

May 26, 2003

The Hon. Joyce Murray
Minister of Water, Land and Air Protection
PO Box 9047
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Victoria, BC V8W 9E2

Dear Minister,

Provincial/Territorial Regulatory Instruments and the *Fisheries Act* of Canada

At the *2nd National Conference on Organic Residuals* in Penticton last month you described the development and use of a range of instruments (from Guidelines and Best Management Practices to Regulations) that are being developed in BC to guide municipalities in addressing their water and wastewater responsibilities. You clearly favour Guidelines and BMPs and wish to use Regulations only where necessary or possible. Many of your counterparts in the other Provinces and Territories are following the same enlightened approach.

This approach leaves municipalities in jeopardy of prosecution under Subsection 36 (3) of the federal *Fisheries Act*, which simply makes it an offence to discharge a deleterious substance to a fish habitat.

CWWA asks you as President of CCME, to raise this subject with the Council and particularly with The Hon. David Anderson whose Department is responsible for enforcing this provision of the *Act*.

CWWA's role it is to represent the interests of municipal water and wastewater systems across Canada in respect to national and federal legislative, policy and program initiatives. Recent court cases under the *Fisheries Act* across the country clearly make this a "national" as well as a "federal" policy issue.

We have raised the issue with Environment Canada staff - seeking from them some guidance as to what may be acceptable designs and practices in regard to the management of deleterious substances by municipal water and wastewater services - but to no avail. Unlike the Provinces and Territories, Environment Canada is unwilling or unable to publish guidelines or best management practices and claims that Regulations would take somewhere between 5 and 8 years to develop.

Court Decisions make it clear that conformity with sound engineering principles, best management practices or even Provincial or Territorial Regulations does not provide a defense of due diligence - if there was a discharge of a deleterious substance, the provisions of Subsection 36 (3) of that Act have been breached. It is not even necessary to show an environmental impact occurred, merely that a release occurred. Lack of funds or priority of other investment needs also are not taken into account.

Environmental action groups (Sierra Legal Defense Fund and various Riverkeepers alliances) are taking an increasing interest in using the *Fisheries Act* to pursue polluters. Charges have been allowed by Environment Canada on information supplied by such groups as well as by their own investigations. However, there is no consistency in enforcement within the same Region, let alone across the country. Neighboring municipalities following the same practices as a municipality that has been charged, may not be charged. Notably, many federal facilities discharging untreated wastes into the environment have not been charged, yet Environment Canada staff are aware of these discharges.

The CWWA is greatly concerned that municipalities are now looking over their shoulders to determine not if they are at risk of prosecution but when they will be prosecuted under the *Fisheries Act*. All wastewater effluents, all storm water outlets, and even water treatment plant back flushes to the source water, are likely to include “deleterious substances” if sampled and tested under laboratory conditions of immersing rainbow trout in a aquarium of these liquids. Mixing zones and the capability of free swimming fish to avoid deleterious substances are ignored in this simple test.

As you know, municipalities and the other levels of government are struggling to find the capital funds necessary to address water and wastewater infrastructure needs. Allocating whatever scarce funds are available to us should be on the basis of rational public health or environmental health decision-making, taking into account risk-benefit assessments to optimize the investment decisions. They should not be on the basis of fear of prosecution or in accordance with a narrowly taken Court Order.

Minister, a policy decision and direction of the Canadian Council of Ministers of Environment is needed on this issue.

- Will Environment Canada publish enforcement guidelines for Subsection 36 (3) in respect to municipal water and wastewater discharges to the environment respecting discharges allowed under provincial or territorial operating certificates or regulations?
- Will Environment Canada immediately issue an *interim* regulation in respect to Subsection 36 (3) setting levels for deleterious substances at levels above current average measured levels?

Yours sincerely,

T. Duncan Ellison
Executive Director

cc: CCME Ministers
Hon David Anderson, Minister of Environment Canada
Hon Robert G. Thibault, Minister of Fisheries and Oceans
CWWA Board of Directors

Attachment:

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KEY COURT DECISIONS UNDER THE *FISHERIES ACT*

In the Dawson City case in 2003, the Court in addition to imposing a fine, ordered the City to build a Secondary Wastewater Treatment plant by September 1, 2004.

