PART III – THE NEED FOR LEGISLATIVE REFORM IN ONTARIO

3.1 Introduction

As described above in Part I of this Paper, the current legal regime for protecting Ontario's drinking water (and its sources) consists of a diverse mix of general legislation, regulation, standards, by-laws, objectives, and guidelines at the federal, provincial and municipal levels.

In some instances, there is overlap between the federal, provincial, and municipal regimes. For example, within their respective jurisdictions, all three levels of government have attempted to control substances or activities that may contaminate groundwater or surface water which serve as sources of drinking water. Thus, the federal government has enacted the *Fisheries Act* and *CEPA 1999* (and regulations thereunder), the provincial government has enacted the *Environmental Protection Act* and *Ontario Water Resources Act* (and regulations thereunder), and municipalities have enacted zoning and sewer use by-laws under the *Municipal Act* and *Planning Act* –which are aimed at a single overarching purpose, *viz.,* to control, reduce or prevent water pollution.

Given the current structure of Canada's Constitution, some degree of legislative overlap is inevitable in broad areas of concurrent jurisdiction, such as the environment and public health. Indeed, some commentators have argued that such overlap may even be helpful or desirable because if one level of government balks at enacting necessary safeguards, then other levels of government have legislative competence to intervene and take appropriate action. This argument has been framed as follows:

> Overlapping federal-provincial legislation can be beneficial. Although this may lead to interjurisdictional squabbles, it also increases the likelihood that either one or the other level of government will engage in action to protect the environment.[241]

Furthermore, ecosystems, including groundwater and surface watercourses, do not neatly conform to political, territorial or jurisdictional boundaries.

Moreover, even if Ontario had (or assumed) exclusive jurisdiction over the environment and public health, there are a number of significant problems in the province's current drinking water regime. For example, there is considerable fragmentation and inconsistency within and between provincial laws, regulations, and policies developed by various ministries and agencies. Such problems are particularly apparent respecting water contamination concerns associated with agricultural operations such as intensive farming and nutrient management, as described below.
Aside from resolving this and other instances of legislative inconsistency, there are also significant legislative "gaps" within Ontario's drinking water regime. Alarmingly, for example, there is no Ontario law that expressly confers or guarantees the public right to clean and safe drinking water. Similarly, Ontario law contains few mechanisms for political or judicial

[241] Webb, "On the Periphery: The Limited Role for Criminal Offences in Environmental Protection", in Tingley (ed.), *Into the Future: Environmental Law and Policy in the 1990's* (Environmental Law Centre, 1990), at page 65.

accountability for drinking water safety at the provincial level, and opportunities for public participation in drinking water standard-setting and approval processes are limited at best. In addition, Ontario law imposes no mandatory duty to identify and evaluate new or emerging threats to drinking water safety, nor does Ontario law mandate comprehensive source water assessment or protection programs.

These and other other legislative shortcomings are compounded by procedural, fiscal and institutional barriers that make it difficult to address drinking water concerns in a unified, systematic manner, as described below.

Thus, while the current legal regime for protecting drinking water in Ontario appears, at first glance, to be complex and comprehensive, a closer examination reveals that despite recent improvements (e.g. O.Reg. 459/00), there are number of remaining weaknesses, flaws, and concerns which require further legislative attention. This is particularly true given the existence of important drinking water provisions which have been passed or proposed in other jurisdictions, but which have not yet been adopted adequately or at all in Ontario.

Accordingly, it is the purpose of this Part of the Paper to undertake a legal analysis of Ontario's current drinking water regime, utilizing the various benchmarks and principles used in Part II of the Paper for the comparative analysis of drinking water regimes in other jurisdictions. Where appropriate, this Part of the Paper offers recommendations for legislative reform to address shortcomings in the current legal framework in Ontario.

It should be noted that the legislative reforms proposed herein are primarily directed at the provincial level. This is not to suggest that the federal government lacks constitutional authority to play an important regulatory role regarding drinking water safety. To the contrary, a strong argument can be made that the federal government has sufficient jurisdiction over public health and the environment to justify the enactment of federal safe drinking water legislation, or, alternatively, nationally binding drinking water standards. Indeed, in the wake of the recent *Cryptosporidium* outbreak in North Battleford, there have been renewed calls for increased federal presence (eg. by amendments to the *Food and Drug Act*) in the regulation of drinking water safety. In the short-term, however, it appears that the federal environment and health ministers are extremely reluctant to move beyond traditional federal activities regarding drinking water (e.g. drinking water guidelines, technical research, infrastructure funding, etc.), and they have cited jurisdictional constraints in support of their position.

Because Ontario cannot invoke constitutional constraints in regulating drinking water safety, the reforms proposed herein are aimed at the province. In fact, Ontario is already extensively involved in drinking water matters, but the legal analysis below suggests that legislative reform is necessary in order to ensure effective, efficient and enforceable protection of drinking water and its sources across the province.

3.2 Analysis of Current Legal Regime in Ontario

(a) General

While federal environmental laws and policies apply within Ontario, the key components of the current legal regime exist primarily at the provincial level. Thus, the remainder of this Paper will focus on the strengths, weaknesses, and opportunities for reform within the provincial drinking water regime. This is not to suggest that federal laws or policies are insignificant or irrelevant for the purposes of protecting drinking water quality and quantity. However, given that water resource management and public health protection have largely evolved as matters of provincial jurisdiction, it is both timely and imperative to assess the adequacy of Ontario's current legal regime.

Having regard for the various elements of Ontario's legal regime, it is possible to make some general observations and draw some overall conclusions about the nature, scope and content of the current regulatory framework.

For example, it is readily apparent that Ontario's water-related provisions are not integrated or consolidated within a single statute or regulation. To the contrary, such provisions are scattered across a number of different statutes and regulations that are administered by different ministries, agencies or institutions whose mandates, resources, and degrees of expertise in drinking water matters vary greatly. For example, water resource management is generally carried out in Ontario by the MOE under the auspices of the OWRA, although the MOE also administers regulations related to water quality generally under the EPA (e.g. MISA effluent standards).

At the same time, however, activities or undertakings which can adversely affect drinking water quality or quantity may be subject to the jurisdiction of any number of ministries, agencies or institutions, such as: the MOE (e.g. the *Environmental Assessment Act*); the MNR (e.g. the *Public Lands Act, Lakes and Rivers Improvement Act*, or *Aggregate Resources Act*); the Ministry of Agriculture, Food and Rural Affairs (e.g. the *Drainage Act*); the Ministry of Municipal Affairs and Housing (e.g. the Provincial Policy Statement under the *Planning Act*); the Ministry of Consumer and Commercial Relations (e.g. the *Gasoline Handling Act*); conservation authorities (e.g. floodplain regulations under the *Conservation Authorities Act*); and municipalities (e.g. by-laws under the *Municipal Act* or *Planning Act*).

It goes without saying that this multi-jurisdictional regime is not necessarily conducive to ensuring a unified and consistent approach to the long-term sustainable management of Ontario's water resources.[242] This is particularly true in relation to groundwater management:

> In summary, the current legal and policy framework for groundwater management is best characterized as fragmented and uncoordinated. The ministries do not have a publicly recognizable strategy that spells out how priorities are to be set and how ministries can coordinate their efforts and

[242] Generally, see McCulloch and Muldoon, *A Sustainable Water Strategy for Ontario* (CELA, 1999), and McClenaghan and Miller, *Submissions to the Water Resource Management Committee regarding Devlopment of a Long-Term Strategic Water Policy Framework in Ontario* (CELA, 2000): <http://www.cela.ca>.

> work with all stakeholders to address the conflicting goals contained in different laws and policies.[243]

In the discrete matter of communal drinking water, the MOE has assumed the role of lead agency pursuant to the OWRA and regulations thereunder (e.g. Regulation 903, O.Reg.435/93, and O.Reg. 459/00). There are, however, a number of other players (e.g. public utility commissions or medical officers of health) and different statutes (e.g. *Public Utilities Act* or *Health Promotion and Protection Act*) which are directly relevant to the delivery of drinking water at the local level. Indeed, it is the *Public Utilities Act* (whose administration has not been assigned to the MOE or, indeed, any other ministry) that specifically prohibits the deposit of injurious materials into waterworks (section 13).

The net result is a complex, convoluted and generally uncoordinated legislative regime, both for water management in general and drinking water in particular. The highly fragmented nature of the current provincial regime is contrary to the objectives of accountability, transparency, and avoidance of shared responsibility. To avoid unnecessary confusion or duplication, Ontario should expressly clarify jurisdictional roles, duties and responsibilities of the various officials and entities involved in drinking water quality and quantity. While this may be achieved through different means, Ontario should consider consolidating drinking water provisions (and related regulations and policies) into a single, integrated statute that deals solely with drinking water matters.

As described in Part I of this Paper, the concept of a special *Safe Drinking Water Act* is not new in Ontario, and, in fact, such legislation has been proposed on numerous occasions since the early 1980s by individual legislators as well as public interest organizations. It should be noted, however, that consolidating drinking water requirements into a single statute does not dispense with the need for other environmental laws and regulations of general application, such as the EPA or OWRA.

Ideally, a comprehensive drinking water statute would eliminate the current need for interested parties (e.g. drinking water regulators, suppliers and consumers) to obtain and review the voluminous (and often disparate) array of laws, regulations and policies described in Part I of this Paper. In this sense, a specialized statute would provide a "one-window" compendium of drinking water requirements for all interested parties. Consolidation also offers an important opportunity to clarify, improve and coordinate drinking water requirements, which, in turn, may enhance investigation and enforcement capability.

It is noteworthy that other jurisdictions have passed or proposed specialized drinking water statutes, rather than attempt to address drinking water through environmental laws of general application. For example, the U.S. enacted the specialized SDWA rather than amend or expand other general environmental laws (e.g. *National Environmental Policy Act*, *Clean Water Act*, or *Toxic Substances Control Act*) to include drinking water matters. Similarly, British Columbia has recently enacted the *Drinking Water Protection Act* (Bill 20) as part of its "Drinking Water Protection Plan", as described above in Part II of this Paper.

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[243] Environmental Commissioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming: Special Report to the Legislative Assembly of Ontario* (ECO, 2000), at page 6.

At the very least, the passage of a separate, stand-alone drinking water statute would heighten the profile and priority of ensuring drinking water quality in Ontario. It would also represent a tangible and highly visible statement of the government's commitment to safe drinking water. Otherwise, addressing drinking water matters via *ad hoc* regulations under a statute that is over 40 years old (eg. the *Ontario Water Resources Act*) tends to diminish the importance of drinking water safety, and does not represent the optimum level of protection for this fundamental value.

Assuming that Ontario's drinking water provisions are consolidated within a single statute, there are a number of other legislative provisions and policies which are inconsistent (or conflict) with the paramount objective of protecting drinking water and quality.

For example, although disposal of animal wastes can pose serious risk to drinking water quality,[244] Ontario's EPA contains several exemptions for this activity (e.g. sections 6(2), 13(2), 14(2), and 15(2)), provided that animal waste disposal is carried out in accordance with "normal farming practices". Although municipalities may attempt to address animal waste disposal through "nutrient management" by-laws, the *Farming and Food Production Protection Act, 1998* provides that "no municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation" (section 6(1)).[245]

Further examples of inconsistency regarding water resources may be found in the province's land use planning regime under the *Planning Act*. While the current Provincial Policy Statement ("PPS") directs municipalities to protect water quality and quantity (Policy 2.4.1), this policy does not supercede or take precedence over other policies set out in the PPS, such as providing "sufficient land for industrial, commercial, residential, recreational, open space and institutional uses to promote employment opportunities" (Policy 1.1.2), or ensuring "long term economic prosperity" by providing "that infrastructure and public service facilities will be available to accommodate projected growth" and "providing a supply of land to meet long term requirements" (Policy 1.1.3). The PPS provides little guidance to municipalities on how these often-incompatible objectives are to be resolved in cases of conflict. Even if such guidance existed, it should be further noted that the *Planning Act* merely requires municipalities to "have regard" for these pronouncements of provincial policy. Thus, the permissive nature of the PPS, and the considerable municipal discretion in applying PPS policies, makes it difficult to ensure long-term protection of water quality and quantity under the current land use planning process.

At the very least, these and other examples of inconsistency should be formally revisited and, where necessary, revised and/or revoked to ensure consistency with the provincial objective of protecting drinking water quality and quantity across Ontario.

Even if the above-noted formal review is undertaken, such a review may not necessarily identify and remedy all actual or potential cases of conflict with the provisions of Ontario's drinking

[244] See, for example, Environmental Commissioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming: Special Report to the Legislative Assembly of Ontario* (ECO, 2000), at page 9.
[245] *Farming and Food Production Protection Act, 1998*, S.O. 1998, c.1. The Walkerton Inquiry has received testimony indicating that such provisions make it difficult for municipalities to protect drinking water sources from agricultural runoff: see the Part 1A testimony of Mr. David Thomson and Dr. Goss.

water regime. To safeguard against this possibility, it would be prudent to include a paramountcy clause in the provincial drinking water statute. This clause should be in addition to a purpose statement that entrenches the acknowledged public priority of ensuring safe drinking water for all Ontarians, as described below.

In essence, a paramountcy clause would provide that where there is conflict between drinking water provisions and any general or special Act (or regulations), the drinking water provisions prevail to the extent of the conflict. Incredibly, it appears that the OWRA lacks such a paramountcy clause. However, an example of a paramountcy clause is found in the SDWA (Bill 96) recently proposed as a private member's bill by Ms. Marilyn Churley MPP:

> In the event of conflict between any provision of this Act or the regulations made under it, and a provision of any other Act or regulation, this Act and the regulations made under it prevail (section 17).

Aside from the issue of paramountcy, it should be noted that most of Ontario's current drinking water requirements are set out in the form of subordinate regulation (e.g. Regulation 903, O.Reg. 435/93, and O.Reg. 459/00), rather than in legislative form (e.g. OWRA).

For investigation and enforcement purposes, regulations are binding and legally enforceable instruments, and are therefore preferable to policies, objective, manuals or guidance documents. In addition, regulations offer a degree of flexibility in the sense that it can be relatively easier and quicker to amend or update regulations to take into account new information, emerging technologies, or material changes in circumstances.

Nevertheless, there are a number of serious concerns about relegating most substantive drinking water provisions to mere regulation -- or accompanying guidance documents[246] -- rather than legislation.

Once enacted, for example, legislation generally enjoys a high degree of permanence and longevity, primarily because parliamentary procedures[247] must be observed before legislation can be amended or repealed. Such procedures typically result in considerable public, media, and political scrutiny of proposed legislative amendments or repeals. In addition, to promote long-term stability and predictability, legislatures are generally reluctant to completely overhaul or repeal existing legislation unless there are compelling public policy reasons to do so.

Regulations, on the other hand, are generally not subject to rigorous public or parliamentary oversight. In some instances, regulations can virtually disappear at the stroke of a pen with little or no public input. As noted above, the *Environmental Bill of Rights* has attempted to make environmental regulation-making in Ontario more open, accessible and transparent. Nevertheless, the Environmental Commissioner of Ontario has found many examples of

[246] For example, while section 13 of O.Reg.459/00 requires the periodic submission of "engineer's reports", the actual scope and content of such reports are not specified in the regulation but in a MOE technical publication entitled "Terms of Reference for Engineer's Reports for Water Works", as may be amended from time to time.
[247] For example, First, Second and Third Reading debate (with possible referral to committee); Royal Assent; and proclamation into force.

environmentally significant regulations that were made, amended or repealed with little or no opportunity for public review and comment.[248]

Indeed, the Drinking Water Protection Regulation itself was subject to negligible public notice and comment opportunities. For example, notice of the proposal was first posted on the EBR Registry as an "emergency exception" on May 31, 2000.[249] The proposed text of the regulation was not made available to the public at that time, nor was a Regulatory Impact Statement prepared by the MOE. Instead, the EBR Registry notice claimed that "urgency" prevented a full 30-day comment period, but indicated that public input would be accepted until June 6, 2000 – a mere six days after the notice was first posted. After this "comment period" closed, no further opportunities for public review and comment were provided until the actual regulation was released and proclaimed in force in August 2000.[250] Thus, despite the urgency claimed by the MOE, it actually took close to three months to finalize and publish the regulation – a timeframe which would have permitted ample opportunity for more effective public consultation. Clearly, there was a compelling public interest need for this overdue regulatory initiative, but it remains doubtful whether it was necessary to dispense with meaningful comment opportunities on the new regulation.

In any event, the questionable origin of the Drinking Water Protection Regulation illustrates the often inaccessible (if not secretive) manner in which regulations may be unilaterally made, amended or repealed in Ontario. This practice stands in stark contrast to the much more public process involved in making, amending or repealing statutes, as described above.

Another concern about using regulation rather than legislation centres on the fact that most regulations are ultimately approved by Cabinet, not the Legislature. Thus, regulations often reflect only the priorities or policies of the governing political party, rather than the Legislature as a whole or the public at large. This concern has been summarized as follows:

> …[R]egulations are prepared by civil servants, often in closed-door consultation with the regulated industry, and rarely in consultation with the affected public or public interest groups that represent them. Regulations are approved by Cabinet. Unlike statutes, they do not pass through Parliament or the provincial legislature, where MPs and MPPs can criticize them and propose amendments. So the final version reflects only the views of the party in power, not the views of the opposition parties or the general population.[251]

Given the profound public interest in ensuring drinking water safety, a strong argument can be made that wherever possible, substantive drinking water provisions should be entrenched in legislation rather than regulation. In general, fundamental drinking water principles, rights, obligations and remedies should be codified into law, thus providing a clear framework for any

[248] These examples are described in virtually every Annual Report released by the Environmental Commissioner.
[249] EBR Registry No. RA00E0014. Generally, see Lindgren, *Submissions of the Canadian Environmental Law Association to the Director, Standards Development Branch (MOE) regarding the Proposed Drinking Water Regulation* (CELA, June 6, 2000).
[250] EBR Registry No. RA00E0020.
[251] Estrin and Swaigen (eds.), *Environment on Trial (3rd ed.)* (Emond Montgomery, 1993), at page 11.

regulations that are needed to implement the statutory regime. If the primary justification for having regulations is the need for flexibility, finetuning, and technical updating, then regulations should be confined to matters that will likely change frequently, and should be drafted and evaluated on that basis.

If drinking water requirements are left largely in regulatory form, such requirements remain constantly vulnerable to the unpredictable vagaries of the political process, particularly since incoming governments can virtually change or abolish regulations overnight with little or no public consultation. In contrast, legislation tends to be more permanent in nature, and proposed legislative changes are processed in much more open, accessible and transparent manner than regulations.

Even if Ontario enacts a special *Safe Drinking Water Act*, there is still a role for detailed regulations to fine-tune or implement statutory requirements. In other words, the enactment of a *Safe Drinking Water Act* may diminish – but not dispense with – the need for prescriptive regulations. Nevertheless, for the reasons stated above, drinking water provisions should, to the greatest possible extent, be entrenched in law in order to maximize their legal weight, significance, and long-term survival.

RECOMMENDATION #1: Ontario should, to the greatest possible extent, entrench drinking water provisions into a single, integrated statute, rather than in regulation or policy. This statute should contain a paramountcy clause that provides that in cases of conflict between drinking water provisions and any other general or special Act, the drinking water provisions shall prevail to the extent of the conflict.

RECOMMENDATION #2: Ontario should systematically review and, where necessary, revise provincial laws, regulations and policies to ensure that they are consistent with the overall provincial priority of protecting drinking water and its sources.

(b) Accountability

Accountability Principles and Mechanisms

It is widely accepted that ministries, agencies and institutions should be accountable for their environmental decision-making. In fact, enhancing governmental accountability for environmental decision-making in Ontario was an important policy objective which led to the passage of the *Environmental Bill of Rights, 1993.*[252] However, there are mixed views as to whether the EBR has actually achieved the level of governmental accountability anticipated by the drafters of the EBR.[253]

[252] Muldoon and Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Emond Montgomery, 1995), Chapter 5.

