

IN THE MATTER of Part IV of the *Environmental Bill of Rights*, S.O. 1993, c.28;

APPLICATION FOR REVIEW

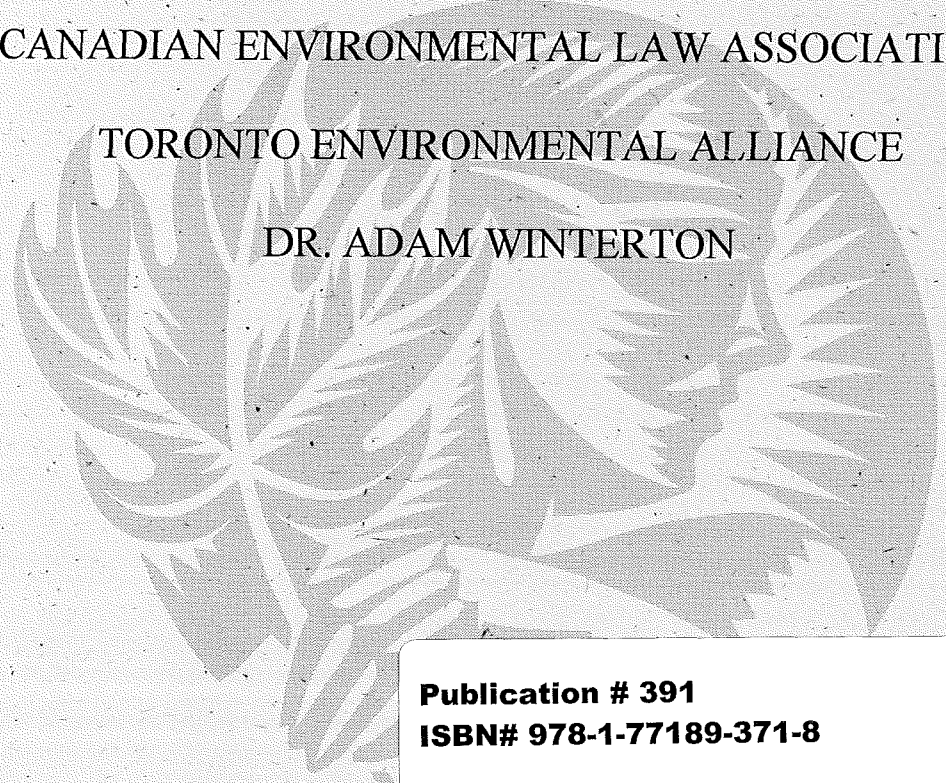
RE: SAFE DRINKING WATER ACT

FILED BY

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

TORONTO ENVIRONMENTAL ALLIANCE

DR. ADAM WINTERTON



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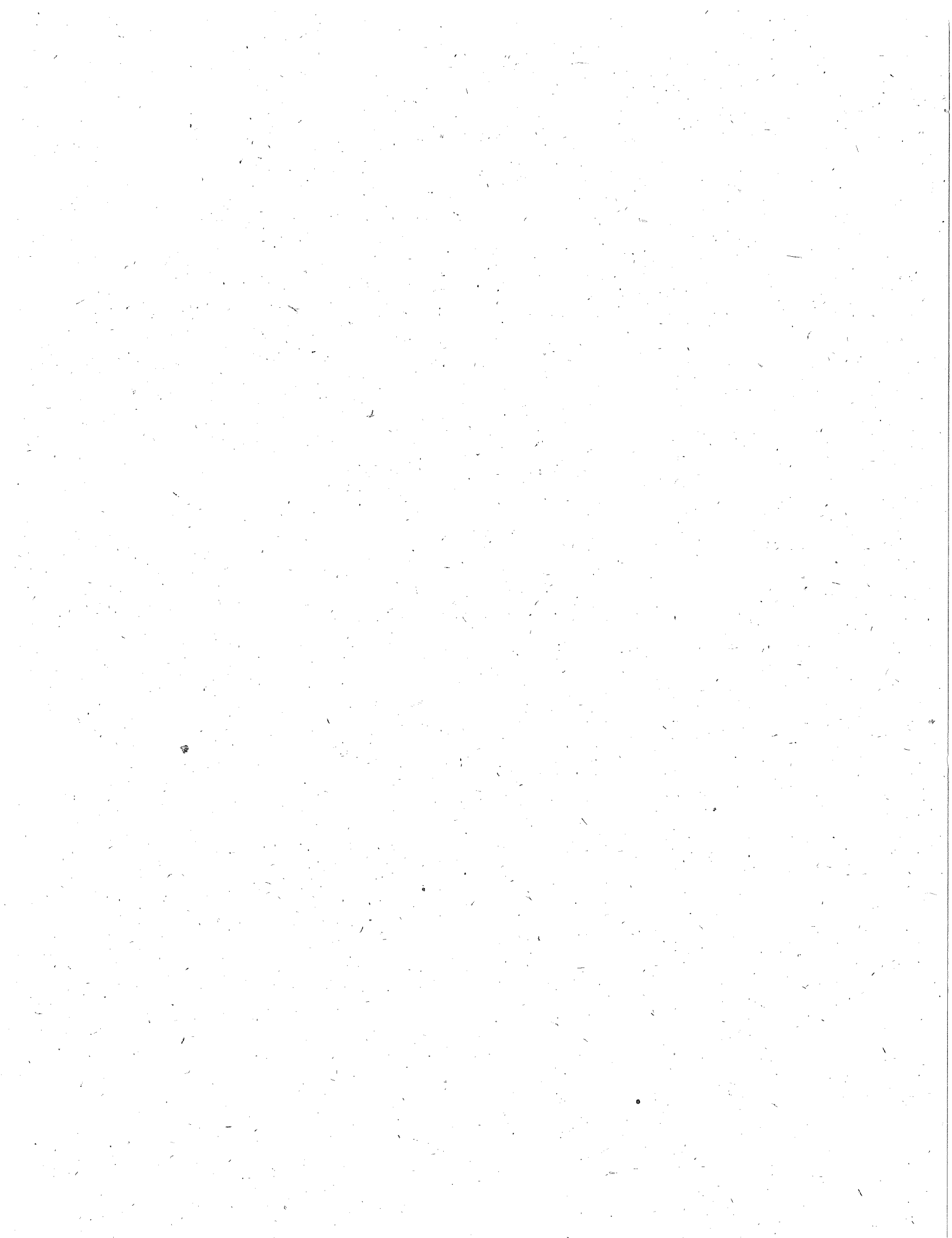
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**EBR APPLICATION FOR REVIEW
RE: SAFE DRINKING WATER ACT
FILED BY
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TORONTO ENVIRONMENTAL ALLIANCE
DR. ADAM WINTERTON**

PART I – APPLICANT INFORMATION

CORPORATE APPLICANT NO. 1

Name of Corporation: Canadian Environmental Law Association

Name and Position of
Corporate Officer: Judy Simon
President

Address: 517 College Street, Suite 401

City: Toronto

Province: Ontario

Postal Code: M6G 4A2

Telephone: 416-960-2284

Declaration of Incorporation in Ontario

I hereby declare that the **Canadian Environmental Law Association** is a Canadian federal corporation in good standing, carrying on business with its head office in Ontario, established by articles of incorporation in 1981.

