



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
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KINGSTON SEWAGE WORKS

APPLICATION FOR REVIEW

RE: OWRA CERTIFICATES OF APPROVAL

Filed Pursuant to Section 61 of the Environmental Bill of Rights

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RE: OWRA CERTIFICATES OF APPROVAL -- KINGSTON SEWAGE WORKS

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I solemnly declare that I currently reside in the Province of Ontario

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Question 1: What is the subject-matter of the requested Review?

The applicants request a Review of all existing certificates of approval (C of A's) issued to the Corporation of the City of Kingston under the *Ontario Water Resources Act* (OWRA) in relation to sewage works used to collect, transmit, treat, and dispose of domestic sewage from the City of Kingston.

These instruments include (but are not necessarily limited to) the existing C of A's issued to the City in relation to the following facilities:

- Ravensview Water Pollution Control Plant (C of A No. 3861-68CK9P);
- Kingston West Wastewater Treatment Plant (C of A No. 9506-5G8SK7);
- River Street Pumping Station (C of A No. 1388-5S6LAN); and
- all other pumping stations or infrastructure where sewage treatment bypasses may occur.

Question 2: What are the grounds for the requested Review?

The applicants submit that the Ministry of the Environment (MOE) should undertake the requested Review because the above-noted C of A's are inadequate to protect the environment and public health and safety. Accordingly, the applicants submit that it is in the public interest to review and revise the C of A's forthwith.

The specific grounds for the requested Review are set out below in more detail.

(a) Background

The City of Kingston (population 113,000) owns an extensive but aging system of sewage pipes, trunklines, storage facilities, pumping stations, and treatment plants. These sewage works are generally authorized under various C of A's issued and amended over the years by the MOE. Utilities Kingston operates the sewage works on behalf of the City of Kingston.

Sewage effluent from the City's system may enter three watercourses (i.e. Lake Ontario, Cataraqui River, and St. Lawrence River) via treatment plant discharges, combined sewer overflows, or sewage treatment bypasses.

One of the most significant systemic problems with the City's current sewage infrastructure is the frequency and voluminous nature of bypass incidents, whereby large quantities of raw sewage are discharged into local watercourses without any treatment. The apparent purpose of such bypasses is to prevent raw sewage from backing up into homes and businesses within the City, and to prevent damage to pumping and treatment equipment or processes. Bypasses typically occur during wet weather conditions (i.e. rainfall or spring runoff), and on average 10 bypasses per year occurred in the City in a recent six-year period (see attached summary of bypass events from 1996 to 2002). The duration of such bypasses ranges from 1-2 hours to 1-2 days, and they have occurred during spring, summer, fall, and winter months.

The discharge of untreated or partially treated sewage into watercourses can cause various impacts upon the natural environment and public health and safety. For example, raw sewage discharges can impair water quality and deleteriously affect aquatic ecosystems (i.e. by increasing nutrient loading, total suspended solids, and biological oxygen demand). In addition, such discharges can pose serious risks of waterborne illness or disease since raw sewage may contain harmful bacteria (i.e. *E. coli*) and other chemical substances or compounds that have entered the sewage system.¹

In light of these adverse impacts, the Environmental Commissioner of Ontario has raised strong concern about the pervasive nature of bypass events (and combined sewer overflows) throughout the province, and he recommended that the MOE “put in place a plan to upgrade Ontario’s aging municipal sewage treatment plants to modern environmental standards.”² In response, the MOE has committed to developing “a more effective framework for managing STP’s that entails updated effluent standards and consistent monitoring and reporting requirements for all sewage treatment plants across Ontario, including the monitoring of bypasses and sewage overflows (emphasis added).”³

In the meantime, as the MOE continues to refine its provincial “framework” for upgrading sewage treatment facilities, Kingston’s sewage works continue to annually discharge huge quantities of untreated sewage into local watercourses, as described below.

(b) April 2005 Bypass Incident

On April 2 and 3, 2005, the City’s sewage system experienced a major bypass incident that resulted in the discharge of approximately 52 million litres of raw sewage into local watercourses. Nearby riparian owners (i.e. shore well users) and downstream communities (i.e. Wolfe Island) received no notice of the bypass incident.

On April 4, 2005, Wolfe Island residents (and one of the applicants herein) observed and photographed sewage debris (including numerous tampon applicators, condoms, syringes with needles, human excrement, etc.) washed ashore near Brophy’s Point. Similar sewage debris also washed up on Ferguson’s Point, Wolfe Island and nearby Simcoe Island during this timeframe.