[253] For example, it has been suggested that the considerable discretion conferred upon various Ministers under the EBR mitigates against full accountability: see Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences" (1998), *Villanova Env. L.J. (Vol IX, Issue 2)*, at pages 435 to 436.

For accountability purposes, institutional arrangements under a statutory regime should reflect or incorporate a number of important principles, such as:

- clearly delineated areas of jurisdictional responsibility;
- avoidance of conflicting objectives or mandates;
- avoidance of shared or fragmented responsibility;
- single-point accountability (e.g. accountable only to a single entity or official);
- provision of sufficient resources to accomplish assigned duties;
- open, transparent processes for decision-making;
- clear criteria to guide decision-making;
- effective review and appeal mechanisms;
- requirement to monitor and report outcomes; and
- responsiveness to changing demands, trends or risks.[254]

These principles may be implemented through political accountability mechanisms, judicial accountability mechanisms, or a combination thereof.[255] Political accountability mechanisms include, for example, statutory provisions which mandate annual reports by ministries to the Legislature (or a Standing Committee), require periodic ministerial statements (e.g. "State of the Environment" addresses), or establish an independent office (or auditor) to provide objective oversight and regular reports. Judicial accountability mechanisms include provisions which create new statutory causes of action, permit judicial review of ministerial non-performance of mandatory duties, or allow public access to the civil courts to address unlawful conduct (e.g. citizen suit provisions).

Accountability for Drinking Water in Ontario

While the MOE has primary responsibility for administering Ontario's drinking water regime, there are few, if any, accountability mechanisms built into either the OWRA or the regulations thereunder.

With respect to political accountability, for example, there is no provision in the OWRA which requires the MOE to report annually (or at all) to the Legislature (or a Standing Committee) on matters related to drinking water quality or quantity. Similarly, the Minister is not statutorily obliged to table annual "State of Ontario's Drinking Water" Reports which discuss statistical

[254] These principles are derived from the Australian Productivity Commission, *Arrangements for Setting Drinking Water Standards: International Benchmarking* (April 2000), page 8, Attachment 1A.
[255] EBR Task Force, *Report of the Task Force on the Ontario Environmental Bill of Rights* (MOE, 1992), at page 66.

summaries (e.g. quarterly reports filed by drinking water suppliers); number and nature of exceedances of health-based parameters; trends respecting orders, approvals or prosecutions; or emerging issues or challenges regarding the MOE's drinking water program.[256] In addition, there is no independent "Office of Drinking Water Safety" to oversee or report upon the MOE's drinking water program. The absence of such mechanisms clearly diminishes the political accountability of the MOE for its decision-making in the provincial drinking water regime.

With respect to judicial accountability, the OWRA simply provides that the Act binds the Crown (section 2). However, the OWRA does not contain a statutory cause of action for harm or loss arising from contraventions of drinking water provisions or regulations. Similarly, the OWRA does not impose any mandatory duties upon the Minister (e.g. to set, review, amend or enforce contaminant standards), and does not include any judicial review provisions. In addition, the OWRA does not contain a citizen suit provision that allows Ontarians to seek redress in civil court for contraventions of drinking water standards. Again, the absence of such mechanisms clearly diminishes the judicial accountability of the MOE for its decision-making in the provincial drinking water regime.

As noted in Part I of this Paper, the MOE recently conducted an internal review of whether there is a need for a *Safe Drinking Water Act* in Ontario. This review was carried out in response to a formal application filed by CELA and other applicants pursuant to Part IV of the EBR. In late October 2000, the MOE completed its review of its own drinking water regime, and concluded that a *Safe Drinking Water Act* was not needed in Ontario.[257] With respect to judicial accountability concerns raised by CELA and other applicants, the MOE simply noted that "anyone affected by a statutory power of decision may apply for judicial review of that decision".[258]

As a general proposition of law, this MOE statement is correct, but it begs the fundamental question of whether, for example, one can seek judicial review of a ministerial failure or refusal to establish new contaminant standards, or to review the adequacy of existing standards within a prescribed timeframe or frequency. Under the OWRA, there is no mandatory duty upon the Minister to establish, review or amend any drinking water standards at all, as discussed below. Given the permissive nature of the regulatory powers under the OWRA,[259] the establishment, review or amendment of drinking water standards is entirely discretionary, and an order of *mandamus* would not lie against the Minister under the *Judicial Review Procedure Act*. Indeed, the MOE could, in theory, repeal O.Reg. 459/00 and turn the drinking water standards back into non-enforceable Ontario Drinking Water Objectives, and even this significant rollback would not be judicially reviewable in court. Accordingly, the mere existence of the *Judicial Review Procedure Act* does not address concerns about the OWRA's failure to impose mandatory (and enforceable) duties upon the Minister in relation to drinking water standards.

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[256] Currently, the MOE reports on its Drinking Water Surveillance Program, and publishes other drinking water information. However, these *ad hoc* reports are largely done on discretionary basis, since there is nothing in the OWRA that actually requires the MOE to compile and publish these reports.

[257] H. Wong, Water Policy Branch (MOE), dated October 30, 2000.

[258] *Ibid.*, page 4.

[259] Section 75(1)(i) of the OWRA provides that Lieutenant Governor in Council "may" make regulations "prescribing standards of quality for potable or other water supplies". This enabling provision has existed within the OWRA for years, but no drinking water quality regulations were made until August 2000 (O.Reg.459/00).

Similarly, the MOE has noted that "under specific circumstances, the EBR legislation itself also provides a right to sue for harm to a public resource".[260] Again, this proposition is correct in law, but it does not address concerns about judicial accountability under the OWRA. First, it should be noted that the new cause of action under section 84 of the EBR is intended to protect "public resources", not drinking water from communal waterworks.[261] Second, even if the section 84 cause of action applied to drinking water *per se*, Part VI of the EBR imposes numerous conditions precedent and procedural requirements,[262] which likely explains why only one section 84 lawsuit has been brought to date in Ontario. Accordingly, one must question whether such lawsuits would be used widely by Ontarians to address local problems, even if section 84 did apply to drinking water.

The MOE's apparent refusal to consider the need for further accountability mechanisms in the OWRA stands in contrast to the trend in other jurisdictions which have seen fit to establish a variety of political and judicial accountability mechanisms. For example, the U.S. *Safe Drinking Water Act* requires annual public reports by the Environmental Protection Agency, and which create judicial review opportunities for non-compliance with duties imposed by the Act, as discussed below.

Unless and until such mechanisms are incorporated into Ontario law, the current drinking water regime seems to impose accountability only upon drinking water suppliers, who must comply with the Drinking Water Protection Regulation (eg. treatment, monitoring and reporting). The Minister of the Environment, on the other hand, has no mandatory legal duty to do anything in relation to drinking water, and is not statutorily obliged to monitor or report upon drinking water matters at the provincial level.

While local accountability is undoubtedly important, provincial oversight and overall regulatory responsibility is critical to ensuring drinking water safety across Ontario. At a minimum, in order to fully implement the multi-barrier approach, Ontario must develop and oversee a number of provincial standards that:

- require local authorities to develop and implement source water assessment and protection programs;

- regulate well siting, infrastructure, maintenance, repair, and other operational aspects of drinking water treatment and distribution;

[260] H.Wong, f.n. 17, page 4.
[261] As noted in Part I of this Paper, the EBR is intended to address the natural environment, rather than social, cultural, economic or indoor environments.
[262] For example, before commencing an EBR action, plaintiffs must generally file an Application for Investigation and await a governmental response that is either unreasonable or untimely. Special procedural rules (eg. public notice of action; service upon Attorney General; application to Farm Practices Protection Board; public interest stay, etc.) and special defences (eg. statutory authority and mistaken interpretation of an instrument) are also codified in Part VI of the EBR.

- specify monitoring and reporting requirements in relation to source water and delivered water;

- require treatment of surface water and groundwater (including continuous, site-specific determinations of whether groundwater is subject to influence by surface water);

- empower regulatory officials to issue binding orders to require immediate action to address problems regarding source water or delivered water;

- regulate the development and content of emergency response, contingency plans, and communication plans where unsafe drinking water is detected;

- establish the nature and frequency of inspections by regulatory officials;

- regulate laboratory accreditation, certification, testing and training requirements (including performance audits to ensure compliance);

- require operator and agency training and professional development (including performance audits to ensure compliance);

- establish requirements for public reporting on drinking water matters at the provincial and local level; and

- require the prioritization, undertaking, and dissemination of research on new technology, emerging pathogens, and related drinking water matters.

To date, only limited progress on the foregoing measures has been achieved, largely under the Drinking Water Protection Regulation. Ideally, these measures should be consolidated under the auspices of specialized drinking water legislation so that all parties – regulatory officials, drinking water suppliers, and members of the public – know exactly what is required (and by whom) for the purposes of implementing the multi-barrier approach to drinking water safety.

Nevertheless, simply asserting that provincial role should be strengthened and entrenched in law begs the question of which Ontario ministry or agency should be given the primary responsibility for overseeing the implementation of the drinking water regime.

As noted above in Part II of this Paper, British Columbia's Ministry of Health has considerable responsibility under that province's drinking water regime. Most other jurisdictions, however, have tended to rely upon environmental ministries or departments for ensuring drinking water quality and quantity. This has traditionally been the approach used in Ontario, and there are strong arguments for retaining the Ministry of the Environment as the lead agency for the province's drinking water program.[263] At the same time, other public bodies (eg. municipalities, medical officers of health, public utilities, and conservation authorities) should continue to play

[263] See, for example, OPSEU, *Renewing the Ministry of the Environment: Submission by OPSEU to the Walkerton Inquiry* (April 27, 2001).

their related roles under their respective statutes, as may be amended by safe drinking water legislation.

Having said this, it does not necessarily follow that the Ministry should continue to deliver the drinking water program through its existing institutional structure and administrative arrangements. On this point, it should be noted that other jurisdictions have passed or proposed legislative provisions that create and empower drinking water officials, or that create specialized drinking water agencies or institutions. New Jersey, for example, has established the Bureau of Safe Drinking Water within the Department of Environmental Protection. This Bureau is responsible for for all state-level programs and activities required under the federal *Safe Drinking Water Act*.

Similarly, the B.C. Auditor General's 1999 report advocated the creation of a single lead agency for protecting drinking water, primarily on the grounds that drinking water protection should not be handled as a sub-component of a broader mandate given to generalist ministries. In response, B.C.'s recently enacted *Drinking Water Protection Act* requires the health and environment ministers to each appoint "provincial drinking water coordinators", who are required to jointly establish guidelines and directives to be considered by officials acting under the legislation. The two coordinators are also required to prepare and deliver annual reports to the health minister, who, in turn, was obliged to file the reports with the Legislature. Interestingly, the B.C. law also proposes a new official known as "drinking water officer". Among other things, these officers would be empowered to receive and act upon notices of adverse water quality; order water source/system assessments; require assessment response plans; issue hazard abatement/prevention orders; issue "contravention" orders directing persons to remedy non-compliance with the Act or regulations; and take his/her own direct action to address drinking water health hazards.

Likewise, England has established the independent Drinking Water Inspectorate in 1990 pursuant to the *Water Industry Act*. While England's Environment Agency continues to have general responsibility for environmental protection (including freshwater resources), the Drinking Water Inspectorate is staffed by specialists and focused solely on drinking water. Among other things, the Inspectorate undertakes inspections to ensure that treatment and monitoring requirements are carried out by water suppliers. The Inspectorate also undertakes enforcement measures (pursuant to its *Code of Enforcement*), implements research programs (especially in relation to *Cryptosporidium*), and plays a major role in standard-setting and regulation-making. The English experience under the Drinking Water Inspectorate has prompted Australia's Office of the Regulator-General (Victoria) to advocate creation of a similar specialized agency, as described above in Part II of this Paper.

Having regard for these intiatives in other jurisdictions, a strong argument can be made that it is time for Ontario law to create a statutory "Drinking Water Commission" (reporting to the Minister of the Environment) to develop and oversee the implementation of Ontario's drinking water program. If such a Commission is created, Ontario would not be breaking new ground, but would simply be following the lead established by other jurisdictions.

Indeed, it should be noted that the concept of a specialized water commission is not unprecedented in Ontario. In particular, the Ontario Water Resources Commission was established by law in the late 1950's. It reported to the Department of Health (since the MOE was not yet in existence), and possessed a number of important water-related functions and regulatory responsibilities.[264]

Over its fifteen year history, the Ontario Water Resources Commission served as an independent body that, among other things, undertook annual inspections of waterworks, provided financial and technical assistance, developed water testing procedures, established and operated laboratory services, and developed training and certification programs. In 1972, the Ontario Water Resources Commission was consolidated with other governmental departments to form the Ministry of Environment, which was a given a broad mandate to protect the air, land and water of Ontario (not just drinking water). Accordingly, the Ontario Water Resources Commission provides an important model for current discussions about the delivery of Ontario's drinking water program.

It could be suggested a new Drinking Water Commission is redundant since the Ontario Clean Water Agency ("OCWA") already exists as a Crown agency, and is extensively involved in water and sewage services across the province. It is for this very reason, however, that OCWA would not be an appropriate substitute for the Commission recommended herein. Since OCWA provides water services for many municipalities on a contractual basis, it is not in a position to "self-police" itself or to otherwise serve as the provincial regulator of drinking water safety. The fact that OCWA has also been considered as a candidate for privatization makes it even less likely to serve as a regulatory body.

It could be further suggested that the new Drinking Water Commission is redundant since the Ministry of Environment already has jurisdiction and staff to protect drinking water in Ontario. However, it should be further noted that the Ministry of Environment has numerous other statutes, regulations and programs to administer across the province. Similarly, evidence at the Walkerton Inquiry suggests that the actual time spent by Ministry staff on the communal water program has traditionally been small compared to the other components of the Ministry's overall mandate to safeguard the air, land and water of Ontario. This situation has been exacerbated by recent staff and budget cuts which have made it even more difficult for the Ministry to fully and properly administer its communal drinking water program. However, even if funding and staffing were restored to their pre-existing levels, the fact remains that drinking water is one of several competing demands on staff time and availability. Put another way, restoration of Ministry budgets and staffing is undoubtedly important, but it does not necessarily address the need to have a single-purpose agency whose only priority and mandate is drinking water safety in Ontario.

In order for the Drinking Water Commission to be effective, the drinking water statute must ensure that the Commission has adequate legal authority, sufficient staffing and resources, and independence from other governmental employees and officials, particularly those involved in land use and resource development decisions. For the purposes of political accountability,

[264] *Ontario Water Resources Commission Act, 1957*, S.O. 1957, c.88. Generally, see Ontario Sewer and Watermain Construction Association, *Drinking Water Management in Ontario: A Brief History* (January 2001), at pp.3-7.

however, the statute should provide that the Commission reports directly to the Minister of Environment, who, in turn, shall immediately table the Commission's reports before the Legislature.

In general, the Drinking Water Commission should be headed by a Commissioner appointed to five year renewable terms in order to ensure continuity, consistency and independence from election cycles. The Commission's staff should include dedicated inspectors, who may be drawn from current (or former) Ministry employees with training and experience in drinking water matters. Core funding should be guaranteed by law, and must be at a level sufficient to enable the Commission to carry out its duties and functions imposed by the safe drinking water statute.

The principal mandate of the Drinking Water Commission should be to assume and expand the drinking water program presently administered by the Ministry of Environment. Among other things, the drinking water statute should require the Commission to develop (with full public input) provincial standards on all components of the multi-barrier approach, as discussed above (eg. source assessment/protection, infrastructure, treatment, monitoring, reporting/notification, remedial action, contingency planning, inspection, operator training/certification, laboratory accreditation, research, etc.). Creating such a Commission would help reduce the excessive fragmentation that currently plagues the existing legal regime, and would assist in enhancing accountability and avoiding shared (or diffuse) responsibility for drinking water safety.

The creation of a specialized Drinking Water Commission would not necessarily displace other public officials who currently play a role in protecting drinking water quality or quantity. For example, medical officers of health should continue to exercise their jurisdiction under the *Health Protection and Promotion Act*. However, overarching responsibility for Ontario's drinking water program should be statutorily vested in the Drinking Water Commission, with other agencies and officials providing a backup system of "checks and balances" to ensure that localized problems are quickly identified and remediated. It goes without saying that to make this system workable, the drinking water statute must clearly delineate the lines of authority, responsibility and communication between the Commission and other officials involved in drinking water protection in Ontario.

In summary, Ontario's current legal regime generally imposes no mandatory duties upon the Ministry of Environment in relation to provincial standards, monitoring and reporting on drinking water matters. In addition, the current regime generally leaves provincial monitoring and reporting issues by default to Environmental Commissioner of Ontario and/or the Provincial Auditor. While these independent offices can and do play important auditing and reporting functions, neither office has any particular expertise in drinking water matters. Moreover, the annual reports generated by these offices tend to catalogue -- not stop or reverse -- poor or questionable governmental decisions regarding the environment and public health.

Accordingly, if Ontario enacts safe drinking legislation as proposed in this Paper, then the statute must include a number of political and judicial accountability mechanisms (eg. provincial reporting and judicial review opportunities) in order to ensure drinking water safety. It goes without saying that such a statute should expressly bind the Crown. In addition, while the Minister of the Environment should continue to have ultimate responsibility for Ontario's

drinking water program, there are compelling reasons why the drinking water statute should create a specialized Drinking Water Commission to develop and oversee the implementation of drinking water standards and requirements. The drinking water statute should also clearly articulate lines of authority, responsibility, and communication between the various public officials who are involved in protecting drinking water (and its sources) and public health in Ontario.

An example of such a specification of roles, which should be set out in the statute, is in Table 1 below, titled "Example of Potential Assignment of Roles in a Multi-Barrier Safe Drinking Water System."

RECOMMENDATION #3: Ontario's drinking water statute should include provisions that:

(a) establish appropriate judicial and political accountability mechanisms, such as provincial monitoring/reporting and judicial review opportunities;

(b) specify that the statute binds the Crown;

(c) establish an new "Drinking Water Commission" that reports to the Minister of Environment, and that has the statutory mandate to develop and oversee the delivery of Ontario's drinking water program by (among other things) setting and enforcing provincial standards which implement the multi-barrier approach; and

(d) clearly delineate lines of authority, responsibility and communication requirements between Ministry staff, the Drinking Water Commission, municipal officials, public utilities, and medical officers of health.

(c) Application of Legal Regime

If Ontario enacts a single, comprehensive drinking water statute, there are a number of key implementation questions that must be answered. For example, should the drinking water statute apply only to public suppliers of drinking water (e.g. municipalities or public utility commissions), or should it also apply to private suppliers of drinking water (e.g. subdivisions or campgrounds)? Should drinking water requirements apply only to waterworks over a certain threshold (e.g. five or more service connections, or serving 25 or more people), or should they apply equally to all waterworks regardless of size? Finally, should individual private wells be subject to drinking water requirements imposed by law?

To answer these and related questions, it is instructive to review the current application of Ontario's Drinking Water Protection Regulation (O.Reg. 459/00). As described above in Part I of this Paper, this new Regulation only applies to water treatment or distribution systems that require waterworks approvals under section 52(1) of the OWRA.[265] In addition, the Regulation specifies that it does not apply to systems that supply 50,000 litres of water or less on at least 88

[265] Note that section 52(8) exempts a number of different waterworks from the requirement to obtain a section 52(1) approval: *Ontario Water Resources Act*, R.S.O. 1990, c.o.40, section 52(8).

