

Ten years after Walkerton - Ontario's drinking water protection framework update

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It's been ten years since the Walkerton tainted water tragedy killed at least seven residents, sickened about 2,500 others, and single handedly curtailed the provincial government's 'self regulation' philosophy.

The report of the Walkerton Commission laid out a detailed blueprint for rebuilding public confidence in the safety of our drinking water supplies. Most of Justice O'Connor's recommendations in the Walkerton report have been fully implemented.

This paper looks at the progress Ontario has made in regulating drinking water and implementing Justice O'Connor's recommendations. The paper also examines the regulatory holes that remain and the recommendations that still need to be fulfilled.

1 PROGRESS SINCE WALKERTON

1.1 SAFE DRINKING WATER ACT

With the Ontario *Safe Drinking Water Act, 2002* ("SDWA") Ontario now has mandatory drinking water standards, better training and certification of operators, licensing of all municipal residential drinking water systems, regular review and revision of drinking water standards, the licensing, accreditation and inspection of testing labs, more vigilant enforcement, and greater public transparency through the annual reports issued by both the Minister of the Environment and the Chief Drinking Water Inspector.

SDWA has imposed responsibility for the quality of drinking water on owners and operators of drinking water systems in Ontario. The Ministry of the Environment ("MOE") continues to aggressively prosecute municipalities, non-municipal corporations and individuals responsible for drinking water systems for breaches of the SDWA.

Penalties for non-compliance with the SDWA are onerous. Corporations facing charges under the SDWA that have a history of previous convictions potentially face penalties of up to \$200,000 per day. For individuals, fines for subsequent offences can be up to \$50,000 per day, imprisonment of up to one year or both a fine and imprisonment. For serious offences, such as those that could have resulted in a drinking water health hazard, the maximum penalty for corporations for subsequent offences can be up to \$10,000,000 per day. For individuals, maximum penalties for these serious offences can be up to \$7,000,000 per day, imprisonment of up to five years less a day or both a fine and imprisonment.

In practice, fines to date have been significantly lower. For municipalities, since 2005, fines for first convictions have ranged from \$1,500 to \$13,000 per charge. Since 2006, fines against municipalities for subsequent convictions have ranged from \$3,500 to

\$15,000 per charge. For non-municipal corporations, fines for first convictions have ranged from \$1,500 to \$70,000.

For individuals, fines for first convictions have ranged from \$1,500 to \$5,000. For the subsequent conviction of one individual charged under the *SDWA*, the individual was ordered by the court to surrender his operator's licence and was prohibited from applying for a licence under the *SDWA*.

However, the cumulative fine amounts can still add up, since the MOE generally brings a number of charges concurrently. In addition, on conviction, there is a mandatory 25% victim surcharge added to the cumulative penalty amount. In some cases this has resulted in escalation of the total fine amount to close to \$100,000.

On February 24, 2011, the MOE began issuing Municipal Drinking Water Licenses under section 44 of the *SDWA*. The Municipal Drinking Water Licence Program replaces the Certificate of Approval Program for municipal residential drinking water systems. To obtain a license, a municipal residential drinking water system owner must have the following five criteria

- 1 A Drinking Water Works Permit
- 2 An Acceptable Operational Plan (documents the quality management system, must be accepted by the Director)
- 3 An Accredited Operating Authority
- 4 An approved financial plan
- 5 A Permit to Take Water.

We discuss the most difficult of these, the financial plans component of Drinking Water Licenses below.

On January 1, 2013, two additional sections will come into force.

Section 14 provides that an owner of a drinking water system can enter an agreement with an accredited operating authority for the operation of the system. The owner may delegate duties imposed under the *SDWA* to the accredited operating authority. The owner of the drinking water system cannot delegate the statutory standard of care it owes to ensure that the accredited operating authority acts in a competent and diligent manner, and ensuring that the accredited operating authority complies with the *SDWA*.

Section 19 of the *SDWA* will establish a statutory standard of care required by owners, operators and persons who oversee operators or have decision-making authority over the system. Section 19 will expand the list of persons who may be charged in connection with municipal drinking water systems to specifically include those with oversight responsibilities. For example, Municipal mayors and councilors who do not exercise an adequate level of care or oversight of an accredited operating authority may find themselves the target of MOE investigations and fines.

