AMO Response to Bill 43

Proposed *Clean Water Act, 2005*

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Association of
Municipalities
of Ontario

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Roles and Responsibilities

We believe that the government has genuinely good intentions to protect Sources of Water, which Ontario Municipalities full heartedly share. The issue is how to protect our sources of water and fairly delineate the roles and responsibilities of managing the process, from the development of the policy to the ongoing implementation of it. AMO has reiterated its concerns with the issue of roles and responsibilities from the beginning. Unfortunately, AMO continues to have substantive issues with the lack of a municipal role in areas of policy development and, in the area of implementation, having a substantive, but apparently unfunded mandate.

The government is intent on melding together the highly irregular boundaries of the natural systems, watersheds, with the lines of our political boundaries. This has, perhaps inadvertently, not provided for decision-making by municipal government. The nature of the watershed planning approach envisioned for this endeavor has lead the government down an unpracticed, untested route of policy and decision-making. The government, having recognized the challenges of this approach, yet having committed to implement, literally, every recommendation of the Walkerton Report, has proceeded with the development of a new, complicated layer of decision making to deal with, primarily, a land use matter. We understand the argument that this is more than land use, that it is a matter of activities as well. But if one is to step back, one must concede that activities are located on land and land is regulated through land use instruments such as the *Planning Act*. In addition, activities have been regulated in the past and could, and would, continue to be regulated in the future.

What complicates matters more is the apparent desire by the government to have Source Water Protection Plans (SWPP) as local instruments, of local creation. The government has tried valiantly to make this vision a reality but the proposed structure has not, in our view, accomplished that end result. Unfortunately, municipalities do not appear to have a leading role in the development of any of the work leading to the development of the SWPP nor the decisions on the actual Plan. The responsibility of preparing the Terms of Reference, Assessment Reports and the development of the SWPP falls to the SWP Authorities (Conservation Authorities (CA)) or the SWP Committees. There is very limited representation of any one municipality on either of those leading SW groups. More importantly, municipalities will not have the responsibility of making any decisions within the boundary of their municipality affected by the work being done for the SWPP, the scope of work, the science or the policy.

It will be the Conservation Authorities, who will be in the leadership role of providing technical or scientific and administrative expertise, of providing professional guidance and expertise to scope the work and for the creation of the policy. We appreciate that CA's do not make decisions, per say, and we agree with that. Decisions should be made by those elected to have that prerogative. Unfortunately, in the case of SWP planning, municipalities also do not appear to have any decision making powers, not even for matters that may directly impact their municipalities, including municipal

operations, existing municipal policies and priorities. Municipalities only need to be consulted.

So where does that leave municipal governments? In the case of Source Water Protection (SWP), it is clear from the proposed legislation that the only decision maker is the Province. The Minister of the Environment will be making decisions on the Terms of Reference, the Assessment Report and the Source Water Protection Plan (SWPP) as well as decisions on other administrative matters such as appointing the Chair of the Source Water Protection Committee. This is very disconcerting, especially when dealing with SWP around wellheads and intake areas, which is a critical municipal responsibility as it deals with the protection of drinking water. In past discussions, AMO was made to understand that municipalities will be the lead in this area of SWP, unfortunately the proposed legislation does not read that way and is therefore an issue of serious concern. As it currently reads, the Province, by virtue of its decision making in all aspects of the SWPP development has the full "ownership" of the SWPP.

While municipalities have no apparent role in decision-making at the front end of the process, they are required to take on new and substantive responsibilities of implementation. Not only are they being directed to provide this role, but provide it without any discernible liability protection or secure long-term funding (The issues of liability and funding will be discussed later in the report). The structure of the municipal role appears to have many similarities to the (Ontario Disabilities Support Program (ODSP), where municipalities have no decision-making role yet they deliver the program and pay a large proportion of the cost. Like ODSP, the proposed new unfunded mandate around SWP is a most serious concern to municipal government. As a minimum, if municipalities are to be the implementers of the SWPP, then surely they should be given every opportunity to endorse or approve requirements at every opportunity in the process.

Integration with the Existing Legislative and Regulatory Framework

We appreciate that the government has made considerable effort to provide co-ordination and integration of this new initiative with that of the existing initiatives and frameworks. Unfortunately, AMO's reservations about the achievability of a clear, clean slate upon which to set up a new regime still remain.

