

Source Protection Planning Bulletin – Overview of Prescribed Instruments



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Introduction

The purpose of the *Clean Water Act, 2006* (“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.

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.

Purpose

This document provides source protection committee (SPC) members with a summary of the key legislative requirements, in plain language, for the use of prescribed instruments as a tool to manage threats to drinking water. There are 7 additional bulletins that set out details about each of the instruments prescribed in the General Regulation – Ontario Regulation 287/07 (“the Regulation”).

- Certificates of Approval (sewage and waste)
- Renewable Energy Approval
- Pesticide Permits
- Municipal Drinking Water Licence and Drinking Water Works Permit
- Aggregate Resources Act Instruments
- Nutrient Management Act Instruments
- Permits to Take Water

The bulletins will help SPC members understand the general scope of each of the prescribed instruments, the types of threats each instrument may address and how terms and conditions are used within the instrument to manage the threats.

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.

Context

Under the CWA, an “instrument” is defined as any document of legal effect, including a permit, licence, approval, authorization, direction or order issued or otherwise created under Ontario legislation¹. The CWA states that instruments may be prescribed for the purposes of the Act, which means that they can be used to implement policies in a source protection plan and manage threats to source water. The instruments listed in section 1.0.1(1) of Ontario Regulation 287/07 are prescribed for the purposes of the CWA and included in Table 2 attached to this bulletin.

In addition to the CWA, the Province of Ontario has extensive legislation in place to protect the environment and human health. As a result, it is important to note that many threats to drinking water sources are already regulated through provincial instruments. While there are many instruments established in legislation only a finite set of instruments are prescribed to the CWA for the purposes of implementing policies in source protection plans.

While the CWA sets out this new power for a Source Protection Committee to impact the content of instruments that are prescribed to the CWA for that purpose it does not impact the existing legal powers of the Ministries responsible for issuing these instruments under existing legislation as will be explained in this bulletin.

What is an Instrument?

Legislation (including regulations) typically set out broad requirements that everyone needs to follow. An instrument on the other hand sets out additional requirements that are specific or customized to the activity being carried out at one site and in some cases multiple sites operated by one company or person. Instruments manage these site specific requirements by containing terms and conditions that direct specific ways in which certain activities may be undertaken at the site. These terms and conditions are often designed to protect the environment and/or human health.

It is common for site specific instruments to include additional terms and conditions that establish requirements not listed in the legislation. For example, Certificates of Approval for waste disposal sites (i.e. landfill sites) often require monitoring of groundwater and/or surface water quality at specified locations around the landfill site. This type of requirement is not stipulated in the broader legislation; instead these types of requirements are left to be addressed by the site specific instrument. This allows the monitoring program to be customized to fit the needs of the particular landfill site.

Instruments are generally issued by government (although in some cases they are created by a private individual) and by different levels of government. Some examples of instruments issued by government include the following:

- Municipal government – e.g., business licences, building permits

¹ An instrument defined under the CWA does not include a regulation within the meaning of Part III of the *Legislation Act, 2006*

- Provincial government – e.g., certificates of approval, permits (i.e. pesticide permits, permits to take water), licences, orders
- Federal government – e.g., authorization to establish/operate a nuclear facility, authorization for works or undertakings affecting fish habitat, licence/permit for storage/transportation of explosives

Provincial instruments are usually issued by a Minister or any other official that the legislation (i.e., enabling statute) names, such as a Director. In many instances the law permits the authority to issue, amend or revoke an instrument to be delegated to a public servant.

Instruments may or may not include expiry dates. Additionally, the issuing ministries may have powers to revoke or modify instruments based on criteria set out in the enabling statute. Often applicants for instruments are required to submit an application form along with the appropriate fees to the issuing person/body to consider before an instrument is issued.

This section has provided a brief description of what are instruments generally for context. The remainder of this bulletin will focus on information related to instruments prescribed to the CWA.

