MINISTER OF THE ENVIRONMENT AND CLIMATE CHANGE

IN THE MATTER OF sections 34.1, 100 and 101 of the *Ontario Water Resources* Act, R.S.O. 190, c. 0.40 as amended;

-and-

IN THE MATTER OF Part XIII of the *Environmental Protection Act*, R.S.O., c. E.19 as amended;

-and-

IN THE MATTER OF sections 38 to 48 of the *Environmental Bill of Rights*, S.O. 1993, c.28:

-and-

IN THE MATTER OF an appeal by the Concerned Citizens of Brant against the decision of Belinda Koblik, Director, Ministry of the Environment and Climate Change, under section 34.1 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended, in issuing Permit No. 7115-9VVLJW, dated October 29, 2015, to CRH Canada Group Inc., for the taking of groundwater from the Source Pond at the Paris Pit, located at Part Lot 27, Concession 2, Geographic Township of Dumfries, County of Brant;

-and-

IN THE MATTER OF an appeal by the Concerned Citizens of Brant against the decision of Fariha Pannu, Director, Ministry of the Environment and Climate Change, under section 20.3 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, in issuing Environmental Compliance Approval No. 1400-9VNPVY, dated October 29, 2015, to CRH Canada Group Inc., for the establishment, use and operation of sewage works for the collection, transmission, treatment and reuse of wash water effluent from an aggregate washing operation at the Dufferin Aggregates - Paris Pit, at Lot 26, 27, 1, 2 & 3, Concession 3, 2, WGR, South Dumfries, County of Brant.

-and-

IN THE MATTER OF an appeal by the Concerned Citizens of Brant of a decision dated April 11, 2017 of the Environmental Review Tribunal in respect of the above matter.

RESPONDING SUBMISSIONS OF THE INSTRUMENT HOLDER CRH CANADA GROUP INC.

June 23, 2017

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RESPONDING SUBMISSIONS OF THE INSTRUMENT HOLDER

I. BACKGROUND AND OVERVIEW

1. Dufferin Aggregates, a Division of CRH Canada Group Inc. ("**Dufferin**") has been one of Ontario's leading aggregate producers for decades. Dufferin operates 48 pits and quarries in Ontario. Dufferin has long been recognized for its environmental stewardship, having won several awards for pit and quarry rehabilitation including for its industry-leading Milton Quarry rehabilitation. In a landmark 2016 announcement, the Cornerstone Standards Council officially recognized Dufferin's Acton Quarry as the first quarry in the world to receive certification as a supplier of responsibly sourced stone, sand and gravel.

2. The Aggregate Resources Act License ("**License**") governing the Pit for which the ECA under appeal was issued (the "**Paris Pit**", or the "**Pit**") was granted in the 1970s. The Appellants (the "**CCOB**") have objected to the opening of the Paris Pit for years. In 2012, the CCOB commenced an application under the Environmental Bill of Rights ("**EBR**") requesting that the Ministry of Natural Resources and Forestry ("**MNRF**") review the License. The MNRF determined that there was no basis for doing so. It found that there were sufficient measures in place to regulate the Paris Pit operation and to protect the environment, including drinking water sources.

3. Having failed to prevent the opening of the Pit through the EBR process, the CCOB then objected to the granting of the Permit to Take Water ("**PTTW**") and Environmental Compliance Approval ("**ECA**") necessary to implement the approved aggregate washing operations. After a lengthy and thorough public process (including the addition of new conditions more protective and proscriptive than conditions standard for pits and quarries to address concerns raised by the public including the CCOB) the Ministry of the Environment and Climate Change ("**MOECC**") approved the PTTW and ECA. The CCOB sought leave to appeal both the PTTW and ECA to the Environmental Review Tribunal (the "**ERT**" or the "**Tribunal**"); leave was granted with respect only to 2 specific ECA conditions and 7 specific PTTW conditions. Prior to the ERT hearing on the appeal pertaining to these conditions, Dufferin worked with the County of Brant to resolve its remaining concerns. The decision of the ERT in the appeal largely reflects the

settlement between the County of Brant and Dufferin, and rejects the bulk of the concerns raised by the CCOB.

4. The scope of what the Minister has been asked to review in this appeal is narrow. The existence and operation of the Pit is not before the Minister; nor is the issuance of the ECA. The CCOB's appeal relates only to two specific conditions in the ECA. Specifically, the CCOB requests that conditions 4.8 and 5 of the ECA be revoked and replaced with the CCOB's proposed language.