1.2 THE CLEAN WATER ACT

In 2006, the province enacted the *Clean Water Act, 2006 (CWA)*. With the *Clean Water Act*, Ontario also has legislation in place to protect sources of drinking water. This legislation takes a unique approach of watershed level protection developed at the local level by stakeholders as guided by Ministry of Environment regulations and guidance documents.

The CWA is Ontario's still relatively new drinking water source protection legislation, which implements many of Justice O'Connor's recommendations from the Report on the Walkerton Inquiry.

The CWA creates source protection areas, which generally share the same boundaries with one or more conservation areas, and establishes source protection committees for each of the source protection areas.¹ The committees are composed of representatives of municipalities, the agricultural, industrial, commercial sectors, first nations, academics, non-government organizations and other members of the public.

Source protection committees have been tasked with preparing assessment reports that are to describe the water resources in the source protection area, identifying vulnerable areas, and identifying activities and conditions that are or would be "drinking water threats" or "significant drinking water threats". The general regulation under the CWA² enumerates activities that constitute drinking water threats. The list includes activities like the storage or application of road salt, handling and storage of organic solvents, and sewage handling activities.³

The committees must then develop source protection plans that contain policies to prevent any activity from resulting in any of the significant drinking water threats identified in the assessment reports.

Once a source protection plan is approved by the Ministry of the Environment, planning decisions made by municipalities (such as decisions relating to official plans and zoning by-laws), as well as decisions made by other branches of government (including boards, agencies and commissions) and must conform to the significant threat policies (and "have regard to" the other policies) set out in the source protection plan. The CWA provides that a provincial "decision to issue, otherwise create or amend a prescribed instrument shall conform with significant threat policies and ... have regard to other policies set out in the source protection plan".⁴ The Province has introduced the list of prescribed instruments in the new regulations.

Even existing commercial, industrial and municipal operations that are identified as drinking water threats may be required to take protective measures to reduce discharges of contaminants, prevent spills, change chemical storage and handling practices, or otherwise reduce the risks of contaminating water supplies. The CWA achieves this by requiring that "a person or body that issued or otherwise created a prescribed instrument

¹ Some source protection areas are consolidated into source protection regions.

² O. Reg. 287/07.

³ O. Reg. 287/07, s. 1.1.

⁴ Section 39(7).

before the source protection plan took effect shall amend the instrument to conform with the significant threat policies”.⁵

Finally, the CWA also allows source protection committees to designate activities that are prohibited in an area⁶ and activities and land uses that must be regulated through risk management plans.⁷

Source protection committees have now had their terms of reference approved by the Ministry of the Environment and completed their assessment reports. Source protection committees are now developing significant threat policies and source protection plans.

In 2010, significant and wide-ranging amendments were made to the General regulation under the Act.⁸

Highlights of these changes include the following

- ◆ **New categories of threats.** The Act requires committees to address significant drinking water threats, but the regulation now also defines “low drinking water threats” and “moderate drinking water threats”.
- ◆ **“Prescribed instruments” subject to plans defined.** The regulation now lists the “prescribed instruments” that must comply (or have regard to) policies in source protection plans. The Ministry of the Environment considered a wide range of instruments before settling on this list. Many were rejected if they were temporary or could not be amended, or because they were not considered to be an effective tool for source protection. Nonetheless the regulation provides the Ministry with the authority to add to the list of prescribed instruments. Some “Prescribed Instruments” that must conform to Significant Threat Policies include
 - *Environmental Protection Act*
 - ▶ Certificates of approval for waste disposal sites
 - ▶ Certificates of approval for waste management systems
 - ▶ Renewable energy approvals
 - *Ontario Water Resources Act*
 - ▶ Permits to take water
 - ▶ Certificates of approval for sewage works

⁵ Section 43(1).

⁶ Section 57(1). Existing activities that are prohibited will have at least 180 days to be phased out; s. 57(2).

⁷ Sections 58(1) and 59(1).

⁸ Amendments to O. Reg. 287/07 made by O. Reg. 59/10 and O. Reg. 246/10 came into force July 1, 2010.