General Information about Policy Development Related to Instruments Prescribed in Ontario Regulation 287/07

Legal Effect of Plan Policies on Prescribed Instruments

Depending on the type of policy (e.g., significant, moderate or low drinking water threat) that an SPC includes in a source protection plan, there are different legal effects on prescribed instruments. There are two key sections in the CWA that describe the legal effect.

Section 43 of the CWA requires that prescribed instruments that are already issued (i.e. **existing**) at the time the source protection plan is approved, must **conform with** significant threat policies and designated Great Lakes policies set out in the approved source protection plan. This means that instruments already held by persons undertaking activities that are identified as significant drinking water threats may need to be amended by the person/body responsible for issuing those instruments to ensure the requirements of the instrument conform with the requirements of the applicable SPP policy. In most cases, the instruments prescribed in O. Reg. 287/07 are issued by the provincial government².

² Nutrient Management Plans (NMPs) issued under the Nutrient Management Act and O. Reg. 267 are created by farmers. The Province does not issue or approve these instruments or include terms and conditions. If these instruments are required to be amended to conform with an applicable significant threat policy in a source protection plan, they will have to be amended by the farmers. See the Bulletin prepared for each instrument prescribed in O. Reg. 287/07 for more details.

Clause 39(7)(a) of the CWA requires that any **future** decision to issue, create or amend an instrument that has been prescribed by O. Reg. 287/07 must **conform with** (i.e., comply with) any applicable significant threat policies and designated Great Lakes policies that are set out in a source protection plan. This means that in the future when the province is issuing an instrument that is prescribed in O. Reg. 287/07 they will need to ensure that the instrument conforms with (i.e., complies with) applicable significant threat policies in a source protection plan.

Other threats such as moderate and low drinking water threats are **not** required to be addressed or managed through a source protection plan, but SPCs may write policies to address these activities. For moderate and low drinking water threats the CWA stipulates that the decision to issue or amend a prescribed instrument must “**have regard**” to other applicable policies³.

Who is Responsible for Achieving Conformity?

It is the responsibility of the person or body that issued or otherwise created the prescribed instrument before the applicable source protection plan policy took effect to ensure that the instrument is amended, as necessary, to conform to the applicable significant threat policies in the plan.

Given that most of the instruments prescribed by O. Reg. 287/07 are provincial instruments (see bulletins that detail each prescribed instrument for specifics) it is the responsibility of the Crown (i.e., Province of Ontario) to achieve conformity with applicable significant threat policies. This may require the Crown to amend terms and conditions in prescribed instruments that existed at the time the applicable source protection plan policy took effect, and going forward, any new instruments issued must also conform to the policies.

SPCs may include policies in a source protection plan to prohibit significant threat activities in wellhead protection areas and intake protection zones. Under the regulation this can only be done if the SPC is of the opinion that there is no way to manage the activity that meets the objectives of the plan and therefore it has to be prohibited. In these situations where an SPC includes a provision in a source protection plan that prohibits an existing activity, the person or body responsible for a prescribed instrument must (under clause 39(7)(a) and section 43 of the CWA) conform with the policy. For example if the policy indicates no application of pesticides in a specific area is allowed (because the activity in this area has been identified as a significant threat) then existing pesticide permits that allow the application of pesticides in that area need to be amended so that pesticide application in that area does not occur. This conformity will be achieved by including an appropriate condition in the pesticide permit. Additionally any new permits for the area must include conditions that conform to this policy as well. These conditions should be designed to achieve the intended outcome of the policy.

³ See the Source Protection Planning Bulletin – Overview of Source Protection Plan Requirements for a more detailed discussion on legal effect

In some circumstances it may be determined that the terms and conditions in the instrument may already meet or even exceed the restrictions in the policy and therefore no amendment to the prescribed instrument will be required.

The CWA makes clear however, that the authority to include policies in a source protection plan that will affect prescribed instruments does not extend the authority or jurisdiction of a person or body that is issuing, otherwise creating or amending a prescribed instrument. For instance, if the legislation under which a prescribed instrument is issued does not provide broad enough authority for the instrument to regulate a specific drinking water threat activity, the threat activity cannot be regulated by that instrument under the authority of the CWA. If there are no prescribed instruments that can regulate a specific drinking water threat activity then another tool must be used, such as Part IV of the CWA.

