: In cases where multiple drinking water threats exist on a single property, a single risk management plan may be able to address multiple threat activities. As a result, there would not be a need to negotiate a separate plan for each threat.

Consultation, Engagement and Information Gathering: If the application of a risk management plan is being contemplated for certain threat activities, efforts should be made to get a general sense of the types of existing risk management measures or operational practices currently in place that pertain to those activities, and to ensure that the person(s) who would be affected (both those engaged in the activity and the policy implementers) are aware of the approach being considered.

What to include in a Section 58 Risk Management Plan Policy

If the source protection committee decides to use risk management plans to deal with a significant drinking water threat activity, the legislation requires that the policies in the plan:

- a) clearly designate the activity(ies) to which section 58 of the Act applies, and
- b) identifies the specific area(s) to which section 58 of the Act applies.

The source protection committee has the option of identifying the date by which the section 58 policy shall apply to existing activities (i.e., those activities that were engaged in prior to the source protection plan coming into effect). If a date is not specified in the policy itself, subsection 58(4) of the Act gives the local risk management official the authority to determine, on a case by case basis, the date by which a risk management plan would be required.

Section 58 policies may be either general or specific in the way they are written. For example, a policy could simply say: “A Risk management plan is required to manage threat X in the area Y” - threat “X” being the prescribed threat (or threats) to which the risk management plan policy will apply, and area “Y” being the area where the threat is or would be significant. Alternately, the policy could be more specific and include some further details on the minimum content requirements for all risk management plans, such as requiring a particular risk management measure or standard (e.g., minimum requirements for storage tanks, etc).

It is up to the source protection committee to determine how prescriptive a risk management plan policy ought to be. Keeping in mind that a source protection plan must contain policies to meet the objective that, as per subsection 22(2) of the Act, activities either never become a significant threat or, if the activity is already taking place, the activity ceases to be a significant threat¹, a policy written in a general way could in fact satisfy this requirement. In this case, the local risk management official is similarly required to meet this subsection 22(2) objective when negotiating the actual content of a risk management plan.

¹ Note: the objective of “ceases to be a significant threat” is one of the objectives included in section 22 of the Act and section 22 of the Regulation. As noted on page 2 of the “Overview of Source Protection Plan Requirements” bulletin, this objective may be met by policies that manage the activity so that the risk is reduced, not necessarily eliminated.

Section 59 Restricted Land Uses

Where source protection plan policies rely on a section 58 risk management plan tool (or a section 57 prohibition tool) under the Act, it is recommended that a complementary policy using section 59 (restricted land uses²) be included in the plan to effectively prevent future activities from being established that would be a significant threat, and allow development to proceed that does not pose a significant threat to drinking water. This restriction would apply to activities that are associated with specifically named land uses where the activity would be a significant drinking water threat if established or expanded in the future. Land uses not specifically named would be exempt from the application of section 59 policies.

Implementing Part IV Policies

Section 47 of the CWA outlines the parties responsible for implementing policies that get their authority from Part IV. Generally, a municipality that has the authority to pass by-laws respecting water production, treatment and storage under the *Municipal Act, 2001* is responsible for enforcing Part IV of the Clean Water Act, 2006. Municipalities can also enter into an agreement with each other to share the costs associated with enforcement, or a municipality or group of municipalities could instead enter into an agreement with a board of health, planning board or source protection authority to transfer this responsibility. The party on whom the responsibility is transferred can charge all or some of the costs back to the municipality.

In areas where source protection plans use Part IV tools (section 57 prohibition, section 58 risk management plans, section 59 restricted land uses), municipalities must appoint a risk management official and any necessary risk management inspectors to enforce these policies.

The ministry is developing additional guidance information to assist municipalities understand the roles, responsibilities and qualifications of risk management officials.

Section 59 of the CWA provides a process for implementing section 58 risk management plan policies (and section 57 prohibition policies) for future threats. Using section 59 provides a link between the Part IV tools and municipal planning approvals and building permits. In this way, the application of section 59 can be seen as providing a “screening” tool for municipalities when reviewing applications under the *Planning*, to prevent the unintentional approval of applications (or building permits) that would lead to the creation of significant drinking water threats. It will also help ensure that applicants are following the applicable source protection policies.

Applications where significant threat activities are *not* proposed would proceed normally. If a committee writes a source protection plan policy that applies a section 58 policy to certain threat activities but does not wish the policy to apply to, for example, residential land uses, they would not name residential land uses

² The definition of the term “restricted land uses” under Section 59 of the CWA does not have the same meaning as when used in relation to decisions made under the Planning Act.

in the accompanying section 59 restricted land uses policy. This would mean that during implementation, the section 59 tool would “screen out” residential development activities and the section 58 policy would not be applied.