Table 1. Example of Potential Assignment of Roles in a Multi-Barrier Safe Drinking Water System

Multi Barrier Item	Primary Delivery of This Barrier	Establishment of Requirements for this Barrier	Oversight Responsibility
A. Source Protection (including planning and development decisions)	Local municipalities & conservation authorities	Provincial standards and requirement for local authorities to establish source protection per the standards – Provincial Drinking Water Commissioner (reporting to the Minister of the Environment)	
B. Drinking Water delivery (wells, pipes)	Local municipalities & public utilities	Provincial standards for infrastructure, well siting & maintenance etc. and requirement for local authorities to ensure compliance – Provincial Drinking Water Commissioner	Ministry of Environment to ensure compliance
C. Monitoring (source water and delivered water)	Local municipalities and public utilities	Provincial standards for monitoring & reporting – Provincial Drinking Water Commissioner	Auditing by local medical officer of health and by MoE/ Drinking Water Commissioner; Ability of both to require action; specified communication among the agencies in case of adverse results. Regional and provincial scale review of results by Drinking Water Commissioner to identify issues in specific communities or regions
D. Treatment	Local municipalities and public utilities	Provincial standards for treatment according to specified conditions, including continuous examination of whether "groundwater" is subject to surface water influence – Drinking Water Commissioner	Ministry of Environment & Medical Officers of Health
E. Fix any Problems in source, treatment or delivery	Local municipalities and public utilities		Powers to make orders: Ministry of Environment & Medical Officers of Health
F. Emergency Response	Local municipalities and public utilities to have the plans and act on them, including contingency plans and communications plans	Provincial standards as to content of plans – Drinking Water Commissioner	Additional powers to initiate operation of plans or aspects of them: Medical Officer of Health; Ministry of Environment

Multi Barrier Item	Primary Delivery of This Barrier	Establishment of Requirements for this Barrier	Oversight Responsibility
G. Inspection	Dedicated Inspectors – Ministry of Environment; Follow up and ensuring compliance with deficiencies – Ministry of Environment; If health issues, also follow up responsibility of Medical Officer of Health	Provincial standards as to frequency and content of inspections and as to performance requirements – Drinking Water commissioner	Auditing of inspections (frequency, results, follow up) – Drinking Water Commissioner
H. Labs	Accredited, Certified & trained labs	Provincial standards as to accreditation, certification, testing, training requirements including auditing performance – Drinking Water Commissioner	Annual public reporting listing accredited, certified labs and audit performance
I. Training	By each agency in the system as to their staff and their roles, including understanding roles of the others: municipal / local; Ministry of Environment; Drinking Water Commissioner; Health Units; labs etc.	Provincial standards as to training requirements; re-training requirements; content and frequency of critical continuing education topics – Drinking Water Commissioner	Auditing each of the agencies for compliance with training requirements; annual reporting on same: Drinking Water commissioner
J. Public Reporting	Local municipalities, public utilities	Establishment of standards for content and format of public reporting – Drinking Water Commissioner	Auditing of compliance by local municipalities and public utilities with reporting requirements: Drinking Water Commissioner; Annual or more frequent reports by Drinking Water Commissioner as to each of the topics of its responsibilities under this Act
K. Research and Emerging Issues	Dissemination of recent / new research results; emerging issues etc. by Drinking Water Commissioner and Ministry of Health to local municipalities, utilities, health units and Ministry of Environment staff; ensuring receipt and review of these materials by each of these agencies	Identification of research priorities and advice re: same: Drinking Water Commissioner	

Note 1: Public input and advice to the standard setting process and to the Drinking Water Commissioner in carrying out its mandate must be specified and mandated in the legislation.
Note 2: The Drinking Water Commissioner would report to the Minister of the Environment; the Minister of the Environment would remain accountable for the system as a whole.

days in every 90 day period, unless the system serves more than five private residences (section 3(3)). Similarly, the Regulation further specifies that it does not apply to systems that are incapable of supplying water at a rate greater than 250,000 litres/day, unless the system serves more than five private residences (section 3(4)).

Thus, the new Regulation applies to many public and private water systems across Ontario, but does not generally apply to small waterworks serving five or fewer private residences. In effect, this means that a large number of commercial or institutional establishments that supply drinking water to the public from wells or surface water sources are not currently subject to the new regulation. These exempted establishments include facilities which may serve small numbers of people (e.g. stores, service stations, rental cottages, etc.) or large numbers of people (e.g. restaurants, campgrounds, churches, motels, golf courses, etc.), or which may provide water to the public over many months or years (e.g. day nurseries, long-term care facilities, or small schools and hospitals).[266]

For certain facilities not subject to the new Regulation (e.g. schools, day nurseries, restaurants), it is open to local health unit officials to conduct inspections and take water samples to ensure compliance with the *Health Promotion and Protection Act*. However, many facilities (e.g. service stations, churches, rental cottages, etc.) are not routinely inspected by health unit officials at the present time.[267] Even if all such facilities were subject to inspection by health unit officials, it must be noted that health units face resource constraints, competing demands, and other public health priorities which may significantly limit the staff time available to pursue drinking water concerns.[268]

More fundamentally, having some waterworks subject to MOE oversight, but leaving others by default to health unit oversight, perpetuates jurisdictional fragmentation, creates unnecessary confusion and uncertainty, and militates against a consistent and comprehensive approach to drinking water safety. To its credit, the Ontario government has undertaken public consultation on various options for regulating small waterworks, and, among other things, has raised the possibility of making water sampling and testing requirements less frequent, or making treatment requirements more flexible, for small waterworks.[269] At the present time, it is unknown whether – or to what extent – Ontario will regulate small waterworks under O.Reg.459/00 or a separate regulation containing different monitoring and treatment requirements, for example.

In any event, if Ontario's overall goal is to protect drinking water quality and public health, then there is no compelling policy reason to regulate large waterworks but exclude small waterworks from regulatory coverage. Accordingly, if Ontario adopts a comprehensive drinking water statute, then it must apply to all public and private treatment and distribution systems in the province.

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[266] MOE, "Protecting Drinking Water for Small Waterworks in Ontario: Discussion Paper" (August 2000), at page 2.

[267] *Ibid.*

[268] Health unit personnel have tesitifed at the Walkerton Inquiry that they spend relatively little time in drinking water matters, particularly where drinking water is treated and supplied by public waterworks.

[269] MOE, "Protecting Drinking Water for Small Waterworks in Ontario" (August 2000), at pages 3 to 6.

Nevertheless, it is conceivable that regulations under the drinking water statute could be carefully tailored to reflect the fiscal and technical constraints facing owners and operators of small waterworks. The bottom line is that all public and private systems should be subject to the same general principles, duties, obligations, and remedies that are set out in the statute. Where appropriate, these general statutory requirements may be fine-tuned through regulations to address the special circumstances of small treatment and distribution systems.

Because private individual wells do not require a section 52(1) approval under the OWRA, private well owners are not subject to the new Drinking Water Protection Regulation. In addition, private well owners do not require a permit to take water under the OWRA, since water-taking for domestic or farm purposes is generally exempt from the OWRA provisions regarding water-taking (section 34(1) and (5)). Moreover, the MOE has claimed that the water-taking provisions in the OWRA only allows the MOE to address water quantity rather than quality,[270] although a recent Environmental Appeal Board decision has cast considerable doubt on the soundness of the MOE's position.[271] In any event, aside from general requirements regarding well construction, operation and abandonment,[272] it appears that the quality of drinking water from private wells is largely unregulated under Ontario's current legal regime.

Given that many rural Ontarians rely upon their own wells for drinking water purposes,[273] it seems unjustifiable that they should be wholly excluded from regulatory coverage under the current legal regime. This is particularly true in light of studies that have found rural wells to be at risk from various contaminants, such as herbicides, insecticides, bacteria, and organic and inorganic substances.[274] Thus, if Ontario wishes to adopt a holistic, comprehensive approach to protecting drinking water safety for all Ontarians (not just those served by large waterworks), then certain aspects of the legal regime must be extended to include private individual wells.

It should be noted that other jurisdictions have passed and proposed testing requirements in respect of private individual wells. For example, New Brunswick requires new wells to be tested prior to its use for drinking water purposes, as described above in Part II of this Paper. In addition, Québec recently unveiled a draft regulation which requires persons using wells for drinking water purposes to test for coliforms twice per year and nitrates once per year. Moreover, British Columbia has recently enacted the *Drinking Water Protection Act* (Bill 20), which contains provisions which address public and private "domestic water systems" (including those serving single-family residences), and includes new statutory requirements regarding the establishment, operation, floodproofing, and abandonment of private individual wells.

Similarly, New Jersey has proposed mandatory testing of private wells (and disclosure of results) whenever the owner proposes to rent or sell the property to another person. The parameters for such testing include the 84 nationally regulated contaminants under the U.S. *Safe Drinking*

[270] During Part 1B at the Walkerton Inquiry, this traditional MOE position was outlined in the testimony of Mr.Bob Shaw.
[271] *Schneider et al. v. Ministry of the Environment* (unreported), Board File No. 99-026 (August 31, 1999).
[272] Regulation 903.
[273] Approximately 18% of Ontarians rely upon drinking water from wells or other private sources: MOE, *Drinking Water in Ontario: A Summary Report 1993-97* (2000), at page 10.
[274] See, for example, Agriculture Canada, *Ontario Farm Groundwater Quality Survey, Winter 1991-92* (Ottawa, 1992).

Water Act, plus such further parameters (e.g. pesticides and radium) as may be specified by the State for the region in which the property is located.

Thus, by ensuring that its legal regime includes private individual wells, Ontario would place itself at the forefront of North American jurisdictions which are attempting to protect the health and safety of residents who use wells for drinking water purposes.

RECOMMENDATION #4: Ontario's drinking water statute should apply to all public and private water treatment and distribution systems in the province. In addition, the statute should impose appropriate testing and sampling requirements in relation to private individual wells in order to detect and remedy unsafe drinking water.

(d) Purpose of Legal Regime: The Right to Clean and Safe Drinking Water

The twin legislative pillars of Ontario's current drinking water regime are the OWRA and EPA (and the regulations thereunder). Incredibly, however, neither the OWRA nor the Drinking Water Protection Regulation (O.Reg. 459/00) contains an explicit statement of purpose. The EPA contains a purpose statement, but it is aimed at protecting and conserving the natural environment (section 3). While this is undoubtedly a laudable purpose, it does not necessarily cover or ensure drinking water safety, particularly at the point of consumption.

As one leading authority has noted, "purpose statements play an important role in modern regulatory legislation".[275] First, purpose statements reveal the underlying principles and policies that the legislature intends to achieve by enacting the statute in question. Second, purpose statements help define the limits of discretion granted under the statute, such as administrative discretion conferred upon a minister, official, or tribunal. Third, purpose statements carry more legal weight than preambles, and can be an invaluable source of legislative intent when courts are attempting to construe the meaning of substantive provisions which may be vague or reasonably capable of alternative interpretations.[276]

Significantly, the private member's bills which proposed to establish safe drinking water legislation in Ontario (see Part I of this Paper, *supra*) included a relatively simple purpose statement:

> The purpose of this Act is the protection and enhancement of drinking water throughout Ontario.[277]

More recently, Bill 96 proposed a broader statement of purpose:

> 1.(1) The purposes of this Act are,

[275] *Driedger on the Construction of Statutes*, at page 264.
[276] *Ibid.*, pages 263 to 268.
[277] This purpose statement is found in Bill 45 (1982); Bill 62 (1985); Bill 62 (1986); Bill 14 (1987); Bill 99 (1987); and Bill 25 (1989).

> (a) to recognize that people who use public water systems in Ontario have a right to receive clean and safe drinking water from them;
> (b) to restore public confidence in the quality of drinking water throughout Ontario; and
> (c) to protect and enhance the quality of drinking water in Ontario.
>
> 1.(2) In order to fulfill the purposes set out in subsection (1), this Act provides,
>
> (a) means for reviewing decisions about drinking water quality made by the Government of Ontario and holding it accountable for those decisions; and
> (b) increased access to the courts for the protection of drinking water quality.

Given the various benefits of purpose statements, the current lack of a well-crafted purpose statement in Ontario's drinking water regime is problematic. Among other things, the lack of a purpose statement perpetuates uncertainty about the overall goal or objective of the current legal water regime. Similarly, the absence of a purpose statement makes it more difficult to ascertain the proper limits of administrative discretion concerning drinking water (e.g. planning or approval decisions). In addition, the lack of a purpose statement may impair judicial attempts to discern legislative intent when construing ambiguous provisions. Thus, adopting an express purpose statement would help rather than hinder the proper interpretation and application of Ontario's drinking water statute.

In law, however, a mere statement of legislative purpose does not confer a substantive right that is enforceable in the courts. Thus, even if a broad purpose statement was included in Ontario's drinking water statute, it would not necessarily create an express public right to clean and safe drinking water.

At the present time, the public right to clean and safe drinking water has not been entrenched in the OWRA, EPA, O.Reg.459/00, or any other provincial (or federal) law or regulation. Nevertheless, it is widely accepted that the public is entitled to clean and safe drinking water. For example, former Environment Minister Dan Newman has stated that "all Ontarians are entitled to safe, clean drinking water".[278]

Similarly, Premier Michael Harris has recognized the public entitlement to safe and clean drinking water:

> We're talking about drinking water… The most important requirement for human life on this planet – and something we in this country are privileged to be blessed with in abundance.

[278] MOE News Release, "Ontario launches consultation on additional measures for drinking water protection" (August 9, 2000): see http://ene.gov.on.ca/envision/news/aug9nr.htm.

> We take for granted – and I think we have a right to take for granted – that when you turn on the tap, what comes out is safe and clean, not contaminated. Parents have a right to take for granted that what they give to their children is life-sustaining, not threatening (emphasis added).[279]

If Ontarians are entitled to clean and safe drinking water, then this public right should be explicitly entrenched in drinking water legislation. Drinking water safety is a fundamental and widely shared value that should be expressly recognized by the Ontario Legislature for accountability and enforcement purposes.

It should be noted that there has been continuing debate about the efficacy of adopting a "rights-based" approach for protecting the environment and public health. For example, some commentators have suggested that a rights-based approach is problematic for various legal, policy and implementation reasons:

> The first kind of discussion that usually arises with respect to environmental rights is whether the "rights-based" approach to the protection of the environment is an appropriate one. Some would suggest that a rights-based approach is too formalistic and that it reinforces problems inherent in the legal and social institutions rather than transforms them for the betterment of the environment. One commentator has listed a long list of problems with entrenching environmental rights or at least the generic right to a healthful environment. Some of the problems range from the abstract to the very practical problems of implementation.[280]

Despite such concerns, there are a number of important societal benefits associated with entrenching substantive rights within environmental statutes:

> It can also be argued that environmental rights are an important component of any environmental protection strategy… Moreover, it can be argued that certain rights are needed for the public to allow them to enforce environmental laws and compel governments to act in situations where they would otherwise be reluctant to do so.[281]

Moreover, a substantive right – such as the right to clean and safe drinking water – would entail more than the mere right to be notified of a proposed governmental decision. Instead, it would provide substantive direction to government decision-makers when administrative discretion is being exercised, such as when the MOE is considering the issuance of approvals, permits or licences for undertakings that may adversely affect surface water or groundwater serving as sources of drinking water.

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[279] Premier Michael Harris, "Speech to the Legislature: Walkerton Statement" (May 29, 2000): see http://www.premier.gov.on.ca/english/speeches/WalkertonStatement052900.htm.
[280] Muldoon & Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Emond Montgomery, 1995), at p.5.
[281] *Ibid.*

The rationale for developing a rights-based approach in the environmental context has been framed as follows:

> Perhaps this is the time to renew the search for a substantive right to environmental quality – one which ensures advocates of environmental quality more than a mere right to participate, and entrenches environmental quality in the legal system as a value equivalent to private property rights and a fetter on government discretion to permit environmentally harmful activities…
>
> Substantive rights usually confer upon their holder status to participate in the making of decisions that affect the interest to which the rights relate. In an early attempt to describe the effects environmental rights might have, Christopher Stone identified three incidents of rights: 1. The right-holder can institute legal action; 2. Injury to the right-holder must be taken into account by the legal system; and 3. Relief must run to the benefit of the right-holder…
>
> Those who search for a right to environmental quality hope it will confer more than a right to participate or some requirement of due process or natural justice before environmentally harmful decisions are taken. They want a right which will dictate a decision in favour of environmental protection in difficult cases. They hope this right will be equivalent to a civil liberty, on the one hand, constraining government actions harmful to the environment, and, on the other, equivalent to a property right, restraining the use of private property in ways that are incompatible with sound ecological management.[282]

Thus, the statutory creation of a substantive public right to clean and safe drinking water would enhance efforts to protect drinking water and its sources against contamination and degradation. To be effective, however, this substantive right must be more than a hollow declaration or a green platitude entrenched in law. Instead, the drinking water statute must also provide means to implement the right (e.g. mandatory duty to set, update and enforce standards), and must ensure that key aspects of implementation are judicially reviewable (e.g. ministerial refusal or failure to fulfill statutory duties), as described below.[283]

This is not to say that the right to clean and safe drinking water should necessarily "trump" all other legal rights. Instead, the statutory right to safe drinking water would, at a minimum, entitle the right-holder to at least enter the judicial forum to seek relief in respect of acts or omissions which allegedly violate the right. In such a scenario, it would still be up to the courts to weigh the competing interests and determine, on a case-by-case basis, whether the right to clean and safe drinking water has been violated. In this sense, this substantive right would establish a more level playing field for those Ontarians interested in protecting the environment and public health:

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[282] Swaigen & Woods, "A Substantive Right to Environmental Quality", in Swaigen (ed.), *Environmental Rights in Canada* (Butterworths and CELRF, 1981).

[283] D. Gibson, "Constitutional Entrenchment of Environmental Rights", in Hughes et al., *Environmental Law and Policy (2nd Ed.)* (Emond Montgomery, 1998), at p.420.

> To be substantive, it need not be absolute. However, it must have the same *prima facie* weight as a property right. This would give it substantial clout against actions of the State and against private property rights. If this essential quality is not recognized, environment rights will not be substantive in the same sense as property rights.[284]

Indeed, it could be argued that the public right to clean and safe drinking water is an essential precondition for the fulfillment of all other human rights -- even the right to life itself. Thus, any discussion of protecting other human rights without first guaranteeing the public right to clean and safe drinking water is academic at best.[285]

However, the ability of Ontarians to take legal action to protect their entitlement to safe drinking water is significantly limited under the province's current legal regime. As noted above, this is primarily because no provincial law or regulation explicitly confers a substantive public right to clean and safe drinking water. Accordingly, there is a strong legal and policy argument that Ontario's drinking water statute should create a substantive right to clean and safe drinking water.

RECOMMENDATION #5: Ontario's drinking water statute should entrench a substantive public right to clean and safe drinking water. The statute should further state that its purpose is to recognize, protect and enhance the public right to clean and safe drinking water.

(e) Setting and Amending Standards

One of the most significant developments regarding drinking water safety in Ontario was the transformation of contaminant limits under the Ontario Drinking Water Objectives into binding and enforceable standards under the Drinking Water Protection Regulation (O.Re.g.459/00). As Premier Michael Harris noted when introducing the new Regulation:

> This is the first time in Ontario's history that universal water quality standards and testing have been given the force of law.[286]

Nevertheless, despite the promulgation of the new Regulation, there are number of procedural and substantive concerns about drinking water standard-setting in Ontario.

For example, the OWRA has not been amended to impose a mandatory duty upon the Minister to set and maintain appropriate drinking water standards. To the contrary, the Minister enjoys virtually unfettered discretion regarding such standards since the OWRA merely provides that regulations "may" (not "shall") be made in relation to "standards of quality for potable water"

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[284] Swaigen & Woods, "A Substantive Right to Environmental Quality", in Swaigen (ed.), *Environmental Rights in Canada* (Butterworths and CELRF, 1981).
[285] N. Gibson, "The Right to a Clean Environment", (1990) *Sask. L.R.* 5, at page 16.
[286] Office of the Premier, "News Release: Harris Government Action Plan to Improve Water Quality Includes Tough New Regulation" (August 8, 2000).

(section 75(1)(i)). Indeed, under the current legal regime, it would be open to the Minister to transform some or all of the standards back into non-binding objectives. This scenario may be unlikely to materialize for various political reasons, but, as a matter of law, there is no barrier or impediment under the OWRA to prevent such a rollback from occurring in the future. Clearly, this underscores the tenuous nature of regulations in general, and emphasizes the need to entrench drinking water standards on the firmest legislative basis possible. Thus, at the very least, Ontario's legal regime should impose a mandatory duty on the above-noted Drinking Water Commission (or, alternatively, the Minister) to set and maintain drinking water standards.