Analysis of water samples taken on April 5, 2005 from the St. Lawrence River near Brophy’s Point revealed the presence of *E. coli* bacteria. More alarmingly, water samples taken from a nearby shore well (which supplies drinking water to a young Wolfe Island family) revealed elevated levels of *E. coli* bacteria (i.e. 13 counts per 100 ml). Ontario’s current Drinking Water Quality Standards (O.Reg. 169/03) stipulate that there should be no *E. coli* bacteria detected in drinking water.

Without admitting responsibility, the City sent some municipal staff to Wolfe Island to clean up and remove sewage debris from the shoreline. MOE officials also attended Wolfe Island to observe the sewage debris. The MOE subsequently advised the applicants that this matter has been referred to the Ministry’s Investigation and Enforcement Branch.

¹ See, for example, Environmental Commissioner of Ontario, *Thinking Beyond the Near and Now: Annual Report 2002-03*, pages 35 to 49.

² *Ibid.*

³ Environmental Commissioner of Ontario, *Choosing Our Legacy: Annual Report 2003-04*, page 167.

Irrespective of the outcome of the MOE's investigation, the applicants submit that the April 2005 bypass incident highlights serious deficiencies within the C of A's, as described below. Moreover, even if the origin of the washed up sewage debris cannot be proven beyond a reasonable doubt, the uncontradicted evidence is that a massive bypass occurred in Kingston (again) in April 2005, and that nearby communities and water users received no notification of the bypass. Accordingly, the applicants submit that the requested Review should be undertaken by the MOE, regardless of whether a prosecution is commenced.

(c) Deficiencies within the Existing Instruments

The applicants submit that the existing C of A's are inadequate and urgently require amendments. For example, the C of A for the Ravensview treatment facility expressly permits bypasses under certain conditions (see Condition 5(1)), and imposes minimal sampling, testing, disinfection, and logbook requirements where bypasses occur. Similar conditions exist within the C of A's for the River Street Pumping Station (Condition 2) and the Kingston West Wastewater Treatment Plant (Condition 15).

In the result, where an unscheduled or unplanned sewage treatment bypass occurs, the C of A's generally do not require the City to:

- provide timely warnings to riparian owners, downstream communities, the local medical officer of health, or the local MOE District Manager;
- monitor and publicly report upon the movement and environmental effects of contaminants present within raw sewage discharged during bypass incidents;
- promptly and fully clean up sewage debris that may be present in local watercourses or along shorelines during or after bypass incidents;
- provide compensation to persons adversely affected by bypass incidents, or to undertake appropriate mitigation measures;
- undertake public outreach or community education programs regarding the proper disposal of problematic materials (i.e. syringes and personal health products); and
- develop and implement technical measures to remove such materials from sewage flows prior to bypasses.

The applicants understand that the City of Kingston is in the process of implementing certain upgrades and/or expansions of its sewage infrastructure. It should be pointed out, however, that some of these key changes are barely underway or remain largely incomplete at the present time, while others are only at an early planning or design stage. For example, it is anticipated that the long overdue upgrade/expansion of the Ravensview treatment facility will not be completed for another four years. More importantly, even if all of the City's proposed changes are undertaken, there appears to be no evidence that such changes will totally eliminate bypass incidents.

Until such time that bypass incidents are fully eliminated by infrastructure improvements, the applicants submit that the City must be legally obliged by its C of A's to undertake all reasonable measures to avoid, minimize and mitigate the potential adverse effects associated with sewage treatment bypasses.

Accordingly, the applicants submit that pursuant to subsection 53(4) of the OWRA, all existing C of A's should, at a minimum, be amended to require the City to:

1. Provide advance notice of planned bypasses, and timely notice during unplanned bypasses, to downstream communities, the MOE District Manager, and the local medical officer of health;
2. Develop and implement an appropriate plan to immediately monitor and publicly report upon each bypass incident, and to specify "triggers" for contingency or emergency measures (i.e. enhanced warnings for shore well users);
3. Ensure that local watercourses and shorelines are promptly cleaned up of sewage debris after each bypass incident;
4. Provide compensation to persons adversely affected by bypass incidents, and to undertake appropriate mitigation measures (i.e. provide alternate water supplies or install appropriate water treatment devices in affected households, etc.);
5. Undertake public outreach or community education programs regarding the proper disposal of hypodermic needles and personal health products; and
6. Investigate and implement technologies that remove such materials from sewage flows prior to bypasses.

