

Of the First Water

The rights and roles of First Nations in source protection and water quality.

By Bryony Halpin



Josephine Mandamin, leader of the Mother Earth Water Walk. A still from Kevin McMahon's *Waterlife* documentary about the plight of the Great Lakes.

In the wake of such crises as Walkerton and Kashechewan, Canadians have become acutely aware of the importance of effective water management. Water is critical for the economic and social development of all Canadian communities, large and small.

Water is also at the core of traditional and spiritual life for First Nations. However, some four years after Kashechewan made it clear that government policy must ensure that aboriginal peoples attain a comparable level of water quality to Canadians living in other communities, there is still no legislative and regulatory framework that applies to drinking water and wastewater on reserves. Although the federal government has pledged to remedy this situation and is in the process of developing a legislative framework for drinking water and wastewater on reserves, progress has been tremendously slow and the required resources have not been forthcoming.

At the same time, economic development such as mining, forestry, petrochemical processing and hydroelectric dams has placed increasing pressure on the water in First Nations communities. Also, historical contamination from military

and industrial activities has resulted in high levels of polychlorinated biphenyls (PCBs) and other pollutants in water systems located on First Nations territories.

Despite having legal obligations under treaties, action by the federal government has been slow.

The Assembly of First Nations reports that 20 per cent of communities live with contaminated water, posing severe health risks. Health Canada data indicates there are currently 93 boil water advisories in First Nations communities across the country, some of which are long-standing. For example, the 282 residents of the Neskantanga First Nation in Northwestern Ontario remain under an advisory that was issued in 1995.

Although First Nations share some of the same challenges as other communities with small systems, some First Nations people feel the effects of pollution in different and often more extreme ways. Many First Nations people live off the land and their communities are often situated in close proximity to water and, unfortunately,

polluters. Combined with a host of other challenging living conditions, many First Nations communities struggle with poor water quality and have few resources to deal with the problem.

The right to water

Under the treaties between Canada and First Nations, the right to water was never relinquished to the Crown. Aboriginal title, aboriginal rights and treaty rights are protected under Section 35 of the *Constitution Act* of 1982: "The existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed." Aboriginal title refers to the territorial lands of aboriginal people far beyond those sectioned off as reserves. Title also includes right to resources on those lands. Most importantly, title rights recognize indigenous people's right to be included in all decisions that affect their traditional land and resources (including water). Aboriginal rights are those rights that are distinct

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Taking Responsibility

A recent Safe Drinking Water Foundation (SDWF) review of Indian and Northern Affairs Canada's (INAC) federal engagement sessions concludes that INAC has not been meeting its obligations to provide safe drinking water to First Nations.