Arguably, the mandatory duty to establish drinking water standards is one of the most important strengths of the U.S. *Safe Drinking Water Act*. As described above in Part II of this Paper, the 1974 Act created legally binding standards for a small number of contaminants, and established standard-setting schedule for other drinking water contaminants. The Act was then amended in 1986 to establish new deadlines for standard-setting, and in particular required the Environmental Protection Agency to set or revise standards for 83 contaminants by 1989. Further amendments in 1996 revised the process and timeframe for standard-setting, but the Act continued to impose a number of positive duties on the Agency in relation to standards development.

Accordingly, if Ontario's drinking water statute imposed similar mandatory duties upon the Drinking Water Commission (or Minister) in relation to standards, Ontario would not be breaking new ground but would merely be catching up with long-standing regulatory practice in the United States.

However, imposing a legal duty to set and maintain Ontario's drinking water standards begs the question of whether the current standards are, in fact, sufficiently stringent to protect public health and safety. While former Environment Minister Dan Newman has claimed that the current standards "reflect the most current expertise",[287] there is growing evidence that this may not be the case for all drinking water contaminants. For example, Appendix I to this Paper contains a chart comparing and contrasting Ontario's current standards with those found in other jurisdictions. Significantly, Ontario's current standards for certain parameters are less stringent than the relevant standards in other jurisdictions. Similarly, other jurisdictions have established standards for certain parameters for which no standards exist in Ontario under the Drinking Water Protection Regulation. Moreover, even where drinking water is being treated and meets prescribed standards, public health problems can still occur and remain largely undetected by the public health systems.[288]

It is beyond the scope of this Paper to determine what the "right" number is for each drinking water contaminant of concern in Ontario. The essential point is that once drinking water standards have been established, they cannot be cast in stone and remain unchanged and unreviewed for prolonged periods of time. Instead, the standard-setting process needs to include mechanisms to ensure that existing standards are reviewed and, if necessary, revised in order to achieve maximum protection of public health and safety.

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[287] *Ibid.*

[288] See, for example, Dr. Pierre Payment's testimony at the Walkerton Inquiry (Transcript, February 27, 2001, pages 12-13).

Unfortunately, the current legal regime in Ontario contains inadequate tools to ensure a timely and systematic review of drinking water standards. For example, the OWRA imposes no duty on the Minister to review the adequacy of existing standards, nor does it require the Minister to establish an advisory committee to review and report upon drinking water standards and related matters. Similarly, the provincial government's 1995 decision to abolish the highly regarded Advisory Committee on Environmental Standards ("ACES") has also deprived the Minister of a meaningful, multi-stakeholder process for reviewing drinking water standards in an open and public manner.

As noted above in Part I of this Paper, Ontario participates as a member of the Federal-Provincial Subcommittee on Drinking Water, which serves as the forum for developing national guidelines for drinking water in Canada. These guidelines generally form the basis for drinking water objectives or standards adopted within Canadian provinces, including Ontario. In theory, this Subcommittee could (and sometimes does) review current drinking water guidelines if new information or technological developments suggest that such a review may be warranted.

However, it should be recalled that the Subcommittee has no independent legal status; its consensus-based recommendations are not legally binding on Ontario; it has no enforceable duty to review its own drinking water guidelines; its decision not to reassess a particular guideline is not judicially reviewable; and it has no jurisdiction to compel changes to Ontario's drinking water standards. In addition, there appears to be no formal opportunities for members of the public to participate in the Subcommittee's deliberations, or to initiate reviews of suspect or outdated drinking water standards. Moreover, recent experience demonstrates that the Subcommittee's review process is often slow (presumably due to limited staff and resources), and revisions to individual guidelines may take a number of years to complete. Indeed, the Subcomittee is free to set its own priorities and timeframes for review, which may not necessarily reflect the priorities or interests of Ontario residents. Therefore, it cannot be seriously suggested that the Subcommittee *per se* constitutes an adequate mechanism for reviewing and revising Ontario's drinking water standards.[289]

In a similar vein, it has been suggested by the MOE that the "Application for Review" provisions under Part IV of the EBR provide sufficient means for the public to trigger reviews of inadequate drinking water standards in Ontario.[290] This suggestion is unpersuasive for several reasons. First, if an Application for Review is filed, the Minister is not compelled to actually undertake the requested review. In fact, it is open to the Minister, in his or her discretion, not to undertake the review at all, even in the face of compelling evidence from the applicants that impugned standard is inadequate. This is precisely what has happened in Ontario, as various public interest groups have filed reasonable, properly documented applications requesting reviews of certain drinking water objectives, only to have the Minister, after considerable delay, refuse to carry out the requested reviews for unconvincing reasons.[291]

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[289] Federal-Provincial Subcommittee on Drinking Water, "Approach to the Derivation of Drinking Water Guidelines", February 1995, and "Canadian Drinking Water Guidelines Development Process", also February 1995.
[290] H. Wong, f.n. 17, at page 6.
[291] As described in Part I of this Paper, the MOE has refused to carry out reviews requested under the EBR in relation to drinking water objectives for tritium, trichloroethylene, cryptosporidium, viruses, dichloroethane, and

Second, even where the Minister has made a preliminary decision to carry out the review, there is no guarantee that the review will actually result in a revision to the impugned standard, again because of the Minister's broad discretion in such matters. Indeed, the OWRA, as currently drafted, does not establish the specific criteria to be applied when the MOE is considering the development of a new drinking water standard or the revision of an existing standard (see below).

Third, it is unclear why the onus should fall by default to concerned Ontarians to request reviews of questionable drinking water standards. Since the province is responsible for promulgating the current drinking water standards in Ontario, it is the province – not the public at large – that should be proactively reviewing the standards to ensure that they remain sufficiently protective of human health and safety. This is why Bill 96 recently proposed a mandatory duty upon the Minister to annually undertake "a public review of all the regulations made under this section to evaluate their adequacy in protecting human health" (section 18(5)). However, Bill 96 was not enacted, which means that the Minister still enjoys considerable discretion as to when – or whether – drinking water standards will be reviewed and revised.

In contrast to Ontario's discretionary approach, the duty to systematically review the adequacy of existing standards is well-established in the U.S. *Safe Drinking Water Act*. For example, the 1986 amendments to the Act required the Environmental Protection Agency to set or revise standards for 83 contaminants within a three-year period. The 1996 amendments to the Act varied the standards development process, but imposed a duty on the Agency to review and/or revise the existing primary drinking water regulations every six years. Thus, if Ontario's legal regime imposed a similar duty upon the Minister to periodically review drinking water standards, Ontario would simply be catching up with long-standing regulatory practices in the United States.

The 1996 amendments to the U.S. *Safe Drinking Water Act* are also significant because they specify the factors or considerations to be taken into account during the development of drinking water standards (e.g. prevalence of the contaminant in the environment, degree of risk to human health based upon best available information, etc.). In contrast, the OWRA is silent on the factors or considerations to be taken into account, which, in effect, makes standard-setting almost wholly discretionary in Ontario. If the province's drinking water standards are intended to protect human health and safety, then this primary health-based objective should be expressly entrenched in law to guide the regulatory process. Moreover, drinking water regulations should not only protect the public at large, but should also address the health needs of particularly sensitive or vulnerable segments of the population (e.g. children, elderly persons, immuno-suppressed persons, etc.).

Where there is doubt or uncertainty about the potential health impacts of a particular contaminant, then the "precautionary principle" should be applied and caution shall be exercised

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atrazine. Such refusals have been the subject of critical comment in the Annual Reports prepared by the Environmental Commissioner of Ontario, but such criticism does not prevent similar refusals in the future.

in favour of protecting human health and safety.[292] In other words, scientific uncertainty should not be used as an excuse for failing to regulate drinking water contaminants that may pose a risk to human health and safety.

It may be argued by some that the "cost of compliance" should also factor into the standard-setting process. If so, then the legal regime should stipulate that such economic considerations do not trump or override the primary objective of protecting public health and safety. If, for example, the standards require drinking water suppliers to undertake more extensive water testing or to install better treatment equipment, then this must be considered as a necessary (and unavoidable) cost of protecting Ontarians' health and safety. This is precisely the case in New Jersey, where the state's drinking water legislation does not include cost criteria as considerations in standard-setting, which, in turn, has enabled New Jersey to enact and enforce health-based standards that are stronger than the federal standards.

In addition to entrenching the guiding principles for standard-setting, Ontario's legal regime should also establish mandatory opportunities for public review and comment whenever new standards are being set or existing standards are being developed. At the present time, it appears that such public participation opportunities may be available under Part II of the EBR, which creates public notice/comment rights for certain regulations under the OWRA and other prescribed statutes. However, it must be noted that these EBR provisions are again subject to excessive discretion by the Minister. For example, a proposal to set or revise a drinking water standard may trigger public notice/comment opportunities under the EBR only if the Minister "considers that [the] proposal under consideration… could, if implemented, have a significant effect on the environment" (section 16). Similarly, the limited right to judicial review under the EBR (section 118) is only available with respect to proposed "instruments" (e.g. licences, approvals, permits, etc.), <u>not</u> regulatory standards. In short, a Ministerial failure or refusal to provide proper public notice or comment opportunities with respect to drinking water standards does not appear to be judicially reviewable in Ontario.

Accordingly, there is no guarantee that meaningful public consultation will occur under Ontario's current legal regime when drinking water standards are being set or revised. In fact, in recent years, the Environmental Commissioner's Annual Reports have documented countless instances where environmentally significant proposals were <u>not</u> posted on the EBR Registry or otherwise subjected to meaningful public review and comment. Indeed, this is precisely what occurred when the Drinking Water Protection Regulation itself was developed, as the MOE provided negligible public comment opportunities, as described above. Similarly, the MOE decision to close its provincial water testing laboratories in 1996 was not posted on the EBR Registry, nor were municipalities or members of the public consulted in advance about this fundamental change. As a result, Ontario municipalities had barely eight weeks to find and hire private labs to undertake drinking water sampling and testing.[293]

[292] In its *Statement of Environmental Values* under the EBR, the MOE has committed to exercising "a precautionary approach in its decision-making".
[293] Environmental Commissioner of Ontario, *Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making*, at pages 17-20.

The discretionary approach to public participation in drinking water standard-setting in Ontario is to be contrasted with the detailed regulatory procedures under the U.S. *Safe Drinking Water Act*. For example, the Environmental Protection Agency is compelled by law to publish draft standards as "proposed rules" in the Federal Register, and to provide public comment opportunities (including hearings) on the draft standards prior to finalization. In addition, the Agency must consult with the National Drinking Water Advisory Council established under the Act, as well as the Science Advisory Board established under the *Environmental Research, Development and Demonstration Authorization Act, 1978*. In addition, the Act creates a broad right of judicial review to ensure Agency compliance with statutory requirements regarding regulations. These and other provisions are clearly intended to ensure that members of the public – who are the intended beneficiaries of drinking water standards – have a meaningful opportunity to get involved in setting and revising regulatory requirements.

The public participation rights and remedies found in federal American legislation clearly represent a vast improvement over the current discretionary regime in Ontario. While it may not be necessary to import all of the prescriptive details associated with American regulation-making, it is highly desirable that, at the very least, Ontario's drinking water statute should include a self-contained code for public participation in setting and revising drinking water standards. It is noteworthy that the principle of public participation was entrenched in virtually every private members' bill introduced in Ontario to establish safe drinking water legislation; however, none of these bills were enacted, as described in Part I of this Paper.

At a minimum, Ontario's drinking water statute should make public notice/comment mandatory whenever standards are being set or revised (e.g. a minimum 60 day comment period, and enhanced public notice through electronic means, newspaper ads, etc.). To ensure compliance, the statute should provide that a failure to satisfy these procedural requirements is judicially reviewable at the instance of any Ontario resident. In addition, the statute should include provisions that permit Ontario residents to petition the Drinking Water Commission (or Minister) to set new standards for unregulated contaminants, or to make existing standards more stringent. As described below, the statute should also create a provincial drinking water advisory committee to assist in setting, reviewing and revising drinking standards.

With respect to unregulated contaminants, it may not be sufficient to simply leave it to concerned Ontario residents to look out for new or emerging substances that may pose a risk to public health and safety. Since the provincial government has the primary responsibility for protecting drinking water and its sources, the Ontario statute should place a mandatory duty on the Drinking Water Commission (or Minister) to identify and evaluate unregulated contaminants in Ontario. Under the current legal regime, there is no such duty on the Minister, which means, in effect, that new threats to drinking water quality (e.g. viruses, bacteria, disinfection by-products) could go undetected and unregulated for prolonged periods of time.

In comparison, the 1996 amendments to the U.S. *Safe Drinking Water Act* require the Environmental Protection Agency to publish a list of high-priority unregulated contaminants, and for at least five such contaminants, to make a determination whether they will be regulated under the Act. Similarly, New Jersey assesses contaminants (e.g. certain carcinogens) that are not regulated under the federal Act to determine if they constitute a current or future threat to public

health and safety. This type of preventative approach is conspicuous in its absence in Ontario, and should undoubtedly be entrenched within provincial drinking water legislation.

For the foregoing reasons, the recent Drinking Water Protection Regulation cannot be viewed as a complete regulatory vehicle for fully addressing drinking water concerns in Ontario. To be fair, the establishment of enforceable contaminant standards under the Regulation was an important first step by the provincial government. However, unless additional changes are made (e.g. mandatory duty to set/revise standards; substantive criteria to guide regulation-making; meaningful public participation; and assessment of unregulated contaminants), then Ontario's regulatory regime should be regarded as incomplete at the present time.

RECOMMENDATION #6: Ontario's drinking water statute should include provisions that:

(a) impose a mandatory duty upon the Drinking Water Commission (or Minister) to set and maintain drinking water standards;

(b) impose a mandatory duty upon the Drinking Water Commission (or Minister) to periodically review the adequacy of existing standards, and to make such revisions to the standards as may be necessary to protect human health and safety;

(c) specify that the primary objective of drinking water standards is to protect public health and safety of all Ontarians, including those who may be particularly vulnerable to waterborne illness or disease;

(d) entrench the precautionary principle as a mandatory consideration when drinking water standards are being drafted, reviewed or revised;

(e) establish legally binding mechanisms for meaningful public participation in drafting, reviewing or revising drinking water standards; and

(f) impose a mandatory duty upon the Drinking Water Commission (or Minister) to identify and evaluate new and emerging contaminants for which no standards exist in Ontario.

(f) Approvals, Licencing and Accreditation

Ontario's current legal regime contains a number of useful provisions regarding approval, licencing and accreditation matters. For example, waterworks owner/operators are required to apply for and receive a certificate of approval under section 52 of the OWRA, and it is open to the Director to impose terms and conditions on the approval to protect public health and safety. To guide the approvals process, the MOE has recently prepared some model conditions[294] and

[294] These model conditions for waterworks using surface water or groundwater have been posted on the MOE website: http://www.ene.gov.on.ca/envision/WaterReg/WaterReg.htm.

published various guidance documents and technical briefs. Moreover, the Drinking Water Protection Regulation requires owners/operators to apply for approval in accordance with the Ontario Drinking Water Standards, and further requires the Director to "have regard" for the Standards during the approvals process. Water-taking permits are also required under the OWRA for waterworks withdrawing more than 50,000 litres/day of surface water or groundwater.

With respect to licencing matters, the MOE has promulgated a regulation (O.Reg. 435/93), which classifies water treatment/distribution facilities and establishes a licencing system for operators of such facilities. This regulation also requires ongoing training of operators (40 hours per year), and sets out basic record-keeping requirements. The MOE has recently proposed to amend this regulation by creating a new licence category (water quality analyst) to allow certain parameters to be tested in the facility rather than by an accredited laboratory. The MOE has further proposed to require operators to verify that they have received 36 hours of additional training in the three years prior to licence renewal.

With respect to accreditation, the Drinking Water Protection Regulation requires private laboratories to be accredited (by the Standards Council of Canada or equivalent) for any sampling or analysis they are undertaking on behalf of waterworks owners/operators. In addition, owners/operators are required to disclose to the MOE the identity of the laboratories being used for sampling and analysis, and laboratories cannot subcontract analysis work to unaccredited laboratories. A listing of accredited private, municipal and provincial laboratories has been published by the MOE.[295]

Taken together, Ontario's current requirements regarding approvals, licencing and accreditation appear largely consistent with similar provisions in other jurisdictions. For example, Canadian jurisdictions generally require drinking water suppliers to apply for and receive a permit or licence, and several provinces have passed or proposed operator licencing and/or training requirements, as described above in Part II of this Paper.

Similarly, England's Drinking Water Inspectorate works with the UK Accreditation Service to set standards for laboratories accredited for drinking water analysis. In addition, English water quality regulations require laboratories to establish quality control protocols that are periodically checked by an independent inspector.

Nevertheless, there are certain improvements that can be made to Ontario's current legal regime regarding approvals, licencing and accreditation. For example, with respect to approvals, there is considerable concern about the limited role of the public where municipalities are seeking waterworks approvals and water-taking permits under the OWRA. In many instances, applications for these technical approvals will occur during or after the completion of the planning steps prescribed in the Municipal Class EA, as described above in Part of this Paper. In light of this EA coverage, the MOE has taken the position that these applications do not necessarily have to be posted on the EBR Registry for public review, comment, or third-party appeal because of the "EA exemption" contained in the EBR (section 32).[296]

[295] *Ibid.*
[296] See the Part 1B testimony of Mr. Bob Shaw at the Walkerton Inquiry.

The result is that members of the public may have no formal notice or comment opportunities with respect to the technical approvals under the OWRA, or the terms and conditions that may be proposed to address environmental or public health concerns. At the very least, notice of these technical approvals could be posted on the EBR Registry for informational purposes pursuant to section 6 of the EBR, or alternatively, could be posted on the electronic database recommended below. Further concerns about the existing approvals process are described below in the context of source assessment and protection.

If Ontario adopts a comprehensive drinking water statute, then it would make little sense to leave waterworks approval requirements in section 52 of the OWRA. Accordingly, the drinking water statute should include a self-contained procedure for the Drinking Water Commission to issue, refuse and amend approvals to waterworks providing drinking water. Among other things, this procedure should ensure meaningful public notice and comment in the decision-making process.

Developing a drinking water statute would also provide an opportunity to address concerns about the implementation of Ontario's current licencing regime. Traditionally, for example, there appears to have been little meaningful follow-up by MOE staff to ensure that waterworks operators were properly licenced for their particular facility, or that they were receiving the annual training required by O.Reg. 435/93. In Walkerton, MOE inspection reports in the 1990s routinely noted inadequate training records were kept by the waterworks, but these findings were not pursued by way of an order or prosecution to ensure compliance. Moreover, the Walkerton Inquiry has received evidence that unlicenced staff were undertaking tasks that should have been undertaken by the facility's only two licenced operators. Significantly, both of these operators were "grand-fathered" under the licencing regime, and were not required to take courses or write exams. Similarly, given the lack of prescriptive detail in the regulation as to what properly constitutes annual "training", it appears that it was open to Walkerton's licenced operators to consider as "training" various items not directly related to waterworks operations.[297]

At the present time, it is unknown whether or to what extent such circumstances existed in other small waterworks across Ontario. In any event, the Walkerton circumstances clearly highlight some shortcomings in Ontario's licencing regime, which was largely unchanged by the Drinking Water Protection Regulation. At the very least, the licencing regime should be tightened up by eliminating grand-fathering opportunities, better defining what constitutes "training", and undertaking proper investigation and enforcement to ensure full compliance with licencing and training requirements.

Finally, with respect to laboratory accreditation, Ontario's drinking water statute should retain existing requirements but entrench them on a firm legislative basis.