For example, the prescribed instruments that relate specifically to farms are the nutrient management plans and nutrient management strategies described in s.1.0.1(1) of O. Reg. 287/07. The *Nutrient Management Act, 2002* and the regulations made under it authorize nutrient management plans and nutrient management strategies to manage nutrients associated with the farm unit but not other drinking water threats such as DNAPLs. Therefore some other policy tool must be used to manage DNAPLs on farms.

The MOE's Source Protection Programs Branch is working with affected ministries that issue prescribed instruments to ensure that they are aware of and prepared to implement their conformity obligations under the CWA and as a result of source protection plans.

Minister Requests for Amendments to Prescribed Instruments

There are two additional provisions in the CWA that impact prescribed instruments. Section 44 of the CWA contains two subsections that set out powers for the Minister of the Environment regarding prescribed instruments.

Section 44(1) states that the Minister may request an amendment to a prescribed instrument if he or she is of the opinion that the instrument does not conform to a significant threat policy or designated Great Lakes policy set out in an applicable source protection plan. For example, should a ministry not amend a prescribed instrument to conform to a significant threat policy, the Minister may request the issuing ministry to take action to amend the prescribed instrument to achieve conformity and to report back on the steps taken.

With respect to a *condition that results from a past activity* (i.e., a site with contamination) and that is identified as a significant drinking water threat in an approved assessment report, the Minister is authorized under subsection 44 (2) of the Act to request that an instrument be issued to deal with such a condition. The person or body responsible for the issuance of that instrument (i.e., the Crown) is then required to report back to the Minister on what action was taken. The Minister is not restricted under this subsection to making a request only with respect to the instruments prescribed in section 1.0.1(1) of the Regulation, but because of section 1.0.1(2) of the Regulation, he or she may make a request to any person or body responsible for the issuance of any instrument under any Act.

Using Prescribed Instruments to Manage Drinking Water Threats

Instruments prescribed by O. Reg. 287/07 were prescribed because they can be used to manage one or more of the prescribed drinking water threats set out in section 1.1 of O. Reg. 287/07 (i.e., the list of 21 prescribed drinking water threats). Instruments may also be used to manage local threats approved by the Director and included in the assessment report where the mandate of the instrument provides an authority to manage these local activities.

SPCs are only authorized by the CWA to write policies requiring conformity by persons or bodies issuing instruments that are on the list of prescribed instruments set out in s.1.0.1(1) of O. Reg. 287/07. Any instruments not prescribed in s.1.0.1(1) can not be used by SPCs in their source protection plan policies.

Using prescribed instruments to manage the risk of drinking water threats where they exist or may exist in the future offers a number of advantages compared to some of the other available approaches to policy development. For example, property owners undertaking activities that already require a prescribed instrument may be familiar with and incorporate compliance with the instrument requirements into their day-to-day business. As well, where an instrument may be used to manage the risk posed by the threat activity, using the prescribed instrument approach avoids regulatory duplication. Furthermore, unlike an approach that relies on decisions under the Planning Act or Condominium Act to reduce the risk of future drinking water threats, policies that use this approach can affect both existing and future activities.

Mandate or Legislative Authority of Prescribed Instruments

As stated previously, a policy that relies on the prescribed instrument conformity requirements in the CWA can only control activities that the prescribed instrument can legally regulate – i.e., SPCs cannot use prescribed instruments to address threats if the instruments cannot legally already address those threats. Therefore, it is important for SPCs to understand which instruments can legally address which drinking water threats and for what purposes.

For a full list of prescribed instruments and which prescribed drinking water threats they may manage see Table 2: Prescribed instruments – Management of Drinking Water Threats accompanying this bulletin.