The rationale for each of these proposed amendments is described below. At this point in time, it is not the applicants' intention to make suggestions for the finalized legal text of the C of A terms and conditions that are necessary to meet the above-noted objectives. Presumably, such wordsmithing can occur if and when the requested Review is granted.

As discussed below, the applicants further note that several of these suggestions have reportedly been the topic of recent discussions between the City and the MOE. However, such discussions appear to be "closed door" sessions with little or no opportunity for public review and comment. Moreover, there is no indication that such discussions will ultimately lead to appropriate amendments of the C of A's. If, as the City and MOE appear to have conceded, it is desirable to have bypass monitoring protocols, public notification procedures, timely clean ups, and community education efforts, then such measures should be incorporated directly into the C of A's in order to maximize their effectiveness and enforceability.

In short, the applicants submit that such matters should not be left to voluntary abatement measures by the City. Instead, the MOE should take firm and decisive mandatory abatement measures (i.e. C of A amendments or, alternatively, an order). In this regard, the applicants note that the Environmental Commissioner recently expressed concern over the use of voluntary measures in the context of

discharges of untreated sewage, and he pointed to an example where mandatory measures were undertaken by the MOE in relation to sewage treatment bypasses in Port Hope.⁴

The applicants also note that the Part 2 Report of the Walkerton Inquiry strongly endorsed mandatory abatement, particularly in the context of drinking water safety:

Recommendation 74: The Ministry of the Environment should increase its commitment to the use of mandatory abatement.

Mandatory abatement should be the only option to address anything other than technical violations of operations requirements. Mandatory orders carry greater force than do voluntary measures. If they are breached, they can result in the commencement of enforcement procedures or, as discussed below, an administrative penalty. Voluntary abatement tools, on the other hand, can result in confusion. The clear message behind them is that the deficiency is not as serious as one that would merit a mandatory order... As such, while voluntary abatement may be sufficient for minor problems, it is not appropriate for any deficiency that affects the safety of drinking water.⁵

For these reasons, the applicants submit that voluntary abatement is an insufficient regulatory response to the City's bypass incidents. Such incidents create profound risks to drinking water safety, public health and aquatic ecosystems, and therefore must be addressed via mandatory abatement tools.

The applicants further note that the focus of the requested Review on the City's C of A's does not imply that Kingston is the only Ontario municipality that undertakes sewage treatment bypasses. As noted above, this is a systemic problem throughout the province, particularly in older urbanized areas. Similarly, it is not the applicants' intention to make an "example" or "scapegoat" out of the City. To the contrary, it is hoped that if appropriate bypass-related conditions can be developed for Kingston's C of A's, then such conditions could be used as a model or precedent by the MOE and community groups for the purposes of updating and strengthening sewage C of A's elsewhere in the province.

Public Notice of Bypasses

The City's present process of undertaking major sewage treatment bypasses without attempting to notify residents who may be exposed to bypass contaminants is completely unacceptable and contrary to the public interest. Failure to provide timely warnings to residents could result in their exposure to, or ingestion of, contaminated water leading to serious health consequences. For example, proper notification will allow those residents who rely on shore wells to avoid drinking the water until such time as they can verify its safety.

Therefore, before a planned bypass is actually commenced, and during an unplanned bypass, the City should provide actual (not constructive) notice to nearby communities, the MOE District Manager, and the medical officer of health. Presumably, upon receipt of such information, these entities can determine whether further public notices are required (i.e. media alerts, boil water advisories, door-to-door

⁴ *Annual Report 2002-03 Supplement* re combined sewer overflows at Ashbridges Bay.

⁵ *Part 2 Report of the Walkerton Inquiry*, page 443.

warnings, or other emergency responses). The actual content and manner of the notice (i.e. verbal, written, or both) can be developed during the requested Review.

On this point, the applicants note that there have been ongoing discussions between the City and MOE “to determine the appropriate procedure to provide public notification both during and after such bypass events” (see attached MOE letter dated May 13, 2005). In response, the applicants point out that public notification should occur as early as possible, and preferably during unplanned bypasses, rather than after-the-fact. Secondly, for the purposes of greater certainty and accountability, the notification procedures should be prescribed within the C of A’s, rather than be left to the discretion of the City or reflected in documents that lack legal weight or status.