In summary, Ontario's existing provisions regarding approvals, licencing and accreditation offer a good starting point, and appear generally consistent with requirements found in other jurisdictions. As discussed above, however, there are opportunities for fine-tuning and strengthening these provisions that should be pursued in Ontario's drinking water statute.

[297] See the Part 1A testimony of Mr. Frank Koebel at the Walkerton Inquiry.

RECOMMENDATION #7: Ontario's drinking water statute should contain provisions that:

(a) establish a self-contained process for the Drinking Water Commission to approve (or reject) applications for waterworks that supply drinking water, and to ensure full public participation in the approvals process;

(b) clarify and strengthen existing requirements regarding operator licencing and training; and

(c) retain existing requirements regarding the mandatory use of accredited laboratories for drinking water sampling and analysis.

(g) Operational Duties: Testing, Treatment, Notification and Corrective Action

Ontario's legal regime has been recently strengthened by the Drinking Water Protection Regulation, which establishes a number of mandatory duties in relation to drinking water testing, treatment, notification, and corrective action. In particular, this Regulation requires owners of water treatment and distribution systems to:

- carry out water tests for microbiological parameters, turbidity, chlorine residual, fluoride, volatile organics, inorganics, nitrates/nitrites, pesticides and PCBs in accordance with the prescribed number, frequency and locations (section 7 and Schedule 2);

- provide a minimum level of treatment consisting of disinfection in relation to groundwater sources, and chemically assisted filtration and disinfection (or other equivalent treatment methods) in relation to surface water sources (sections 5(1) and (2));

- ensure that no water enters the distribution system or plumbing unless it has been treated with chlorination (or equivalent treatment method) (section 5(3));

- provide immediate verbal and written notice to the MOE and medical officer of health if water sample analyses show exceedances of acceptable concentrations for prescribed parameters, or indicate adverse water quality (section 8);[298]

- undertake resampling or other prescribed "corrective actions" (e.g. increase chlorination or flush water mains) if the above-noted notice is submitted to the MOE and medical officer of health (section 9); and

- post a public warning notice if the owner does not comply with sampling/analysis requirements in respect of microbiological parameters, or if notice to the MOE and medical

[298] The laboratory that conducts the analysis is under a similar duty to provide notice to the MOE and medical officer of health in such circumstances.

officer of health is required in respect of a microbiological parameter and the prescribed corrective action has not been taken (section 10).

It should be pointed out that the above-noted treatment requirements do not apply to waterworks approvals that are issued after August 1, 2000 which do not require disinfection or chlorination, provided that that source used is groundwater and other criteria are met (section 6). For pre-existing facilities that do not meet the new treatment requirements, the Regulation gives the owners until December 31, 2002 to come into compliance (section 5(5)).

These new regulatory provisions have been accompanied by numerous MOE guidance documents and technical briefs that attempt to further explain the requirements respecting testing, treatment, notification, and corrective action.[299]

While these regulatory changes represent a clear step forward in protecting public health and safety, there is a need for greater clarity and definition within the Regulation. For example, the Regulation stipulates differing treatment requirements for surface water and groundwater, but fails to expressly deal with those situations where groundwater is under the influence of surface water (e.g. Well #5 at Walkerton). By failing to define groundwater "under the influence" – and by failing to specify that surface water treatment requirements apply to groundwater "under the influence" – the Regulation perpetuates uncertainty. In addition, the current Regulation invites water suppliers to avoid surface water treatment requirements by claiming that their groundwater sources are not "under the influence". This is a significant gap that must be immediately addressed in Ontario's drinking water statute.

Aside from operational concerns arising from the Regulation, there is a strong argument that the Regulation's requirements should, to the greatest possible extent, be entrenched in a statute, for the reasons described above. In this regard, it should be noted that Ontario's recently proposed Bill 96 attempted to place testing, treatment, notification and corrective action requirements on a firm legislative basis.

Similarly, a number of other jurisdictions have elected to entrench these critically important requirements into law (or mixed law and regulation), rather than regulation alone. In British Columbia, for example, disinfection is mandatory by regulation, but the recently enacted *Drinking Water Protection Act* would impose a legal duty upon water suppliers to supply "potable" water,[300] and would impose water monitoring and notification requirements upon water suppliers and their laboratories.

Similarly, in the United States, the *Safe Drinking Water Act* requires the Environmental Protection Agency to promulgate various water treatment rules. For example, the Agency has developed a number of regulatory requirements for surface water and groundwater, such as:

[299] See, for example, MOE, "Notification Requirements" (August 2000), "Adverse Drinking Water Quality – Corrective Actions" (August 2000).

[300] "Potability" is defined in the B.C. proposal as water that meets prescribed standards and is safe to drink without further treatment.

- Total Coliform Rule (1989): sets out monitoring and public notification requirements in relation to total coliforms, which indicate presence of (or potential for) fecal contamination;

- Surface Treatment Rule (1989; rev. 1998): covers public water systems that use surface water or groundwater under the influence of surface water (as defined), and requires disinfection and filtration (unless filtration avoidance criteria are satisfied);

- Information Collection Rule (1996): requires monitoring and data reporting for the purposes of developing new microbial and disinfection byproducts rules;

- Stage 1 Disinfectants/Disinfection Byproducts Rule (1998): sets out maximum residual levels for certain disinfectants (e.g. chlorine) and disinfectant byproducts (e.g. total trihalomethanes); and

- Ground Water Rule (proposed May 2000): seeks to implement a multi-barrier approach consisting of: periodic sanitary surveys; hydrogeological assessments; source water monitoring; corrective action (e.g. treatment, alternative water source, elimination of contaminant source, etc.); and compliance monitoring.

In comparison to the Environmental Protection Agency, it appears that Ontario has been inexplicably slow to impose legally enforceable treatment, monitoring, notification, and corrective action requirements upon drinking water suppliers. In any event, the development of safe drinking water legislation in Ontario would give the province an important opportunity to catch up with (if not surpass) current requirements in the United States. At the very least, the Ontario statute should entrench current operational requirements under O.Reg. 459/00, but should also include a definition of "groundwater under the influence of surface water" and should specify that surface water requirements apply in such situations, as described above.

RECOMMENDATION #8: Ontario's drinking water statute should include provisions that:

(a) entrench current testing, treatment, notification and corrective action requirements into law rather than regulation; and

(b) define "groundwater under the influence of surface water", and specify that surface water treatment requirements apply in such situations.

(h) Source Assessment and Protection

One of the most significant gaps in Ontario's current legal regime is the absence of a clear legal duty upon private and public drinking water suppliers to undertake "source assessment" (e.g. detailed hydrological or hydrogeological evaluations) or "source protection" programs (e.g. land acquisition, setbacks, land use restrictions, etc.) in order to safeguard drinking water sources against the risk of current or future contamination.

In particular, the OWRA does not explicitly require drinking water suppliers to take any steps to identify, assess, or mitigate threats to surface water or groundwater that serve as sources of drinking water. Similarly, it does not appear that "source protection" programs have been routinely required by terms and conditions attached to waterworks approvals issued by the MOE under section 52 of the OWRA.

In some instances, however, MOE officials have made non-binding suggestions to drinking water suppliers that they undertake land acquisition, or to impose land use restrictions, in order to protect sources of drinking water. In fact, this is precisely what occurred in Walkerton, where the MOE issued an OWRA approval in 1978 for Well #5, but did not include a condition that expressly required source protection measures.[301] Instead, having regard for Well #5's known vulnerability to surface water influence, MOE personnel recommended (and municipal staff agreed) that adjoining agricultural lands should be purchased by the municipality in order to protect drinking water quality. However, this recommendation was never implemented by the municipality, and expert evidence suggests that subsurface and/or overland flow from one or more adjoining farms contaminated Well #5 with a deadly strain of E. coli during April or May 2000.[302]

The lack of an express legal duty to undertake source assessment/protection is compounded by the general lack of detailed MOE policy on precisely how to secure and protect sources of drinking water. It now appears well-accepted that the critical first step in the multi-barrier approach to ensuring drinking water quality (and protecting public health and safety) is to find the best possible source of drinking water.[303] However, there appears to be few, if any, detailed MOE policies that expressly direct drinking water suppliers to avoid particular locations (e.g. springs or wetlands) or problematic hydrogeological settings (e.g. "karst" bedrock containing enlarged fissures that can quickly transport groundwater contaminants over great distances).[304]

The vulnerability of a proposed source of drinking water might be taken into account when the MOE is considering an application for a waterworks approval under section 52 of the OWRA, as described below. In the worst case scenario, the risk of source contamination could theoretically lead the MOE to reject the application for approval. In practice, however, this result is not necessarily guaranteed, particularly in the absence of prescriptive policy direction regarding source assessment/protection. In fact, MOE representatives have acknowledged that Walkerton's Well #5 would still be approved under the current legal regime, notwithstanding its clear vulnerability to off-site sources of contamination.

The general policy vacuum in Ontario regarding source assessment/protection stands in stark contrast to the numerous policies that have been developed by the MOE to provide guidance on the preferred locations for waste disposal sites (e.g. Guideline C-13), or the types of land uses that will be permitted within 500 m of a landfill (e.g. Guideline D-4). In fact, some of these MOE policy preferences have been incorporated into detailed regulatory standards (e.g. O.Reg.

[301] Interestingly, Well #5 was initially established without MOE approval under the OWRA, but this approval was subsequently issued by MOE officials.
[302] See the Part 1A testimony by Dr. Goss and Dr. Gilham at the Walkerton Inquiry.
[303] See the Part 1A testimony of Dr. Huck at the Walkerton Inquiry (February 28, 2001).
[304] See the Part 1A testimony of Dr. Gilham at the Walkerton Inquiry.

232/98). Given the potential threats of poorly located landfills to public health and safety, it is not surprising that the MOE has developed an extensive legal and policy framework regarding landfills. What is surprising, however, is the MOE's apparent failure to develop an equally extensive legal and policy framework regarding drinking water sources, even though poorly located wells (or intake pipes in vulnerable watercourses) can also create profound public health risks.

Given the absence of Ontario legislation or detailed MOE policy requiring source assessment/protection, it is perhaps inevitable that such matters are not adequately addressed in the Drinking Water Protection Regulation. For example, the Regulation indicates that "a person who applies for an approval shall do so in accordance with the Ontario Drinking Water Standards" (section 4). Similarly, the Regulation provides that in considering an application for a section 52 approval under the OWRA, the Director "shall have regard to the Ontario Drinking Water Standards" (section 4(2)). It should noted, however, that these "Standards" are not a regulation *per se*, but are instead an MOE publication dated August 2000 containing various drinking water policies, objectives and guidelines.

The MOE's unfortunate use of the term "Standards" to describe what is essentially a guidance document will likely lead to more – not less – confusion and uncertainty about the important legal distinctions between standards prescribed by regulation (which are enforceable) and policies, guidelines, and objectives (which are not enforceable in and of themselves). In fact, the document itself seems to suggest that the only "standards" it contains are those which specify Maximum Acceptable Concentrations (or Interim Maximum Acceptable Concentrations) for parameters regulated under the Drinking Water Protection Regulation.[305]

In any event, the MOE's so-called "Standards" document contains some generic (if not painfully obvious) suggestions regarding source protection. For example, the document recommends that the proposed water supply "should" be of good quality, and that the intended source "should" be the one least subject to pollution.[306] Similarly, the document suggests that waterworks owners "should" conduct surveys of potential pollution impacts on the water supply, and that the survey "should" recognize all potential sources of pollution.[307] The frequent use of the permissive term "should" (as opposed to mandatory terms such as "shall") underscores the loose nature of these "Standards",[308] and undermines any suggestion that these "Standards" provide any peremptory direction upon drinking water suppliers regarding source protection. Indeed, despite the critical importance of source protection, this subject-matter receives only limited textual discussion in the "Standards".

Accordingly, even though the Drinking Water Protection Regulation states that applicants seeking a section 52 approval under the OWRA must comply with these "Standards", the "Standards" themselves (including provisions relating to source protection) are drafted in a

[305] MOE, "Ontario Drinking Water Standards" (August 2000), at pages 1-2.
[306] *Ibid.*, at page 2.
[307] *Ibid.*, at page 3.
[308] Even where testing reveals continuing exceedances of parameter limits, the "Standards" document merely provides that the Director "may" (not "shall") reject the proposed water source. Thus, the Director is free to approve a vulnerable (or even contaminated) water source if he or she is of the opinion that "effective and economic treatment is available": *ibid.*, at page 2.

general and overly permissive manner. In fact, it appears that the "Standards" are not even binding on the Director, in that he or she must merely "have regard to" (as opposed to "shall apply") the "Standards" when considering section 52 applications. Such discretionary language[309] is at odds with the principles of accountability and certainty since the Director is free to apply – or not apply – the provisions of the "Standards" document on a case-by-case basis, as long as he or she has at least considered the document during the approvals process.

It should be further noted that the Regulation also requires the periodic submission of "engineer's reports" (section 13). Again, the actual content of "engineer's reports" is not prescribed by the Regulation, but in a related MOE guidance document which, among other things, requires "assessment of the potential for microbiological contamination" and "characterization of the raw water supply source".[310] First, it should be noted that this document does not appear to require an assessment of the potential for non-microbiological contamination (e.g. pesticides, radioactive substances, or organic and inorganic substances). Since the MOE has recognized that such contaminants can be present in source waters in Ontario,[311] the apparent exclusion of non-microbiological substances in the engineers' assessment of potential contamination is both inexplicable and unjustifiable.

Second, the MOE document suggests that the engineer's assessment of the potential for microbiological contamination is largely limited to a visual inspection of the waterworks (including chlorination facilities) in order to identify "potential sources and pathways of contamination to the physical works". Thus, where groundwater is used as the drinking water source, the engineer should determine whether there is adequate "wellhead protection" (e.g. ensuring the well casing is intact and secure).[312] However, it appears that the engineer's report does not have to include a systematic inventory or review of land uses within the watershed (or sub-watershed) that are or may be affecting the quality of the drinking water source, especially in respect of non-microbiological parameters. Similarly, it does not appear that the engineer's report has to include recommendations for source protection through the establishment of protection zones (e.g. by purchase, expropriation, or land use restrictions). Instead, the engineer's recommendations seem limited to technical or operational matters, and are only specifically required to address the potential for microbiological contamination, as described above.[313]

Third, the MOE document requires the engineer's report to characterize the raw water source for all parameters, and to identify treatment that may be necessary to ensure compliance with the Drinking Water Protection Regulation and the above-noted "Standards" document. In addition, the engineer's report must identify "parameters which may impact the treatment of water and influence the operation of the system", and must determine the potential for formation of

[309] This provision is reminiscent of the controversial "have regard" language found in section 3(5) of the *Planning Act*, which, in effect, leaves it open to planning authorities to decide, on a case-by-case basis, whether to apply the provisions of the Provincial Policy Statement.
[310] MOE, "Terms of Reference: Engineers' Reports for Water Works" (August 2000; rev. January 2001), at pages 1-2.
[311] MOE, *Drinking Water in Ontario: A Summary Report 1993-97* (2000), at pages 10-11.
[312] MOE, "Terms of Reference: Engineers' Reports for Water Works" (August 2000; rev. January 2001), at page 3.
[313] *Ibid.*, at pages 4-5.

disinfection by-products.[314] While these are indeed important matters for the engineer's report to address, they fall short of requiring the development and implementation of comprehensive source assessment/protection measures. If anything, these current requirements reinforce the traditional "end-of-pipe" focus of waterworks operations, where considerable attention is paid to treatment equipment and practices, such as chlorination or filtration, but where scant attention is paid to securing the long-term quality of the raw water source in the first place.

In summary, Ontario's current legal regime largely relegates source assessment/protection matters to MOE guidance documents, rather than the OWRA or regulations thereunder. This general lack of statutory emphasis on source assessment/protection in Ontario stands in contrast to other jurisdictions that have placed considerable priority on source assessment/protection, and that, in some instances, have codified such requirements in law or by regulation.

For example, New Brunswick has passed a Watershed Protection Area Designation Order to protect surface watercourses serving as drinking water sources, and a Wellfield Protection Area Designation Order to protect groundwater serving as drinking water sources. As described above in Part II of this Paper, the Watershed Order establishes setback or buffer zones around designated water supply areas, and restricts land uses in and around such areas. Similarly, the Wellfield Order utilizes a three-zone approach to restrict certain land uses or activities in order to protect aquifers.

British Columbia's recently enacted *Drinking Water Protection Act* also contains a number of source assessment/protection provisions. For example, Part 3 of this Act requires water suppliers to prepare reports that identify, inventory and assess:

- the drinking water source, including land use and other conditions that may affect the source;

- the water supply system, including treatment and operation;

- monitoring requirements; and

- threats to drinking water provided by the system.

Such assessments must be prepared in consultation with the public, and where threats to drinking water have been identified, the water supplier may be required to prepare and implement an appropriate response plan. Among other things, the response plan can include public education, best management practices, infrastructure improvements, and planning or zoning changes that may be necessary to address the threat.

Similarly, Part 5 of the Act authorizes the designation of areas for the purpose of developing a "drinking water protection plan" for such areas. Again, such plans are to be developed with public and stakeholder input, and the plans may address operational changes, permit amendments, and land use planning considerations. For implementation purposes, the plan may supersede or amend decisions made under other statutes or planning processes. Moreover, the plan can restrict or prohibit well drilling in the designated area, or prohibit activities that may

[314] *Ibid*., at page 4.

threaten prescribed drinking water sources in the designated area. The Act also contains amendments to the *Water Act* which enable the development of "water management plans".

Source assessment/protection provisions are also found in the United States at both the federal and state levels. The U.S. *Safe Drinking Water Act*, for example, requires every State to develop programs (with public input) to protect groundwater serving as sources of public drinking water. Accordingly, States must delineate "wellhead protection areas" in which potential contamination sources are to be managed in order to reduce or eliminate threats to drinking water. Such areas are determined on such factors as: well pumping rates; groundwater time-of-travel calculations; aquifer boundaries; and degree of protection offered by the local overburden. Currently, 48 States and two territories have wellhead protection programs in place. To assist in the development of such programs, the Agency has published detailed guidance documents.[315]

Significantly, the 1996 amendments to the U.S. *Safe Drinking Water Act* placed greater emphasis on pollution prevention, and, among other things, created the statutory framework for the Source Water Assessment and Protection Program ("SWAPP"). Accordingly, each State is required to establish a SWAPP that describes how the State will define source water protection areas; inventory significant contaminants in such areas; and determine the vulnerability of each public water supply to contamination. The SWAPP is complementary to the wellhead protection programs described above, and applies to both surface water and drinking water used as sources of public drinking water. The States' SWAPPs were approved by the Environmental Protection Agency in 1999, and States are obliged to complete source water assessments for public drinking water systems by November 2001 (although extensions to May 2003 may be granted by the Agency). A summary of the source water assessment must be made available to the public in the consumer confidence reports required under the Act.

Interestingly, once the assessments are completed, the *Safe Drinking Water Act* does not expressly require States to protect water sources; however, such measures are encouraged by the provisions of the Surface Water Treatment Rule. This Rule, which applies to all systems using surface water or groundwater under the influence of surface water, requires disinfection and, in most cases, filtration. However, filtration requirements may be avoided if the systems meet stringent Agency criteria that define high quality source water. As described above in Part II of this Paper, a number of large U.S.cities – such as New York, Boston and Seattle – have been able to avoid filtration under these avoidance provisions. In May 2000, the Agency proposed a "Ground Water Rule" which is intended to incorporate State SWAPPs and wellhead protection programs into an overall Agency program for protecting groundwater sources of public drinking water.[316]

At the state level, New York and New Jersey have been particularly active regarding source assessment/protection. For example, New York requires water suppliers to own property within a 100 foot radius of the wellhead, and to control or restrict activities on property within a 200

[315] See, for example, "Guidelines for Wellhead and Springhead Protection Area Delineation in Carbonate Rocks" (EPA), which provides detailed information on establishing wellhead protection programs for fractured or "karst" bedrock, which is considered sensitive to contamination.