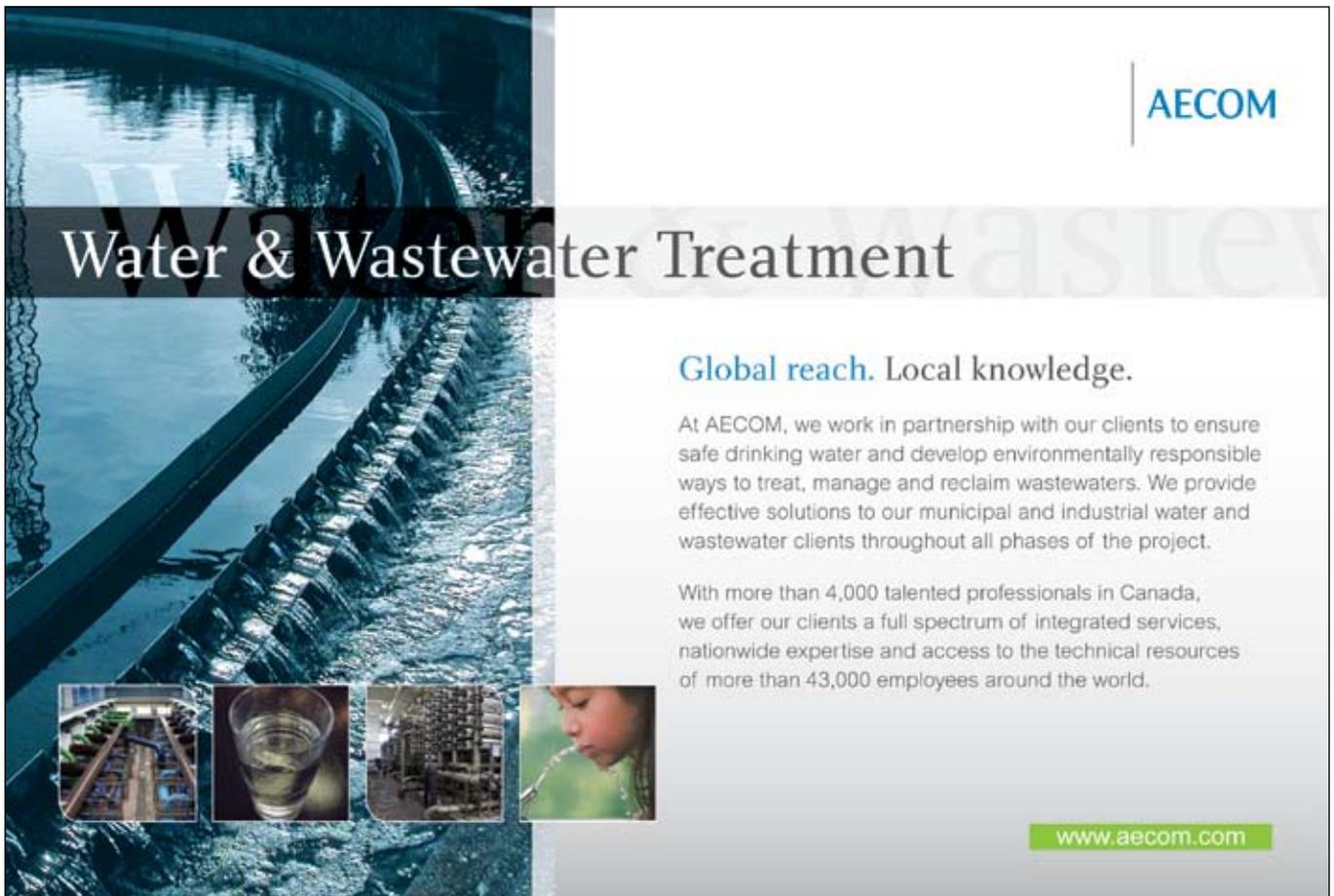
In 2009, INAC invited First Nations to participate in single-day engagement sessions to obtain their input on the Federal Action Plan on Safe Drinking Water for First Nations. In the review, SDWF's Advanced Aboriginal Water Treatment Team charges that some First Nations communities did not receive adequate notice to attend, and the timing of the sessions overlapped with critical annual budgeting events, preventing many leaders from attending. Moreover, government voices dominated the conversations, advocating that water quality on reserves be subject to variations of less strict provincial guidelines instead of the Guidelines for Canadian Drinking Water Quality.

In the spring of 2007, the federal government

transferred responsibility and liability for drinking water to the Chief and Council of each First Nation by changing the small print of contribution agreements, which each community is required to sign and accept before funds for any service (housing, education, health services, or water projects) can flow from INAC to the community for that fiscal year. Today, many First Nation leaders remain unaware of this change. Some communities have successfully rejected it, however, by way of Band Council Resolutions, stating that they reject such responsibility until their respective communities have water treatment systems that are capable of consistently producing safe drinking water that meets all parameters of the Guidelines for Canadian Drinking Water Quality. **W**

Celeste Côte, Sierra Club of Canada

Read the full report at safewater.org.



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to aboriginal people in maintaining their traditional way of life. Water is vital in the actualization of many of these rights such as fishing, hunting and spiritual practices. Treaty rights and modern land claims also involve water. Control and co-management over water resources were elements of most historic treaties. Therefore, it is an age-old right for First Nations to be the keepers of this resource. More specifically, it's the women's role to act as the guardians of water (see "Walk This Way," page 21). The Chiefs of Ontario, in their recently released Water Declaration (see *chiefs-of-ontario.org*), have articulated these rights. They write, "First Nations in Ontario through the teachings of women have the responsibility to care for the land and the waters."

