ERT Case Nos.: 16-048/049/052/053

APPEAL TO THE MINISTER OF THE ENVIRONMENT AND CLIMATE CHANGE

CONCERNED CITIZENS OF BRANT

Appellant

v.

DIRECTOR, MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Respondent

RESPONDING SUBMISSIONS OF THE DIRECTOR, MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

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I. BACKGROUND AND OVERVIEW

1. This is an appeal to the Minister by the Concerned Citizens of Brant ("CCOB") of the Environmental Review Tribunal's April 11, 2017 decision to deny CCOB's request for amendments to Environmental Compliance Approval No. 1400-9VNPVY (the "ECA").

2. The ECA was issued by the Director to CRH Canada Group Inc. ("CRH") for the establishment, use and operation of a sewage works for the collection, transmission, treatment and reuse of wash water from a planned aggregate washing operation at an aggregate pit operated by CRH near Paris, Ontario (the "Paris Pit"). The ECA was issued on October 29, 2015 along with Permit to Take Water No. 7115-9VVLJW (the "PTTW"), for the taking of water at the Paris Pit to use in the aggregate washing operation.

3. The two instruments were issued after a lengthy period of consultations between MOECC, CCOB, the County of Brant ("Brant"), and CRH. As a result of these consultations and detailed comments on the proposed instruments received from CCOB and Brant, both instruments include extensive and unprecedented monitoring conditions.

4. CCOB and Brant sought leave to appeal both instruments to the Environmental Review Tribunal ("ERT" or "Tribunal"). In a decision issued on March 31, 2016 (the "Leave Decision"), the ERT granted leave to appeal, in part. The Leave Decision restricted the scope of the appeal to certain "specific aspects" of the two instruments.[1]

5. Shortly before the appeal was heard, Brant and CRH reached a settlement of Brant's appeal which provided for certain amendments to the two instruments. The issuing Directors endorsed most, though not all, of the proposed amendments. CCOB sought more extensive amendments to the two instruments and proceeded with its appeal.

6. The ERT heard evidence from the parties over the course of fifteen days between December 12, 2016 and February 1, 2017. A total of nineteen witnesses gave evidence: three experts and nine presenters called by CCOB, three experts called by the Directors, and three experts and one non-expert called by CRH. Brant did not call any evidence and did not participate in the hearing, other than to endorse its settlement with CRH.

7. The parties delivered written closing submission to the ERT and the ERT heard oral closing submissions on February 23, 2017.

8. On April 11, 2017, the ERT issued the decision under appeal, ordering most of the amendments to the conditions of the ECA[2] and the PTTW that had been jointly

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[1] *Concerned Citizens of Brant v. Ontario (Environment and Climate Change)*, ERT Case Nos. 15-140 and 15-142, decision issued March 31, 2016 (the "Leave Decision") at paras. 119 and 132, Director's Book of Authorities at Tab 1.

[2] For ease of reference, a copy of the ECA, as issued on October 29, 2015 prior to the amendments ordered by the ERT, is attached to these written submissions as Appendix 1.

proposed by CRH and Brant as a result of their settlement, but rejecting most of the amendments that CCOB had proposed.

9. In the present appeal, CCOB is requesting that the Minister revoke the ERT's decision with respect to the ECA, and replace it with an order that the ECA be amended in the manner that CCOB had requested before the ERT. CCOB has not appealed the Tribunal's decision with respect to the PTTW.

10. The ECA Director opposes CCOB's appeal and requests that the Minister dismiss the appeal and confirm the decision of the Tribunal.

11. CCOB's appeal is based almost exclusively on requests that the Minister re-evaluate the evidence in minute detail and that the Minister reject the careful assessments of the evidence and findings of fact made by the Tribunal. In the submission of the Director, deference must be shown to the Tribunal's assessments of the evidence, to its factual findings and to its determinations about appropriate ECA conditions. The Tribunal was in the best position to weigh the evidence. Further, the Tribunal has specialized expertise to make factual determinations relevant to the ECA.