_____	_____
Date	Name of Officer and Position
12507 1274RP	_____
Company Number	Signature

CORPORATE APPLICANT NO. 2

Name of Corporation: Toronto Environmental Alliance

Name and Position of
Corporate Officer: Lois Corbett
Executive Director

Address: 30 Duncan Street, #201
 City: Toronto
 Province: Ontario
 Postal Code: M5V 2C3
 Telephone: 416-596-0660

Declaration of Incorporation in Ontario

I hereby declare that the **Toronto Environmental Alliance** is an Ontario corporation in good standing, carrying on business with its head office in Ontario, established by articles of incorporation in 1988.

Date	Name of Officer and Position
Company Number	Signature

APPLICANT NO. 3

Last Name: Winterton
 First Name: Dr. Adam
 Address: Box 68
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 Province: Ontario
 Postal Code: N0G 1L0
 Telephone: (W) 519-363-3220 (H) 519-363-3989

Declaration of Ontario Residency

I, **Dr. Adam Winterton**, hereby declare that I am an Ontario resident and have been since 1953.

Date	Signature
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PART II – QUESTIONS

1(a) I request a Review of an **existing** policy, Act, regulation or instrument.

Policy [] Act [] Regulation [] Instrument []

Clearly identify the name of the policy, Act, regulation or instrument that you wish reviewed. Please provide as much detail as possible, including the name, section numbers and instrument numbers where applicable.

Not applicable

1(b) The **Canadian Environmental Law Association, Toronto Environmental Alliance, and Dr. Adam Winterton** (“the applicants”) hereby request a Review of the need for a **new** policy, Act or regulation.

Policy [] Act [x] Regulation []

Description of policy, Act or regulation:

Safe Drinking Water Act

2. Explain why there is a need for a Review:

The applicants submit that the public interest warrants a Review of the need for a Safe Drinking Water Act (“SDWA”) for the following reasons:

(a) Inadequacy of the Current Legislative Regime

At the present time, there is no Ontario law that is specifically designed to safeguard drinking water quality in Ontario. In the applicants’ view, this omission represents the primary reason why the requested Review should be undertaken.

As described below, this legislative “gap” is compounded by the fact that the existing regulatory framework is clearly inadequate for protecting drinking water, particularly at the point of consumption.

Ontario Water Resources Act

Ontario principally relies upon the *Ontario Water Resources Act* ("OWRA"), a general water management statute dating back to the 1950's which, among other things, regulates water-taking and establishes an approvals regime for water works and sewage works. Although certificates of approval (C of A's) issued under the OWRA for water treatment plants could, in theory, incorporate by reference the maximum contaminant levels prescribed under the *Ontario Drinking Water Objectives* (ODWO), in practice many current C of A's fail to wholly incorporate the ODWO. Unless the ODWO are actually adopted in a C of A, they are only guidelines which cannot be enforced in a court of law, as described below.

Significantly, no enforceable drinking water regulations have been passed under the OWRA, although section 75 of the OWRA empowers Cabinet to pass "standards" relating to "potable water". Similarly, the OWRA's main offence provision (section 30) simply prohibits the discharge of materials which may impair "water" (defined as surface water or groundwater), and does not specifically protect drinking water at the point of consumption. In addition, although the Director is empowered under the OWRA to declare areas of public water supply (section 33), and can safeguard such areas from threats posed by "swimming" and "bathing", it appears that this power is entirely discretionary and infrequently exercised.

For these and other reasons, the applicants submit that the current OWRA is insufficient to meet the challenges of protecting drinking water in the 21st century.

Environmental Protection Act

Ontario's current *Environmental Protection Act* (EPA) is another environmental law of general application which does not protect drinking water at the point of consumption.

Although "water" is included in the EPA's definition of "environment", the MOE has generally preferred to use the OWRA rather than the EPA to address water-related matters. Nevertheless, the MOE has used the EPA to address such issues as ice fishing huts and wastewater discharges from boats. However, the MOE has not passed drinking water regulations under the EPA. Similarly, the EPA's main anti-pollution provision (section 14) does not specifically address drinking water quality, particularly at the point of consumption.

For these and other reasons, the applicants submit that the current EPA is insufficient for meeting the challenges of protecting drinking water in the 21st century.

MOE's Drinking Water Regulation

In the wake of the Walkerton tragedy, the MOE recently proposed a new drinking water regulation. Once passed, this regulation is intended to:

- require accreditation for facilities which test drinking water;
- require municipalities to notify the MOE if they change the facility that is testing their drinking water;
- require the review of the C of A's for all water treatment facilities at least once every three years; and
- require testing facilities to immediately notify the MOE, medical officers of health, and water treatment plant operators if test results indicate unsafe drinking water.

While these new provisions are largely unobjectionable, it is clear that the proposed regulation does not go far enough to ensure safe drinking water across Ontario. For example, no enforceable drinking water standards will be promulgated under the regulation. In the applicants' view, merely tinkering with testing accreditation or notification protocol does not address the larger need for statutory protection of drinking water quality in Ontario. Indeed, in his explanation of the drinking water regulation, the Minister described it as an "interim" step, and he left the door open to further measures to protect drinking water quality. In the applicants' view, the next step is enactment of a SDWA.

MOE Policy Framework

Over the years, the OWRA and EPA have been supplemented by numerous MOE policies, guidelines, criteria and guidelines, such as the ODWO and *Water Management: Policies, Guidelines, Provincial Water Quality Objectives (PWQO) of the MOE*.

First, it must be noted that unlike laws or regulations, these various guidance documents are not enforceable *per se*, as described above. Thus, when the MOE's *Water Management* policy "encourages" controls on urban and agricultural drainage to prevent water quality degradation, this well-intentioned statement of policy carries no legal weight whatsoever.

Second, it is questionable whether the maximum contaminant levels set under the ODWO and PWQO remain sufficiently protective of human health (especially children's health), particularly in light of the cumulative or synergistic effect of many contaminants. Recent debate (documented by the Environmental Commissioner's 1994-95 report) over the ODWO's treatment of substances such as tritium, trichloroethylene, and cryptosporidium exemplify the growing public concern over the maximum contaminant concentrations permitted under the ODWO.

Accordingly, the applicants submit that the mere existence of the ODWO does not negate or detract from the need for a SDWA in Ontario. If the SDWA is enacted, the ODWO could be adopted as interim standards in order to avoid starting from scratch when developing drinking water standards. However, it is clear that the existing ODWO levels would have to be reviewed and, in some cases, revised prior to promulgation of final drinking water regulations under the SDWA.