Despite having legal obligations under treaties, action by the federal government has been slow. There are no binding laws specifically related to water quality and drinking water on reserves. However, as noted by Justice O'Connor in the Walkerton Inquiry Report, provincial governments such as Ontario have responsibilities related to drinking water. O'Connor recommended that First Nations be involved in the watershed planning process. Clearly a provincial regime has many jurisdictional challenges in the First Nations context (Manitoba's Bill 6 dealing with traditional lands planning has been under construction for the past six months or so), but First Nations can engage with provincial water policy efforts on a voluntary basis.

Under the *Clean Water Act*, 2006 (CWA) the province of Ontario has begun the task of implementing the source water protection regime as one component of the multi-barrier approach for the protection of drinking water. This includes the creation of 19 Source Protection Committees (SPCs) for watersheds in mostly the southern part of the province. The focus on southern Ontario is based on population and the geographic location of major cities; however, this leaves northern communities wanting.

distinct legal and spiritual connections to water are just as vital. Aboriginal Traditional Knowledge (ATK) can be understood as the collective memory of the community encompassing the biophysical environment, economy, and social and cultural life. These ideas are passed through stories, traditions, observation and action.

With funding from the Walter and Duncan Gordon Foundation, over the past year I have examined the role of First Nations in source protection in Ontario. As well as attempting to understand barriers

In addition to the very practical reasons for First Nations to be key players in source protection, their distinct legal and spiritual connections to water are just as vital.

SPCs are designed to engage multiple stakeholders and create action plans. They're intended to act as forums in which the community can work together to protect and govern drinking water sources. The core tenets of the committees are admirable and have garnered much praise both in and outside of Ontario.

In Ontario, there are 133 First Nation communities whose territories cover northern and southern watersheds. The full participation of First Nations in the source protection process will be crucial to ensuring water in the province is protected, both on and off the reserve. In addition to the very practical reasons for First Nations to be key players in source protection, their

participation (or whether there is even a desire to participate in a provincial regime), I also examined the use of ATK. The research used documentary analysis and interviews with First Nations and local actors in the SPC process. The following is a brief synopsis of what the research has uncovered.

Findings

Regulation 288/07 of the CWA stipulates First Nation membership in the SPCs. First Nations in the watershed may have from one to three seats on the committee based on population and the number of different Nations in the watershed. Ontario Regulation 287/07 and the proposed Assessment Report regulation require that the chiefs

Making Progress

On May 25, the Ministry of Indian Affairs and Northern Development (INAC) awarded aboriginal-owned Neegan Burnside Ltd. an 18-month contract to assess all First Nations water and wastewater facilities across ten provinces and two territories. The contract involves the inspection and corresponding recommendations

for 1,300 facilities, including a representative sampling of over 70,000 wells, cisterns and septic fields, located across 607 First Nations communities.

The engineering assessment will provide a more accurate account of the current state of water and wastewater systems on reserves and will enable both First Nations and the federal government to

focus resources on priorities required to address identified needs for each community.

Project manager Heather MacKenzie, P. Eng., says this is a challenging and exciting undertaking and she is looking forward to working with INAC Regional representatives, circuit rider trainers, and First Nations communities across the country. 

of First Nations communities with reserves in the watersheds be notified of their opportunity to review and comment on the Terms of Reference and the Assessment Report. Finally, the CWA provides opportunity for band councils with reserves located in source protection areas to submit a resolution requesting the minister of the environment create a regulation so that their drinking water system is formally included in the source water protection (SWP) planning process. To date, only one First Nation community has provided the Ministry of Environment (MOE) with a request. The MOE does, however, expect to receive more.

All SPCs have generated their Terms of Reference (TOR) and are beginning to work on their source protection plans with 2012 as the goal for executing the source protection plans. The majority of TORs make little mention of First Nations involvement outside of having seats on the SPCs. Only TOR makes mention of the possible value and integration of ATK in the source protection plan.