12. In any event, The ERT's findings were reasonable and based on a careful and accurate assessment of the extensive evidence, both expert and factual, presented to it at the hearing. The Tribunal considered each of the amendments to the ECA proposed by CCOB at the hearing and gave careful reasons, based on its assessment of the evidence before it.

II. THE SCOPE OF THE MINISTER'S AUTHORITY ON APPEAL AND THE STANDARD OF REVIEW

Deference should be shown to the ERT's findings of fact

13. Section 145.6(2) of the EPA establishes the right of appeal to the Minister on any matter other than a question of law:

> A party to a hearing before the Tribunal under this Part may, within 30 days after receipt of the decision of the Tribunal or within 30 days after final disposition of an appeal, if any, under subsection (1), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Tribunal as to the matter in appeal as the Minister considers in the public interest.

14. While this provision gives the Minister the jurisdiction to review and overturn the Tribunal's factual findings, the Minister's decision must be reasonable and procedurally fair. The Director submits that the Minster must be mindful of the principle that an appellate adjudicator should give deference to factual findings and inferences made by the adjudicator of first instance, be that a judge[3] or an administrative tribunal,[4] and the important public policy reasons why this deference is appropriate and necessary.

15. The Supreme Court of Canada has articulated three bases for deferring to the findings of fact of a trial judge:

> (a) limiting the number, length, and cost of appeals;
>
> (b) promoting the autonomy and integrity of trial proceedings; and
>
> (c) recognizing the expertise of the trial judge and his or her advantageous position.[5]

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[3] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 ("*Housen*"), at paras. 10, 15-18, 23-25, Director's Book of Authorities at Tab 2.

[4] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 ("*Dunsmuir*") at paras. 47-49, 51, 53, Director's Book of Authorities at Tab 3; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 ("*Newfoundland Nurses"*) at paras. 11-16, Director's Book of Authorities at Tab 4.

[5] *Housen*, *supra,* at paras. 15-18, 23 and 25.

These factors recognize the public interest in an efficient justice system in which all parties, whether appellant or respondent, can have confidence. Although these factors were articulated in the context of appeals of a court decision, the rationales also apply in the context of review of administrative tribunal decisions.

16. Most significantly, the expertise and advantageous positon of the ERT with respect to findings of fact and factual inferences must be recognized. The Tribunal had the benefit of hearing the witnesses testify in person, including cross-examination of each witness and the opportunity to see the witnesses interact with and comment on the various exhibits. By contrast, the Minister does not even have the benefit of a transcript of the testimony heard by the Tribunal, let alone the benefit of an opportunity to assess witness credibility through direct observation of their testimony.

17. Further, the ERT is an expert tribunal which has been recognized to have considerable experience in scientific and technical matters.[6] In light of the Tribunal's expertise and its role as the trier of fact, it is in the public interest to accord its findings considerable deference.

18. Because of the ERT's specialist expertise, the standard of review in appeals of ERT decisions on matters of law within the ERT's area of expertise is reasonableness,[7] i.e. even if a court disagrees with an ERT decision on a matter of law within the ERT's core expertise, it will nonetheless defer to the ERT's decision on the matter of law so long as "the decision falls within a range of possible, acceptable outcomes which are defensible."[8]

19. The Director submits that, *a fortiori*, deference must be shown to the ERT's factual findings and factual inferences. The ERT stands in an even more privileged

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[6] *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para. 57, Director's Book of Authorities at Tab 5; *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 36 C.E.L.R. (3d) 191 at para. 34-36, Director's Book of Authorities at Tab 6; *Kawartha Lakes (City) v. Ontario (Ministry of the Environment)*, 2012 ONSC 2708 ("*Kawartha Lakes*"), at paras. 50-52, Director's Book of Authorities at Tab 7 (confirmed in *Kawartha Lakes (City) v. Ontario (Ministry of the Environment)*, 2013 ONCA 310).
[7] *Kawartha Lakes*, *supra*, at paras. 50-52.
[8] *Dunsmuir*, *supra*, at para. 47.

position with respect to findings of fact. This principle is expressed succinctly in the article "Appellate Review of Findings of Fact," quoted in *Housen*, *supra*, at para.14:

> The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.[9]

20. In light of these considerations, the Director submits that it would not be in the public interest for the Minister to disturb the Tribunal's carefully reasoned findings of facft, absent a demonstration of serious error on the Tribunal's part. The Tribunal carefully weighed and assessed the evidence, and clearly articulated the conclusions it drew from the evidence in its decision.