As proposed, the specific work leading up to the development of the SWPP and the approval of the Plan are all responsibilities of the Province, and as such, the logical conclusion is that the ownership of the SWPP is apparently that of the Province. On the other hand, when dealing with land uses, municipalities have the land use planning authority. We are concerned with the potential erosion of this authority, which has the potential to arise as a result of two parallel processes making decisions about land uses, albeit specific to areas relevant to SWP. AMO questions the benefits of having this duplicate process. Why must municipalities go through the *Planning Act* process, which requires "consistency" with provincial policy and requires "conformity" with the SWPP, when at the end of the day, the municipal decision will be a replication of that

which is already approved in a SWPP? The more one looks at this proposed new regime, the more similarities one sees with other provincial plans, most notably the Niagara Escarpment Plan, and in that case, acrimony continues to exist. There is no question in our mind that municipalities will have to expend substantive resources in ensuring that Official Plans parallel the policy of the SWPP in their watershed. This will include duplication of resources, the time expended to making a decision, and the effects on other municipal program areas in order to accommodate this additional requirement.

Will we be making a difference by going through the process twice? Are we providing a benefit to the public, the private interests, who will, along with us, experience similar magnitudes of expending double effort and resources? Will these parallel processes reflect well on any of us? AMO believes that adding these proposed initiatives to the existing complex, however well understood, process, will have a detrimental effect on the improvements we have painstakingly gained in the land use planning regime. AMO has advocated adjusting the system rather than a major overhaul and upheaval, as it may be more acceptable and realistic. As we have said in the past "having municipalities and stakeholders embrace evolution is much easier than embracing radical change or revolution". AMO continues to urge the government to consider an approach where the source water protection document is an "outcome" based document and does not look like or do what land use documents such as Official Plans, at the municipal level or the Niagara Escarpment Plan, at the provincial level, do.

Having considered the appeal issue, we note that there are provisions for Consolidated Hearings. What we do not understand is how the SWPP will get to the Consolidated Board if there are no appeals of the Minister's decision? While the Minister can appoint a Hearing Officer prior to making the decision, there does not appear to be an appeal mechanism after the decision. If the intent is to have a Consolidated Hearing process, this provision may need further consideration, and adjustment.

Content of Source Water Plans and their Relationship to Municipal Responsibility

We appreciate that Regulations are being drafted, however, reviewing the proposed legislation without the benefit of those documents unfortunately raises issues and concerns that may otherwise have been avoided. Of particular concern are the potential new standards and requirements, which may impact existing municipal services and programs. It begs the question, whether facilities such as waste treatment plants will be required, as a result of the mandatory nature of the proposed legislation, to meet new, higher standards. If so, municipalities will need to know what the impacts will be, as their priorities may need to be reconsidered, from fiscal to practical. Should new, higher standards be required, municipalities, as primary delivery agents of services; whether those services be waste treatment, land fills or road salt, will bear the impacts.

This is a serious concern to municipalities. On the one hand municipalities will endeavor to the best of their abilities to do the right thing for their citizens, provide them with the best opportunity for clean drinking water. At the same time, other priorities, many of which are provincial mandatory programs, require resources. Municipalities cannot be expected to readily raise the funds required to cover the potential costs of new requirements, in addition to the existing commitments, from user fees and property-based assessment. This is an area where implementation, secure funding and integration of provincial policies and directives must be cohesively developed. AMO did not see that kind of appreciation from the construct of the proposed legislation.

New Municipal Implementation Responsibilities and Funding

While municipalities have only a commenting role in the SWPP preparation and approval, they will be required to have a substantive role in the implementation of the plan.

For starters, Official Plans and Zoning By-laws must be updated to "conform" to SWPP within a timeframe established by the Minister of the Environment at the time of the approval of the SWPP. The policy development and defense in the Official Plans and Zoning By-laws appear to be the sole responsibility of the municipality. For those familiar with the planning process under the provisions of the *Planning Act*, it would come as no surprise that development of policy, any policy, requires extensive consultation, deliberation, staff resources and, frequently, arbitration before the Ontario Municipal Board. With the development of policy addressing an issue as sensitive as source water protection, even if that entails a direct transfer of provincially approved policy from the SWPP into the Official Plan, the process under the *Planning Act* must still be followed. What is unfortunate about this process is that decisions would already have been made by the approval of the SWPP; anything that comes after may be an exercise in process. Having to "conform" is a very high standard of compliance to meet, and may not be absolute duplication of the policy contained in that higher order plan. So the question becomes, why would municipalities be mandated to undertake this lengthy, highly controversial and expensive process on their own? Commitment is needed from the government that government staff resources will be available to work with municipalities as they develop policies, confer with the public and defend *Planning Act* documents at the Ontario Municipal Board or the Consolidated Board. Funds, such as those committed to the source water technical work must be committed to assist municipalities in the development and defense of Official Plan and Zoning By-law policies that result from the SWP.