In the Iqaluit case in 2002, the City of Iqaluit was found guilty of discharging a deleterious substance from a sewage lagoon due to an overflow resulting from the Spring snow melt. The Court found in this case that it was not necessary even to demonstrate that environmental harm had occurred just that there was potential for harm. It noted that it was “known” that combined sewer overflows (CSOs) were deleterious to fish.

In other earlier cases (e.g., Commissioner of the Northwest Territories, 1993 and the District of North Vancouver, 1982) the question of the design of systems, and the costs of installing fail-safe systems were briefly discussed but found to be outside the purview of the Court: the question for the Court was simply, was there or not a discharge of a deleterious substance? In these cases, the Judge noted that the design used was intended to fail on occasion a fact known to the operator, and pointed out that the issue of costs and failure prevention was not a legal matter, but a political one.

Commentary

Provincial and Territorial policy makers and regulators and their respective municipal constituents are clearly moving towards risk-based decision making which recognizes that we cannot afford to protect against all risks all the time, nor that we can ever achieve an absolutely risk-free system (this applies to many aspects of society and modern life). There are implicitly and even explicitly within the current policy and regulatory regimes of the Provinces and Territories governing water and wastewater systems, acceptable or necessary risks, although the clear attempt is to minimize these. This philosophical approach is followed in many areas of public safety and public health.

Some provinces require chlorination of wastewater effluents to protect down stream users - there is a need to balance decisions made for public health reasons with environmental risks.

The composite package of instruments used in BC and in the other jurisdictions attempts in the best possible way to provide guidance to municipalities facing widely varying situations, where one size fits all is not possible. The *Fisheries Act* approach however, is that one size does fit all. The issue is not what did you do to prevent a deposit or limit deposits, but “did you or did you not deposit a deleterious substance?” The fact that some municipalities may be prosecuted, while others (including federal agencies) may not, also is of concern.

Charges under the *Fisheries Act* can be initiated by any person, although they require confirmation and support by federal authorities to proceed. It is in this area that we have asked Environment Canada to provide guidance and have been refused. Several recent charges have resulted from self-appointed environmental activists and groups. The City of Moncton is currently facing charges for leachate from a solid waste dump site into a tidal basin that was prompted by the Peddicoddiac Riverkeepers, Inc., one of a number of similar “Riverkeeper” groups being formed across the country with the aim of preventing pollution of waters - an aim shared by all, but not to be achieved by prosecution under the *Fisheries Act*. The Sierra Legal Defense Fund has been and remains active in respect to deleterious substances. Both rely on the simple (standard) test of determining if rainbow trout in an aquarium die from exposure to the effluent, without recognizing that mixing zones and free swimming fish are the real world

situations.

Frankly, this is an unacceptable position for municipalities. As prosecutions are pursued and fines (and potentially jail sentences) are imposed on municipalities and their senior staff, the uncertainty will lead to decision-making by fear, and not by common sense and science or by attempts to optimize the benefits of limited investment funds. There are limited funds available for environmental investments - the question is where should those funds be invested and for what purposes? The investment strategies should follow the objective of maximizing environmental health or public health benefits overall, and not to meet particular concerns while ignoring others.

CWWA believes that this issue must be addressed at the policy level by the Provincial and Territorial Ministers responsible for the environment and indeed by those responsible for municipal affairs.

CWWA believes that if the political will is present, an interim regulation under the *Fisheries Act* could be developed and implemented in short order, while any longer term solution is negotiated. Failing that, a clear statement of enforcement policy recognizing current provincial and territorial requirements would be beneficial and provide some level of certainty. The interim regulation, valid for a period of say 5 or 8 years, would protect the majority of municipalities from harassing prosecutions and allow the sector and its provincial, territorial and federal overseers to develop a rational, scientific approach to discharges taking into account environmental impact assessments and site specific conditions.