21. CCOB has raised a wide range of factual issues on appeal. The Tribunal heard extensive evidence on these issues and, after careful deliberation, issued a 67 page decision in which it summarised that evidence in a fair and reasonable manner and made findings of fact. Now, on appeal to the Minister, CCOB is seeking to re-try these issues. The Appellants' submissions do not point to any serious errors or unreasonableness in the Tribunal's findings. Rather, they seek to persuade the Minister to reach a different outcome on the evidence. An appeal is an opportunity to test the soundness of a decision, not a hearing *de novo* in which the case is re-tried. Accordingly, the Director submits that the appeal should be dismissed.

<u>An appeal to the Minster is limited "to the matter in the appeal" and is not an avenue for broader policy or legislative change</u>

22. Just as an appeal to the Minister is not intended to be a hearing *de novo,* it is not intended to be an avenue for broader policy or legislative change. It is not within the Minister's power to enact legislative changes in the context of an appeal to the Minister

[9] R. D. Gibbens. "Appellate Review of Findings of Fact" (1991-92), 13 Advocates' Q. 445, at p. 446 quoted in *Housen*, *supra* at para. 14.

under s. 145.6(2). Nor would it be appropriate to make such changes without the benefit of a broad-based public policy development process, which would include consultation with stakeholders beyond the parties to this appeal.

23. Moreover, 145.6(2) of the EPA limits the Minister's jurisdiction in the appeal to confirming, altering or revoking the decision of the Tribunal "*as to the matter in appeal.*" Accordingly, the scope of the Minister's review is limited to issues that were within the scope of the authority of the ERT.

24. So, for instance, the Minister cannot alter any of the following in this appeal, any more than the ERT could have altered them in its decision:

- the legislative regime governing evaluation and use of pesticides in Canada;
- Ontario's 5 ug/L drinking water quality standard for atrazine, as mandated by O. Reg. 169/03, *Ontario Drinking Water Quality Standards*, made under the *Safe Drinking Water Act, 2002*;
- the terms of the Paris Pit's *Aggregate Resources Act* licence, which require CRH to use the sediment from the proposed aggregate washing operation for purposes of eventual progressive and final rehabilitation of the site as agricultural land.

The Minster may not consider grounds of appeal alleging errors of law

25. CCOB has made allegations in its appeal that the ERT's reasons for its decision are inadequate. For instance, CCOB alleges that "the Tribunal's reasons … do not assess the toxicological and health effects of atrazine".[10] It appears that this ground of appeal, and similar claims made elsewhere about alleged inadequacies in the ERT"s reasons for decision,[11] are really complaints that the ERT ought to have given more

[10] CCOB's appeal at para. 8.
[11] Similar claims are made, for instance, at paras. 13, 18, 24, 25, 27, 35, 45, and 109 of CCOB's appeal.

weight to aspects of the evidence favoured by CCOB and that the Tribunal ought to have arrived at different findings of fact.

26. However, an allegation that the ERT's reasons for decision are inadequate is open to being interpreted as a claim that the ERT's reasons are so inadequate that they prevent meaningful appellate review. If this was CCOB's intent, then these grounds of appeal are outside the Minster's jurisdiction. An allegation that reasons for decision are so inadequate that they prevent meaningful appellate review is an allegation that the ERT committed an error of law.[12] Questions of law are specifically excluded from the Minister's jurisdiction on appeal. Appeals on questions of law can only be brought before the Divisional Court, pursuant to s. 145.6(1), which provides that:

> Any party to a hearing before the Tribunal under this Part may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court.