- *Safe Drinking Water Act*
 - ▶ Drinking water works permits
 - ▶ Municipal drinking water licences
- *Pesticides Act*
 - ▶ Permits for land exterminations, structural exterminations and water exterminations
- *Aggregate Resources Act*
 - ▶ Licences for pits and quarries and associated site plans
 - ▶ Aggregate permits and wayside permits and associated site plans
- *Ministry of Agriculture, Food and Rural Affairs*
 - ▶ Nutrient management strategies and plans
 - ▶ Non-agricultural source material plans
- ♦ **Source protection policy tools.** The main policy tools used by Act
 - mandatory compliance of planning decisions (official plan amendments, zoning by-laws, site plan agreements) with significant threat policies
 - mandatory compliance of prescribed instruments with significant threat policies
 - prohibiting certain activities in certain areas
 - mandatory risk management plans for certain activities in certain areas.

The regulation empowers source protection committees to use other “soft” policy tools in source protection plans, in addition to the above mandatory policies. These policy tools include

- stewardship programs
- best management practices
- pilot programs and other research initiatives
- incentive programs
- education outreach programs

- meteorological and climactic data collection requirements
- mandatory updating of spill prevention and contingency plans.⁹
- ♦ **Notice requirements.** Source protection committees must give formal notice that they have begun preparing their source protection plan to municipalities, First Nations, and anyone who the committee believes would be engaging in an activity that would be a significant drinking water threat. Further notice will be required to affected parties as source protection plans and policies are developed.¹⁰
- ♦ **Consultation requirements.** Source protection committees are required to publish a draft of their proposed source protection plan before it is submitted for governmental approval. Notice that the draft plan has been created must be distributed widely, and the committee must hold at least one public meeting to give members of the public an opportunity to ask questions and to make comments.¹¹
- ♦ **Exemptions to prohibited and regulated activities** The regulation exempts certain activities from some of the source protection regulatory tools available under the Act. Waste disposal sites with approvals under the *Environmental Protection Act* and sewage systems with approvals under the *Ontario Water Resources Act* or regulated by the Ontario Building Code are exempt from risk management orders, prohibitions and restricted land use tools under the Act.

The Act and regulations authorize a variety of approaches and tools that can be used to ensure that an activity does not become (or ceases to become) a significant drinking water threat.

1.3 WATER OPPORTUNITIES ACT

The *Water Opportunities and Water Conservation Act, 2010 (WOA)*¹², which received Royal Assent on November 29, 2010 will further focus municipal water and sewer operations on financial accountability, innovation, and conservation.

The purposes of the *WOA* are to

- ♦ foster innovative water, wastewater and stormwater technologies, services and practices in the private and public sectors
- ♦ create opportunities for economic development and clean technology jobs in Ontario, and
- ♦ conserve and sustain water resources for present and future generations.¹³

⁹ O. Reg. 287/07, s. 26.

¹⁰ See O. Reg. 287/07, ss. 35-39.

¹¹ O. Reg. 287/07, s. 41.

¹² *Water Opportunities Act* S.O. 2010, Chapter 10 Schedule 1.

¹³ WOA section 1(1).

The *WOA* will require municipalities and utilities to prepare and submit sustainability plans for their drinking water, wastewater and stormwater services. It also creates the Water Technology Acceleration Project (WaterTAP) to promote and assist the development and sale of home-grown water treatment and conservation technologies and services.

Consistent with recent provincial practice, much of the practical detail will be embodied in future regulation. For instance we still don't know what must be included in the municipal sustainability plans, and how they are to be reviewed and amended.

The *WOA* contemplates that a water sustainability plan may contain

- ◆ an asset management plan for the physical infrastructure
- ◆ a financial plan
- ◆ a water conservation plan (if the plan is for a municipal water service)
- ◆ a risk assessment and plan to deal with any risks that may interfere with the future delivery of the municipal service (including the risks posed by climate change)
- ◆ strategies for maintaining and improving the municipal service, including meeting future demand, the more efficient use of water, and cooperation with other municipal service providers
- ◆ such other information as may be prescribed in the regulation.¹⁴

The Minister may establish performance indicators and targets for water and sewer services, and such indicators and targets may vary for different municipal service providers and areas of the Province. If a regulated entity does not achieve an applicable performance target, the Minister may invite the regulated entity to provide information on the strategies and steps to be taken by the regulated entity to achieve the target and may direct the regulated entity to amend its municipal water sustainability plan.¹⁵

Regulations may be promulgated requiring public agencies (including municipalities and ministries of the Government of Ontario)

- ◆ to prepare water conservation plans, and
- ◆ to achieve water conservation targets established by the regulations

when acquiring goods and services or making capital investments, to consider technologies and services that promote the efficient use of water and reduce negative impacts on Ontario's water resources.¹⁶

¹⁴ *WOA* section 26(2).