Where there is not a prescribed instrument available to manage a particular activity, due to **limitations to the authority of an instrument's mandate**, it will be necessary for policy developers to rely on other approaches to reduce and manage the risk of drinking water threats, such as risk management plans or other policy tools.

The instruments prescribed in O. Reg. 287/07 are not meant to address or manage the risks associated with *all* prescribed drinking water threats. There are some instruments that will be able to manage multiple activities, such as nutrient management plans and strategies which can manage the storage and handling of agricultural source materials. There are other instruments, like pesticide permits, that are only able to manage very specific activities.

There are also prescribed drinking water threat activities where there is no prescribed instrument that is available to manage the threat. For example there is no instrument available to manage the storage of snow. Where there is no instrument to manage a particular activity, policy developers will need to rely on other approaches to manage the risk to drinking water from the threat.

Level of Detail in Policies

When a SPC decides to use the *Risk Management Plan* tool or *prescribed instrument* tool as the means to achieving the desired outcome of managing a particular threat, they have the option of including some policy details about how the activity should be managed, or outcomes that should be achieved, or may leave those details to the public body responsible for implementing the policy. For example, for existing fuel storage sites that are *significant drinking water threats*, the policy could require a specific standard to be applied, or simply state that measures must be taken to ensure that the activity ceases to be a *significant drinking water threat*. The latter part of the example leaves the specifics about what fuel storage standard must be applied in each case to the implementing body, while the policy sets out the required outcome.

Similarly, for a prescribed instrument policy, the amount of detail in the policy may also depend on how much information a policy developer has about the sites at which a significant drinking water threat activity is taking place in a vulnerable area. For instance, in the case of fuel storage, the SPC may have limited knowledge about how fuel is stored at sites in areas of the wellhead protection area where this activity is a significant drinking water threat. Further, policy developers may not know, nor is it necessary to know, if prescribed instruments that regulate drinking water threats in a vulnerable area already contain terms and conditions that adequately manage the risk posed by the activity. In the absence of such information it may be useful for policy developers to leave the specific details of how to manage the threat to the public body responsible for administering the prescribed instrument or to require a general management measure to be included in the instrument (i.e., conditions to manage the leachate from a landfill by using a liner) rather than requiring the prescribed instrument to adopt a prescriptive set of actions to manage the activity.

The most important thing for the policy developer to understand is if the prescribed instrument has the legislative authority to manage the activity in question.

Where there is no prescribed instrument that can manage the activity in question or where there is no prescribed instrument that can manage the activity at certain sites where it is a significant drinking water threat, it is recommended that the policy developer fill those gaps with other tools. For example, the prescribed drinking water threat activity of fuel storage can be managed using a range of tools, including prescribed instruments, depending on the situation. Fuel storage at aggregate operations may be managed by a prescribed instrument issued under the Aggregate Resources Act. Similarly, fuel storage that is used as part of a municipal residential drinking water system may be regulated by a drinking water works permit or a municipal drinking water licence under the Safe Drinking Water Act, 2002. However, other sites or locations where fuel is stored in a vulnerable area may not be regulated by a prescribed instrument, a bulk fuel distribution terminal, for example. In these other cases, policy

developers will have to consider other tools such as requiring a risk management plan for the other fuel storage sites under Part IV of the CWA or using education and outreach policies to ensure appropriate risk management measures are in place for the activity.

Note, where a prescribed drinking water threat activity like fuel storage can be regulated by a prescribed instrument or by a risk management plan under Part IV of the CWA, there are procedures set out in section 61 of O. Reg. 287/07 that will resolve this duplication at the local level and determine which instrument will ultimately regulate the activity (the risk management plan or the prescribed instrument).

Managing Multiple Threats at One Location

There may also be situations where at one location there are multiple activities being undertaken that are identified as significant drinking water threats. At such a site SPCs may find that a prescribed instrument can manage one activity that the assessment report identifies as a threat, but that same instrument may not be able to manage other threat activities at the same location. In other words, there may be situations where activities can only be adequately managed if the plan's policies coordinate and use both a prescribed instrument approach and another approach, to address different activities at the same location.