Monitoring and Reporting of Bypasses

It is the applicants’ understanding that the City does not monitor the movement of bypass effluent beyond the Cataraqui Harbour (see attached MOE letter dated April 16, 2004). In light of the environmental and public health risks associated with bypass incidents, the applicants submit that the City should not be permitted, in effect, to “flush it and forget it”. Instead, it is imperative that the City be required to monitor the environmental impacts of bypasses, and to promptly publicize its findings so that residents can make informed decisions about which steps should be taken to protect themselves from bypass impacts.

On this point, the applicants note that the City has apparently implemented a “protocol” for monitoring bypass events, in which “bacteria samples are collected throughout the bypass event and have historically shown elevated levels of *E. coli* above the Provincial Water Quality Objectives” (see attached MOE letters dated April 16, 2004 and May 13, 2005). However, this protocol is not entrenched in the C of A’s, and, to the applicants’ knowledge, it does not seem that the protocol was subject to meaningful public review and comment prior to its adoption. In addition, it is unclear whether this protocol mandates environmental monitoring beyond the immediate confines of the Kingston harbour area, and whether the results of such monitoring will be promptly available to the public (i.e. by posting reports on the Utilities Kingston website). Accordingly, the applicants submit that an appropriate monitoring and reporting protocol should be developed and codified within the C of A’s.

In particular, the C of A’s should be amended to require the City to develop an appropriate plan (within a specified timeframe) for immediately monitoring and reporting upon bypass events. At a minimum, this plan should require the City to record and report upon the date/duration of the bypass, the quantity of sewage discharged, the direction/size of the effluent plume, and the nature/extent of contaminants in the effluent plume, such as *E. coli* concentrations. The City’s plan should also provide details on how and where bypass effluent will be monitored (i.e. taking grab samples along watercourses, establishing strategically placed “sentinel” shore wells, etc.). In addition, the plan should describe parameters for assessing or confirming the presence and/or significance of bypass contaminants in the environment, and should prescribe “triggers” (i.e. elevated *E. Coli* concentrations) for further contingency measures or emergency responses by the City (i.e. testing private shore wells, providing enhanced warnings for downstream water users, etc.).

Bypass Clean Up and Remediation

Monitoring of, and reporting upon, bypasses should not be the end of the City's responsibility. Once released into watercourses, the pathogens and other substances in untreated (or partially treated) sewage can create serious public health hazards as well as impairment of aesthetic and recreational values within the receiving waters. Therefore, the applicants submit that the City should be under a legal obligation to follow up every bypass with the immediate deployment of clean-up crews to remediate the impacts of sewage bypasses where feasible.

At the present time, it appears that post-discharge clean up efforts only occur on a case-by-case basis if public complaints are made (as occurred during the April 2005 bypass incident). In the applicants' view, clean up efforts should not await complaints by residents who happen to find sewage debris in watercourses or on their properties in the wake of a bypass incident. Instead, the City must be compelled by its C of A's to immediately take proactive steps to track the movement of its bypass effluent, to provide appropriate public warnings as may be warranted, and to clean up the affected areas as soon as possible.

Compensation and Mitigation

Where a bypass incident occurs, affected downstream residents may incur special damages, such as purchasing bottled water or installing expensive water treatment equipment. To address such instances, the applicants submit that the City should be legally required by its C of A's to establish an appropriate compensation program for aggrieved residents. Such a program would be analogous to conditions in landfill C of A's that require proponents to establish "no fault" small claims funds or property value protection plans. Moreover, the City should be required by the C of A's to provide alternative water supplies, or to install water treatment equipment, in appropriate cases in order to mitigate impacts caused by bypass incidents.

Community Education

The April 2005 bypass incident clearly underscores the need for a comprehensive plan by the City to better educate area residents on the proper disposal of syringes and personal hygiene products. It is the applicants' understanding that the City has been working with the local health unit to develop an educational program (see attached MOE letter dated May 13, 2005). However, there is no indication that this program will be subject to public review and comment, and no indication that implementation of the agreed upon program will be required by law in the C of A's.

Technology Review and Implementation

The applicants further note that the MOE has recently requested the City to "investigate available technologies" to remove syringes and personal health products prior to bypass incidents (see attached MOE letter dated May 13, 2005). It is noteworthy that this "request" has not been entrenched in an order directed to the City, nor has this "request" been reflected in amendments to the C of A's. Therefore, to ensure that appropriate technologies (i.e. screening) are publicly reviewed and expeditiously implemented by the City, the applicants submit that the MOE "request" should take the form of an amendment to the C of A's.