¹⁵ *WOA* sections 28-31.

¹⁶ *WOA* section 37.

Regulations may be promulgated prescribing information that must or may be included on or with a municipal water bill.¹⁷

Amendments to the *Building Code Act, 1992* – which will require the Minister of the Environment to review the code standards for water conservation every five years – and Part II of the *Water Opportunities Act, 2010* (which deals with WaterTAP) will come into effect on a day to be named by proclamation of the Lieutenant Governor.

1.4 THE CHALLENGE OF INFRASTRUCTURE FUNDING: SWSSA, SWIM, AND FINANCIAL PLANS

Justice O’Connor recognized that full cost accounting and full cost recovery were key components to ensuring the sustainability of water and wastewater systems, and that financial plans should be prepared based on these components.¹⁸ The Provincial government’s role would be to set standards for full cost recovery and to determine the degree to which the government would review and approve these plans.¹⁹

Since Walkerton, the province introduced a Drinking Water Licencing Program that includes the requirement to prepare Financial Plans.²⁰ However, Financial Plans would not require full cost recovery until the *Sustainable Water and Sewage Systems Act, 2002* (SWSSA) is proclaimed into force. This does not appear to be imminent.

The Fix That Never Was: *Sustainable Water and Sewage Systems Act*

Mr. Justice Dennis O’Connor’s report of the Walkerton Commission Inquiry was submitted to the government in early 2002, at which point the province had already introduced the *Sustainable Water and Sewage Systems Act* (SWSSA).²¹ However, the SWSSA was never proclaimed into force, nor were the regulations necessary for the act to operate ever developed.

The SWSSA would have required municipalities to conduct an assessment of the full cost of providing the water and wastewater services and the revenue needed to provide them.²² These costs would have included source protection costs, operating costs, financing costs, renewal and replacement costs and improvement costs associated with extracting, treating or distributing water to the public, and “such other costs that may be specified by regulation”.²³ This list of general components lacks the specificity to guide municipalities. For example how are indirect costs, or costs that may also benefit other municipal activities treated?

¹⁷ WOA section 41.

¹⁸ *Ibid.* p. 300.

¹⁹ *Ibid.*

²⁰ Ontario Regulation 453/07.

²¹ 2002, S.O. 2002, c. 29.

²² Ss. 3(5), 4(5).

²³ Ss. 3(7), 4(7).

Municipalities would be required to prepare and implement plans describing how they intend to pay the full cost of providing those services.²⁴ This does not address the exceptional circumstances, as suggested by Justice O'Connor²⁵ when provincial subsidies are appropriate.

Finally, the SWSSA would have required municipalities to establish and maintain a dedicated reserve account, segregated from its general revenues, for revenue allocated to pay the full cost of providing water services or wastewater services.²⁶ Plans would be approved by the Minister of the Environment.²⁷

The Stopgap: the Financial Plans Regulation

Part of the intent of the unfulfilled SWSSA has been revived in the Financial Plans Regulation developed under the *Safe Drinking Water Act*.²⁸ The regulation came into force August 14, 2007. It requires municipalities to prepare financial plans when they apply for a municipal drinking water licence for a new system or apply for a renewal of a municipal drinking water licence.²⁹ For new systems, the financial plans must indicate that the drinking water system is financially viable, include a statement that the financial impacts of the drinking water system have been considered, and include details of the proposed or projected financial operations of the drinking water system.³⁰ Applications for amendments to licences require more detailed information.³¹ Eventually, all municipal drinking water systems will be required to create these financial plans, starting in July 2010.³²

The Ministry of the Environment has developed a guideline to assist municipalities in meeting their obligations under the Financial Plans Regulation.³³ The guideline covers topics such as long-term capital investment planning, asset management, and approaches to developing financial plans.

Although the Financial Plans Regulation fulfills one of the key requirements of the Walkerton Inquiry, it does not require full cost recovery as recommended. Instead, it merely requires that the system be “financially viable”. The Financial Plans Regulation was intended to be a stopgap measure until regulations under the SWSSA could be developed.³⁴

²⁴ Ss. 9(1), 10(1), 14.