On this latter point, the applicants note that Alberta and Quebec have adopted the Canadian Drinking Water Guidelines as enforceable standards in their respective drinking water regimes. In light of these positive developments, it is unclear why Ontarians continue to be deprived of the protection conferred by enforceable drinking water standards.

(b) Harm to Public Health and Safety

In the applicants' view, the paramount importance of protecting drinking water quality in Ontario provides further justification for the requested Review.

In particular, the applicants submit that safe drinking water is a basic human right, and that safe drinking water is essential to maintaining public health and safety. As recent events have demonstrated, unsafe drinking water can cause serious disease and death, and can result in considerable social and economic harm (i.e. health care costs, investigation costs, business losses, victim compensation, remediation of public water systems, etc.).

According to *Drinking Water in Ontario: A Summary Report 1993-97* (MOE, 2000), almost 9 million Ontarians (82% of the population) receive their drinking water from municipal water works. The remaining population is serviced by individual wells or other private water sources. Approximately 66% of Ontarians serviced by municipal systems receive drinking water drawn from the Great Lakes basin. There are approximately 630 municipal water works in Ontario – almost 400 use groundwater as their source of drinking water, 225 use surface water as their source of drinking water, and a few use both surface water and groundwater as their source of drinking water. In the applicants' view, these figures amply demonstrate the clear and compelling need to protect drinking water (and its sources) across Ontario.

At the present time, sources of drinking water in Ontario (i.e. surface water or groundwater) can be contaminated from numerous "point sources", such as landfills, septic tanks, sewage disposal, and industrial wastewater discharges. "Non-point" sources, such as agricultural run-off and atmospheric deposition, can also degrade drinking water sources. In the applicants' view, "pollution prevention" initiatives are the preferred route -- all necessary steps should be taken to prevent contaminants from reaching drinking water sources in the first place.

Despite the fact that Ontario has various measures in place (eg. MISA regulations under the OWRA) designed to abate water pollution, it is clear that drinking water quality has been, and continues to be, at risk in Ontario. For example, a 1991 groundwater study by Agriculture Canada revealed that approximately 37% of rural wells in Ontario had concentrations of farm chemicals and bacteria in excess of ODWO limits. Similarly, over the past decade, NDMA (a carcinogen) was found in drinking water of Elmira, cryptosporidium was found in the drinking water of Collingwood, and E.coli was found in the drinking water of Walkerton and a number of other communities across Ontario.

In 1996, the MOE's Drinking Water Surveillance Program monitored just over 100 water supply systems in municipalities across Ontario, and found exceedances of health-related ODWO for fluoride, turbidity, nitrates, lead, total trihalomethanes, NDMA, and chromium at 21 locations. It is unknown whether these results can be extrapolated to the hundreds of other water supply systems which are not being tested under the DWSP. At the present time, some 161 water systems will be tested under the DWSP, which means that approximately 75% of Ontario's 630 municipal water treatment facilities will not be tested under the DWSP. It should also be pointed out that the number of provincial inspections of municipal water treatment plants declined from 470 in 1993-94 to 152 in 1998-99.

Interestingly, it appears that the Walkerton water system has not been tested under the DWSP, although problems with Walkerton's system reportedly showed up as early as 1994. More alarmingly, it has recently been confirmed by Ministry staff that the DWSP stopped testing for *E. coli* (and other microbiological contaminants such as fecal coliforms) in 1996, purportedly because municipal operators already test for such contaminants at local level. Of course, the fact that other ODWO parameters are tested at the local level has not prevented the DWSP from testing for the same parameters. Thus, the MOE's rationale for discontinuing *E. coli* testing under the DWSP is unconvincing at best. In any event, even if Walkerton's water had been tested under the DWSP, it is clear that *E. coli* contamination would not have been identified under the current provincial testing regime.

For the foregoing reasons, it is difficult to accept the MOE's claim in *Drinking Water in Ontario: A Summary Report 1993-97* that "Ontario demonstrates due diligence in ensuring that the drinking water provided by municipal water systems is of a good quality and meets all health-related objectives" (p.23). Similarly, the applicants take little comfort in the Report's claim that 99% of test results under the DWSP met health-related ODWO (p.3). In the applicants' view, such claims carry little weight since the DWSP excludes most municipal water works (including Walkerton), and does not even test for the contaminant that killed people in Walkerton. Indeed, the Report itself reveals that in a four year period, 46 municipal water supplies had results above health-related ODWO on at least one occasion (p.23). Given the grave consequences of unsafe drinking water, the applicants submit that even one exceedance, at a single location, is one too many.

Despite the MOE's self-serving claims about drinking water safety, Ontario's current drinking water "safety net" was manifestly unable to prevent death and disease arising from municipal tap water. Clearly, further regulatory measures are required before it can be confidently claimed that Ontario's drinking water is being properly safeguarded at the provincial, regional and local levels.

Indeed, a recent report authored by the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) concluded that existing rural infrastructure, such as water and sewage works, was old and in need of substantial improvement and expansion. The report found, however, that due to their limited tax base, rural municipalities are having difficulty in funding these infrastructure upgrades, which could cost some \$9 billion

across the province. In the applicants' view, the uncertainty over when – or if – these improvements will be completed makes it imperative to enact a SDWA to ensure drinking water quality.

The applicants further note that industrial dumping of chemicals into municipal sewers continues to occur across Ontario. Sewage treatment plants are generally unable to capture or breakdown all of the toxic heavy metals or organic compounds present in sewage effluent. Accordingly, these persistent and bioaccumulative chemicals can be (and are) discharged into local surface waters which serve as sources of drinking water.

For example, Toronto's medical officer of health has reported that elevated levels of industrial chemicals accumulating in the near shoreline of Lake Ontario places swimmers and recreational boaters at risk, and, more importantly, degrades the city's drinking water. Similarly, two-thirds of local fish species have consumption restrictions due to the current levels of contaminant residues.

Industrial sewer discharges are not the only pathway for contaminants to enter surface water sources of drinking water. For example, polluted stormwater run-off is a significant source of contamination of surface water in Ontario's urban centres. Similarly, combined sewer overflows can cause elevated levels of E. coli in surface water, thereby forcing the closure of public beaches.

In summary, the applicants submit that the continuing vulnerability of Ontario's drinking water sources to various forms of contamination makes it increasingly important to enact a SDWA to protect drinking water quality, particularly at the point of consumption.

(c) Provincial Downsizing, Downloading, and Deregulation

The applicants further submit that the sweeping nature and extent of Ontario's legislative, regulatory, policy and administrative changes over the past few years provides further justification for a SDWA.

Since 1995, for example, the Ontario government has slashed the MOE budget by almost half (45%). Over the same timeframe, the number of MOE employees has decreased from approximately 2,500 to 1,500 persons.