(d) The MOE's Statement of Environmental Values

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

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

- adopting an "ecosystem approach" to environmental protection;
- adopting the "precautionary principle" and "exercising caution in favour of the environment" where there is uncertainty; and
- considering the "use of a wide range of measures" to better protect the environment.

Taken together, these and other SEV commitments represent a provincial promise to Ontarians that the MOE will take all necessary steps to safeguard the environment and public health and safety.

In this case, the existing C of A's remain incapable of fully preventing or mitigating potential harm to the environment and public health caused by sewage treatment bypasses, as discussed above. Accordingly, the applicants submit that the requested Review of the C of A's is entirely consistent with (if not expressly mandated by) the MOE's SEV.

(e) Absence of Periodic Review

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

At the present time, aside from using Part IV of the EBR, there is no statutory mechanism for the formal public review of the existing C of A's. It should be further noted that most – if not all -- C of A's have no explicit expiry date, provided that the approved works are constructed within the prescribed timeframes. In addition, to the applicants' knowledge, the City of Kingston has not established a public liaison committee to review or comment upon the design, operation and management of the municipality's sewage works.

Accordingly, the applicants submit that the requested Review of the C of A's should be undertaken because there is no other formal, open or consultative process in place that periodically reviews or revises the C of A's. While the City may invite public comment from time to time on its general Pollution Control Plan (PCP), this is not an adequate substitute for intensive scrutiny of the detailed C of A's themselves.

(f) Resources Required for the Requested Review

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

To the applicants' knowledge, the requested Review can be carried out by current MOE personnel (i.e. Kingston District Office, Environmental Assessment and Approvals Branch, Legal Services Branch, etc.) without the allocation of any new resources or staff. Indeed, it appears that such staff are already involved in this matter.

(g) Other Relevant Considerations

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

In the applicants' view, there are two additional considerations which should be taken into account regarding the need to review and revise the existing C of A's: (i) the Ontario government's recent initiatives to protect sources of drinking water; and (ii) the regulatory and policy context for sewage bypasses.

Drinking Water Source Protection

The Ontario government has formally accepted all of the recommendations arising from the Walkerton Inquiry. For example, Commissioner O'Connor recommended that the MOE should increase its commitment to the use of mandatory abatement, and should increase its commitment to "strict enforcement of all regulations and provisions related to the safety of drinking water".

As described above, the sewage works design and operations permitted under the City's C of A's continue to result in the intentional discharge of raw sewage into local surface water resources which serve as the sole source of drinking water for many area residents.

Therefore, if the Ontario government intends to implement Commissioner O'Connor's recommendations regarding drinking water safety (including source protection), then at the very least, the City's existing C of A's must be reviewed and revised.

In short, given that the MOE is currently engaged in developing a watershed-based source protection regime in Ontario, the applicants submit that the requested Review is entirely consistent with the objective of protecting drinking water from known sources of contamination.

Regulatory and Policy Context for Bypasses

The overall aim of Ontario's water pollution control regime is to deter or prevent the discharge of substances that may impair water quality. This aim is clearly reflected in the main anti-pollution provision of the OWRA:

Section 30(1) Every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence.

This preventative approach is also clearly entrenched within the MOE's "blue book", *Water Management: Policies, Guidelines, Provincial Water Quality Objectives* (April 1994, as amended). Among other things, this MOE document endorses the ecosystem approach and pollution prevention, and articulates the goal of surface water protection as follows:

With respect to surface water quality, the goal is to ensure that water quality is satisfactory for aquatic life and recreation, and that water uses which require more stringent water quality be protected on a site-specific basis (Section 1.1).

Similarly, Table 1 of the *Provincial Water Quality Objectives* establishes "narrative objectives" as follows:

All waters shall be free from contaminating levels of substances and materials attributable to human activities which in themselves or in combination with other factors can:

- settle to form objectionable deposits;
- float as debris, scum, oil or other matter to form nuisances;
- produce objectionable colour, odour, taste or turbidity;
- injure, are toxic to, or produce adverse physiological or behavioural responses in humans, animals or plants; or
- enhance the production of undesirable aquatic life or result in the dominance of nuisance species.