5. The CCOB's proposals with respect to conditions 4.8 and 5 fall beyond the proper scope of the ECA and would impose a series of unnecessary, redundant, and unduly burdensome requirements on Dufferin, with no added benefit to the public or the environment. The CCOB proposed the same language before the Tribunal, which declined to accept these proposed conditions.

6. The CCOB has not raised any material public policy issues. Simply put, the CCOB through this appeal seeks to have certain findings of fact and opinion, which were not decided in its favour, overturned. The Minister, it is respectfully submitted, did not have the benefit of hearing all the evidence, seeing the evidence challenged by way of cross-examination, and making findings of credibility or weight based thereon. The MNRF, MOECC, the County of Brant, and the ERT have now all found that this Pit, with the approved conditions, poses no threat to the Brant County water supply. Although the principal basis for the CCOB's complaint now rests on alleged deficiencies in the Tribunal's reasons or failure to consider evidence, the CCOB did not bring these questions of law to the courts by way of appeal as is required by the legislation. Rather, the CCOB asserts some "public policy" argument to dress up what amounts to a complaint that the Tribunal did not accept the evidence of the CCOB's experts.

II. THE APPELLANTS RAISE NO SIGNIFICANT ISSUE OF PUBLIC POLICY OR PUBLIC INTEREST

7. The issues the CCOB raises in this appeal, and the relief it requests, are not matters of public policy and public interest such that Ministerial intervention would be appropriate. As the leading text *Administrative Law in Canada* states, in appeals to a Minister, Ministers "apply their view of the public interest to the matters in dispute and make what is essentially a political decision, responding to the political, economic and social

concerns of the moment".[1] The nature of the appeal brought by the CCOB does not require the Minister to respond to political, economic or social concerns.

8. While the CCOB claims that its appeal is brought on the grounds that the Tribunal's decision is "contrary to the public interest and public policy",[2] an examination of its submissions to the Minister reveal that its appeal does not focus on such matters. This is reflected in a review of the CCOB's submissions, which spend only 2 pages discussing alleged public policy issues, and the remaining 25 on factual and evidentiary complaints about findings made by the Tribunal based on the evidence before it. Indeed, throughout its submissions, including in those parts purporting to deal with public policy issues, the CCOB effectively asks the Minister to re-open the minutiae of the evidentiary record before the Tribunal in order to overturn findings of fact and credibility.

9. The only potential "public policy" basis for review raised by the CCOB relates to the herbicide atrazine. However, the CCOB submissions do not highlight the following facts:

    - Only one witness, Mr. Chappel (who formerly worked setting standards for pesticide products at the MOECC Standards Development Branch) was qualified as an expert in atrazine. His evidence was accepted by the Tribunal.

    - The evidence of Dr. Forkert, the CCOB's witness, which was not accepted by the Tribunal, relied upon a suggestion that this Tribunal should impose standards on Dufferin more stringent than those set by Health Canada, the federal Pest Management Regulatory Agency and the Ontario MOECC. All of the evidence adduced by the CCOB relating to alleged toxicological or other adverse effects was adduced to urge the Tribunal not to accept these existing federal and provincial standards.

    - Atrazine is commonly used on agricultural sites in Ontario.

    - Atrazine has not been used on the Paris Pit site since at least 2013.

    - Despite several rounds of testing, no atrazine was found in the soil on site.

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[1] Sara Blake, *Administrative Law in Canada*, 5th ed (Markham, Ont: LexisNexis Canada Inc., 2011) at 175 [citations omitted], Dufferin Responding Materials, Tab 3D.

[2] CCOB Submissions on appeal to the Minister, dated May 9, 2017 ["**Appeal**"] at para. 6(a).

- Atrazine was found in trace amounts in the groundwater, but at levels well below the Ontario drinking water standards.

- The CCOB was asking the Tribunal, and is now asking the Minister, to impose a standard on the Paris Pit that is far more restrictive than applies to every other property in Ontario.

- The above point is more striking given the fact that all the hydrogeological witnesses, including those called by the CCOB, agreed that the location of the Pit's ECA-approved works is outside the 25-year capture zone of the County of Brant's municipal wells.