Among other things, these massive cutbacks have severely reduced the number of MOE staff who had been working on surface water, groundwater, and drinking water issues. In 1995, for example, some 113 persons worked for the MOE on water matters; this year, only 48 staff work on water matters. Over the same timeframe, the number of people assigned to hydrology and groundwater decreased from 28 to 15. In addition, four of five provincial water testing laboratories were closed in 1996, thereby forcing municipalities to scramble to find private facilities to test municipal drinking water. Some smaller municipalities have subsequently reported that the cost of private water testing is becoming prohibitively expensive compared to the cost of provincial testing.

Similarly, MOE funding to critically important water-related programs has also been significantly reduced or eliminated in recent years. Such programs include:

- Municipal Assistance Program (eg. funding to assist municipalities regarding water/sewage infrastructure);
- Great Lakes clean up program (eg. Remedial Action Plans for Great Lakes “hot spots”);
- Training programs for water treatment staff;
- Green Communities Program; and
- Clean Up Rural Beaches (CURB) program.

There can be little doubt that the above-noted staff and funding cutbacks have undermined the MOE’s institutional ability to safeguard Ontario’s drinking water quality. This point has been made repeatedly by the former Environmental Commissioner of Ontario in virtually every report since 1996 (see below). Reports by the Provincial Auditor have also raised concerns about the province’s environmental track record in recent years.

Similarly, these kinds of cutbacks also prompted criticism in the International Joint Commission’s *Ninth Biennial Report on Great Lakes Water Quality* (1998) as follows:

The fiscal realities of the 1990’s, however, are driving governments to reduce expenditures and debt load, affecting their approach to environmental restoration and protection. The Commission expresses concern about deregulation, devolution and downsizing.

The ability of governments at all levels to deliver is being stressed, and programs to restore and protect the Great Lakes have drastically slowed or halted, especially for Areas of Concern and those directed toward persistent toxic substances, whose effects are far less visible than water clarity or beach aesthetics. The Commission wonders whether the regulatory framework has been compromised...

There is a clear detachment between environmental priorities and those of an economic, social and political nature...

Laws and accompanying regulations, policies, programs and enforcement must not be compromised for the sake of fiscal austerity. Long-term capital investment, the infrastructure and goals of environmental restoration and protection must not be sacrificed for short-term gains.

Nevertheless, the Premier of Ontario continues to reject calls to rehire environmental inspectors in order to protect drinking water quality. In the applicants’ view, this steadfast refusal to reinstate the MOE’s monitoring and enforcement capability means that Ontario’s drinking water will remain at risk.

At the same time, the provincial government continues to pursue its privatization agenda. For example, the Ontario Clean Water Agency (OCWA) remains as a candidate for privatization, even though the value of, and need for, this public agency was clearly demonstrated when OCWA was brought in to supervise and manage Walkerton's water system. Established in 1993, OCWA assumed a number of key roles and responsibilities in order to address the environmental and public health risks associated with unsafe drinking water, aging infrastructure, and related matters. If anything, recent events have shown that these concerns remain outstanding, and that now, more than ever, Ontario needs a publicly owned water/sewage agency to address such concerns from a provincial perspective.

Similarly, the applicants note that the Minister of Municipal Affairs has announced that the Ontario government is considering privatizing Ontario's water and sewage services. However, recent comments from the Premier make it unclear whether Ontario will actually proceed with this privatization possibility, particularly since Ontarians overwhelmingly support keeping water services in public hands. In any event, should Ontario elect to pursue such a privatization scheme down the road, then it is increasingly important to have the SDWA in place to safeguard against the risks of privatized water services.

It is noteworthy that the Ontario's Bill 107 (*Water and Sewage Services Improvement Act, 1997*), paved the way for downloading OWCA assets, such as water treatment facilities, upon municipalities. Bill 107 intended to keep such facilities in public hands by preventing their sale to the private sector unless the municipality paid back all provincial grants received for the facility since 1978. It now appears that some members of the Ontario government sees private water treatment facilities as a possible cost-savings alternative, as long as drinking water quality is guaranteed. In the applicants' view, the best guarantee is to pass a SDWA that protects Ontario consumers against the risks of privatization. However, even if privatization is not pursued, there is still a demonstrable need for a SDWA in Ontario.

In addition to Bill 107, the Ontario government has undertaken other legislative changes which make it harder, not easier, to protect drinking water and its sources. Since 1995, for example, responsibility for septic tank approvals has been downloaded from MOE staff under the EPA to municipal building inspectors under the *Building Code Act*. Similarly, the 1998 *Farming and Food Production Protection Act* shields "normal farming practices" from municipal by-laws and nuisance lawsuits, which (together with the statutory exemption for "normal" farm waste disposal under section 14(2) of the EPA) makes it harder to address agricultural operations which may causing run-off problems. In the applicants' view, these and other legislative "rollbacks" need to be counterbalanced by the swift passage of a SDWA.

In summary, given the current climate of downsizing, downloading and deregulation, the applicants submit that it is even more important to ensure statutory protection of drinking water quality. In particular, the SDWA should include stringent standards and citizen

enforcement mechanisms to allow the public to take steps to protect drinking water quality where provincial officials are unable or unwilling to do so.

(d) The U.S. Experience under the SDWA

In contrast to Ontario's inertia regarding drinking water protection, the United States enacted comprehensive drinking water legislation over 25 years ago in the form of the SDWA, 1974.

Administered by the Environmental Protection Agency, the U.S. SDWA is intended to ensure that public water systems meet national standards which protect consumers from the harmful effect of drinking water contaminants.

Among other things, the U.S. SDWA:

- authorizes the Agency to set enforceable health standards for contaminants in drinking water;
- requires public notification of public water systems' violations of these standards;
- requires annual reports to drinking water customers on contaminants found in drinking water;
- protects groundwater used as source of drinking water;
- establishes a funding mechanism for public water system upgrades; and
- requires an assessment of the vulnerability of drinking water sources to contamination.

Over the past 25 years, it is clear that the statutory measures contained in the SDWA have been successful in protecting drinking water quality across the U.S. Since 1974, for example, the number of contaminants regulated under the SDWA has quadrupled to almost 100 substances (i.e. microbes, radionuclides, organic and inorganic chemicals). At the present time, approximately 90% of the American population is served by public water systems which meet the stringent health-based standards under the SDWA (eg. no violations of such standards).

Similarly, the Environmental Protection Agency and the Centres for Disease Control and Prevention have reported that outbreaks of waterborne disease have steadily declined since the early 1980's. This may be attributable to the fact that the Agency now requires disinfection of most surface water sources of drinking water (lakes, rivers, reservoirs) and frequent testing for microbes. In 2000, the Agency is proposing a regulation which requires protection and treatment of groundwater sources of drinking water.

In the applicants' view, the U.S. track record under the SDWA clearly demonstrates the effectiveness of a strong legislative approach to protecting drinking water quality.

