

Agenda Item # Page #

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TO:	CHAIR AND MEMBERS CIVIC WORKS COMMITTEE MEETING ON OCTOBER 22, 2012
FROM:	JOHN M. BRAAM, P.ENG. MANAGING DIRECTOR, ENGINEERING AND CITY ENGINEER
SUBJECT:	THE STANDARD OF CARE PROVISION IN ONTARIO'S SAFE DRINKING WATER ACT, 2002

RECOMMENDATION

That, on the recommendation of the Managing Director, Engineering and City Engineer, the following report **BE RECEIVED** for information with respect to Section 19 of Ontario's Safe Drinking Water Act, 2002, commonly referred to as the "Standard of Care provision".

BACKGROUND

Following the Walkerton drinking-water tragedy in 2000, the Government of Ontario established a public Inquiry headed by Mr. Justice Dennis O'Connor. The first part of the Inquiry's mandate was to report on the events in Walkerton and the causes of the tragedy. The second part of the mandate was to make recommendations to ensure the safety of drinking water across the province. Justice O'Connor made 93 recommendations in Part 2 of the Report of the Walkerton Inquiry, and the provincial government has addressed these recommendations through the Safe Drinking Water Act, 2002.

Recommendation #45 of the O'Connor report is as follows: *"Given that the safety of drinking water is essential for public health, those who discharge the oversight responsibilities of the municipality should be held to a statutory standard of care."*

This recommendation was addressed by Section 19 of the Safe Drinking Water Act, 2002, which is commonly referred to as the Standard of Care provision. Though introduced in 2002, Section 19 comes into force on December 31, 2012, and is reproduced as follows:

Standard of care, municipal drinking water system

19. (1) *Each of the persons listed in subsection (2) shall,*

(a) exercise the level of care, diligence and skill in respect of a municipal drinking water system that a reasonably prudent person would be expected to exercise in a similar situation; and

(b) act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the municipal drinking water system.

Same

(2) *The following are the persons listed for the purposes of subsection (1):*

1. *The owner of the municipal drinking water system.*

2. *If the municipal drinking water system is owned by a corporation other than a municipality, every officer and director of the corporation.*

3. *If the system is owned by a municipality, every person who, on behalf of the municipality, oversees the accredited operating authority of the system or exercises decision-making authority over the system.*

Agenda Item #	Page #

Offence

(3) *Every person under a duty described in subsection (1) who fails to carry out that duty is guilty of an offence.*

Same

(4) *A person may be convicted of an offence under this section in respect of a municipal drinking water system whether or not the owner of the system is prosecuted or convicted.*

Reliance on experts

(5) *A person shall not be considered to have failed to carry out a duty described in subsection (1) in any circumstance in which the person relies in good faith on a report of an engineer, lawyer, accountant or other person whose professional qualifications lend credibility to the report.*

DISCUSSION

The owner of a municipal drinking water system, and every person who, on behalf of the municipality, oversees the accredited operating authority of the system or exercises decision-making authority over the system is obligated to: (a) exercise the level of care, diligence and skill in respect of a municipal drinking water system that a reasonably prudent person would be expected to exercise in a similar situation; and (b) act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the municipal drinking water system.

Justice O'Connor explained his Standard of Care recommendation as follows:

"In light of municipal ownership of water systems, municipal councils are responsible for ensuring the effective management and operation of their water systems. In some cases, councillors will assume this oversight responsibility directly; in others, they may delegate aspects of the oversight function. Given the importance of drinking water for public health, those responsible for discharging the oversight function of the municipality (e.g., the council or a committee of council) should be held to a statutory standard of care that recognizes and formalizes their responsibilities. These individuals should be required under the Safe Drinking Water Act to act honestly and in good faith with a view to the protection of the safety of the consumer, and to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. This standard of care is similar to the standard of care for directors of corporations under the various corporations' statutes.

Depending on the circumstances, the types of oversight responsibilities to be discharged will include: adopting an overall policy for the system, hiring senior management or contracting with an external operating agency, and periodically auditing or evaluating the performance of the operating agency. Where those who are responsible lack the confidence in their expertise in a particular area, they would be expected to obtain outside expert advice. As with a board of directors of a corporation, obtaining and following proper expert advice can satisfy the statutory standard of care. Also, the fact that a municipality has an accredited operating agency will do much to satisfy the standard of care."

To assist municipal Councillor's in understanding their responsibilities under the Safe Drinking Water Act, the Ontario Ministry of the Environment (MOE) development a guidance document titled "Taking Care of Your Drinking Water – A Guide for Members of Municipal Councils" which is available online at:

http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_086811.pdf .

Hard copies of this guide have also been provided to Council in conjunction with this report.

Agenda Item #	Page #

Although Municipal Councils are generally not involved in the day-to-day operation of water systems, the provision of resources is typically a Council responsibility. The MOE Guide states that “A sustainable system is one that can adequately cover current operating costs, maintain and repair its existing asset base, replace assets when appropriate, fund future growth and enhancements to services, and account for inflation and changes in technology”. The guide also states in part: “It is important that members of municipal council and municipal officials with decision-making authority over the drinking water system understand that they are personally liable, even if the drinking water system is operated by a corporate entity other than the municipality.” The guide further states: “When an incident occurs that may constitute a breach of the statutory standard of care, the MOE will initiate a response that may include an investigation and gathering of evidence to determine if charges should be laid. In a case where charges are laid, it is up to the courts to determine if an offence has been committed and if penalties or fines will be imposed. This procedure is followed in any potentially serious breach of MOE statutes.”

Penalties for conviction under this offence include maximum fines as high as \$10,000,000 for a corporation to \$7,000,000 for individuals, as well as imprisonment for a term of not more than five years less a day.

CONCLUSIONS

Commencing December 31, 2012, Section 19 of the *Safe Drinking Water Act, 2012* will be in force. It will impose a statutory standard of care on the “owner of a municipal drinking water system, and every person who, on behalf of the municipality, oversees the accredited operating authority of the system or exercises decision-making authority over the system”. This standard of care will require that such persons (a) exercise the level of care, diligence and skill in respect of a municipal drinking water system that a reasonably prudent person would be expected to exercise in a similar situation; and (b) act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the municipal drinking water system.

Justice O'Connor recognized actions that can be taken to satisfy the standard of care requirement, including obtaining and following proper expert advice, and ensuring that the water system is operated by an accredited operating authority. As has been previously reported to Council, the City of London Water Operations and Water Engineering Divisions have been recognized as an accredited operating authority for the City of London Water System.

This report has been reviewed by the City Solicitor's Office.

PREPARED BY:	RECOMMENDED BY:
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