²⁵ Part II Walkerton Report page 316.

²⁶ S. 22.

²⁷ S. 7.

²⁸ S.O. 2002, c. 32.

²⁹ O. Reg. 453/07, ss. 1(1), (2). See also *Safe Drinking Water Act, 2002*, s. 32(5) para. 2(ii).

³⁰ O. Reg. 453/07, s. 1(2) paras. 1, 2(i) and 4.

³¹ O. Reg. 453/07, s. 3(1).

³² O. Reg. 453/07, ss. 1(3) and 3(1). See also O. Reg. 188/07, s. 3.

³³ “Toward Financially Sustainable Drinking-Water and Wastewater Systems”, Ministry of the Environment, August 2007.

³⁴ See the Environmental Commissioner of Ontario’s 2008 report: *Getting to K(No)w, ECO Annual Report, 2007-08*, Toronto: The Queen’s Printer for Ontario, at 90-94.

Bill 237, the *Sustainable Water and Waste Water Systems Improvement and Maintenance Act, 2009*

Frustration with the lack of progress in this area resulted in Ontario Bill 237, a private member's bill, introduced by David Caplan (MPP, Don Valley East). The bill passed its second reading on February 18, 2010, but has since stalled.

SWIM proposed to establish the Ontario Water Board to oversee aspects of municipal water and wastewater treatment, and would require municipalities to prepare business plans for the provision of water services or waste water services (which would be submitted to the Board for approval).

Business plans under *SWIM* would contain, among other things, an assessment of the full cost of providing water or wastewater services to the public and a description of how the municipality intends to pay this full cost. The plan would also have to specify that full metering of customers will be used as a source of revenue, subject to any exceptions prescribed by the regulations.

However, none of *SWSSA*, *SWIM* nor the Financial Plans Regulation defines "full cost" as it applies to mandatory cost recovery. Without such standards to guide the approval of Business Plans, the objectives of any Water Board would be thwarted from the outset.

1.5 LAKE SIMCOE PROTECTION ACT

Eight municipalities obtain their drinking water from Lake Simcoe. Significant impacts have been observed on the water quality in Lake Simcoe due to human activities. Phosphorus is one of the more significant challenges to Lake Simcoe. Because of these impacts and the ecological importance of Lake Simcoe, Lake Simcoe has been the target of environmental protection and improvement efforts from the early 1980s. In December 2008 the Ontario Government enacted the *Lake Simcoe Protection Act (LSPA)*.³⁵ The *LSPA* was another step in a long process to protect and restore the health of the Lake Simcoe watershed.

This process moved another step forward with the creation and approval of the Lake Simcoe Protection Plan (LSPP) in 2009.³⁶ Though it is not legislation or a regulation, the LSPP has some enforceability. The *LSPA* contains provisions that allow for sections of the LSPP to be deemed as "designated policies" which have the force of law and must be followed.³⁷ Under the LSPP, approximately 48 sections have been deemed designated policies. Designated policies include

- ♦ requiring environmental assessments for the expansion or establishment of a new settlement area if it will require increasing the capacity of existing sewage treatment plants or establishing new sewage treatment plants³⁸

³⁵ S.O. 2008, c. 23 [*LSPA*].

³⁶ Available at: <http://www.ene.gov.on.ca/en/water/lakesimcoe/index.php>

³⁷ *Supra* note 3 at s. 5(4), 6(1), 6(9), 9.

³⁸ Policy 4.1-DP.

- ♦ restrictions on building new municipal sewage treatment plants³⁹
- ♦ requiring applications to expand or establish a major recreational use to include a recreation water use plan⁴⁰
- ♦ prohibiting development or alteration of vegetation protected zones outside existing settlement areas⁴¹
- ♦ requiring amendments to municipal official plans to make them consistent with the LSPP.⁴²

The *LSPA* also allows for sections of the LSPP to be designated as “have regard to”.⁴³ This would require the relevant authority to consider the LSPP and ensure that decisions are consistent with the LSPP.