10. It is respectfully submitted that if the position of the CCOB or its advisors are that the Federal and Ontario governments ought to ban or change the standards for atrazine they should take that up through the legislative, regulatory or standard-setting process. A site-specific appeal over conditions of an implementing instrument (ECA) for an already-licensed pit is not an appropriate place to establish new standards, different from those applicable to every other gravel pit, indeed every other property, in Ontario. This is particularly striking given the admission of the CCOB's own witness, on cross-examination, that there was nothing special about the Paris Pit site. Dr. Ken Howard stated: "If you're saying do I think there is anything special or unique about this particular situation, I'm not aware of any".[3]

11. The CCOB alleges that the Decision is "contrary to the facts and evidence heard before the Tribunal".[4] It is true that aspects of the Tribunal's decision are contrary to the evidence adduced by witnesses called by the CCOB. However, these aspects are consistent with contrary evidence of the experts called by the PTTW and ECA Directors (the "**Directors**") and Dufferin. This case involved many highly contested factual matters, with respect to which the Tribunal was required to weigh the evidence before it. The Tribunal largely found the evidence adduced by witnesses for the Directors and Dufferin to be more persuasive than that of the CCOB witnesses. This does not constitute an error on the part of the Tribunal nor is it grounds for appeal.

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[3] Cross-examination of Ken Howard, Jan 9, pm 2.

[4] Appeal at para. 6(b).

12. The appellant alleges at several places that the Tribunal "misapprehended" the evidence.[5] The Tribunal did not misapprehend any issues or evidence. The Tribunal simply found the evidence of the Directors and Dufferin to be more credible than that adduced by the CCOB. The Tribunal's careful weighing and balancing of the evidence on the record before it does not constitute a misapprehension.

13. Further, the CCOB takes issue throughout its submissions with the fact that the Tribunal did not explicitly acknowledge or evaluate a specific piece of evidence or argument it made in the course of the hearing. It is well established that an administrative tribunal's reasons are not required to canvas every argument raised by a party. The Supreme Court of Canada has been clear that a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" and that "[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result".[6]

14. The Federal Court of Appeal followed the Supreme Court's approach in the recent decision *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency.*[7] In that case, the appellant argued, as the CCOB argues here, that the tribunal (in that case the Canadian Agricultural Review Tribunal) ignored or did not consider certain pieces of evidence raised by it, and was not sufficiently rigorous when it considered the evidence. The appellant further argued that the tribunal's decision did not explain why it did not give much weight to certain evidence adduced by it. The Court dismissed the appellant's claims. It noted that the "Tribunal had before it thirteen days of evidence offered by both parties, considered that evidence, weighed it, and made findings of fact that were supported by the totality of the evidence".[8] The Court held:

> [A]n administrative decision-maker that does not refer to evidence cannot be taken to have ignored that evidence. Any decision-maker in a long complex case, such as the long, thirteen-day

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[5] See Appeal at e.g. paras. 29, 60, 91.

[6] *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board),* 2011 SCC 62 at para. 16, Dufferin Responding Materials, Tab 3B.

[7] *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency,* 2017 FCA 45 [*Maple Lodge*], Dufferin Responding Materials, Tab 3A.

[8] *Maple Lodge* at para. 24, Dufferin Responding Materials, Tab 3A.

> hearing here, is entitled to synthesize and distill, and of necessity much detail may be left out.[9]

15. The ERT in this case did as prescribed by the Federal Court of Appeal. It produced thorough reasons in which it acknowledged many of the points made by the parties, and weighed the totality of the evidence before arriving at its conclusion on a given issue. The Tribunal's reasons are adequate and should not be disturbed.

16. The Tribunal apparently did not consider it necessary to deal with many of the points which the CCOB alleges the Tribunal neglected to address. This is because another finding by the Tribunal made them unnecessary to determine. The Tribunal's decision not to deal with issues rendered unnecessary does not amount to an error which the Minister should review on appeal.

17. Finally, to the extent the CCOB purports to submit that the Tribunal's reasons fail to consider certain material issues or err in appreciating an issue, this is a question of law which is beyond the scope of the Minister's jurisdiction under subsection 20.16(1)(b) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19.[10] Issues of law may only be appealed to the Divisional Court, pursuant to section subsection 20.16(1)(a), which the CCOB has declined to do.

III. THE MINISTER SHOULD RESPECT THE FUNCTION OF THE TRIBUNAL

18. The Tribunal's findings should not be disturbed. It would not be appropriate for the Minister to second-guess the Tribunal's Decision on the basis only of written submissions on appeal, without the benefit of having the complete record before it. To do so would undermine the principle of finality in decision making and render the Tribunal's role meaningless.