For example, a Certificate of Approval for a waste disposal site issued under Section 27 of the *Environmental Protection Act* (EPA) is required to "...operate, establish, alter, enlarge or extend a.... waste disposal site ...". The Certificate of Approval would be able to manage risks associated with waste disposal at the site, but may not be able to regulate fuel storage on the site – even though the assessment report may identify both activities as significant threats at the same location. In this case, the policy developers may formulate one policy that results in amendments to the Certificate of Approval to reduce the risks associated with waste disposal. A second policy that requires another approach (e.g., creating a risk management plan) may be developed to manage the risks associated with on-site fuel storage.

Use of Other Instruments

Should policy developers determine that there is an existing instrument that can manage a certain drinking water threat, but that the instrument is not prescribed in section 1.0.1(1) of O. Reg. 287/07, they should notify the Director of Source Protection Programs Branch at the Ministry of the Environment of this situation. The Director will consider if this instrument needs to be prescribed through a future amendment to O. Reg. 287/07. Where a prescribed instrument cannot be used to manage a risk adequately, other approaches will need to be explored during the policy development process.

Timelines to Achieve Conformity of Prescribed Instruments

As previously stated, section 43 of the CWA requires that prescribed instruments that manage significant drinking water threats and that existed before the applicable source

protection plan took effect must be examined and amended, if necessary, to conform with the applicable significant threat policies of the plan. The amendment, if necessary must be made by the date specified in the source protection plan. Consulting on draft policies with the person or body responsible for issuing⁴ the prescribed instruments and local persons or businesses that hold these instruments that may be affected by a significant threat policy will be the key to SPCs providing an appropriate date in the plan. This consultation is required in O. Reg. 287/07. The MOE's Source Protection Programs Branch is working with affected ministries and regulated parties to provide additional information and guidance on this process.

Summary

This Bulletin has provided an overview of the key legislative requirements, in plain language, for the use of prescribed instruments as a tool to manage threats to drinking water. For information on other aspects of source protection plan preparation, please refer to other bulletins for each of the instruments prescribed in O. Reg. 287/07.

Policy developers are encouraged to utilize prescribed instruments whenever there is a prescribed instrument that can legally manage the risks associated with an activity that has been identified as a drinking water threat in the assessment report. If such a prescribed instrument has already been issued for an activity identified as a significant drinking water threat, the Province recommends that utilizing that instrument should be the policy developers' first consideration.

Additional Sources of Information

Ministry of the Environment's Clean Water Act Website – 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)

⁴ As per section 36 of O. Reg. 287/07

Table 1: Roles and Responsibilities in respect of Prescribed Instruments and the Implementation of the CWA

Person/Body	Role/Responsibility
Policy Developer (i.e., source protection committee)	<ul style="list-style-type: none"> • Understand mandate of prescribed instruments • Understand how each instrument can be used to manage drinking water threats • Write draft policy (ies) • Consult with impacted persons / bodies (i.e., Crown) issuing or creating prescribed instruments that are proposed to be utilized to implement policies • Consult with persons / bodies (i.e., regulated community such as farmers, industry or municipalities) that hold prescribed instruments that are propose to be utilized to implement policies
Person / body issuing or creating instruments (i.e., Crown)	<ul style="list-style-type: none"> • Provide input to policy development • Assess prescribed instruments that govern existing significant drinking water threats to ensure they conform with significant threat policies in an approved source protection plan and, if they do not, make the appropriate amendments • Ensure that future issuance or amendment of prescribed instruments conform with significant threat policies in an approved source protection plan
Minister of the Environment	<ul style="list-style-type: none"> • Approves source protection plan • Where, in the opinion of the Minister, conformity has not been achieved in a prescribed instrument, request an amendment be made to address the non-conformity (S. 44(1) of the CWA) • Determine and request the issuance of instruments to assist in ensuring that a condition resulting from a past activity that has been identified in the assessment report as a significant drinking water threat ceases to be a significant drinking water threat.(S. 44(2) of the CWA)