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Sent by Email (Patrick.mcmanus@oswca.org)

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Dear Mr. McManus:

Closure of Non-Essential Businesses in Ontario – Assessment of Impact on Contractors Performing Construction Work in the Sewers and Watermains Sector

In light of the COVID-19 pandemic, the Ontario government has ordered the closure of all non-essential businesses pursuant to its powers under the *Emergency Management and Civil Protection Act* (the “**Emergency Act**”). On March 23, 2020, the Ontario government issued a list of essential businesses that would be exempt from the closure order effective Tuesday, March 24 at 11:59 pm for at least 14 days. At that time, the government published a list of essential businesses that would be exempt from the closure requirement. The list of essential services was quite broad. Most businesses performing construction work were included in the essential services list and were therefore permitted to continue operating. However, the Ontario government has since significantly expanded the list of non-essential workplaces with the introduction of *Ontario Regulation 119/20: Order under Subsection 7.0.2(4) - Closure of Places of Non-Essential Businesses* which was declared into law at 3 PM on April 3, 2020 (the “**Essential Services List Regulation**”). The full text of that legislation may be found [here](#).

To be clear, it is a piece of mandatory legislation.

You have asked us to provide some guidance to interpret how the list of essential businesses will affect contractors represented by the Greater Toronto Sewer and Watermain Contractors Association (the “**GTSWCA**”). Specifically, you have asked us to advise as to whether construction work in the sewers and watermains sector on the following types of projects would be covered by the new essential services list:

1. Municipal capital infrastructure projects (e.g., a municipality owns the right of way where a contractor may be performing sewer and watermain work).

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2. Private sites and developments, including projects in both the residential sector and the industrial, commercial and institutional (“**ICI**”) sector.
3. Projects involving the repair and maintenance of sewers and watermains.

Closure of Non-Essential Businesses and Consequences of Non-Compliance

The *Essential Services List Regulation* significantly narrows the list of essential businesses that may remain open, including further limiting those in construction and its related activities. The *Essential Services List Regulation* is currently effective to April 13, 2020, at which time it will be revoked, unless it is further extended.

If a contractor violates the *Essential Services List Regulation*, the contractor may be found guilty of an offence and subject to significant fines. A director or officer of the corporation that violates the *Essential Services List Regulation* may be fined up to \$500,000 and imprisoned for up to a year, and a corporation can be fined up to \$10,000,000 each per day of the contravention. The *Emergency Act* outlines the fines and potential lengths of imprisonment as follows:

7.0.11 (1) Every person who fails to comply with an order under subsection 7.0.2 (4) or who interferes with or obstructs any person in the exercise of a power or the performance of a duty conferred by an order under that subsection is guilty of an offence and is liable on conviction,

(a) in the case of an individual, subject to clause (b), to a fine of not more than \$100,000 and for a term of imprisonment of not more than one year;

(b) in the case of an **individual who is a director or officer of a corporation**, to a fine of not more than **\$500,000** and for a **term of imprisonment of not more than one year**; and

(c) in the case of a **corporation**, to a fine of not more than **\$10,000,000**.

Separate offence

(2) A person is guilty of a **separate offence** on **each day** that an offence under subsection (1) occurs or continues.

Increased penalty

(3) Despite the maximum fines set out in subsection (1), the court that convicts a person of an offence may **increase a fine imposed on the person by an amount equal to the financial benefit that was acquired by or that accrued to the person as a result of the commission of the offence**.

Exception

(4) No person shall be charged with an offence under subsection (1) for failing to comply with or interference or obstruction in respect of an order that is retroactive to a date that is specified in the order, if the failure to comply, interference or obstruction is in respect of conduct that occurred before the order was made but is after the retroactive date specified in the order.

[emphasis added]

The consequences of failing to comply with the *Essential Services List Regulation* are significant. It may be prudent for the GTSWCA's contractors to reach out to the client for each of the contractor's ongoing projects to determine if the client intends on continuing with the particular project. The advantages of this are two-fold. The GTSWCA contractor can rely on the contractor's direction if an issue arises down the road, particularly if there is some doubt as to whether a particular project would be considered essential. Further, it is ultimately the client's project, and the client may have other reasons for concluding it is appropriate to shut down the project even if the client is legally permitted to continue the project under the *Essential Services List Regulation*.