19. The Environmental Review Tribunal was established with the primary purpose of adjudicating applications and appeals such as this one. It has a particular expertise making difficult decisions with respect to complex environmental issues involving matters of science and engineering, as well as public interest considerations. Appeals to the Tribunal are essentially full trials. In this case, the Tribunal heard evidence and argument

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[9] *Maple Lodge* at para. 27, Dufferin Responding Materials, Tab 3A.

[10] See *R. v. M. (R.E.)*, 2008 SCC 51 at para. 38, Dufferin Responding Materials, Tab 3C.

over an oral hearing spanning six weeks, including 15 days of evidence adduced by Dufferin, the Directors and the CCOB. The Tribunal also heard a day of oral closing arguments, and received thorough written closing submissions from each of the parties which participated in the hearing.[11] This case involves complex factual issues, including several difficult scientific and engineering principles. The Tribunal received evidence from a total of 10 witnesses, who submitted written witness statements, gave oral evidence, were cross-examined on their evidence, and in some cases, were asked clarifying questions by the Tribunal.

20. It is respectfully submitted that the Minister, who has not heard the evidence and therefore has an incomplete record before him, should defer to the Tribunal on its findings of fact and weighing of evidence.

IV. THE MINISTER SHOULD DEFER TO THE MOECC EXPERTS

21. By reopening this matter, not only would the Minister be overturning the Tribunal's decision; it would also be acting contrary to the technical conclusions reached by MOECC staff.

22. MOECC scientists and engineers worked for years on Dufferin's ECA application. In particular, Vincent Bulman, Senior Hydrogeologist, Groundwater Group Leader, Technical Support Section, Central Region, was responsible for reviewing Dufferin's ECA application for its potential impact on groundwater. Mr. Bulman is a hydrogeologist with 12 years of experience at the MOECC, during which time he has reviewed over 157 PTTW applications and approximately 10 ECA applications. In his review of Dufferin's ECA application, Mr. Bulman reviewed the application itself as well as several other relevant materials, including:

- Dufferin's ECA application and Supporting Hydrologic and Hydrogeologic Study, completed by its engineering and hydrogeology consultant;
- The Assessment of Herbicide and Pesticide Concerns, a report completed by Dufferin's engineering and hydrogeology consultant which sets out the atrazine sampling performed at the Paris Pit site;
- Hydrologic and Hydrogeologic studies performed of the Paris Pit by engineering and hydrogeology consultants hired by the County of Brant and the CCOB;

[11] A copy of Dufferin's written closing submissions is enclosed. Dufferin Responding Materials, Tab 4.

- A presentation given by Nicholas Greenacre, a member of the CCOB, setting out environmental concerns with the Paris Pit; and

- A summary of comments made by Dr. Howard, hydrogeologist and witness for the CCOB.

23. As a result of concerns raised by the CCOB, the MOECC imposed testing and monitoring requirements on Dufferin, and added several new or increased conditions to the ECA, before recommending the Pit sewage works be approved. Mr. Bulman set out his recommendations with respect to the ECA in a memo addressed to Adedoyin Adenowo.

24. Several other MOECC officials also did work on the ECA application and recommended its approval, including:

- Sarah Day, Surface Water Specialist, Technical Support Section, West Central Region, who evaluated the surface water pond at the Paris Pit site and set out her findings in a memo to Brian Cahill, Environmental Officer, Guelph District Office, and in an updated memo to Belinda Koblik, Water Supervisor, West Central Region;

- Craig Fowler, Surface Water Specialist, West Central Technical Support Section, who gave evidence before the Tribunal on surface water issues;

- Adedoyin Adenowo, Senior Review Engineer (Wastewater), who proposed to Dufferin a modification of the wash operations, which helped reduce the water taking, and who incorporated a number of additional Conditions in the ECA; and

- Fariha Pannu, the Director at the MOECC who approved the Instrument.

25. The MOECC's experts have been satisfied that groundwater is protected. The County of Brant, whose water supplies were (wrongly) said to be at risk, is satisfied that groundwater is protected. The expert Tribunal which heard all of the evidence in these appeals is satisfied that groundwater is protected. For these reasons and those presented throughout these submissions, Dufferin submits that the appeal should be dismissed. Dufferin's response to specific issues raised by the CCOB on appeal are in Schedule "A", attached hereto.

V. ORDER REQUESTED

26. Dufferin requests that the appeal be dismissed and the decision of the Tribunal confirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 23, 2017

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