(e) MOE Statement of Environmental Values

In determining whether the public interest warrants a Review, section 67(2)(a) directs the Minister to consider the relevant Statement of Environmental Values (SEV) promulgated under the EBR.

In this case, the MOE's SEV clearly states that the MOE mandate "is to protect the quality of the natural environment so as to safeguard the ecosystem and human health". In carrying out this mandate, the SEV commits the MOE to a number of important principles, such as:

- adopting an "ecosystem approach" to environmental protection;
- recognizing that the ecosystem is "composed of air, land, water, and living organisms, including humans, and the interactions among them";
- considering "cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the interrelations among the environment, the economy and society;
- placing "priority" on preventing the creation or release of pollutants that can damage the environment;
- adopting the "precautionary principle" and "exercising caution in favour of the environment" where there is uncertainty;
- fostering "an open and consultative process in the implementation of the SEV"; and
- considering "the use of a wide range of measures, including regulation" to better protect the environment.

Taken together, these SEV commitments represent a provincial promise to Ontarians that the MOE will take all necessary steps to safeguard the environment and public health and safety. Where new or emerging threats to the environment or public health and safety are identified (i.e. drinking water contamination), the MOE is duty-bound by the SEV to act swiftly and decisively to eliminate, minimize or mitigate such threats.

Accordingly, there can be little doubt that the requested Review of the need for a SDWA is entirely consistent (if not mandated by) the MOE's SEV, particularly in light of recent events.

(f) Absence of Periodic Review

In determining whether the public interest warrants a Review, section 67(2)(c) of the EBR directs the Minister to consider whether "the matters sought to be reviewed are otherwise subject to periodic review".

First, there is no SDWA in Ontario at the present time. Therefore, there are no built-in provisions for periodic review of safe drinking water legislation in Ontario.

Second, the highly regarded Advisory Committee on Environmental Standards (ACES) was abolished by the Ontario government in 1995. Accordingly, ACES is no longer available as a forum for assessing the adequacy of the existing ODWO, or for reviewing the larger question of whether there is a need for a SDWA in Ontario.

For these reasons, the applicants submit that there is no meaningful mechanism in place to ensure the periodic review of the need for a SDWA.

(g) Resources Required for the Review

Section 67(2)(f) of the EBR lists “resources required to conduct the review” as a factor to be considered by the Minister when determining if the public interest warrants a Review.

At this point, it is unclear what MOE resources would be required to conduct the requested Review. However, given that the MOE Legal Services Branch and Water Policy Branch already exist, it appears that the requested Review can be carried out by existing staff within current budgets. To the applicants’ knowledge, the requested Review can be conducted efficiently and expeditiously without allocating new resources (or reallocating current resources).

However, rather than asking “What is the cost of undertaking the Review?”, the better question is “What is the cost of not undertaking the Review?” In other words, can Ontario afford not to review the need for a SDWA? In the applicants’ view, the true costs of not having a SDWA include not only the monetary consequences (eg. the millions of dollars to be spent in investigating, cleaning up, and litigating the Walkerton tragedy), but also the personal and societal consequences of having Ontarians sickened or killed by unsafe drinking water.

Viewed in these stark terms, there can be little doubt that whatever resources are required to conduct the requested Review, such resources are fully justified in the circumstances, and may lead to significant savings down the road if a SDWA is enacted.

(h) Other Relevant Considerations

In determining whether the public interest warrants the requested Review, section 67(2)(g) of the EBR permits the Minister to take into account “any other matter that the Minister considers relevant”.

In the applicants’ view, the following additional considerations should be taken into account regarding the need for a SDWA in Ontario.

First, a private member’s bill to establish a SDWA was recently introduced in the Ontario Legislature by M.P.P. Marilyn Churley (Bill 96). It must be noted that this is a private member’s bill, not a Government bill, and it is unknown when – or if – this bill will be passed. On this point, the applicants note that the last private member’s bill to establish a SDWA (Bill 25, Ruth Grier) did not pass in 1989. A previous private member’s bill to

establish a SDWA (Bill 45, Mr. Charlton) was also unsuccessful in 1982. In light of this track record, the mere introduction of Ms. Churley's bill does not excuse the MOE from reviewing the need for a SDWA in accordance with this Application for Review. In fact, when asked by Ms. Churley about Bill 96 during Question Period, the Minister flatly refused to commit to passing the SDWA.

Second, the judicial inquiry into the Walkerton tragedy appears to have terms of reference that are sufficiently broad to include consideration of a SDWA. However, the applicants note that at this point, it is unknown whether – or if – Mr. Justice O'Connor will consider or recommend a SDWA in Ontario. Similarly, it may take considerable time for the inquiry to make its factual findings and recommendations for reform. In any event, the applicants submit that it is not necessary to await the end of the inquiry to know that a SDWA is long overdue in Ontario. Thus, the mere fact that the inquiry has been established does not excuse the MOE from reviewing the need for a SDWA in accordance with this Application for Review. In fact, if the Review leads to a governmental commitment to enact the SDWA, then this would allow the Ontario government to report some significant progress to Mr. Justice O'Connor during the inquiry.

3. The following is a summary of the evidence that supports this Application for Review.

The evidence which supports reviewing the need for a SDWA is attached hereto and may be summarized as follows:

TAB A T. Vigod and A. Wordsworth, "Water Fit to Drink? The Need for a *Safe Drinking Water Act* in Canada (1982), 11 C.E.L.R. 80

This seminal article by CELA and Pollution Probe describes the legal and policy justification for the enactment of a SDWA.

TAB B Ministry of the Environment, *Statement of Environmental Values*

The requested Review is consistent with (if not mandated by) various public commitments and principles contained in the MOE's SEV.

TAB C Environmental Commissioner of Ontario, *Annual Report 1994-95: Opening the Doors to Better Environmental Decision Making* (excerpts)

In her 1994-95 report, the former Environment Commissioner made a number of key findings and recommendations related to drinking water protection. Among other things, this report reviews the debate over the adequacy of the ODWO in relation to tritium, trichloroethylene, and cryptosporidium. This report also confirms the vulnerability of groundwater sources of drinking water to various types of contamination, even under current environmental laws:

About 23% of Ontario's population relies on groundwater for drinking water. Moreover, groundwater is the only source of water for about 90% of the rural population. Once impaired, restoring groundwater is difficult and expensive...

Groundwater can be impaired by wastewater infiltration basins, landfills, waste disposal into deep wells, spray irrigation, sludge use or disposal operations, septic tank systems and mine tailings – all of which are regulated through Certificates of Approval issued by MOE.

A number of activities that do not require specific approvals under the OWRA or the EPA can also contribute to groundwater contamination, including improper crop fertilization, manure application and salt spreading, salt storage, unlicensed and closed landfills, and leaks and spills. Unlike some jurisdictions, Ontario has no specific legislation or programs to designate or protect significant groundwater recharge areas...