As few as 28 of the 133 First Nations in Ontario have reserve land that falls within a source protection region. This doesn't include land in which First Nations have outstanding land claims. Only 12 of the 19 SPCs have seats for First Nations' representatives. Despite aboriginal land claims and the need to involve First Nations in watershed management, only watersheds that encompass reserve land have seats for First Nations. Based on the current coverage of SPCs, there are 23 First Nations seats in total with 12 currently filled.

One of the fundamental questions of the research project focused on why participation rates are so low. Based on the research, the most glaring barriers described by members of First Nations communities include resources and capacity, municipal dominance, the negative impact of a "stakeholder" view of First Nations engagement, the scope of the policy and the lack of appreciation and integration of ATK.

According to the Assembly of First Nations, "Capacity requires stable and predictable funding arrangements and revenue generating opportunities sufficient to meet the needs and responsibilities arising from the recognition of First Nations jurisdiction." Resources devoted to basic water knowledge and infrastructure from the federal and provincial governments are limited. Although many people articulated that it's crucial to conduct assessments

Walk This Way

In 2003, Anishinabe grandmother and activist Josephine Mandamin (*see photograph on page 18*) walked with a pail of water around Lake Superior. Since then, with the advice of her spiritual advisors, she and other concerned women (Anishinabe women have a traditional indigenous role of stewards, caretakers and managers of the water) have walked around all of the Great Lakes.

"Protection of the water is key to our survival," wrote Mandamin in her first journal entry during the Mother Earth Water Walkers journey around Lake Huron. The group's goal is to raise awareness about the health and state of these and other waters. According to the group's website, "We are doing this walk for our own beliefs within our own aboriginal culture. The waters are very precious and sacred to our being, as it is one of the basic elements needed for all life to exist."

This year, the Native Women's Association of Canada (NWAC) joined Mandamin on her journey. On April 13, NWAC collaborated with Mother Earth Water Walk to hold the first National Aboriginal Water Day of Action: voicing concerns, conducting water walks, holding vigils and engaging in traditional ceremonies and prayer.

For more information, visit motherearthwaterwalk.com and nwac-hq.org. 

of source water on their own territory before engaging in the provincial process, the financial and technical capacity to do this is simply not there.

Many participants found that the municipalities (and sometimes Conservation Authorities) dominated the SPCs, which was sometimes problematic where relationships between municipalities and First Nations have been strained.

Many of those interviewed did not view the process as being in accordance with First Nations' rights to govern water. The dominant notion in the provincial water policy regime is that First Nations are "stakeholders." This is a controversial notion rejected by many First Nations. They maintain that they are not simply "stakeholders;" they must be at the table as equal Nations in this and all provincial and federal processes.

Another barrier identified by First Nations community members was the scope of the regime. Many First Nations communities are located in the northern part of the province, where much source water contamination takes place. They also argued that it was too focused on drinking water and not holistic enough.

Finally, ATK plays almost no role in source protection in Ontario. Many interviewees, as well as the Chiefs of Ontario, are calling for the creation

of an Aboriginal Traditional Knowledge Council that would gather, disseminate and control the use of ATK in source water protection and other policy areas. The development of this council is currently being researched by the Chiefs of Ontario and others.

Some solutions are obvious, while others are more challenging. The provincial government must first acknowledge that First Nations are not merely stakeholders; they must play a more nuanced role. It was recommended that funding directly to First Nations is required so they can do water quality and source protection reports for their own territories. Given that SPCs are beginning the technical stage of taking inventories of the threats to drinking water sources, this recommendation is timely. The federal government must be engaged in the process, particularly related to funding. The source protection regime also needs to be expanded to include northern communities. 

For the full report, visit the *Walter and Duncan Gordon Foundation website* (gordonfn.org) in the fall of 2009.

Bryony Halpin is a Walter and Duncan Gordon Foundation Water Policy Fellow. She will begin Ph.D. studies at York University in the fall of 2009.