To the extent that a GTSWCA contractor is unsure whether a particular project is permitted to continue under the *Essential Services List Regulation*, the contractor may wish to initially determine if the client wishes to proceed with the project given the *Essential Services List Regulation*, and if that particular client wishes to continue, it should consider seeking an indemnity from the client to continue work.

Assessment of Construction Work in the Sewers and Watermains Sector

An assessment of whether a construction project falls within the list of essential businesses and can therefore continue must be done on a project-by-project basis. The assessment must take into consideration the particular circumstances and project at issue. It is not possible to provide a general conclusion respecting a class of projects. It is quite possible, and indeed likely, that a GTSWCA contractor may be able to continue working on some projects that fall within the list of essential businesses, but not others. It is also important to note that the exemptions for essential businesses would be interpreted narrowly by an adjudicator.

That being said, we will provide some guidance regarding the categories of essential businesses in the *Essential Services List Regulation* that could apply to GTSWCA contractors and how these may apply in practice. The bolding and underlining in each category is our emphasis.

The first applicable category of businesses that may continue to stay open are those that are critical to the supply chain.

Supply Chains

1. Businesses that **supply other essential businesses or essential services** within Ontario, or that supply businesses or services that have been declared essential in a jurisdiction outside of Ontario, with the support, products, supplies, systems, or **services**, including processing, packaging, warehousing, distribution, delivery, and **maintenance necessary to operate**.

If a contractor is conducting "maintenance" for another business that is considered essential under the *Essential Services List Regulation*, and the work being done by the GTSWCA contractor is "necessary" for the client to continue operating, then the particular work and project could fall within this exemption.

The exemption for supply chains could theoretically apply to any of the three categories of works that you asked us to consider, but it would depend on the specific project. For instance, if there is a project to renovate or expand a health care facility (section 27) and a contractor is performing necessary maintenance work associated with the facility, then this work could fall within this exemption.

The exemption for supply chains may be particularly applicable to the repair and maintenance of sewers and watermains for essential businesses.

Maintenance

20. **Maintenance, repair** and property management **services strictly necessary to manage and maintain the safety, security, sanitation and essential operation of institutional, commercial, industrial and residential properties and buildings.**

Maintenance and repair work to sewers and watermains for both ICI and residential projects could fall into this category. This would be most applicable to private ICI and residential projects, but it could also apply to publicly owned construction projects if it involves the construction of ICI and/or residential buildings. The construction of greenfield projects would not be permitted under this section.

However, section 20 sets out a number of preconditions that must be met. The maintenance and repair work must be “strictly necessary” for the “safety, security, sanitation and essential operation” of the ICI and residential properties and buildings. These four qualifiers are not mutually exclusive and the GTSWCA contractor will need to demonstrate that all four apply to the work being performed.

Section 27 through 31 of the *Essential Services List Regulation* outline the types of construction projects that are deemed essential and can therefore continue.

Construction

27. Construction projects and services associated with the **healthcare sector**, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space.

Section 27 of the *Essential Services List Regulation* would allow contractors to continue performing sewers and watermains work for any construction projects associated with the healthcare sector. Although this could include any sewers and watermains work in connection with greenfield construction pertaining to health care, it could also include expansions, renovations and changes to existing spaces. Further, section 27 would also include sewers and watermains repair and maintenance work that may be associated with a healthcare project.

Although section 27 would largely apply to publicly owned projects, it could also apply to private residential and ICI projects, if these projects are associated with the healthcare sector.

Section 28 exempts construction projects and services associated with critical provincial infrastructure:

28. Construction projects and services **required to ensure safe and reliable operations** of, or to **provide new capacity** in, **critical provincial infrastructure**, including transit, transportation, energy and justice sectors **beyond the day-to-day maintenance**.

Section 28 contemplates construction work and services associated with “critical provincial infrastructure”. The sewers and watermains work must also be “required” for the safe and reliable operation of critical provincial infrastructure or to increase the capacity of the critical provincial infrastructure. For instance, any construction work required to add extra lanes to a public highway could fall within the exemption in section 28. Additionally, the work or services must go beyond regular maintenance of critical provincial infrastructure for section 28 to apply.