In February 2010, the Ministry of the Environment (MOE) released three proposals under the LSPP. Each proposal targets a different area under the LSPP and would aid in the implementation of the LSPP. The three proposals are a Phosphorus Reduction Strategy (PRS), a feasibility study for water quality trading, and a discussion paper on a shoreline protection regulation.⁴⁴ To date, only the PRS has been finalized.

The PRS was finalized on July 7, 2010.⁴⁵ The PRS was created as a mechanism to achieve the reduction in phosphorus loading required under the LSPP - 44 tonnes per year or approximately 40% of current average loadings.

The PRS is required under the LSPP.⁴⁶ The PRS is not a legal document. The PRS is a review of the sources and quantities of phosphorus in Lake Simcoe. This is not to say that the PRS does not have legal implications. How? The PRS is one of the strategies for determining if the LSPP is adequate. If it is not, the PRS suggests changes to the LSPP to provide for lower phosphorus loading.

The PRS divides phosphorus sources by sectors, and then sets sector specific targets based on the proportion of current phosphorus loading. These targets can be made legally binding through their incorporation in the LSPP as designated policies. This can be seen with the current version of the PRS. The PRS alters a designated policy provision in the LSPP to require loading limits under Certificates of Approval for sewage treatment plants (STPs) to be lowered in 5 yrs or the next time the STP expands, whichever occurs first. The PRS sets “targets” for STPs to meet between now and 2015. In 2015 these targets will convert to legal limits, and Certificates of Approval will be amended.

³⁹ Policy 4.3-DP.

⁴⁰ Policy 5.6-DP.

⁴¹ Policy 6.1-DP.

⁴² Policy, 6.13-DP, 6.38-DP, 8.4-DP.

⁴³ *Supra* note 3 at s. 6(1), 6(7), 6(9).

⁴⁴ Phosphorus Reduction Strategy EBR #010-8986. Water quality trading feasibility study EBR #010-8989. Discussion Paper on the Shoreline Regulation EBR #010-9107.

⁴⁵ MOE, “Lake Simcoe Phosphorus Reduction Strategy” (June 2010) available online: <http://www.ene.gov.on.ca/publications/7633e.pdf>

⁴⁶ Policy 4.24-SA.

Under the current PRS, STPs are the only sector that will be legally affected. For all other sources of loading, the PRS provides only suggested actions - provisions that are neither legally binding nor require authorities to “have regard to.” However, the PRS is reviewed every five years. During this review, it will be determined if targets should be lowered or if sectors should be held accountable through imposing legal limits or reductions.

The PRS also allows for the creation of a water quality trading system. In essence, this is a proposal to implement a system normally associated with air emissions in the context of a watershed. The plan is similar to an emissions trading system, a popular option for regulating air emissions, such as greenhouse gases and sulphur dioxide. Under a water quality trading system (as with emissions trading systems), pollutants are commodities. If a discharger can reduce its pollutant output, the reduction can be sold as a credit to regulated dischargers who are unable to meet their regulated output levels. For example, STPs could reduce their phosphorus loading to meet the legal limits by paying for farmers to implement practices that will reduce phosphorus loading from their fields. This is generally less expensive for the exceeding discharger than to install new equipment or processes to reduce their own output. Over time, the buying and selling of credits can result in a net reduction in the pollutants being released. A similar system is already in place in Ontario under the South Nation Total Phosphorus Management Program.

Implementing water quality trading would require new regulations and some amendments to the LSPP. It is worth noting that the *Ontario Water Resources Act* already contains provisions (though not yet proclaimed in force) to allow for regulations establishing and governing water quality trading.⁴⁷ It is unlikely, however, that STPs will be buying credits any time in the near future. On July 7, 2010, the MOE announced that it will evaluate a number of issues raised in meetings with the public and key stakeholders, as well as by the Lake Simcoe Science Committee and the Lake Simcoe Coordinating Committee before deciding whether to move ahead with water quality trading. Additionally, the MOE has not yet committed to implementing water quality trading. The MOE’s decision will depend on the outcome of further consultations.⁴⁸

For now, it is important for all sectors responsible for phosphorus discharges to Lake Simcoe to be aware that they cannot simply look to the *Environmental Protection Act* or the *Ontario Water Resources Act* to determine their legal responsibilities. Instead, for those parties located within the Lake Simcoe watershed, there is another, potentially more stringent, layer of legal obligations imposed.