The most significant new direction relative to implementation is in the mandatory requirement to regulate activities and land uses. Part of this new mandate is the requirement to establish permit-officials, with the power to regulate activities. The actual extent of the permitting responsibilities will not be known until the regulations are in place, however, it is quite clear that this position will carry a great deal of responsibility and will likely require high qualifications.

Municipalities have been requesting new tools such as those in respect to the regulation of activities. However, with the absence of the Regulation, it is challenging to assess the extent of the activities to be regulated. Further, considering the potential scope of the permit-officials' responsibilities, our concern is with a municipality's ability to resource that position and those of the inspectors. Whether or not the positions are delegated to another jurisdiction, the cost will ultimately be born by the municipality. Although, the resource and financial impact of the above requirements have not been assessed, we anticipate the costs will be substantive due to the creation of a system to review applications, the high qualification requirements and potentially large number of these positions, undertaking of legal proceedings associated with issuance of orders, safety concerns of the employees and potentially high insurance rates.

Liability

As noted above, the proposed *Act* provides that municipalities will be responsible for enforcement of the provisions of the SWPP, which prohibit or regulate certain activities, including uses of land, to protect drinking water from potential threats. The major portion is the creation of a system to review and approve applications, undertake inspections, issue orders and undertake legal proceedings.

It is a generally accepted proposition that addressing potential threats at the initial review stage is a less time consuming and a more effective measure than utilizing legal proceedings to rectify deficiencies after the fact. That being said, a municipality has two options available to it:

1) maintain in-house expertise to properly review and approve applications to ensure measures have been implemented to protect sources of drinking water from possible threats; and
2) devise a system whereby applicants are required to provide this analysis to the municipality along with funding to permit the municipality to obtain peer review of the analysis.

With respect to both of these options, each will require resources and funding. In the first instance, the Province should be prepared to cover the costs of such in-house review. With respect to the second, the costs will be transferred to the customer and undoubtedly, there will be some opposition to these added user costs.

A potential problem for both areas will be ensuring an expert in the area of water protection will be able to provide assurance that no potential threat exists. One could argue that 100% guarantees do not exist and no professional will attest to same. That being the case, municipalities need to be provided with adequate direction as to what constitutes "no potential threat". Perhaps the language needs to be amended to identify "no unacceptable threat"?

Given the extent to which municipalities will be required to delve into the enforcement of source water plans, AMO felt it necessary to highlight some of the requirements

which will be expected of municipalities as follows:

With respect to legal proceedings being used as enforcement measures, sections 53(5):

(5) The permit official may,

a) amend or revoke any condition that is included in a permit;
b) add conditions to a permit;
c) amend a risk management plan that a condition of a permit requires the holder of the permit to comply with; or
d) revoke a permit that was issued on the basis of false or misleading information or that is spent or obsolete.

And section 54 permits inspections to be conducted on property. Also, section 55 allows the Permit Inspector to issue Enforcement Orders if breaches of the *Act* occur. Finally, the legislation as it is currently written allows for the municipality to conduct the necessary work and require payment. There are sections addressing the collection of such payment through the addition of fees to municipal taxes as one example. This section of the legislation also addresses the use of the Superior Court for enforcement of Orders and also the applicant's right to seek redress before the Environmental Review Tribunal. To provide for a measure of protection for the permit officials, consideration should be given to amending the *Act* to reflect the provisions of the *Building Code Act* as it relates to Building Officials.

All of these measures will require additional resources on the part of the municipalities and appeals to the Environmental Review Tribunal can result in further expenditures to protect the municipality's position.

If the municipality does not transfer this responsibility, it must exercise considerable care when reviewing, approving or rejecting applications for permits. This is particularly important, as the *Act* requires that the permit official state that the activity will not be a significant drinking water threat. No matter who ultimately has the responsibility of the permit official, that position does not appear to be protected from potential legal liability for any actions carrying out the regulated functions. This is a concern not only from the lack of liability protection perspective but also with potential costs associated with this responsibility, including insurance.

Earlier in the report, we also expressed concern with the potential new standards and requirements, which may impact existing municipal services and programs. We used the example of a waste-water treatment plant and whether it will be required, as a result of the mandatory nature of the proposed legislation, to meet new, higher standards. We are concerned about the nature and extent of the municipal liability as it relates to new requirements. Municipalities need reasonable time to respond to new requirements and protection from liability in the interim.