Council Direction:

On Wednesday April 25, 2012, City Council approved item 4 of Board of Health Report 12-003 which reads as follow:

4. Water Fluoridation: New Data and Recent Developments
BOH08024(c) (City Wide) (Item 7.1)

That the General Manager of Public Works, and Legal Services, report to the Public Works Committee respecting the pending changes to the Safe Drinking Water Act

This Information Report is in response to the above direction.

Information:

Background

During the Board of Health meeting of April 16th, 2012, the Board of Health heard several delegations respecting the use of fluoride in Hamilton’s municipal drinking water supply. During the debate, the new standard of care obligations relating to the Safe Drinking Water Act
Drinking Water Act were raised by some of the delegations, and as a result, the Board of Health asked that a report be given to Public Works Committee to discuss those obligations. This report elaborates on this legislation and Council’s responsibilities in this regard.

Safe Drinking Water Act and Standard of Care


Section 14 sets out the requirements for agreements to be entered into between the owner of a drinking water system and an accredited operating authority. As the City of Hamilton is currently both the owner and operator of its municipal drinking water system, section 14 is not applicable. However, it is interesting to note that the provisions of section 14 expressly state that an owner of a municipal drinking water system cannot delegate the standard of care duty set out in section 19 of the Safe Drinking Water Act. In fact when an accredited operating authority is involved, section 14 also states that the owner of the municipal drinking water system has some additional duties with respect to that operating authority.

It should be noted that for the purposes of the Safe Drinking Water Act and this report, the City’s “Operating Authority” consists of the staff within the water and wastewater sections of the Environmental & Sustainable Infrastructure Division.

Section 19 sets out the standard of care requirements which will be a legal obligation of all persons who have oversight responsibilities for municipal drinking water systems in Ontario. This includes all owners of municipal drinking water systems and every person who, on behalf of the municipality, oversees the operating authority of the system or exercises decision-making authority over the system. Therefore this standard of care can extend to all members of City Council as well as applicable City staff within the Operating Authority (referred to as “Owners and Managers” in the remainder of this report). The specific section 19 standard of care requirements to come into force on December 31, 2012 are set out 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. 2002, c.32, s. 19 (1).

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. 2002, c. 32, s. 19 (2).

**Offence**

(3) Every person under a duty described in subsection (1) who fails to carry out that duty is guilty of an offence. 2002, c. 32, s. 19 (3).

**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. 2002, c. 32, s. 19 (4).

**Reliance on experts**

(5) A person shall not be considered to have failed to carry out a duty prescribed 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. 2002, c. 32, s. 19 (5).

The standard of care provisions in the *Safe Drinking Water Act* are essentially a due diligence requirement for all Owners and Managers of municipal drinking water systems. There are potentially significant penal consequences to a person who is convicted of an offence under the standard of care provisions.

It is important to note that the standard of care requirements in the *Safe Drinking Water Act* recognizes that Owners and Managers can rely on external experts for guidance on operational matters. These experts may include engineers, lawyers, accountants or other persons with professional qualifications, such as medical professionals. If, during the course of executing their duties, Owners and Managers act in reliance on a report of such a professional, subsection 19(5) of the *Safe Drinking Water Act* provides that a person shall not be considered to have failed to carry out a standard of care duty set out in subsection 19(1). An example of where reliance on experts has already taken place is the fluoridation of water issue where to date, members of Council have been relying on reports of the City’s Medical Officer of Health, as well as other provincial and federal health officials as experts in public health matters. City staff will continue to obtain third party expert reports when necessary in order for both City staff within the Operating Authority and members of Council to make informed decisions on matters that arise with the City’s drinking water systems.

As a result of the coming into force of Sections 14 and 19 of the *Safe Drinking Water Act*, it is important to note that the public enforcement rights already contained in Ontario Regulation 242/05 will also become applicable to those sections on December 31, 2012. In particular, pursuant to subsection 7(1) of Ontario Regulation 242/05, “Any person resident in Ontario who believes that the Act, or a regulation or instrument under
the Act has been contravened may submit an application to the Director for an investigation of the alleged contravention by the enforcement branch.” It will then be up to the Director to determine whether an investigation is required. Timelines are set out in the regulation for the Director to follow upon receiving such an application.

The role of members of Council has been one of both oversight and decision-making with respect to the provision of safe drinking water to the residents of the City of Hamilton. The introduction of Sections 14 and 19 to the Safe Drinking Water Act does not change this role; rather it codifies it in the legislation so that it is now a statutory obligation re-enforced with potential penalties for individuals as well as corporations.

**Ongoing Communications and Information to Council**

City staff within the Operating Authority assist members of Council in meeting their responsibilities under the Safe Drinking Water Act. For example, they ensure that:

1. staff meet the competence requirements under the Act;
2. accreditation of the City laboratory and the Operating Authority is obtained and maintained;
3. training programs for members of Council and applicable City staff are provided;
4. the required policies and plans are developed, implemented and updated as required; and
5. drinking water reports are prepared.

As members of Council are aware, the following policies and plans have already been approved by Council and put into place:

- Drinking Water Quality Management System Policy
- Drinking Water Quality Management System Operational Plan
- Water Infrastructure Financial Plan
- Source Protection Plans and Policies required under the Clean Water Act (pending final Ministry of the Environment review and approval).

Updates of the above policies and plans will be presented to Council for future approval as required.

The following reports are also provided to members of Council as they are prepared or received:

- Annual Drinking Water Summary Report
- Annual Drinking Water Management System Summary Report
- Ministry of the Environment Drinking Water Inspection Reports
- Council Update Reports related to current drinking water issues (e.g. Accreditation for City’s Drinking Water Systems, Corrosion Control Plan - Woodward Sub-System of Hamilton Drinking Water System)
- Annual Rate Book

Further, updates are provided when significant drinking water system events are involved.

Lastly, it should be noted that City staff within the Operating Authority have the professional qualifications and expertise to prepare the majority of the policies, plans
and reports which are provided to and relied upon by Council. However, when external professional assistance is required, other experts within the City as well as third party experts have been, and continue to be, retained to provide assistance to both the Operating Authority and to members of Council on matters related to specific drinking water system issues.

**Training for Members of Council on Standard of Care Requirements**

As noted above, training for members of Council will assist in better understanding their responsibilities under the *Safe Drinking Water Act*.

Due diligence training of members of Council and relevant City staff was provided in May 2008. This training focused on the legislative framework for drinking water, roles and responsibilities for owners and operators of drinking water systems, requirements of the DWQMS Standard and the upcoming standard of care requirements described in this Information Report.

Given the pending standard of care requirements, the Operating Authority is hosting mandatory training for all members of Council as well as applicable City staff on the standard of care provisions. This training began in June, 2012 and will continue during the fall of 2012.