

Municipalities: Lessons from Walkerton

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What Justice O'Connor said

- The Town of Walkerton lacked the legal power to control land use on the adjoining property - because the farm was in another municipality
- There was a PUC operating the waterworks and so it was the PUC, not the Town that had expropriation power

Implications

- Cooperation with adjoining municipalities (will be required with watershed based source protection plans)
- Consideration of use of expropriation powers beyond municipal boundaries for purposes related to making, maintaining and protecting utility works

When there's a PUC

- The Public Utilities Act section 41(1) provided that the commission, not the municipality, possessed all the powers, rights, authorities and privileges that otherwise the municipality would have
- However, the mayor was ex-officio on the PUC and failed to follow up on the 1998 inspection report by M. Zillinger; did not bring to council
- Town's control was rather limited - to dissolving the PUC

Boil Water Advisory

- “Brockton’s mayor and therefore the municipality did not take an active role when the outbreak first came to light”
- Medical officer of health did not seek mayor’s assistance in publicizing the BSA; neither did the mayor offer any
- Mayor did nothing after McQuigge called for two days

BWA Implications

- Commissioner did not fault mayor but said others in his position might have done more
- Examples would have been to advise on how best to publicize in the community
- Contacting fire, police
- Telephoning the utility manager
- Health Canada epidemiologist testified hundreds of illnesses would have been prevented with earlier notice

Emergency Plan

- Brockton did not invoke their emergency plan (had been passed 7 months earlier)
- Commissioner said their duty was only to consider whether to do so
- Biggest advantage to doing so would have been to help publicize the Boil Water Advisory
- By the time council convened, BWA was well known

Boards of Health and Health Units

- Municipalities provide part of the funding
- Municipal representatives sit on the board
- Board of health / local medical officer of health role in the disaster was key
- “Medical officer of health independence from local political process is an essential component of the public health system”

Health Unit / MoH ongoing role

- Makes the health determination as to potability of water
- Issues orders and advisories such as boil water advisories
- Data sharing is essential
- Receives adverse water reports
- Regular communications between MoH / health unit, utility, municipality and MoE seen as critical
- Must be some overlap in oversight as a safety measure

Key operational questions

- What is the quality of the source? Is it ground water under the influence of surface water?
- Continuous chlorine and turbidity monitors would have prevented most of the outbreak
- Certificates of approval will be time limited and subject to a renewal process

Voluntary vs Mandatory Abatement

- MoE failed to follow up with Walkerton's 1998 inspection
- MoE also failed to make use of mandatory abatement measures after the 1998 inspection to address the operational problems
- “After the 1998 inspection report, the MoE should have invoked mandatory measures to require the PUC to maintain minimum chlorine residual”

Implications

- Commissioner found one of the consequences of repeated use of voluntary approach was to reinforce Stan Koebel's belief that the MoE requirements, found in guidelines, not in legally binding regulations, were not essential to the safety of drinking water - supported Mr.. Koebel's misplaced confidence in the safety of the water even when the PUC was not complying

Trust and Safety Culture

- One of the repeated responses to cross examination on issue of safety culture was that “we trust them”
- A belief that questioning and seeking validation of responses indicates mis-trust
- A need to understand oversight role
- Importance of verification
- Importance of redundancy so failure in one part of system does not result in tragedy

Operator certification & training

- Both Reg. 459/01 as amended and proposed Safe Drinking Water Act have tougher requirements
- Will no longer be any grandparenting
- Critical role for councilors to ensure highly qualified staff
- New training requirements - must be supported with time and money

Importance of source

- Direct source of contaminant to Walkerton was from manure stored and spread on adjoining fields to shallow well
- That farmer followed “best practices” in most respects; but did not know there was a municipal well adjacent to his farm!
- Many ways for contamination to reach groundwater

Contamination pathways

- Controversy about overland flow
- Infiltration through soils
- Fence post holes and cracks in surface soils
- Ditches, trenches, pits all make travel time quicker
- Karstic limestone - very fast flow from far distances
- Flows change seasonally
- Unexpected findings of surface impact even in deep wells at Walkerton

Protection against what?

- Severe events are becoming more common
- With climate change, this trend will increase
- May need re-evaluation of 100 year storm criteria
- Redundancy in the monitoring, warning and shut-down systems essential
- Stand-pipe storage capacity issues

Source Protection - 1st Barrier

- Justice O'Connor reiterated the importance of the multi-barrier approach to drinking water protection
- Source protection is the first barrier
- Province has established Source Protection Advisory Committee on which I sit - to develop a framework by the end of January; legislation expected by spring

Integrated approach

- Source protection framework will have to be integrated with Nutrient Management Act regulations and farm plans
- Water taking permit approvals
- Development approvals
- Emissions to water approvals
- Will be Conservation Authority / municipal - led development of watershed based source protection plans
- Vulnerable areas will require consistency

Funding the system

- CELA advocates including source protection in Bill 175
- CELA also advocates a new levy on water takings and emissions to water to fund source protection, including conservation
- Must protect small systems and low income residents
- Otherwise lots of capacity for full cost recovery in existing systems

What's ahead?

- Passage of Nutrient Management Act phase 1 regulations
- Proposals for phase 2 regulations (beginning now)
- Safe Drinking Water Act and Bill 175 both at Committee
- Watershed based Source protection plans framework and legislation
- Impacts on development - e.g. new provision in SDWA to consent to private water systems

Pollution Prevention

- Municipalities will also be required to respond to federal requirements such as the Canadian Environmental Protection Act pollution prevention measures
- Federal government is consulting now on municipal waste water effluent strategy - targeted at ammonia and chlorinated by-products - will have implications for water treatment and wastewater treatment

CONCLUSION

- Municipalities have a fundamentally significant role in protecting their residents from impacts of contamination
- From nutrient management by-laws to pesticide by-laws, municipalities must decide on local approaches
- Supreme Court of Canada reinforced the appropriateness of this role in the Hudson case

Responsibility and Constraint

- At the same time, there are many existing and new constraints - NMA prevails over inconsistent by-laws; Bill 175 will require approval of full cost financing reports and plans for water and waste-water; new water standards are in regulation and are not voluntary; a full range of tools for land use control for water protection are still to be developed

Opportunity ahead

- With the new Municipal Act and a completely different basis for municipal action, municipalities now have the opportunity to take new approaches to meet all of their obligations and responsibilities for the best protection of their communities
- The next few years will see on-going change to relevant legislation and responsibilities