Many contaminant sources affect the quality of Ontario's vital groundwater. Effective control of these contaminant sources is impeded by inadequate legislation, plus inadequate inspection and enforcement resources (pp.51-52, emphasis added).

TAB D Environmental Commissioner of Ontario, *Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making* (excerpts)

In her 1996 report, the former Environmental Commissioner made a number of key findings and recommendations related to drinking water protection:

Drinking water must be rigorously tested to ensure contamination is found and fixed right away. Ontarians expect safe, reliable water to drink...

For years, the MOE and the Ministry of Health provided drinking water testing services to municipalities. To save money, in 1996 the MOE decide to stop its water testing service and the Ministry of Health followed suit. As a result, 400,000 annual water quality tests were transferred to the private sector, and each municipality now has to pay for testing.

This decision was not posted on the Environmental Registry for public comment by either ministry. The public was not consulted. Nor were municipalities.

Municipalities had barely eight weeks to find private labs...

The MOE did no independent review of the cost of private sector testing... Worse still, the MOE did not check if drinking water testing is now being done properly.

In 1996, the Provincial Auditor noted that, because of resource constraints, drinking water testing by hundreds of small treatment plants is not audited by the Ministry. This decision most likely increases the risk of inadequate water testing in Ontario. When it comes to inspecting and testing the quality of our drinking water to ensure public health and safety, and environmental protection, the Ministry must take every precaution (pp.17-20, emphasis added).

I urge the government to make it a priority to develop a sustainable strategy for restoring, protecting and conserving Ontario's groundwater, which includes:

- strong emphasis on preventing contamination;
- establishment of specific groundwater protection zones;
- assistance to regional or municipal governments to develop controls to restrict activities that may contaminate groundwater;
- a focus on the cumulative effects of agriculture, septic systems, lawn chemicals and municipal systems on groundwater; and
- a publicly accessible data management system, including waterwell records, monitoring information, complaints, inspections and enforcement, and information about contamination and remediation (p.44).

TAB E Environmental Commissioner of Ontario, *Annual Report 1997: Open Doors – Ontario's Environmental Bill of Rights* (excerpts)

In her 1997 report, the Environmental Commissioner found that "environmental health continues to be a very low priority for the ministers of this province" (p.3), and that many provincial legislative and policy initiatives (eg. reduced ministry resources and diminished regulatory role of ministries) do not "advance the goals of the EBR – namely, to protect Ontario's environment" (p.4). In addition, the Report criticizes the MOE's greatly reduced role in water-related monitoring and reporting:

The MOE...

- is not tracking total loadings of industrial discharges into waterways;
- does not monitor persistent toxics in effluents of sewage treatment plants;
- does not compile statistics on total loadings of raw sewage spills to waterways;
- has drastically reduced reporting on municipal/industrial discharges to water;
- has little data on the condition of the province's one million-plus septic systems (p.47)

TAB F Environmental Commissioner of Ontario, *Annual Report 1998: Open Doors – Ontario's Environmental Bill of Rights* (excerpts)

In her 1998 report, the Environmental Commissioner “documents the decline of Ontario’s capacity to protect the environment”, and concludes that “evidence of the deterioration of the province’s environmental protection standards is widespread” (p.4). The report also concludes that “less government in this case means less enforcement and less environmental protection” (p.5). With respect to water, the report confirms that “large quantities of hazardous materials are discharged into sewers and sewage treatment plants, eventually reaching lakes and rivers” (p.173).

TAB G U.S. *Safe Drinking Water Act*, 42 U.S.C. SS300f—300j-26

The U.S. SDWA provides illustrative examples of the various requirements which could be incorporated into safe drinking water legislation in Ontario.

TAB H U.S. Environmental Protection Agency, *Drinking Water: Past, Present and Future* (EPA, Feb. 2000)

This factsheet describes the highlights of the U.S. SDWA, compliance trends, incidence of waterborne diseases, and future challenges for protecting drinking water. The full text of the 25 year review of the U.S. SDWA is available at the EPA’s website (www.epa.gov).

TAB I Agriculture Canada, *Ontario Farm Groundwater Quality Survey, Winter 1991-92* (Ottawa, 1992)(excerpts)

This federal groundwater study documents the nature and extent of wellwater contamination in rural Ontario. Among other things, the study found that of the 1300 wells sampled:

- 37% contained contaminants at concentrations above the ODWO;
- 31% contained contaminants which exceeded the maximum acceptable concentration for coliform bacteria; and
- 20% contained faecal coliform bacteria.

TAB J Ministry of the Environment, *Drinking Water Surveillance Program: 1996-97 Executive Summary Report* (MOE, 1998)(excerpts)

This document describes the MOE's Drinking Water Surveillance Program, and reports that of the 111 water supply systems monitored in 1996 by the MOE, "the health-related ODWO for fluoride, turbidity, nitrates, lead, total trihalomethanes, NDMA and chromium were exceeded on at least one occasion at 21 locations in 1996".

TAB K Ministry of the Environment, *Drinking Water in Ontario: A Summary Report 1993-97* (MOE, 2000)(excerpts)

Among other things, this report describes the results of DWSP testing from 1993-97, which revealed that "46 municipal water supplies had results above the health related ODWO on at least one occasion" (p.3). This report also confirms that since 1996, the DWSP has not tested for *E. coli* and other microbiological parameters (p.3). This report also describes the various threats to Ontario's drinking water quality as follows:

In Ontario, drinking water is provided from rivers, lakes, streams, ponds, springs and wells. As water travels through the ground or over the surface, it dissolves minerals and can also pick up contaminants of animal, human or industrial origin.

Categories of contaminants that can be present in source waters include:

- bacteriological substances, such as viruses and bacteria, which may come from sewage treatment plants, septic systems, agricultural livestock operations and wildlife;

- inorganic substances, such as salts and metals, which can be naturally occurring or result from urban storm water run-off, industrial or domestic wastewater discharges, oil and gas production, mining or farming;
- pesticides and herbicides, which may come from a variety of sources such as agriculture, storm water run-off and residential use;
- organic substances, synthetic and volatile, which are by-products of industrial processes and petroleum production and can come from gas stations, urban storm water run-off and septic systems; and
- radioactive substances, which can occur naturally or result from nuclear power production and mining activities (pp.10-11).

TAB L J. Struger et al., "Environmental Concentrations of Urban Pesticides", in *Current Practices in Modelling the Management of Stormwater Impacts* (CRC Press, 1994)

This study of urban stormwater run-off found numerous herbicides, insecticides and organochlorines (some in excess of PWQO) in the water and sediment from two urban streams in Hamilton and two stormwater detention ponds in Guelph.

TAB M R. Lindgren, "Submissions of the Canadian Environmental Law Association regarding the Proposed Drinking Water Regulation: EBR Registry No. RA00E0014" (CELA, June 2000)

This brief examines the requirements under the MOE's recently proposed drinking water regulation, and explains why such requirements do not go far enough to protect drinking water quality in Ontario.