2 THE MISSING PIECES

Last year, the Province announced that all of Justice O’Connor’s 121 formal recommendations have been implemented, or at least the enabling legislation needed to implement them has been passed. However, the text supporting those recommendations also included a number of additional suggestions and sound guidance that would address several unresolved questions about drinking water.

⁴⁷ R.S.O. 1990, c. O.40 at s. 75(1.7).

⁴⁸ EBR Registry #010-8989.

Who will pay for source protection implementation?

So far, the Province has largely paid the costs involved in developing source protection plans. However, there is no commitment to cover costs to implement those plans.

The Walkerton Report recommended that the provincial government ensure that sufficient funds are available to complete the planning and adoption of source protection plans. Justice O'Connor did not recommend that these costs come exclusively from provincial coffers and recognized that components may have to come from municipal water rates charged to water users and effluent dischargers. Ontario has yet to develop a comprehensive plan to ensure the necessary funds are available.

When will full-cost accounting be implemented?

Justice O'Connor devoted a number of pages to 'full-cost accounting and recovery' and its importance for ensuring safe drinking water in Ontario. Justice O'Connor recognized the linkage between full-cost accounting and recovery and safe drinking water, and the importance of financial sustainability to the health of all Ontarians.

Coincident with the Inquiry, the province passed the *Sustainable Water and Sewage Systems Act*, which would require municipalities to institute full-cost accounting and recovery for water and wastewater services. Aware of this legislation, Justice O'Connor had expected implementing regulations would follow. Notwithstanding that the SWSA was passed back in 2002, the province has not passed the implementing regulations.

The new *Water Opportunities Act* would require water sustainability plans. These would provide for performance indicators and targets and financial plans and strategies to maintain and improve water service. These tools should assist the province and municipalities to implement full-cost accounting and recovery with less provincial prescription. They allow for consideration of issues faced by small, remote and rural municipalities.

Meanwhile municipalities are developing financial plans as required by the *Safe Drinking Water Act* regulations, currently being phased in, with the first plans this past July.

What about smaller communities?

It cannot be ignored that the Walkerton tragedy occurred in a small municipality. Studies have shown that Canadians in smaller remote communities are far less likely to have access to clean drinking water.⁴⁹

Small municipalities face numerous challenges in ensuring safe drinking water for their citizens. Smaller municipalities often do not have the resources required to adequately fund drinking water systems or hire and train qualified and knowledgeable system operators. Additionally, many smaller municipalities have their own drinking water systems – this prevents smaller communities from benefiting from economies of scale enjoyed by larger municipalities.

⁴⁹ Hrudey, S.E. 2008. "Safe water? Depends on Where You Live!" *Canadian Medical Association Journal* 178(8): 975.

This situation is complicated further by Ontario's water regulatory system, which focuses on monitoring water quality and initiating prosecutions where standards are not met.

Funding to ensure that operators are properly trained and understand how to monitor their system is lacking.

A recent report by Steve Hrudehy of the C.D. Howe Institute suggests that Ontario's regulatory framework should test the viability of water systems by examining the competence of the operator in understanding their drinking water system and measures needed to ensure safe drinking water.⁵⁰

Hrudehy further suggests that an effective mechanism to overcome the difficulties experienced by smaller communities is to consolidate smaller systems into 'larger more viable operations.' A similar conclusion was reached in the Watertight Panel Report. The Report found that the only way for smaller communities to keep the costs of providing safe drinking water to a manageable level while avoiding risks is to increase the scale and capacity of water systems through consolidation.⁵¹

This suggestion of consolidation has met with opposition from municipalities. As the Watertight Panel Report observed, there are concerns from smaller municipalities that local accountability and autonomy over water will be lost.

To date the province has not addressed the particular difficulties faced by small communities.

What about water quality on First Nation reserves?

Recognizing that the inquiry was under the *Ontario Public Inquiries Act*, Justice O'Connor made some recommendations at the request of First Nations. He encouraged the federal government and First Nations to adopt drinking water standards applicable to reserves that are at least as stringent as standards off reserve in Ontario.

Justice O'Connor observed that there were no legally enforceable drinking water standards for First Nations reserves. He also observed 22 high risk First Nation water systems. Things have changed very little in the past 10 years. There have been inexplicable delays, even in developing the simple enabling legislation. According to Indian and Northern Affairs Canada, as of March 2010, 114 First Nations communities across the country were under Drinking Water Advisories and 49 First Nations water systems were classified as "high risk" down from a peak of 193 high risk systems in 2006.