The section 59 tool will be integrated into the existing municipal development review process so that applicants will continue to benefit from a single application process. This policy approach will ensure that drinking water threats are dealt with at the front-end of the land use planning process when developers first consult with the municipality before formally submitting a land use planning or building application. This will save time and cost while providing land developers with certainty about their application and a clear understanding of how source protection plan policies affect land use planning in their area.

Regulatory Requirements

A source protection plan policy that uses the restricted land uses approach must first identify the significant threat activity it is addressing and whether it requires a risk management plan under section 58 of the Act or a prohibition policy under section 57. The policy must identify the area and the land use(s) to which section 59 applies.

Names for the same types of land uses vary across the province. Due to these differences, the source protection plan must identify and name the local land use (either the official plan designation or zoning) for each of the areas where a policy using section 59 applies. Where several uses are permitted in the area, certain components (for example residential, commercial, or light industrial) of a development may be exempt from section 59 requirements (and subsequently section 58 risk management plan requirements) where the committee has determined not to regulate the activity using section 58 within any particular land use component.

In an area where the section 59 restricted land uses policy does apply, an individual or business proposing to construct or change the use of a building for a land use named in the policy is required to apply to the risk management official for a notice before proceeding to apply for a building permit or planning application. This will allow the applicant and risk management official to determine whether their proposed activity is subject to a section 58 risk management plan policy or a section 57 prohibition policy. The section 59 restricted land uses policy does not eliminate a land use, but ensures that activities in the designated area are assessed for their potential risk to drinking water before they become established.

When an application for a development³ (or a building permit, new construction or change of use) is sent to the risk management official for review, the official would refer to the source protection plan to find out whether the proposed activities are subject to policies using section 58. If an activity is regulated by section 58, a notice will not be issued by the risk management official and the application for that specific threat activity will not be processed until such time as a risk management plan has been agreed to or established, at which time the official will provide a notice allowing the activity to proceed. The notice from the risk management official is recognized as applicable law for the purposes of the *Building Code Act*.

Limitations

The section 59 restricted land uses screening tool can help address future significant threats, but it cannot be used for existing activities unless the activity is changing or expanding.

A policy in a source protection plan can only rely on section 59 restricted land uses to complement a policy that uses the section 58 risk management plan or section 57 prohibition approach. The restricted land uses (s. 59) approach can not be used by itself.

Other Considerations

Advantages of using the restricted land uses approach in plan policies:

- allows for an activity to be managed, without eliminating an entire land use designation;
- alerts risk management officials when land uses that may relate to significant threat activities are proposed;
- provides a process for communicating the source protection plan policies at the beginning of the development or building process;
- may allow development that does not pose a significant drinking water threat to be established in the designated area; and
- requires that a risk management plan be established before a regulated activity can proceed.

³ Please refer to section 62 of the Regulation for a list of the provisions of the *Planning Act* that are prescribed for section 59 of the *Clean Water Act, 2006*. These are summarized as applications to/for: official plan and zoning by-law amendments, temporary use authorizations, development in site plan control areas, minor variances, plans of subdivision, and consents.

Early and Pre-Consultation

An important step in the preparation of the source protection plan is consultation. Regardless of the policy tool, consultation with the person or body responsible for implementing a Part IV policy is required. Engaging this party early in the policy development process is key to identifying important considerations and getting their support for implementation of the plan.

When a source protection plan policy uses section 58 to address drinking water threats, section 39 of the Regulation requires that committees notify the municipality(ies) responsible for enforcement of the policy in the areas where the policy would apply. The notification must happen before the draft source protection plan is published for public comment.

The notice must include the draft wording of the policy and a request for comments, as well as a summary of the reasons for using section 58 to address the threat. The Regulation does not specify the timeframe by which the body must reply, although the committee may request a date⁴ by which the information would be needed so that the committee could successfully complete their source protection plan. The Regulation requires the committee to consider the municipality's feedback before they publish the draft source protection plan. A summary of consultation, including the comments received and how they affected the development of source protection plan policies, must be included in the explanatory document published along with the plan.

Summary

This Bulletin has provided an overview of the section 58 risk management plan tool authorized by Part IV of the *Clean Water Act, 2006*. It has provided some guidance with respect to the limitations and important considerations when considering the application of this tool, as well as some of the details that must be included in a source protection plan for such policies.

For information on other aspects of source protection plan preparation please refer to the corresponding bulletins in this series.

⁴ This date would be determined locally, and where ever possible, through discussions with the implementing body.

Additional Sources of Information

Ministry of the Environment's Clean Water Act Website

www.Ontario.ca/cleanwater

Clean Water Act, 2006

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06c22_e.htm

Ontario Regulation 287/07 "General"

http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070287_e.htm