[316] EPA, "National Primary Drinking Water Regulations: Ground Water Rule", *Federal Register* (Vol. 65, No.91, May 10, 2000.

foot radius of the wellhead. In New Jersey, source assessments must consider not only federally regulated substances, but also unregulated substances that may constitute a present or future health threat.

European jurisdictions have also placed increasing importance on source assessment/protection measures. In October 2000, for example, the European Union ("EU") introduced the Water Framework Directive (2000\60\EC) which obliges member states to enact domestic legislation requiring the development of watershed-based management plans to protect water quality and quantity. This Directive also requires member states to implement measures to prevent or limit contamination of groundwater, as described above in Part II of this Paper. Similarly, England's Environment Agency has authority to establish "water protection zones" in respect of surface water sources of drinking water. Such zones are defined catchment areas in which special land use controls are established in order to prohibit or restrict activities that degrade surface water quality.

A similar watershed-based approach has been adopted in Australia, where the New South Wales government enacted the 1998 *Sydney Water Catchment Management Act*. This Act established the Sydney Catchment Authority, which, among other things, has a mandate to manage, protect, and monitor water quality within defined catchment areas (e.g. by restricting public access to such areas).

In summary, having regard for the initiatives undertaken by other provincial, state and national governments, Ontario lags far behind in terms of source assessment/protection. If Ontario wishes to ensure drinking water quality, then the province clearly needs to follow the lead of these other jurisdictions by entrenching mandatory source assessment/protection requirements into law. As described above, the Drinking Water Commission should develop provincial standards regarding source assessment/protection programs, and should oversee and review the implementation of such programs at the local level.

Some municipal officials have properly noted that they lack the full suite of tools necessary to implement source protection.[317] Thus, the drinking water statute should ensure that municipalities have sufficient statutory powers to, among other things, acquire or expropriate lands; enter into co-management or stewardship arrangements with landowners; or enact zoning by-laws under the *Planning Act* to restrict or prohibit land use and development for source protection purposes including tools to deal with existing uses.

RECOMMENDATION #9: Ontario's drinking water statute should expressly require public and private water treatment and distribution system owners and operators to:

(a) avoid drinking water sources that will, or are likely to, result in hazards to public health and safety due to pollution from activities within the watershed or sub-watershed;

[317] See, for example, the comments of staff from the Regional Municipality of Waterloo at the Walkerton Inquiry's Part II public meeting in Waterloo (March 22, 2001).

(b) assess and periodically review the vulnerability of their sources of drinking water to current or future contamination or degradation, and publicly report upon the results of such assessments;

(c) develop and implement appropriate source protection measures where necessary to safeguard public health and safety;

(d) involve the public in developing source assessment programs and source protection measures that will be implemented to safeguard public health and safety; and

RECOMMENDATION #10: Ontario's drinking water statute should amend existing laws (such as the *Planning Act, Municipal Act,* and/or *Conservation Authorities Act*) to ensure that municipal officials have sufficient legal tools to implement the measures specified in source protection programs.

(i) Community Right to Know

The term "community right to know" is usually used to denote several different ideas or concepts. Defined broadly, this term means that the public:

- should be regularly informed about what is in their drinking water;

- should receive timely and adequate warnings if the drinking water is found to be unsafe or may be unsafe, if testing or treatment equipment is inoperative or malfunctioning; or if required sampling or testing is not being undertaken;

- should be regularly informed about the water supplier's operating performance, including whether there have been exceedances of contaminant limits or other non-compliance with prescribed standards; and

- should have full and timely access to all records, reports, and documents kept or maintained by the water supplier.

If these are the essential elements of the "community right to know", then it is clear that Ontario's current legal regime satisfies some – but not all – of these elements. Significantly, the OWRA itself is completely silent on this fundamentally important matter. Instead, "community right to know" is left to the Drinking Water Protection Regulation, which, among other things, requires the owner of a water treatment or distribution system to:

- post a "warning notice" in a "prominent location" if the owner does not comply with sampling or analysis requirements for a microbiological parameter, or if there is a microbiological indicator of adverse water quality but no corrective action has been taken (section 10);

- make available for public inspection various technical and legal documents, such as: laboratory reports; records regarding chlorine residual, turbidity and other operational parameters; statutory approvals, orders and directions; quarterly reports (see below); the Regulation and the Ontario Drinking Water Standards (section 11); and

- submit quarterly reports (also known as "consumer confidence reports") to the MOE (and to users upon request) on the drinking water system's operation, compliance measures, sampling results, and notices (if any) of adverse drinking water (section 12).

While these provisions represent a good first step towards entrenching "community right to know" in Ontario, there are a number of questions and concerns about the scope, content and enforcement of such provisions. First, it should be noted that since the Regulation itself generally applies to large waterworks, these warning and reporting obligations will generally not apply to small public and private water suppliers, as described above. Thus, commercial or institutional facilities which may serve large numbers of the public for prolonged periods of time will not be required to post warning notices, maintain public records, or submit quarterly reports.

Second, there are some inexplicable omissions and unjustifiable exclusions in the Regulation's warning and reporting obligations. For example, it is unclear why the section 10 warning requirement is limited to microbiological parameters when other substances (e.g. chemical or radiological) may also pose public health risks. If, for whatever reason, the owner is not carrying out the sampling and analysis prescribed in Schedule 2 of the Regulation for any health-based parameter, then this information should be immediately conveyed to users of the system so that they can decide what precautions, if any, should be taken. Similarly, it is unclear why the public records required under section 11 do not expressly include the engineers' reports required by section 13 of the Regulation. In the absence of an explicit cross-reference to section 13, it can be reasonably anticipated that some waterworks owners will refuse to disclose the engineers' reports on the grounds that they are not listed in section 11.

Third, there is some question about the limitations of the quarterly reports required under the Regulation. For example, the quarterly report provisions do not appear to require the waterworks owner to specifically identify and explain the nature, duration, magnitude or significance of exceedances of health-based parameters, or other instances of non-compliance with prescribed requirements or standards. Instead, all that is required by section 12 is a "summary" of any notices filed with the MOE and medical officer of health pursuant to section 8 of the Regulation. An MOE guidance document on quarterly reports offers some discussion of the suggested content of such reports.[318] However, for the purposes of accountability and enforceability, it would have been helpful for the Regulation (if not the OWRA) to require quarterly reports to more fully explain, in plain language, what happened, why, what steps were taken in response, and what further measures will be taken in the future to prevent a recurrence.

Similarly, it would have been helpful if the quarterly report (or at least a detailed summary) were distributed to users (e.g. with their water bills), as opposed to waiting for users to learn that they can request a copy of the report. Interestingly, Bill 96 proposed to require waterworks owners to provide summaries of all testing and sampling results to users with their water bills (section 3),

[318] MOE, "Technical Brief: Waterworks' Quarterly Reports to Consumers" (August 2000).

but this proposal was not enacted. In addition, it is unclear why the quarterly reports (or summaries thereof) are not required to prominently display warnings or other information for users who may be particularly vulnerable to waterborne disease through exposure to contaminants known or suspected to be present in the drinking water.

Fourth, there is increasing concern about the MOE's willingness to actually enforce these "right to know" provisions under the Regulation. For example, anecdotal evidence already suggests that some municipalities are refusing to provide public access to records required by the Regulation. Similarly, the MOE has confirmed that 35 waterworks owners failed to submit the first quarterly reports, which were due by October 30, 2000. This non-compliance rate prompted then Environment Minister Dan Newman to remark that MOE investigators "will consider prosecutions on a case-by-case basis", and that "the government and the Ministry are determined to ensure that every single water treatment facility and municipality is in compliance".[319] To date, however, it is unknown whether the MOE has laid charges against even a single waterworks owner for failing to comply with the quarterly reporting requirement or any other provision of the Regulation.

In any event, the limited scope of Ontario's current "community right to know" provisions become readily apparent by examining such provisions in other jurisdictions. For example, the U.S. *Safe Drinking Water Act* initially included provisions that required public water system operators to notify consumers where there was a failure to meet a prescribed standard, or where prescribed monitoring was not carried. The 1996 amendments to the Act expanded the "community right to know" by requiring the annual preparation and distribution of annual consumer confidence reports. In particular, each community water system must annually mail such reports to consumers, and the reports must address the following matters;

- information on the drinking water source;

- plain language definitions of key terms under the Act;

- identification and discussion of any regulated contaminants detected in the drinking water system;

- discussion of any violations of prescribed standards for regulated contaminants, and any related public health concerns;

- compliance status (e.g. variance or exemptions to prescribed standards);

- monitoring of unregulated contaminants (e.g. *Cryptosporidium* and radon);

- direction to contact the Agency for further information; and

- additional information as may be appropriate for public education.

[319] MOE, "News Release: 35 Water Treatment Facilities Fail to Meet Reporting Requirements: Newman" (November 17, 2000).

Under the Act, systems serving less than 10,000 persons may be relieved against the requirement to mail the reports. In such cases, however, the system operator must inform consumers through newspaper notice that the reports will not be mailed out (but are available upon request) and will be published in one or more newspapers. Systems serving less than 500 persons may elect to simply notify customers by mail that the report is available upon request.

Similarly, in Australia, the New South Wales government enacted the 1994 *Sydney Water Act*, which creates both statutory and contractual "rights to know" for consumers, as discussed above in Part II of this Paper. In addition, the Sydney Water Corporation is required to prepare annual reports on all routine water quality testing results, and is further required to post consumer confidence reports on the internet every three months. Such electronic reports are to include:

- details of water quality and quantity within the catchment areas;

- evaluations of the Corporation's effectiveness in water treatment;

- literature reviews regarding drinking water developments; and

- overview of issues related to catchment management.

The use of electronic means to collect and publicly disseminate drinking water information has been passed or proposed in other jurisdictions. In England, for example, it is mandatory for the government to post a centralized water database on the internet. In Ontario, Bill 96 proposed a similar duty on the MOE to establish and operate a "water quality registry", which, among other things, would be used to compile all test results submitted to the MOE, and to contain copies of all approvals issued to public water suppliers (section 6).

Although the MOE's current web site contains considerable drinking water information, neither the OWRA nor the Drinking Water Regulation actually requires that this web site be maintained for such purposes. It should be further noted that the existing EBR Registry also does not currently serve these purposes. Significantly, the Environmental Commissioner of Ontario has expressly recommended that the MOE establish "a publicly accessible data management system, including water well records, monitoring information, complaints, inspections and enforcement, and information about contamination and remediation".[320]

In summary, Ontario's current "community right to know" requirements are somewhat rudimentary and incomplete. As discussed above, the requirements of the Drinking Water Protection Regulation offer a good starting point, but they should be clarified, expanded and placed upon a firm legislative basis in Ontario's drinking water statute.

RECOMMENDATION #11: Ontario's drinking water statute should fully entrench "community right to know" principles, and in particular, should include provisions that require:

[320] Environmental Commissioner of Ontario, *Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making*, at page 44.

(a) immediate public notice through appropriate means (e.g. news media, signs, internet, etc.) whenever:

(i) exceedances of prescribed standards or indicators of adverse water quality are detected including "presumptive" results;
(ii) treatment or testing equipment is inoperative or malfunctioning; or
(iii) required sampling and analysis is not being carried out;

(b) preparation of comprehensive consumer confidence reports which are to be mailed to all consumers on an annual basis, and which address the following matters:

(i) source assessment/protection;
(ii) discussion of any regulated contaminants or unregulated substances detected in the raw or treated water;
(iii) discussion of any violations of contaminant limits or prescribed standards, and related public health concerns, particularly for vulnerable persons; and
(iv) discussion of the steps taken to address such violations, and measures proposed to prevent any future violations; and

(c) require the Drinking Water Commission (or Minister) to establish and maintain an electronic drinking water registry that summarizes consumer confidence reports, discusses issues and trends arising from such reports, and otherwise serves as a public repository for significant drinking water information (e.g. approvals, prosecutions and orders, State of Drinking Water Reports, etc.).

(j) Provincial Monitoring and Reporting

Under Ontario's current legal regime, the Minister is not under any mandatory duty to undertake provincial monitoring or reporting regarding drinking water matters. For example, neither the OWRA nor the Drinking Water Protection Regulation requires the Minister to prepare or table "State of Ontario's Drinking Water" reports, or to conduct monitoring programs at the provincial level regarding drinking water quality or quantity. Similarly, there is no legal duty on the MOE to aggregate, analyze or discuss the quarterly reports submitted by public water suppliers. This type of broad-scale analysis/reporting would clearly assist the MOE – and Ontarians – in understanding the nature, number and causes of exceedances of health-based parameters, and in identifying trends, issues and challenges regarding drinking water across the province.

It should be noted that the MOE, in its discretion, has undertaken certain types of *ad hoc* provincial monitoring and reporting. For example, the MOE has undertaken a "Drinking Water Surveillance Program", which monitors and reports upon a subset of public water systems across Ontario each year. Significantly, however, this program stopped testing for E. coli and other microbial contaminants in 1996. From time to time, the MOE has prepared statistical summaries

of these reports,[321] and has made them available through the MOE web site. While such initiatives are commendable and should be continued, the fact that there is no legal duty to do so means that the MOE can, at any time, scale down or even eliminate such monitoring and reporting programs without legal consequences.

Ontario's discretionary approach to provincial monitoring and reporting stands in contrast to other jurisdictions which have proposed or passed statutory provisions which require drinking water officials to monitor and publicly report upon drinking water matters. For example, British Columbia's recently enacted *Drinking Water Protection Act* requires the appointment of provincial "drinking water coordinators" who, among other things, are compelled to prepare annual reports on activities under the Act. These reports must be tabled in the Legislative Assembly if in session, or otherwise must be filed with the Clerk of the Legislative Assembly.

Similarly, the U.S. *Safe Drinking Water Act* imposes a number of mandatory monitoring/reporting duties upon the Administrator of the Environmental Protection Agency. For example, the Act requires the Administrator to file annual reports with two congressional committees[322] in order to outline the Agency's activities under the legislation and to make recommendations as may be necessary. In addition, the Administrator is empowered and, in some cases, required by the Act to undertake specific monitoring/reporting activities, as discussed below in the context of drinking water research and assistance programs.

In England, the Drinking Water Inspectorate carries out audits and inspections of water suppliers, and publicly releases reports on the suppliers' performance, including recommendations for improvements. This reporting is done on an annual basis, although the relevant EU Directive only requires reports on the state of drinking water once every three years. Similarly, in New South Wales, operational audits are required and publicly released in relation to the water supplier's performance in meeting licence requirements and standards, as discussed above in Part II of this Paper.

In summary, the value and importance of provincial monitoring and reporting is well-recognized, and has prompted Ontario to impose such duties upon the Provincial Auditor regarding fiscal matters, and upon the Environmental Commissioner for general environmental matters. However, no such duty has been imposed by law upon the Minister regarding drinking water matters. Accordingly, Ontario's drinking water statute should impose a mandatory duty upon the Drinking Water Commission (or Minister) to undertake provincial monitoring and reporting programs for the purposes of accountability.

RECOMMENDATION #12: Ontario's drinking water statute should contain provisions that require the Drinking Water Commission (or Minister) to:

(a) prepare and file annual "State of Ontario's Drinking Water Reports" in the Legislative Assembly; and

[321] See, for example, MOE, *Drinking Water in Ontario: A Summary Report 1993-97* (2000).
[322] The Senate Committee on Commerce, Science and Transportation, and the House of Representatives Committee on Energy and Commerce.

(b) establish and maintain provincial monitoring programs on drinking water matters, such as:

(i) quality and quantity of surface water and groundwater sources of drinking water;
(ii) sources of contamination of drinking water;
(iii) new or emerging pathogens and substances that may be present in drinking water and that may pose a threat to public health and safety in Ontario; and

(iv) compliance by water suppliers with parameter limits and other prescribed standards.

(k) Investigation and Enforcement

The substantive requirements of any legal regime are as only as good as the provisions relating to investigation and enforcement of such requirements. Unless adequate tools for investigation and enforcement are built into law, then any prohibitions established by law amount to little more than a paper tiger since there is no meaningful threat of judicial or administrative proceedings to ensure compliance. Moreover, there must be an institutional willingness (e.g. stringent compliance policies) and capability (e.g. adequate staff and resources) to undertake timely and effective investigation and enforcement efforts.

Ontario's current legal regime does contain some useful mechanisms for the investigation and enforcement regarding environmental offences that may affect drinking water. For example, both the OWRA (section 30) and the EPA (section 14) create general prohibitions that may be enforced through prosecution. Both Acts also empower MOE officials to issue legally binding orders against persons responsible for environmental harm, and both laws require compliance with the terms and conditions attached to licences, permits or approvals issued under the legislation. In addition, the MOE has developed policy guidelines regarding compliance matters,[323] and has established the special Investigations and Enforcement Branch for environmental law enforcement purposes. All of the foregoing components of Ontario's legal regime were in place prior to the Walkerton tragedy, but they manifestly failed to avert the tragedy.

Accordingly, there are a number of concerns about the enforceability of Ontario's current legal regime with respect to drinking water safety. First, as described below, Ontario's current legal regime lacks specific drinking water prohibitions that have been passed or proposed in other jurisdictions. For example, some jurisdictions have enacted special drinking water laws that specifically prohibit the supply of unsafe drinking water and/or the pollution of drinking water systems. Such broad prohibitions have not been entrenched in Ontario, which means that MOE officials are more limited in their enforcement options since they can only address drinking water safety through environmental laws of general application.

[323] See, for example, MOE, "Compliance Guideline" (Guideline F-2, rev. 1995).

Second, the MOE's decision to investigate and enforce remains almost wholly discretionary.[324] In particular, there is no mandatory duty upon the MOE to investigate and enforce anything by way of prosecution, administrative order, or both. In the Walkerton case, for example, it appears that Well #5 was constructed without approval in 1978, and although prosecution was threatened, it was never undertaken and *ex post facto* approval was granted by the MOE. Even then, there appears to have been non-compliance with a term of the approval that required construction of a new pipe from the pumphouse to ensure fifteen minutes of chlorine contact time. Again, this apparent non-compliance did not trigger any prosecutions or orders by the MOE. It also appears that Well #5 was drawing water without the Permit to Take Water required by the OWRA. Once again, this approval was granted by the MOE *ex post facto*, and no prosecution was undertaken in respect of this non-compliance.

More recently, MOE inspectors in the 1990s detected a number of instances of non-compliance by the Walkerton's public utility with respect to drinking water requirements, but the MOE failed to prosecute or issue orders in respect of these matters. Indeed, two years before the Walkerton tragedy, an inspector recommended that the MOE undertake mandatory measures (e.g. issue an order or direction under the OWRA) to bring the utility into compliance, but this recommendation was rejected by her superior, who preferred "voluntary abatement" and decided to send a sternly worded letter to the manager of the Walkerton utility.[325] Only after the Walkerton tragedy occurred did the MOE issue field orders against the Walkerton utility in relation to drinking water matters.

The continuing lack of timely enforcement activities in the Walkerton situation clearly underscore the potential problems – and public health risks – associated with a regulatory regime that does not demand a strict, "zero tolerance" approach to non-compliance in drinking water matters. Indeed, several local officials in the Walkerton case have acknowledged that mandatory abatement action by the MOE likely would have prompted more timely and effective compliance efforts by the utility and its staff.[326]

Third, there is concern about the diminished role of the public in investigation and enforcement matters under the current drinking water regime in Ontario. At the present time, Ontarians who suspect that environmental offences have been committed can file formal "Applications for Review" under Part V of the EBR. Such applications are filed with the Environmental Commissioner, who forwards it to the appropriate Minister, who, in turn, is compelled to report back to the complainants within the prescribed timeframe. In some instances, it may be several months before the Ministry completes its investigation and reports back to the complainants. In the context of drinking water safety, where time is clearly of the essence to protect public health, investigation/response timeframes measured in months are clearly inappropriate.

