

# Safe Drinking Water Act 2002



## Duty of Care and Enforcement

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# Overview

- **Key Messages**
- **The Duty of Care**
- **What now?**



# SDWA Key Messages

- You're Stan Koebel
- Cost doesn't matter
- (Almost) Zero Tolerance



# You're Stan Koebel

- Can't be trusted
  - Detailed rules
- Must be forced
  - High penalties
- Lots of oversight / reports



# (Your) Cost Doesn't Matter

- High standards for all
- It's not what you can afford; it's what you need to do a (near perfect) job
- Forcing changes in municipal priorities



# What Cost?

- Predictable costs
  - Staff, training, equipment, analyses, energy, chemicals, paperwork
- Unpredictable costs
  - Changing standards
  - Downloading
  - Orders
  - Enforcement



# Cost

- Your job to get it back through water rates or taxes
  - Full Cost Recovery
    - Complex accounting
    - Crystal ball
- Who gets the heat?



# How much risk?

- Walkerton Report (Part Two, 3.2):
  - “The goal of any drinking water system should be to deliver water with a level of risk that is so negligible that a reasonable and informed person would feel safe drinking it”





# How much risk?

- “the reasonable and informed public will not feel safe with anything other than the most imperceptible level of risk...”
  - Social Amplification of Risk
  - Ontario Drinking Water Risk Perception Study



## (Almost) Zero Tolerance

- Rigid requirements
- Very high penalties
- High duty of care
- Rigorous enforcement through criminal courts



# Fines

- Durham: \$10,000 + VFS
  - alum off for 6 hours
- Chatham-Kent: \$10,000
  - 2 low chlorine residual
- Timmins: \$32,000
  - 4 missed samples



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# Duty of Care: s. 19

- In force January 1, 2013
- Who will owe the duty of care?
- What will you have to do?
- What if you don't meet it?



# Whose duty?

- Municipality
- Council
- Line Management
  - How far down the line?



# How much?

- S. 19: Each must:
  - (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.



# Who can I rely on?

- Owner can assign responsibility to an Operating Authority
- But, Owner has ultimate responsibility for:
  - Compliance with law
  - Safety of the water





# Who can I rely on?

- No one can do everything
- Council v. staff
- Limited right to rely on experts



# Breadth of Duty

- How much care is enough?
- Whose acts are we responsible for?
- What about source protection?



# Due diligence?

- Similar to “due diligence”?
  - All reasonable care to prevent an offence
  - Hundreds of cases
  - Similar to civil negligence
- Is it different now?
  - “*ensuring*”
  - “*safety*”



# Understanding Due Diligence

- *R. v. Sault Ste. Marie* (SCC)
- Scale of caring
- More care for:
  - Bigger risks
  - More probable events



# Responsible for who/what?

- Control is vital. It may be exercised by “*supervision or inspection, by improvement of his business methods or by exhorting* those whom he may be expected to influence or control.”
- The purpose is to “put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale.”



# Proving Due Diligence

- Onus of proof of due diligence:
  - on you,
  - on a balance of probabilities



# The Role of Benchmarks

- How much care is enough?
- What does the judge know?
- What do other people think is enough?
  - Custom of the trade
  - Statutes / regulations
  - Government reports
  - Learned texts / articles
  - Codes of Practice



# Developing a Benchmark?

- Relevant
- Helpful
- Authoritative
  
- Can you help each other?





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# What now?

- Managing Liability:
  - Reduce
  - Shift
  - Pool



# Reduce Liability:

- Good environmental management
  - Overall plan
  - Risk management
  - Benchmarks
  - Documentation
  - Resources
  - Training



# Pulling it together

- Environmental Management Systems
  - ISO 14001
- Integration
- Documentation
- Verification



# Shift Liability:

- Limited potential
- Insurance / Indemnification
- Limited right to rely on experts; must ask lots of questions; ensure they have insurance
- Source water protection: Give notice to Province?



## Pool Liability:

- Joint agreement on benchmarks
- Self-insurance, perhaps through AMO?
- Limited use for prosecution



# A few last words

- Expect surprises
- Stick together
- The province is not your friend

Questions?

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