Ottawa hopes to make good on its long-standing promise that First Nation reserves will have access to the same quality of drinking water that the rest of us enjoy. On May 26, 2010, the federal government introduced Bill S-11, the *Safe Drinking Water for First Nations Act*, which will allow it to draft legally enforceable drinking water standards for

⁵⁰ Steve Hrudehy, "Safe Drinking Water Policy for Canada" (February 2011).

⁵¹ "Watertight: The case for change in Ontario's water and wastewater sector" (2005) Report of the Water Strategy Expert Panel.

First Nations communities. The enabling legislation would also allow for “regional flexibility,” with the enabling regulations likely to vary from province to province.

In an unusual move, the government’s proposed legislation was first tabled in the Senate, rather than the House of Commons. Background information on the Bill is posted prominently on the Indian and Northern Affairs Canada (INAC) website, and touted in government press releases, so we expect this is something the feds intend to pursue.

Although the federal *Protocol for Safe Drinking Water for First Nation Communities* already sets out standards for the design, operation and maintenance of drinking water systems, there is no legislative framework to ensure compliance. To fill this gap, Ottawa says it will review provincial and territorial regulations “to identify areas that can be adapted into federal regulations, while at the same time, allowing for regional differences, and recognizing the unique water challenges facing many First Nation communities.” Bill S-11 would allow the adoption of a wide range of regulations

- ◆ standards for the quality of drinking water on First Nation lands
- ◆ protection of sources of drinking water
- ◆ location, design, construction, modification, maintenance, operation and decommissioning of drinking water and wastewater systems
- ◆ monitoring, sampling and testing of drinking water and wastewater, and the reporting of results
- ◆ emergency measures in response to the contamination of water on First Nation lands
- ◆ training and certification of system operators
- ◆ making remediation orders where standards have not been met.

Provincial and territorial drinking water standards could be incorporated by reference into the federal regulations to be promulgated under the Act. These harmonized rules could enhance opportunities for First Nations to coordinate training or even share water treatment and distribution systems with off reserve communities.

The Act would automatically apply to all First Nation communities, except self-governing First Nations that are operating under comprehensive self-government agreements with the Government of Canada. However, self-governing First Nations could be made subject to the legislation following written agreement with the Minister.

If the legislation receives Royal Assent, Ottawa will consult with First Nations, regional First Nation organizations, the provinces and territories, and other stakeholders on the development of the regulatory regime. These discussions would also address compliance and enforcement mechanisms. The proposed legislation follows at least some of the recommendations made by the Office of the Auditor General, the Expert Panel on Safe Drinking Water for First Nations, and the Standing Senate Committee on Aboriginal Peoples.

The Bill has already triggered some opposition. According to Assembly of First Nations National Chief Shawn A-in-chut Atleo, “First Nations [would] need infrastructure, training and support to meet the requirements of the new regulations. Regulations without the capacity and financial resources to support them will only set up First Nations to fail and to be punished for this. In my view, we must address the ‘capacity gap’ as well as the ‘regulatory gap’.”

Chief Atleo also said that Bill S-11 could negatively impact First Nations water rights. According to section 6 of the proposed legislation, regulations made under the Act prevail over any laws or by-laws made by a First Nation, as well as over the land claims agreement or self-government agreement to which a listed Aboriginal body is a party.

First Nations Water and Wastewater Action Plan Extended

At the same time Bill S-11 was introduced, Ottawa announced a two-year extension until 2012 of the First Nations Water and Wastewater Action Plan to invest an additional \$330 million in water and wastewater facilities. The Action Plan is also funding the National Assessment of First Nations Water and Wastewater Systems to provide a more accurate account of water and wastewater needs.

Between 2006 and 2012, Ottawa will have invested over \$2.3 billion in First Nations water and wastewater infrastructure, including the First Nations Water Management Strategy (\$270 million), the Plan of Action for Drinking Water (\$60 million) and the First Nations Water and Wastewater Action Plan (\$660 million).

Another \$183 million was allocated to drinking water and wastewater infrastructure projects to address health and safety priorities in 18 First Nation communities as part of Canada’s Economic Action Plan.