More fundamentally, it should be recalled that the Minister is not actually compelled to investigate anything upon receipt of an EBR application, and he or she is free <u>not</u> to investigate

[324] *Ibid.* The MOE's "Compliance Guideline" lists a number of factors to take into account when MOE officials are considering the use of voluntary or mandatory abatements tools, but ultimately the decision on which tools (if any) to be used remains within the discretion of the MOE officials.
[325] See, for example, the Part 1A testimony of Ms. Michelle Zillinger and Mr. Phil Bye at the Walkerton Inquiry.
[326] See, for example, the Part 1A testimony of Mr. Jim Keiffer and Mr. David Thomson at the Walkerton Inquiry.

the matters complained of in certain circumstances (section 77(2) and (3)). Moreover, even in those relatively rare situations where the Minister proceeds with the requested EBR investigations, very few ultimately result in MOE prosecutions or orders, even where offences have been confirmed by investigators.[327]

Under the EBR, filing an Application for Review (and waiting for an MOE response months later) is generally required before Ontarians can go to court using the new civil cause of action under Part VI of the EBR. However, the EBR's new statutory cause of action is intended to protect "public resources", not drinking water *per se*, from "significant harm", as described above in Part I of this Paper. Thus, the availability of the EBR right to sue is largely limited to situations where "public resources" (e.g. groundwater or surface water) are being "significantly harmed" as a direct result of a contravention of a prescribed law, regulation or instrument (section 84(1)). Because of the EBR's focus on the natural environment, it seems unlikely that the EBR right to sue applies to water once it has been removed from the outdoors and transported through drinking water treatment, storage or distribution systems, particularly if they were privately owned.

Similarly, the restrictive language of the EBR right to sue seems unlikely to catch Walkerton situations, where, for example, a failure to take water tests or to properly monitor may constitute a contravention of a prescribed regulation (or instrument), but it may not, in and of itself, cause "significant harm" to a "public resource" within the meaning of the EBR. Indeed, the EBR cause of action may not even address situations involving non-point sources of pollution that are largely unregulated (e.g. manure disposal in accordance with normal farming practices), provided that there are no actual or imminent contraventions of environmental laws. In any event, on a more practical level, the rather cumbersome constraints and conditions precedent imposed by the EBR on "public resource" lawsuits have resulted in negligible use of this new right to sue.

In addition, it should be noted that the EBR right to sue does not allow plaintiffs to recover monetary damages (section 93(2)). Thus, if Ontario residents suffer loss or injury as a result of unsafe drinking water, they cannot use the EBR cause of action in order to obtain compensation. Instead, aggrieved residents would have to plead and prove causes of actions (e.g. common law or statutory) that may be available on the facts (e.g. negligence), but that were not necessarily developed to specially address drinking water concerns. To remedy this situation, Bill 96 (and the preceding private members' bills in Ontario) proposed to create a new civil cause of action for damages against persons who contravene drinking water legislation, regulation, or certificates of approval. However, such proposals have not been enacted to date. As an alternative, consideration could be given to the "consumer contract" approach used in Australia, where legislation provides water customers with certain statutory remedies (e.g. rebates, compensation, injunctive relief) for breaches of water supply contracts.

In any event, for the foregoing reasons, it cannot be seriously contended that EBR Applications for Investigation, or EBR "public resource" lawsuits, serve as an adequate basis for public involvement in the investigation and enforcement of drinking water complaints. Indeed, it should be pointed out that the EBR was in place for years prior to the Walkerton tragedy, but it

[327] See the Annual Reports filed by the Environmental Commissioner of Ontario.

played absolutely no role in preventing or responding to the crisis. Thus, while the EBR regime may offer the public some assistance in general environmental matters, the EBR's utility and value in the drinking water context is questionable at best, primarily because it was not drafted to specifically address drinking water concerns.

Significantly, other jurisdictions have passed or proposed provisions that significantly enhance the public rights in relation to investigation and enforcement of drinking water matters. For example, British Columbia's recently enacted *Drinking Water Protection Act* enables concerned citizens to request investigations of suspected threats to their drinking water. Unlike Ontario's EBR, such investigation requests go directly to specially appointed "drinking water officers", who must review and respond to such requests. Part 4 of the B.C. Act also empowers drinking water officers to issue a wide range of orders to: abate "drinking water health hazards"; require drinking water hazard remediation or prevention plans; require measures to bring the orderee into compliance; and take direct action (and recover costs) if there is default under such orders.

Similarly, citizen access to the courts is entrenched in the U.S. *Safe Drinking Water Act*. This Act (like many federal environmental statutes in the U.S.) contains a "citizens' suit" provision, which as been framed as follows:

> Any person may commence a civil action on his own behalf,
>
> (1) against any other person (including (A) the United States, and (B) any other government instrumentality or agency…) who is alleged to be in violation of any requirement prescribed by or under this subchapter;
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this subchapter that is not discretionary with the Administrator; or
> (3) for the collection of a penalty by the United States Government (and associated costs and interest) against any Federal agency that fails, by the date that is 18 months after the effective date of an order to pay a penalty assessed by the Administrator under [section 300j-6 (administrative penalty orders)].

Interestingly, the Act also empowers the Administrator of the Environmental Protection Agency to impose administrative penalty orders against any federal agency that violates the Act. These civil penalties can order agencies to pay up to payment of $25,000 per day per violation.

In England, the Drinking Water Inspectorate has a *Code of Enforcement* that, among other things, specifies what actions its officials will take in relation to different drinking water incidents. Orders are used to promptly address operational concerns identified through the Inspectorate's monitoring and inspection activities, but a number of high-profile prosecutions have also been undertaken in England where a water supplier supplied unsafe drinking water and failed to exercise due diligence. In recent years, the Inspectorate has used audits and random, unannounced inspections in order to address problems such as falsifying test results, or failing to test at all.

In Ontario, governmental investigation and enforcement activities regarding drinking water offences would be significantly enhanced by the development of a compliance manual that specifically targets drinking water contraventions. The province's current enforcement policies are written at a general level and tend to lump most environmental offences under provincial law into broad categories without adequately highlighting or addressing drinking water offences in particular. In addition, these policies are replete with highly discretionary language, leaving MOE officials with considerable room not to pursue mandatory abatement measures even where they are clearly warranted on the facts.

Accordingly, the Drinking Water Commission (or Minister) should develop (with public input) an appropriate compliance manual that entrenches the "zero tolerance" approach described above, and that contains prescriptive direction on when mandatory abatement measures must be taken to protect drinking water safety and public health. Such a manual would remove much of the uncertainty, unpredictability and inconsistency regarding drinking water enforcement across the province, and it would enhance accountability for enforcement (or non-enforcement) of Ontario's drinking water statute. To ensure that such a manual is actually developed within a reasonable timeframe, Ontario's drinking water statute should place a positive duty upon the Drinking Water Commission (or Minister) to produce the required manual (with public input) by a specified deadline.[328]

It should be noted, however, that requiring the development of an appropriate compliance manual begs the fundamental question of whether public entities (such as the Drinking Water Commission or MOE) should still be involved in investigation and enforcement activities regarding drinking water offences. It may be suggested that in light of the Walkerton tragedy, it is time to consider alternative delivery strategies for environmental investigation and enforcement, such as creating a private corporate entity analogous to the Technical Standards and Safety Association ("TSSA"), which has recently assumed delegated enforcement responsibilities from the Ministry of Consumer and Commercial Relations.

In response to this suggestion, it should be noted that no other jurisdiction has elected to delegate investigation and enforcement responsibilities regarding drinking water matters to private corporate entities. Second, even where such corporate entities have been used for other matters (e.g. TSSA), there is little empirical evidence to suggest that such approaches result in faster, better or more efficient compliance activities. Third, there are a number of serious concerns about the political, legislative, administrative and fiscal accountability of using private entities to enforce public laws.[329] Unless these fundamental concerns can be adequately addressed, it remains highly preferable to retain investigation and enforcement responsibilities for drinking water matters in public hands.

[328] This was the approach taken in Ontario's *Crown Forest Sustainability Act*, which obliged the Ministry of Natural Resources to produce key implementation manuals within specified periods.

[329] Winfield et al., *The "New Public Management" Comes to Ontario: A Study of Ontario's Technical Standards and Safety Authority and the Impacts of Putting Public Safety in Private Hands* (CIELAP, 2000).

RECOMMENDATION #13: Ontario's drinking water statute should contain provisions that:

(a) impose a positive duty on the Drinking Water Commission (or Minister) to enforce the provisions of the statute on a "zero tolerance" basis;

(b) impose a positive duty on the Drinking Water Commission (or Minister) to develop (with full public input) a compliance manual to provide detailed direction regarding the investigation and enforcement of drinking water provisions under the statute;

(c) establish a broad range of mandatory abatement tools, including administrative penalties, stop orders and emergency orders;

(d) create a streamlined right for Ontarians to require (not just request) investigations of suspected contraventions of drinking water requirements;

(e) create a "citizens' suit" mechanism that allows Ontarians to enforce drinking water requirements in civil court; and

(f) create a new cause of action for persons who suffer loss, injury or damage as a result of a contravention of the statute or the regulations thereunder.

(l) Prohibitions and Penalties

As described in Part I of this Paper, Ontario's current legal regime contains a number of general prohibitions, scattered across a number of different statutes, which are collectively intended to protect drinking water systems and safeguard public health and safety.

For example, the *Environmental Protection Act* prohibits the discharge of contaminants into the natural environment that cause, or are likely to cause, adverse effects (section 14). Similarly, the *Ontario Water Resources Act* prohibits the discharge of polluting materials into or near water (section 30). In addition, the federal *Fisheries Act* prohibits the deposit of "deleterious substances" into water frequented by fish (section 36(3)). Large fines and other penalties may be imposed in respect of contraventions under these general prohibitions.

With respect to drinking water in particular, there are few specific prohibitions that universally protect drinking water (or its sources) in Ontario. For example, the *Public Utilities Act* prohibits persons from depositing "injurious" or "offensive" substances into water or waterworks, and from damaging the waterworks and pipes (section 13). It would appear, however, such provisions apply only to waterworks owned or operated by public authorities, and thus would not apply to private waterworks or private individual wells.

Similarly, Ontario's new Drinking Water Protection Regulation creates no new offences *per se*, but imposes a number of mandatory testing, treatment and reporting duties that may be enforced

through the general offence provisions of the *Ontario Water Resources Act*. Interestingly, the Act has recently been amended to provide higher fines for contraventions of regulatory requirements regarding drinking water treatment and notification of adverse drinking water quality.[330] However, the statutory amendments did not create any new offences regarding drinking water and its sources.

Thus, it appears that Ontario's current legal regime contains remarkably few prohibitions that are aimed specifically at protecting drinking water and its sources. To remedy this long-standing situation, the various private members' bills introduced in Ontario to establish safe drinking water legislation included prohibitions against supplying unsafe drinking water and polluting drinking water systems. Like most environmental offences in Canada, these drinking water prohibitions were framed as "strict liability" offences, meaning that the prosecution would not have to prove *mens rea* (guilty mind or intent) on the part of the defendant. Instead, the prosecution must only demonstrate the *actus reus* (prohibited act) beyond a reasonable doubt. If this is proven, then the onus would shift to the defendant to avoid liability by satisfying the court that he or she exercised due diligence (reasonable care) to avoid the commission of the offence.[331]

Ontario's most recent private member's bill (Bill 96) framed drinking water prohibitions as strict liability offences in the following manner:

> 7. (1) No public water supplier shall cause or permit to be supplied to users water that,
>
> (a) exceeds the maximum permitted level for any contaminant or substance; or
>
> (b) contravenes a prescribed standard.
>
> (2) No person shall deposit in, add to, emit or discharge into a public water system or a private water system any thing so as to cause the water to,
>
> (a) exceed the maximum permitted level for a contaminant or substance; or
>
> (b) contravene a prescribed standard (emphasis added).

Bill 96 provided for $1 million fines and restraining orders in respect of such contraventions. However, Bill 96 was not enacted, as described above.

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[330] *Toughest Environmental Penalties Act, 2000*, S.O. 2000, c.22 (Royal Assent November 21, 2000), section 2. This section provides for fines up to $6 million for a first conviction and $10 million for subsequent convictions. It remains to be seen whether these provisions will be actively enforced by the MOE, and whether the courts will be willing to impose fines at or near these prescribed maximum levels.

[331] Generally, see Saxe, *Environmental Offences* (Canada Law Book, 1990); Swaigen, *Regulatory Offences in Canada* (Carswell, 1992); and Hughes, "The Reasonable Care Defences" (1992), 2 *Journal of Environmental Law and Practice* 214..

Bill 96's proposed strict liability offences are somewhat broader than those found in the U.S. *Safe Drinking Water Act*, which simply prohibits persons from "tampering" with public water systems. The U.S. Act, however, goes on to also prohibit persons from "attempting" or "threatening" to tamper with a public water system. "Tampering" is defined as the introduction "of a contaminant into a public water system with the intention of harming persons", or the interference "with the operation of a public water system with the intention of harming persons". Because of this explicit *mens rea* requirement, it appears than the U.S. prohibition would catch deliberate acts (e.g. terrorist activities) that were specifically intended to harm persons using public water systems. However, the prohibition would not necessarily catch careless or negligent acts (e.g. agricultural runoff) that were not specifically intended to harm persons using public water systems. Under the U.S. Act, fines, civil penalties, and imprisonment up to five years may be imposed for contraventions of the "tampering" prohibition.

In contrast to the U.S. approach, British Columbia's recently enacted *Drinking Water Protection Act* frames its drinking water offences on a strict liability basis. In particular, the B.C. legislation contains a number of offences that go beyond the simple prohibitions proposed in Ontario's Bill 96. For example, the B.C. legislation:

- imposes a duty on "water suppliers"[332] to provide users with drinking water that is "potable"[333] and that meets regulatory requirements (section 6);

- imposes a duty to report "threats" to drinking to the drinking water officer who, in turn, may request or order public notice of the threat (sections 13 and 14);

- prohibits persons from introducing anything "into a domestic water system[334], drinking water source, a well recharge zone or an area adjacent to a drinking water source" that results, or is likely to result, in a drinking water health hazard (section 23(1)); and

- prohibits persons from destroying, damaging, opening, closing, or tampering with any part of a domestic water system (or introducing anything into a domestic water system, drinking water source, well recharge zone, or area adjacent to a drinking water source) if it is "reasonably forseeable that, as a result, the owner of the domestic water system would have to limit the use of the water provided by the system on the basis that there may be a risk of a drinking water health hazard" (section 23(2)).

Contraventions of any of these provisions represent offences that may be punishable by fines and/or imprisonment (section 45(1) and (2)). Additional sentencing authority (e.g. prohibition, restoration orders, expense reimbursement, community service, etc.) is found under B.C.'s

[332] "Water supplier" is defined as the owner of a "water supply system", which is further defined as a "domestic water system" that serves more than one single family residence: *Drinking Water Protection Act* (Bill 20), section 1.
[333] "Potable water" is defined as "water provided by a domestic water system that (a) meets the standards prescribed by regulation; and (b) is safe to drink and fit for domestic purposes without further treatment": *Drinking Water Protection Act* (Bill 20), section 1.
[334] "Domestic water system" is defined as "a system by which water is provided or offered for domestic purposes [eg. human comsumption, food preparation, sanitation, household purposes]", including works, equipment, facilities, intake water and water in the system: *Drinking Water Protection Act* (Bill 20), section 1.

Health Act (section 45(3)). In addition, amendments to B.C.'s *Water Act* would prohibit persons from operating wells in a manner that causes or is likely to cause a significant adverse impact on groundwater quality or other well users. These amendments would further prohibit persons from introducing foreign matter (e.g. refuse, human or animal waste, pesticides or fertilizers, construction debris, etc.) into wells.

In light of these developments in other jurisdictions, it is clear that there is room for considerable improvement in Ontario's current legal regime. At the present time, the province's environmental laws contain general prohibitions that are not specifically aimed at drinking water protection. The Drinking Water Protection Regulation does contain certain testing, treatment and reporting duties that may be enforced through the general offence provisions of the *Ontario Water Resources Act*. However, such provisions do not displace or dispense with the need to entrench carefully crafted prohibitions that go beyond testing, treatment and reporting duties.

In particular, Ontario's drinking water statute should create various "strict liability" offences and should impose severe penalties for contraventions of such offences, including jail terms for the most serious offences (e.g. causing actual impairment of drinking water quality, or causing actual harm to any user of the drinking water system). To enhance the deterrent value of fines, the Act should impose minimum fines (not just large maximum fines which rarely, if ever, get imposed) so that potential defendants know that, at the very least, they will face mandatory minimums if caught and convicted.[335]

RECOMMENDATION #14: Ontario's drinking water statute should include:

(a) broad, "strict liability" offences that prohibit:

(i) owners/operators of public and private water treatment and distribution systems from providing users with drinking water that exceeds permitted contaminant levels or contravenes prescribed standards;

(ii) owners/operators of public and private water treatment and distribution systems from contravening the terms or conditions imposed under statutory approvals for such systems;

(iii) owners/operators of public and private water treatment and distribution systems from submitting false information or reports required by law;

(iv) owners/operators of public and private water treatment and distribution systems from failing to report threats to drinking water quality to the Minister and/or public health officials;

[335] Minimum fines already exist for certain offences under the *Environmental Protection Act* (section 193), but not under the *Ontario Water Resources Act.*

(v) any person from causing or permitting the release of contaminants into or near waterworks, drinking water sources, wells or well recharge areas, or attempting or threatening to do so;[336] or

(vi) any person from damaging, destroying, altering, or otherwise tampering with waterworks or wells, or attempting or threatening to do so; and

(b) severe penalties for contraventions, including:

(i) minimum fines for a first conviction;

(ii) maximum fines of not more than $6 million for a first conviction;

(iii) significant higher fines for subsequent offences, or for offences where the health of any person has been impaired as a result of the contravention;

(iv) jail terms for serious offences, such as where the health of any person has been impaired as a result of the contravention;

(v) stripping of any profits or monetary benefits acquired or gained by the defendant through the contravention;

(vi) orders of prohibition, restitution, or restoration, including orders to provide an alternate drinking water supply; and

(vii) such further orders or conditions that are necessary to prevent further offences or to contribute to the rehabilitation of the defendant.

(m) Funding, Research and Technical Assistance

Under Ontario's current regime, the Minister is under no express legal duty to undertake, commission or fund drinking water research programs, technical assistance programs, or financial assistance programs. Under the *Ontario Water Resources Act*, for example, the Minister is given general administrative responsibility for the Act (section 3). The Act further states that the "function" of the Minister is to "conduct research programs" and to "disseminate information and advice" regarding the collection, treatment, storage and distribution of water, and he or she is empowered to do so (section 10). However, it does not appear to be mandatory for the Minister to establish or maintain any specific drinking water programs, and it is open to the Minister to reduce, limit or even discontinue water research and assistance programs in his or her discretion.

[336] For such an offence, it may be necessary to recognize a limited "statutory authority" defence for situations where, for example, a company is lawfully discharging contaminants into the environment in accordance with its Certificate of Approval, but then there should be an express power to the Ministry of the Environment / Director to amend or withdraw that Certificate of Approval permitting the emission.

In fact, this is precisely what has happened in recent years in Ontario as some important water-related programs have been significantly modified, reduced or wholly eliminated.[337] In addition, four of five MOE water testing laboratories were closed in 1996, and numerous MOE water personnel (e.g. hydrologists, hydrogeologists, etc.) were laid off. In light of such sweeping cutbacks and program changes, it is difficult to understand how the Minister can properly discharge his or her "function" under the *Ontario Water Resources Act.*

In any event, to remedy such situations, Bill 96 proposed a mandatory duty on the Minister to conduct research programs, as follows:

> 13. The Minister shall cause research to be conducted on,
>
> (a) the causes, diagnosis, treatment, control and prevention of health effects associated with contaminants and with failure to adhere to prescribed standards;
> (b) the quality, quantity and availability of water from private water systems;
> (c) the sources of surface and ground water contamination;
> (d) methods of purifying drinking water; and
> (e) methods of conserving water (emphasis added).