Taken together, the foregoing evidence demonstrates the need for a SDWA in Ontario that, at a minimum, contains the following provisions:

- entrench a clear public right to clean and safe drinking water;
- impose a mandatory duty on the Minister to establish legally enforceable limits on drinking water contaminants which may adversely affect human health;
- require drinking water suppliers to sample, monitor and report upon the quality of drinking water;

- ensure full public access to test results and reports required under the law;
- ensure that water collection, treatment, storage and distribution systems are properly maintained, repaired or upgraded to meet drinking water standards;
- impose a mandatory duty on drinking water suppliers (and/or their laboratories) to immediately notify consumers, MOE officials, and medical officers of health whenever there are operational problems, water testing delays or difficulties, or test results indicating violations of drinking water standards;
- establish stringent prohibitions and penalties, and permit citizen enforcement of the law;
- allow individuals to sue violators of the law or the drinking water standards, or to seek judicial review if the Minister fails to perform his/her duties under the law; and
- require drinking water suppliers to assess the vulnerability of drinking water sources to contamination.

EBR APPLICATION FOR REVIEW
RE: SAFE DRINKING WATER ACT
FILED BY
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TORONTO ENVIRONMENTAL ALLIANCE
DR. ADAM WINTERTON

SUPPLEMENTARY SUBMISSIONS

1. On June 22, 2000, the Canadian Environmental Law Association, Toronto Environmental Alliance, and Dr. Adam Winterton ("the applicants") filed an Application for Review pursuant to Part IV of the *Environmental Bill of Rights* ("EBR"). This Application requests a Review of the need for a *Safe Drinking Water Act* ("SDWA") in Ontario.
2. Subsequent to filing the Application for Review, the applicants have come into possession of two documents which provide further evidentiary support for the requested Review, as described below.
3. The first document is a memorandum dated January 25, 2000 authored by an ad hoc group of the province's "Drinking Water Coordination Committee" (attached). Entitled "Proposed Revisions to Ontario Drinking Water Objectives", this memorandum contains a number of significant findings regarding drinking water safety under the current regulatory regime. For example, this memorandum confirms that:

Concerns regarding the ODWOs were raised by Operations Division, Ministry of the Environment, in a memo sent to Program Development Branch dated August 21, 1997. A number of issues were brought forward, with the main points centering on the non-reporting of drinking water quality by smaller municipalities, the cost to smaller municipalities of the sampling requirements contained in the ODWOs, recent administrative changes rendering the discovery of the adverse drinking water quality notification protocol obsolete, and the updating of the ODWOs to reflect the latest water quality limits.

Subsequently, in an information briefing to the Drinking Water Coordination Committee (DWCC) on November 14, 1997, Operations Division presented additional background information and a rationale for their concerns. They also proposed certain modifications to the ODWOs be considered by the DWCC. Their briefing indicated:

- A number of smaller municipalities do not comply with the minimum monitoring and reporting requirements established in either Certificates of Approval or the ODWOs...

- Restructuring of public sector laboratory services (which have resulted in a move to private sector laboratory testing of drinking water) necessitate a review of the protocol for notification of the Medical Officer of Health on discovery of adverse drinking water quality...
- Since the 1994 revision to the ODWOs was published, existing limits have been revised and limits for new parameters have been developed. The ODWO document needs to be updated to reflect these changes.

The Drinking Water Coordination Committee noted that not monitoring drinking water quality is a serious concern for the Ministry in view of its mandate to protect public health (emphasis added, pp.1-2).

4. The second document is a draft Cabinet submission dated March 14, 2000, apparently authored by MOE staff for signature by the Minister and Deputy Minister. Although it appears that this Cabinet submission was not finalized nor its recommendations implemented, this document contains some startling factual admissions:

In the Blueprint and the October 1999 Throne Speech, the Government affirmed that a strong Ontario must be a cleaner Ontario, and that the province requires strong laws that allow for tough enforcement [and] tough penalties... A component of this commitment involves strengthening environmental laws...

There is a growing public perception that the "government" is not protecting the air, water and land. Public surveys have consistently shown that the public equates the health of the environment with their own health...

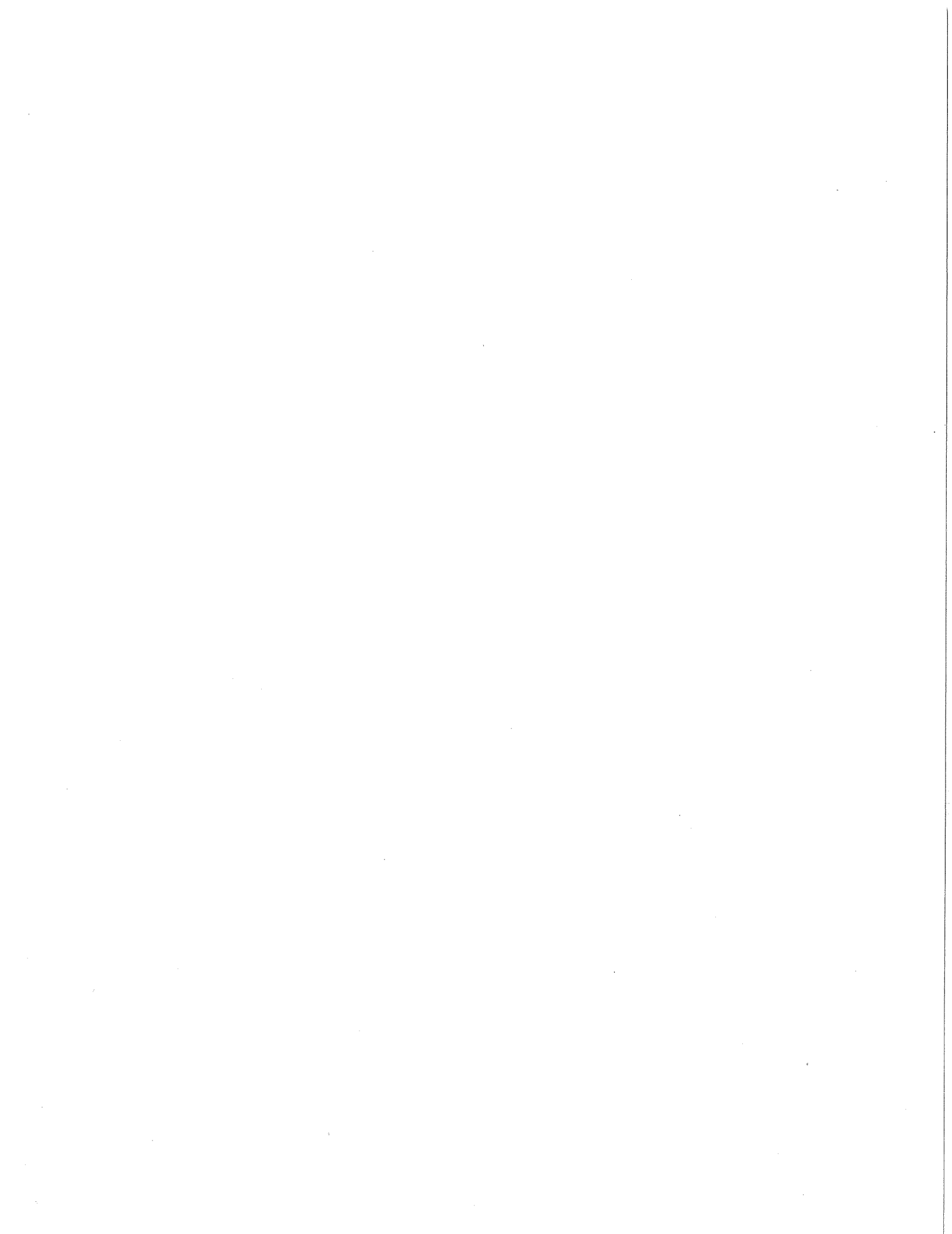
Less than 10% of sources of pollution in the province (those most likely to cause health or environmental problems) are inspected in any one year. The capacity for inspection and investigation activities needs to be increased and the compliance and enforcement approach needs to be toughened so that the Ministry can effectively and visibly deter those who choose to operate outside the law and threaten public health and our air, land and water...