The type of work encompassed by section 28 would generally be public works and projects (e.g., work to expand or add public subway lines). Section 28 could encompass repair and maintenance work in the sewers and watermains sector, but it must be more significant than maintenance work that is required on a regular daily basis for critical public infrastructure.

Of note, section 28 would include repair and maintenance work (as long as the qualifications are satisfied) or construction that will increase the capacity of critical public infrastructure. Section 28 appears to permit the construction of new critical public infrastructure and additions to existing critical public infrastructure to increase its capacity.

Unless another specific exception applies, the *Essential Services List Regulation* does not allow a contractor to perform commercial and institutional work. Section 29 of the *Essential Services List Regulation* outlines the narrow circumstances where industrial construction is permitted to continue.

29. **Critical industrial construction activities required** for,

i. the maintenance and operations of **petrochemical plants and refineries**,

ii. **significant industrial petrochemical projects where preliminary work** has already commenced,

iii. **industrial construction and modifications** to existing industrial structures limited **solely to work necessary for the production, maintenance, and/or enhancement of Personal Protective Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the Covid-19 pandemic**.

It seems unlikely that any work performed by the GTSWCA’s contractors would fall within the circumstances contemplated in section 29. Section 29 contemplates “critical industrial activities” that are “required” and related to petrochemical plants and refineries, and industrial construction and modifications related “solely” as needed to assist with the production of items directly related to combatting COVID-19. Section 29(iii) is aimed at any

changes needed to and within manufacturing facilities to ensure continued production or to change to the production of medical equipment and other items related to COVID-19. It is possible that contractors could perform sewers and watermains work that is required for the maintenance and operation of petrochemical plants and refineries in section 29(i), but a narrow set of circumstances would fall within this category.

Any construction work by a GTSWCA contractor on a residential project that meets one of the three requirements in section 30 is permitted to proceed.

30. **Residential construction projects** where,

- i. a **footing permit** has been granted for **single family, semi-detached and townhomes**,
- ii. an **above grade structural permit** has been granted for **condominiums, mixed use and other buildings**, or
- iii. the project involves **renovations to residential properties** and construction work was **started before April 4, 2020**.

The preconditions set out in section 30 reflect the government's intent that construction work on residential projects that already started before the essential services list was amended on April 4 be allowed to continue. One of the three above-noted conditions must be met for construction on a residential project to continue: (1) a footing permit has been granted in respect of a legal family, semi-detached or town home can continue (which covers a large portion of residential projects); (2) the above grade structural permit has been granted in respect to condominiums, mixed-use and other buildings (which opens it up to just about any residential project that has an above grade structural permit); or (3) the project involves renovations to residential properties where the work was started before April 4, 2020.

Any sewers and watermains work is permitted to continue on residential projects (whether private or occurring on publicly owned property) that falls within one of the three above-noted circumstances. This work may include renovations to existing residential properties or new construction projects. Although section 30 refers to residential projects, it is not limited to residential work on such projects given that it refers to "residential construction projects" and not "residential construction work". As such, section 30 will allow construction work in a variety of sectors to occur on a given residential project as long as one of the requirements in section 30 is fulfilled.

The last category of permissible work in the construction section is related to any construction and maintenance work required to temporarily close construction sites that are not ongoing to ensure public safety.

31. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

Section 34 of the *Essential Services List Regulation* – Community Services – also outlines a number of circumstances where the work of sewer and watermain contractors would fall within the list of essential businesses and be permitted to continue.

Community Services

34. Businesses that deliver or **support the delivery of services** including:

i. **Sewage treatment and disposal.**

ii. Collecting, transporting, storing, processing, disposing or recycling of any type of waste.

iii. **Potable drinking water.**

iv. Critical infrastructure repair and maintenance including roads, dams, bridges etc.

...

Businesses that support the delivery of services outlined in section 34 – including construction companies that construct, maintain and repair existing infrastructure providing these services – are permitted to continue operating. Section 34 captures a broad range of activities of sewer and watermain contractors, apart from work connected to storm sewers is not contemplated on a plain reading of section 34. Work related to storm sewers could be included in section 34(iv), if it is related to the repair and maintenance of critical infrastructure. Alternatively, if storm sewer work is part of a package of work that also includes work in section 34(i)-(iii), it can likely also proceed.