In addition, Bill 96 proposed to require the Minister to test water from private water systems at the request of users of such systems (section 14). Similarly, Bill 96 empowered the Minister to establish a "Safe Drinking Water Fund" to provide technical and financial assistance to public water suppliers for improving drinking water quality, improving delivery systems, employee training, and source assessment/protection programs (section 19). However, Bill 96 was not enacted, which currently leaves such matters in the discretion of the Minister.

Ontario's largely discretionary approach stands in sharp contrast to the numerous research/ assistance duties and powers specified under the U.S. *Safe Drinking Water Act*. Under the Act, some duties upon the Administrator of the Environmental Protection Agency are framed in mandatory terms, such as provisions which compel the Administrator to study and report upon the following matters:

- contamination of actual or potential sources of drinking water by PCBs and other substances known or suspected to be harmful to public health, and means of removing, treating or controlling such contamination;

- waste disposal that may endanger groundwater serving as supply for public water systems;

- methods of underground injection which do not degrade groundwater sources of drinking water;

[337] Such programs include: Municipal Assistance Program; Great Lakes clean up program; training programs for water treatment staff; Green Communities Program; and Clean Up Rural Beaches (CURB) program.

- methods of detecting and controlling surface spills of contaminants which may degrade underground sources of drinking water;

- virus contamination of drinking water sources and means of controlling such contamination;

- intensive application of pesticides and fertilizers in underground water recharge areas;

- the nature, source, extent and means of control of contamination by chemicals and suspected carcinogens in public water supplies and sources;

- chlorination by-products and effects on human health;

- groups of people within the general population who may be at greater risk of adverse health effects from exposure to drinking water contaminants;

- mechanisms by which chemical contaminants are absorbed, distributed, metabolized and eliminated from the human body;

- toxicological and epidemiological study of harmful substances in drinking water; and

- occurrence of waterborne disease.

Similarly, the Act requires the Administrator to provide and fund training for State enforcement personnel, persons who manage or operate public water systems, and persons involved in the public health aspects of providing safe drinking water. Since 1974, hundreds of millions of dollars in public funds have been appropriated to carry out these mandatory research/assistance provisions. In addition, the Administrator is required to ensure that technical assistance is available in each State for small water systems to achieve compliance with national drinking water standards. Similarly, the Administrator (in conjunction with the Director of the Centres for Disease Control and Prevention) is required to establish a national health care provider training and public education campaign about waterborne disease caused by infectious agents such as microbial contaminants. The Administrator must also provide funds to States for local educational agencies to test for, and remedy, lead contamination in school drinking water.

Other research/assistance powers under the U.S. legislation are framed in optional terms, such as provisions that give legislative authority to the Administrator to:

- undertake general research, studies or demonstrations regarding public health and drinking water;

- provide grants or technical assistance in respect of emergency situations affecting public water systems;

- provide grants and loans for certain State programs (e.g. public water system supervision, underground water source protection, etc.);

- provide financial assistance in respect of demonstration projects under New York City's watershed protection program;

- provide grants to special study and demonstration projects regarding technology improvements and treatment/recycling/reuse of wastewater;

- provide grants to other public sector agencies for technological research and development;

- provide technical and financial assistance for infrastructure construction/improvement and watershed management programs; and

- enter into agreements with States to establish revolving loan funds (e.g. capitalization grants or letters of credit).

In comparison to the above-noted provisions (many of which are mandatory) under the U.S. *Safe Drinking Water Act*, Ontario's current regime is clearly incomplete (if not entirely deficient) with respect to drinking water research and technical/financial assistance programs. To ensure that drinking water requirements are properly implemented by small and large waterworks, Ontario's drinking water statute should follow the U.S. lead by imposing mandatory duties in respect of drinking water research and technical/financial assistance programs.

RECOMMENDATION #15: Ontario's drinking water statute should establish a mandatory duty upon the Drinking Water Commission (or Minister) to:

(a) undertake and fund research programs such as:

(i) identification, treatment and prevention of adverse public health effects from drinking water contaminants;

(ii) quality and quantity of water available to public and private water suppliers in Ontario;

(iii) current and future sources of drinking water contaminants, including unregulated substances;

(iv) controlling or avoiding the effects of intensive farming on sources of drinking water;

(v) identifying and protecting Ontarians who may be at special risk of waterborne disease;

(vi) watershed management and source protection measures; and

(vii) water conservation; and

(b) establish and fund programs that provide technical and financial assistance to owners/operators of public or private water treatment and distribution systems in order to:

(i) install, construct or upgrade equipment in the waterworks (or related infrastructure) in order to meet drinking water standards;

(ii) implement water conservation plans or programs;

(iii) undertake source assessment/protection programs; and

(iv) employee training;

(n) Advisory Mechanisms

Under Ontario's current legal regime, there is no multi-stakeholder advisory committee that can assist the Minister in protecting drinking water and its sources. As described above, the highly regarded Advisory Committee on Environmental Standards ("ACES") was abolished in 1995,[338] and no other general or special advisory committee has been established in relation to drinking water matters.

To remedy this situation, Bill 96 included provisions that would have established a multi-stakeholder "Water Advisory Council" in Ontario.[339] Under Bill 96, members of the ten person Council were to be selected on the basis of their "competence and knowledge in matters relating to drinking water quality" (section 11), and were to be given several important advisory functions:

12. The Water Advisory Council has the following duties:

1. To advise the Minister on the results of current research related to:

(i) drinking water quality;
(ii) prescribed standards;
(iii) contaminants and substances and their effects.

2. To consider any matter affecting drinking water quality that the Minister refers to the Council, or that the Council decides to consider on its own initiative, and to advise the Minister on the matter.

[338] The MISA Advisory Committee and the Environmental Assessment Advisory Committee were also abolished at the same time by the provincial government.
[339] Similarly, all other private members' bills to establish safe drinking water legislation in Ontario included proposals to establish an advisory committee.

However, during legislative debate on Bill 96, former Environment Minister Dan Newman dismissed the proposed Council as "red tape",[340] and Bill 96 ultimately was not enacted, as described above.

Characterizing a public advisory committee as “red tape” reflects a poor understanding of the value, purpose and function of such bodies in modern regulatory regimes. Moreover, Ontario’s continuing failure to establish such a committee is clearly out of step with other jurisdictions that have created drinking water advisory committees to research and report upon drinking water matters.

For example, British Columbia’s recently enacted *Drinking Water Protection Act* includes provisions which authorize the creation of drinking water advisory committees, and which amend the *Water Act* to authorize the creation of a groundwater advisory board. Similarly, New Jersey’s legislation creates a “Drinking Water Institute”, which conducts research and makes recommendations specifically related to the drinking water issues and needs facing New Jersey residents. In addition, the U.S. *Safe Drinking Water Act* establishes the National Drinking Water Advisory Committee, which must be consulted during regulation-making under the Act. Interestingly, the Act further specifies that of the Council’s fifteen members, five are to be representatives of the general public, five are to be representatives of state and local agencies involved in public water supply, and five are to be representatives of private organizations or groups involved in public water supply.

In contrast, the composition of Canada’s Federal-Provincial Subcommittee on Drinking Water is limited to representatives from federal, provincial and territorial governments. Thus, representatives of non-governmental organizations, academic institutions, or the drinking water industry do not serve as members of the Subcommittee. Accordingly, it cannot be seriously suggested that the mere existence of the Subcommittee eliminates the need for a multi-stakeholder advisory body in Ontario to address provincial drinking water issues and priorities.

Thus, Ontario’s drinking water statute should require the establishment of a multi-stakeholder advisory committee to assist the Drinking Water Commission (or Minister) to carry out its duties and responsibilities under the law.

RECOMMENDATION #16: Ontario’s drinking water statute should require the establishment of a public advisory committee to research and report upon drinking water matters to the Drinking Water Commission (or Minister).

3.3 Conclusions and Summary of Recommendations

Premier Michael Harris has asserted that the provincial government’s “goal is to have the safest water in Canada”.[341] Similarly, when introducing the new Drinking Water Protection

[340] *Hansard* (June 15, 2000).
[341] Office of the Premier, “News Release: Harris Government Action Plan to Improve Water Quality includes Tough New Regulation” (August 8, 2000).

Regulation, former Environment Minister Dan Newman committed to a "comprehensive approach to achieve our goal of the safest drinking water in Canada".[342]

However, Minister Newman also recognized that "changes" were needed to prevent a recurrence of the Walkerton tragedy, and that the requirements of the new Regulation were just "interim steps to strengthen the protection of Ontario's drinking water supply". At the same time, Minister Newman noted that "while the Ontario government has confidence in the ability of the current system to protect water supplies, there is always room for improvement".[343]

As noted above, there is considerable room for improvement in the current legal regime, notwithstanding the passage of the Drinking Water Protection Regulation. In particular, there are a number of outstanding gaps, flaws and shortcomings in current legal regime, which may be summarized as follows:

- regulatory responsibility for drinking water is highly fragmented and uncoordinated;

- there are a number of laws, regulations and policies which are inconsistent and/or conflict with the overall objective of protecting drinking water and its sources;

- the current legal regime lacks a paramountcy clause which ensures that drinking water considerations shall prevail in cases of conflict;

- the bulk of Ontario's drinking water requirements are set out in subordinate regulation, which lacks the legal weight, significance and longevity of legislation;

- the current legal regime contains few mechanisms to ensure provincial accountability for protecting drinking water and its sources;

- there is no specialized public agency whose only priority and focus is drinking water safety;

- the current legal regime does not generally apply to small waterworks, including those which provide drinking water to large numbers of people;

- the current legal regime lacks any legislative statement of purpose;

- the current legal regime does not recognize or create a substantive public right to clean and safe drinking water;

- there is no mandatory duty to set, review or revise drinking water regulations in order to protect public health and safety, including vulnerable persons;

[342] MOE, "News Release: Ontario Launches Consultation on Additional Measures for Drinking Water Protection" (August 9, 2000).
[343] MOE, "Notes for Remarks by Environment Minister Dan Newman: Press Conference on Walkerton Water Situation (Queen's Park)" (May 29, 2000).

- there is no mandatory duty to identify and evaluate new or emerging drinking water contaminants;

- public participation opportunities are limited in the approvals process for waterworks;

- the current legal regime fails to define "groundwater under the influence of surface water", and fails to specify that surface water treatment requirements apply in such situations;

- source water assessment and source water protection programs are not mandated by law;
- municipal officials lack the statutory powers to fully implement source water protection programs;

- "community right to know" provisions are limited;

- provincial level monitoring/reporting is discretionary;

- the current legal regime contains inadequate investigation and enforcement provisions;

- existing legal prohibitions and penalties are inadequate to protect drinking water safety;

- financial and technical assistance programs for drinking water are discretionary and incomplete; and

- no multi-stakeholder drinking water advisory committee exists in Ontario.

Accordingly, if the Ontario government is serious about strengthening the protection of the province's drinking water so that it is "the safest in Canada", then Ontario should enact safe drinking water legislation in accordance with the following recommendations:

RECOMMENDATION #1: Ontario should, to the greatest possible extent, entrench drinking water provisions into a single, integrated statute, rather than in regulation or policy. This statute should contain a paramountcy clause that provides that in cases of conflict between drinking water provisions and any other general or special Act, the drinking water provisions shall prevail to the extent of the conflict.

RECOMMENDATION #2: Ontario should systematically review and, where necessary, revise provincial laws, regulations and policies to ensure that they are consistent with the overall provincial priority of protecting drinking water and its sources.

RECOMMENDATION #3: Ontario's drinking water statute should include provisions that:

(a) establish appropriate judicial and political accountability mechanisms, such as provincial monitoring/reporting and judicial review opportunities;

(b) specify that the statute binds the Crown;

(c) establish an new "Drinking Water Commission" that reports to the Minister of Environment, and that has the statutory mandate to develop and oversee the delivery of Ontario's drinking water program by (among other things) setting and enforcing provincial standards which implement the multi-barrier approach; and

(d) clearly delineate lines of authority, responsibility and communication requirements between Ministry staff, the Drinking Water Commission, municipal officials, public utilities, and medical officers of health.

RECOMMENDATION #4: Ontario's drinking water statute should apply to all public and private water treatment and distribution systems in the province. In addition, the statute should impose appropriate testing and sampling requirements in relation to private individual wells in order to detect and remedy unsafe drinking water.

RECOMMENDATION #5: Ontario's drinking water statute should entrench a substantive public right to clean and safe drinking water. The statute should further state that its purpose is to recognize, protect and enhance the public right to clean and safe drinking water.

RECOMMENDATION #6: Ontario's drinking water statute should include provisions that:

(a) impose a mandatory duty upon the Drinking Water Commission (or Minister) to set and maintain drinking water standards;

(b) impose a mandatory duty upon the Drinking Water Commission (or Minister) to periodically review the adequacy of existing standards, and to make such revisions to the standards as may be necessary to protect human health and safety;

(c) specify that the primary objective of drinking water standards is to protect public health and safety of all Ontarians, including those who may be particularly vulnerable to waterborne illness or disease;

(d) entrench the precautionary principle as a mandatory consideration when drinking water standards are being drafted, reviewed or revised;

(e) establish legally binding mechanisms for meaningful public participation in drafting, reviewing or revising drinking water standards; and

(f) impose a mandatory duty upon the Drinking Water Commission (or Minister) to identify and evaluate new and emerging contaminants for which no standards exist in Ontario.

RECOMMENDATION #7: Ontario's drinking water statute should contain provisions that:

(a) establish a self-contained process for the Drinking Water Commission to approve (or reject) applications for waterworks that supply drinking water, and to ensure full public participation in the approvals process;

(b) clarify and strengthen existing requirements regarding operator licencing and training; and

(c) retain existing requirements regarding the mandatory use of accredited laboratories for drinking water sampling and analysis.

RECOMMENDATION #8: Ontario's drinking water statute should include provisions that:

(a) entrench current testing, treatment, notification and corrective action requirements into law rather than regulation; and

(b) define "groundwater under the influence of surface water", and specify that surface water treatment requirements apply in such situations.

RECOMMENDATION #9: Ontario's drinking water statute should expressly require public and private water treatment and distribution system owners and operators to:

(a) avoid drinking water sources that will, or are likely to, result in hazards to public health and safety due to pollution from activities within the watershed or sub-watershed;

(b) assess and periodically review the vulnerability of their sources of drinking water to current or future contamination or degradation, and publicly report upon the results of such assessments;

(c) develop and implement appropriate source protection measures where necessary to safeguard public health and safety;

(d) involve the public in developing source assessment programs and source protection measures that will be implemented to safeguard public health and safety; and

RECOMMENDATION #10: Ontario's drinking water statute should amend existing laws (such as the *Planning Act, Municipal Act,* and/or *Conservation Authorities Act*) to ensure that municipal officials have sufficient legal tools to implement the measures specified in source protection programs.

RECOMMENDATION #11: Ontario's drinking water statute should fully entrench "community right to know" principles, and in particular, should include provisions that require:

(a) immediate public notice through appropriate means (e.g. news media, signs, internet, etc.) whenever:

(i) exceedances of prescribed standards or indicators of adverse water quality are detected including "presumptive" results;
(ii) treatment or testing equipment is inoperative or malfunctioning; or
(iii) required sampling and analysis is not being carried out;

(b) preparation of comprehensive consumer confidence reports which are to be mailed to all consumers on an annual basis, and which address the following matters:

(i) source assessment/protection;
(ii) discussion of any regulated contaminants or unregulated substances detected in the raw or treated water;
(iii) discussion of any violations of contaminant limits or prescribed standards, and related public health concerns, particularly for vulnerable persons; and
(iv) discussion of the steps taken to address such violations, and measures proposed to prevent any future violations; and

(c) require the Drinking Water Commission (or Minister) to establish and maintain an electronic drinking water registry that summarizes consumer confidence reports, discusses issues and trends arising from such reports, and otherwise serves as a public repository for significant drinking water information (e.g. approvals, prosecutions and orders, State of Drinking Water Reports, etc.).

RECOMMENDATION #12: Ontario's drinking water statute should contain provisions that require the Drinking Water Commission (or Minister) to:

(a) prepare and file annual "State of Ontario's Drinking Water Reports" in the Legislative Assembly; and

(b) establish and maintain provincial monitoring programs on drinking water matters, such as:

(i) quality and quantity of surface water and groundwater sources of drinking water;
(ii) sources of contamination of drinking water;

(iii) new or emerging pathogens and substances that may be present in drinking water and that may pose a threat to public health and safety in Ontario; and

(iv) compliance by water suppliers with parameter limits and other prescribed standards.

RECOMMENDATION #13: Ontario's drinking water statute should contain provisions that:

(a) impose a positive duty on the Drinking Water Commission (or Minister) to enforce the provisions of the statute on a "zero tolerance" basis;

(b) impose a positive duty on the Drinking Water Commission (or Minister) to develop (with full public input) a compliance manual to provide detailed direction regarding the investigation and enforcement of drinking water provisions under the statute;

(c) establish a broad range of mandatory abatement tools, including administrative penalties, stop orders and emergency orders;

(d) create a streamlined right for Ontarians to require (not just request) investigations of suspected contraventions of drinking water requirements;

(e) create a "citizens' suit" mechanism that allows Ontarians to enforce drinking water requirements in civil court; and

(f) create a new cause of action for persons who suffer loss, injury or damage as a result of a contravention of the statute or the regulations thereunder.

RECOMMENDATION #14: Ontario's drinking water statute should include:

(a) broad, "strict liability" offences that prohibit:

(i) owners/operators of public and private water treatment and distribution systems from providing users with drinking water that exceeds permitted contaminant levels or contravenes prescribed standards;

(ii) owners/operators of public and private water treatment and distribution systems from contravening the terms or conditions imposed under statutory approvals for such systems;

(iii) owners/operators of public and private water treatment and distribution systems from submitting false information or reports required by law;

(iv) owners/operators of public and private water treatment and distribution systems from failing to report threats to drinking water quality to the Minister and/or public health officials;

(v) any person from causing or permitting the release of contaminants into or near waterworks, drinking water sources, wells or well recharge areas, or attempting or threatening to do so;[344] or

(vi) any person from damaging, destroying, altering, or otherwise tampering with waterworks or wells, or attempting or threatening to do so; and

(b) severe penalties for contraventions, including:

(i) minimum fines for a first conviction;

(ii) maximum fines of not more than $6 million for a first conviction;

(iii) significant higher fines for subsequent offences, or for offences where the health of any person has been impaired as a result of the contravention;

(iv) jail terms for serious offences, such as where the health of any person has been impaired as a result of the contravention;

(v) stripping of any profits or monetary benefits acquired or gained by the defendant through the contravention;

(vi) orders of prohibition, restitution, or restoration, including orders to provide an alternate drinking water supply; and

(vii) such further orders or conditions that are necessary to prevent further offences or to contribute to the rehabilitation of the defendant.

RECOMMENDATION #15: Ontario's drinking water statute should establish a mandatory duty upon the Drinking Water Commission (or Minister) to:

(a) undertake and fund research programs such as:

(i) identification, treatment and prevention of adverse public health effects from drinking water contaminants;

(ii) quality and quantity of water available to public and private water suppliers in Ontario;

[344] For such an offence, it may be necessary to recognize a limited "statutory authority" defence for situations where, for example, a company is lawfully discharging contaminants into the environment in accordance with its certificate of approval.

(iii) current and future sources of drinking water contaminants, including unregulated substances;

(iv) controlling or avoiding the effects of intensive farming on sources of drinking water;

(v) identifying and protecting Ontarians who may be at special risk of waterborne disease;

(vi) watershed management and source protection measures; and

(vii) water conservation; and

(b) establish and fund programs that provide technical and financial assistance to owners/operators of public or private water treatment and distribution systems in order to:

(i) install, construct or upgrade equipment in the waterworks (or related infrastructure) in order to meet drinking water standards;

(ii) implement water conservation plans or programs;

(iii) undertake source assessment/protection programs; and

(iv) employee training;

RECOMMENDATION #16: Ontario's drinking water statute should require the establishment of a public advisory committee to research and report upon drinking water matters to the Drinking Water Commission (or Minister).