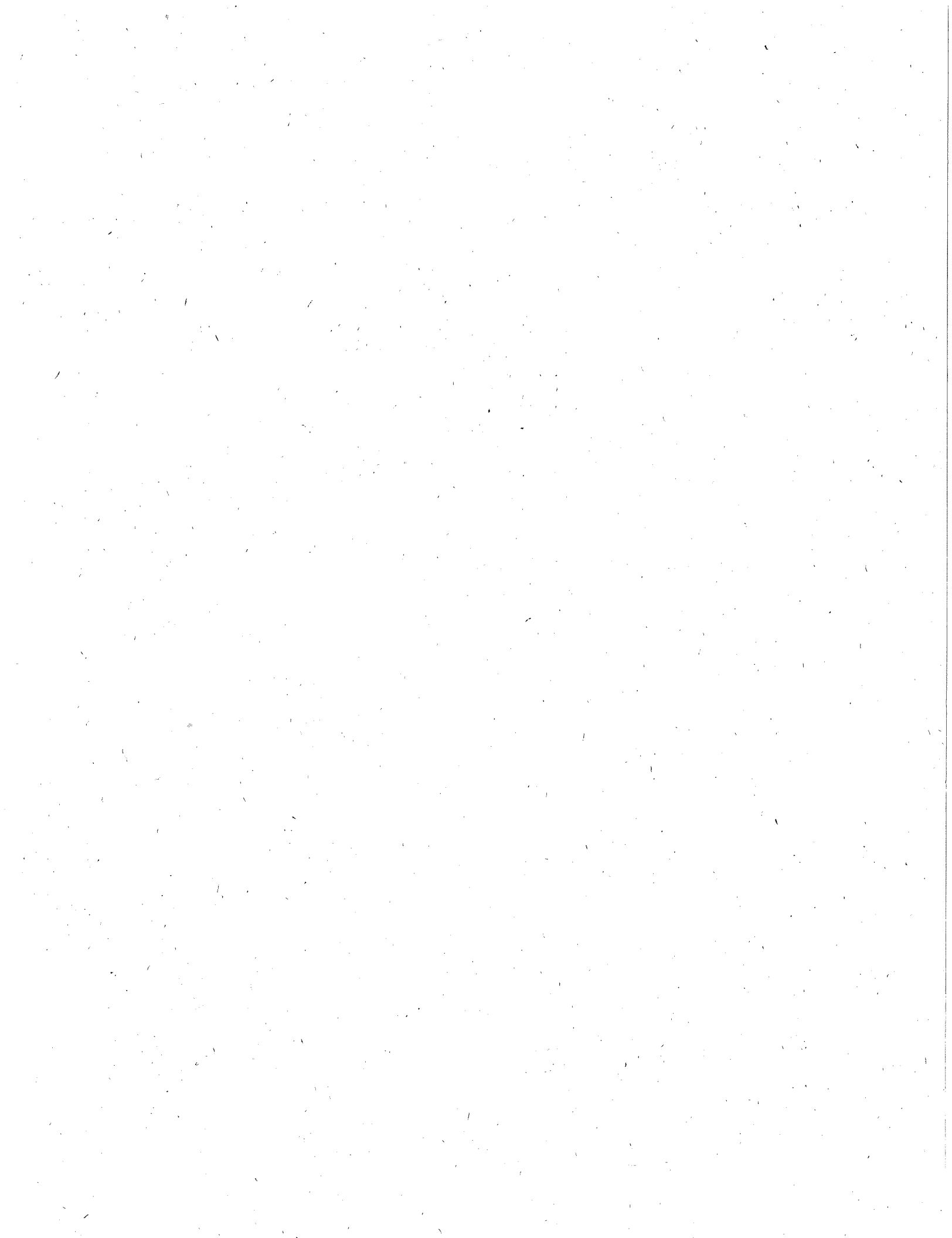
Historically, the Ministry approach of working cooperatively with industry to develop workable solutions to reduce their pollutant releases has been only moderately successful. The existing low inspection rate referred to above, allows numerous industries the opportunity to break the law...

The citizens of the province have voiced their dissatisfaction with the current environmental situation and want to see stricter enforcement and better environmental protection (pp.2-4).

5. In the applicants' view, these two documents provide further justification why it is in the public interest for the requested Review to proceed. Significantly, both documents pre-date the Walkerton tragedy, and both provide clear evidence that the MOE was (and is) fully aware that further measures are required to protect the environment in general, and to protect drinking water quality in particular.
6. Moreover, given that the recommendations in the draft Cabinet submission (eg. increase fines/jail terms, establish an environmental SWAT team; establish a toll-free pollution hotline) have not been adopted or implemented to date, Ontario's drinking water sources continue to be vulnerable to contamination from industrial, agricultural and other activities. Accordingly, the need for a SDWA has not been diminished or eliminated by governmental action. To the contrary, governmental inaction regarding drinking water quality has made the need for a SDWA even more acute, as demonstrated by recent events. In any event, even if the recommendations to Cabinet are implemented (eg. more environmental officers get hired over the summer), such measures, at best, will only partially offset the devastating staff and budget cutbacks suffered by the MOE in recent years, and do not detract from the continuing need for a SDWA.
7. For the foregoing reasons (and for the reasons outlined in the EBR Application for Review), the applicants submit that the public interest warrants the requested Review and, more importantly, warrants the prompt enactment of a SDWA in Ontario.

June 28, 2000







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