It is not clear whether section 34 allows sewer and watermain contractors to work on new projects (*i.e.*, greenfield projects) that will support the delivery of services including sewage treatment and disposal; the collection, transportation, storage, processing, disposal or recycling of waste and potable drinking water. It is clear from section 34(iv) that if the work being performed by the contractor will support critical infrastructure repair and maintenance, this would not include new works and developments.

Whether sewer and watermain contractors would be permitted to work on greenfield projects involving the categories of work outlined in section 34(i)-(iii) would depend on if the project was otherwise permitted under the *Essential Services List Regulation*. For instance, if a new residential development is being built, but the work has not yet started and it would not be permitted to proceed under section 30, it is unlikely that the sewer and watermain work would also be able to proceed. If, however, the residential development has the necessary permits as required by section 30, then the sewer and watermain contractor can also perform work on the project, including greenfield projects.

It is also unclear from section 34 whether sewer and watermain contractors are permitted to provide the services contemplated in section 34 for public projects only, or whether this also extends to privately owned projects. The heading specifically refers to “community services”, which would imply that the services contemplated in this section are provided to the community and therefore are public in nature. However, in Ontario, the *Legislation Act* expressly states that headings are inserted into an act or regulation for convenience of reference only and do not form part of the act or regulation. Headings are deemed to be inserted for convenience of reference only. As such, the substance of the provision must be considered in interpreting the section, and the heading would not factor into this analysis.

The specific works contemplated in section 34 are essential for communities and the public, but section 34 likely does not preclude the provision of these services to private entities. Further, there are other categories of essential works in section 34 that serve the public at large, but are not necessarily provided to purely public clients. For instance, section 34(v) provides permits businesses that deliver or support the delivery of services including environmental rehabilitation, management and monitoring, and spill clean-up and response are considered essential. If a private company had an oil spill on its property, the businesses that provide spill-clean up and response services would be able to respond to the spill and clean it up. The services in section 34 serve the public at large, but do not necessarily need to be provided to a public entity to be deemed essential.

It may be that the construction, repair and maintenance work performed by sewer and watermain contractors that qualifies as an essential business by virtue of section 34 will be provided to a municipality or the province. However, on balance, section 34 likely permits contractors to provide these services to any entity. These are services that further the public interest and community – it likely does not matter whether the client is public or private.

Conclusions

Contractors will need to assess on a project-by-project basis whether the work falls into one of the categories of essential businesses in the *Essential Services List Regulation*. Some contractors will be able to provide services on multiple projects and others may not be able to perform any work as its ongoing projects will be required to close. In any event, we will broadly address the three categories of projects that you asked about, namely:

1. Municipal capital infrastructure projects.
2. Private sites and developments, including projects in both the residential sector and the ICI sector.
3. Projects involving the repair and maintenance of sewers and watermains.

Municipal capital infrastructure

Section 34 largely contemplates the continuation of public sewer and watermain projects and projects where sewer and watermain work is a key component of the overall project.

If a contractor is performing work that supports the provision of sewage treatment and disposal; the collection, transportation, storage, processing, disposal or recycling of any type of waste, potable drinking water and critical infrastructure repair and maintenance, then this work is permitted to continue. This would include maintenance and repair of the infrastructure necessary to ensure these services can continue to be provided.

Section 34 does not generally permit the construction of new works that would support the provision of sewage treatment and disposal; the collection, transportation, storage, processing, disposal or recycling of waste; and potable drinking water down the road. If work performed by a contractor will support critical infrastructure repair and maintenance in section 34(iv), this does not include new works and developments.

However, new works may be permitted for specific types of projects. New works that will eventually support the delivery of these services are permitted if they are associated with a new facility being built in the healthcare sector (section 27) or building critical provincial infrastructure (section 28) which includes bridges, roads and dams. Of note is the reference to roads, of which sewer and watermain works are almost always an integral component.

It should be noted that if a project meets the requirements in section 27 then the contractor can perform any sewer and watermain work associated with the project – not just the types of work outlined in section 34. The same observation applies with respect to critical infrastructure projects that meet the requirements in section 28, but note that sewer and watermain work must go beyond the day-to-day maintenance.

If a project is otherwise required to close by virtue of *O Reg 82/22*, the sewer and watermain work associated with the project also probably cannot continue.