The applicants further note that the MOE's specific policy direction regarding sewage treatment bypasses (Procedure F-5-1) indicates that such incidents shall not be allowed except in "emergency conditions". This Procedure further states that:

It is the goal of the Ministry to abate all discharges of untreated sanitary wastewater... All municipalities serviced by combined sewerage should, however, prepare a staged program leading towards the ultimate goal of total containment for treatment of all sewage flows (Section 3.4).

The applicants therefore submit that granting the requested Review is consistent with (if not mandated by) the applicable regulatory and policy context for sewage treatment bypasses. For example, whereas the Province has declared that the goal is "total containment for treatment of sewage flow", over one billion litres of City sewage has bypassed treatment and been discharged into local watercourses in recent years under the auspices of the existing C of A's.

Similarly, whereas provincial policy generally prohibits bypasses except in emergency circumstances, the occurrence of bypasses in the City (i.e. average of 10 per year) is far too frequent or routine to be considered "emergencies". Indeed, if the City is faced with approximately 10 sewage "emergencies" per year, then it is clear that significant infrastructure improvements must be expedited, and that interim protective measures (i.e. public notice, monitoring, reporting, remediation, etc.) are urgently required to safeguard the environment and public health and safety.

The applicants further submit that the requested Review is consistent with (if not mandated by) the MOE's *Protocol for Updating Certificates of Approval for Sewage Works*. Among other things, this *Protocol* explicitly recognizes that an EBR Application for Review may serve as an "external trigger" for amending C of A's, and that the primary purpose of such C of A's is to "protect human health and the environment by preventing potentially harmful effects." This *Protocol* further states that during the first phase of its implementation, the "focus" shall be upon "significant facilities with direct discharges to surface water," such as "municipal or private facilities for the treatment and disposal of sewage" and "pumping stations and detention chambers that are designed and approved to overflow". Clearly, the C of A's that form the subject-matter of this requested Review fall squarely within this "focus", and they satisfy certain assessment criteria used under the *Protocol* to trigger reviews and/or updates of C of A's (i.e. environmental, monitoring and reporting requirements).

(h) Presumption Against Reviewing Recent Decisions

Subsection 68(1) of the EBR provides a general presumption against reviewing regulatory decisions made within the past five years. However, the applicants submit that this presumption is not applicable in this case, even though, for example, the Ravensview C of A was amended as recently as January 2005.

First, subsection 68(1) itself states that the presumption is only applicable where the decision was made in a manner that is "consistent with the intent and purpose of Part II" of the EBR. It appears that many of the original approvals for the City's sewage works pre-date the EBR, and thus were not issued in a manner that is consistent with Part II of the EBR.

Second, subsection 68(2) provides that the presumption does not apply if there is new "social, economic, scientific or other evidence that the decision could result in significant harm to the environment". The applicants submit that subsection 68(2) applies in this case because there is new evidence (i.e. the massive April 2005 sewage bypass and subsequent water sampling/analysis) demonstrating that the existing C of A's clearly create ongoing risks to the environment and public health and safety.

In the circumstances, the applicants submit that the MOE should not attempt to invoke or hide behind the section 68(1) presumption. Simply put, there is a compelling public need to review and revise the existing C of A's now in the manner suggested by the applicants. It would be highly unconscionable to avoid or defer a formal public review of the C of A's for another five years (i.e. until 2010), particularly if the City averages 10 bypass incidents per year.

Question 3: What is the evidence that supports the requested Review?

The documentary evidence supporting the requested Review is attached hereto as follows:

- copies of C of A's issued under the OWRA for sewage works owned by the City of Kingston;⁶

⁶ These copies are the only C of A's provided to the applicants by the MOE to date, but it is unclear whether this collection constitutes all of the C of A's for Kingston's sewage works, as had been originally requested by the applicants (see letter to MOE dated April 18, 2005). It is also unclear whether all existing sewage works, in fact, have C of A's due to their age.

- local media accounts of the April 2005 bypass incident (*Kingston Whig- Standard*);
- Utilities Kingston website information regarding the April 2005 bypass incident;
- photographs of sewage debris along Wolfe Island shoreline (April 2005);
- certificates of analysis: water samples taken from Wolfe Island shore well and St. Lawrence River (April 2005);
- summary of bypass events (1996 to 2002) re sewage treatment bypasses from Kingston pumping stations;⁷ and
- MOE correspondence to and from the applicants.

⁷ The City has refused to provide copies of post-2002 bypass records unless the applicants file an FOI application. Lake Ontario Waterkeeper has recently filed such a request with the City, but no records have been disclosed to date in response to this request.