Taking a step back from the wording of *O Reg 82/22*, it makes sense that work on existing sewers and watermains would be able to continue, and other projects that are allowed to continue pursuant to the order. Sewers and watermains are critical and fundamental infrastructure. Failing to maintain this infrastructure during the COVID-19 pandemic could result in serious harm to the public and increased strain on the public purse down the road.

Private sites and developments (residential)

Any sewer and watermain work is permitted to continue on residential projects (whether private or occurring on publicly owned property) as long as one or more, of the three requirements in section 30 is met. This may

include renovations to existing residential properties or new construction projects. If a contractor wants to work on a new residential development or site, and the requirements in section 30 are not met, the contractor likely cannot proceed with any sewer and watermain work (even if the work is contemplated in section 34(i)-(iii)).

For an existing residential site or development, if a contractor will be performing one of the types of work in section 34(i)-(iii), then the contractor can continue with this work.

If the work does not fall within one of the categories in section 34(i)-(iii), then the contractor would have to demonstrate that any maintenance and repair work with respect to a residential property or building is necessary to manage and maintain the safety, security, sanitation and essential operation of residential buildings to continue (section 20).

Private sites and developments (ICI)

For an existing industrial, commercial or institutional site or development, if a contractor will be performing one of the types of work in section 34(i)-(iii), then the contractor can continue with this work.

If the work does not fall within one of the categories in section 34(i)-(iii), then the contractor would have to demonstrate that any maintenance and repair work with respect to an industrial, commercial or institutional property or building is necessary to manage and maintain the safety, security, sanitation and essential operation of the buildings to continue (section 20).

Alternatively, if the project or work is critical for another business that is essential under the *Essential Services List Regulation* (section 1) or is associated with the healthcare sector (section 27), then any work by sewer and watermain contractors in connection with these projects may continue. Contractors may also continue work on an industrial construction project related to petrochemical plants and/or to assist with the manufacturing of products to battle the COVID-19 crisis (section 29).

Projects involving the repair and maintenance of sewers and watermains

Repair and maintenance work relating to existing infrastructure to permit sewage treatment and disposal; the collection, transportation, storage, processing, disposal or recycling of waste; and potable drinking water can continue (section 34(i)-(iii)). Further, any repair and maintenance of critical infrastructure including roads, dams and bridges can continue (section 34(iv)). Contractors can continue with regularly scheduled maintenance and repairs with respect to infrastructure that permits the services contemplated in section 34 to continue being provided to the public.

If contractors want to perform repair and maintenance work relating to infrastructure that is not contemplated in section 34, then it will need to fit within another exemption. It will be more difficult to establish that contractors

can continue with regularly scheduled maintenance with respect to private projects and developments. If it relates to an ICI residential property or building, the maintenance must be strictly necessary to manage and maintain the safety, security, sanitation and essential operation of both (section 20).

Summary

In the limited time available, we have done our best to provide an overview of the exceptions in the *Essential Services List Regulation* as it applies to the sewer and watermain industry. The wording of the *Essential Services List Regulation* is not entirely clear, and of course, there is no case law to assist with the analysis. Having said that, we have done our best to analyze the regulation.

For your convenience, the following is a broad summary of the general guidelines for sewer and watermain contractors. However, the analysis will depend on the particular project at issue and the nature of the work the contractor will perform on that project.

1. Work on public rights of way and public infrastructure relating to sewage, collecting and treating waste, and drinking water, can mostly continue. This includes work relating to existing and new infrastructure. Contractors can also perform repair and maintenance on public infrastructure. Any sewer and watermain work can be performed for a new healthcare facility or critical provincial infrastructure project.
2. Sewer and watermain contractors can perform any work on a private residential site or development that was started before April 4, 2020 or for which the necessary permits have been obtained.
3. Sewer and watermain work relating to private industrial, commercial or institutional projects cannot proceed subject to narrow exceptions.
4. The repair and maintenance of public sewer and watermain lines can mostly continue. With respect to the repair and maintenance of private sewer and watermain lines, regularly scheduled maintenance may not be able to continue except in compelling circumstances.

We trust that the above is satisfactory, but please let us know if you have any questions.

Yours truly,



Richard J. Charney

RC/LD