27. It should also be noted that in the context of review of an administrative tribunal's reasons for decision, the Supreme Court has emphasized that

> Reasons 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 under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.[13]

28. CCOB has advanced its arguments with passion and in minute detail. Understandably, CCOB wants those arguments to be adopted, just as every litigant wants their arguments to be adopted by the adjudicator. However, and with respect, CCOB's appeal submissions bespeak an unreasonable expectation that the ERT must explicitly refer in its reasons for decision to every piece of evidence led by CCOB, and

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[12] *R. v. Sheppard*, [2002] 1 S.C.R. 869 at paras. 40-46, Director's Book of Authorities at Tab 8.
[13] *Newfoundland Nurses*, *para* at para. 16.

that ERT must explicitly evaluate in its reasons for decision every argument advanced by CCOB. To do so would obviously be impractical and, as a matter of law, it is not required that the ERT do so.

29. The ERT's reasons in the present case are clear, fair and based on the evidence that was presented to the ERT. The reasons certainly allow a reviewing adjudicator "to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes." The Director submits that grounds of appeal relating to alleged inadequacies in the ERT's reasons should be dismissed.

III. CCOB'S GROUNDS OF APPEAL HAVE NO MERIT

30. Most of CCOB's grounds of appeal allege deficiencies in the ERT's findings of fact. In particular, CCOB alleges that the ERT failed to adequately address evidence led by CCOB on the following four topics:

i. the toxicology of atrazine,

ii. sampling for Atrazine in the soil at the Paris Pit,

iii. sampling for Atrazine in groundwater, and

iv. the aggregate washing process.

31. CCOB has also advanced two grounds of appeal arguing that the ERT's decision is contrary to public policy. These grounds are:

i. the ERT's alleged failure to adequately assess the evidence regarding the toxicology of atrazine; and

ii. the ERT's alleged failure to recognize the risks posed by an aggregate washing operation where atrazine may be present in soil.

32. On closer examination, these "public policy" grounds of appeal duplicate, respectively, CCOB's first and fourth grounds of appeal relating to the ERT's assessment of the evidence – the grounds relating to (i) the toxicology of atrazine, and (iv) the aggregate washing process. As a result, the public policy grounds are not given separate consideration below.

(i) The toxicology of atrazine

33. CCOB says that the ERT gave insufficient attention to the evidence of Dr. Forkert on the toxicology of atrazine, in particular her evidence that Canada's 5 ug/L standard for atrazine in drinking water may be insufficiently protective of human health because of the possibility that atrazine has a "non-monotonic dose response" and the possibility that it is an endocrine disruptor. (We note that Dr. Forkert's evidence on these points was vigorously disputed by Mr. Chappel, the toxicologist called by CRH.)

34. With respect, the ERT considered the evidence of both Dr. Forkert and Mr. Chappel in its decision regarding the toxicology of atrazine. The ERT concluded that there was no basis for disturbing the determination made by Health Canada that a concentration of 5 ug/L of atrazine in drinking water is safe and protective of human health. The Tribunal heard evidence from both Dr. Forkert and Mr. Chappel that Health Canada's guideline is based on a risk assessment which determines the level of exposure to atrazine at which there will be no adverse effects, together with an uncertainty factor for added precaution. The Tribunal heard evidence that the lower European drinking water standard that applies to all pesticides, regardless of their particular toxicological characteristics, is an arbitrary standard that is not based on an assessment of the risks posed by any particular pesticide.

35. Further, Health Canada's 5 ug/L guideline has been adopted into law as a drinking water standard in Ontario by O. Reg. 169/03, *Ontario Drinking Water Quality Standards*, made under the *Safe Drinking Water Act, 2002*.[14]

36. Based on this evidence, the ERT concluded that the 5 ug/L standard is protective of human health and an appropriate standard to use in evaluating the proposed terms of the ECA. The Director submits that this conclusion was reasonable, well supported by the evidence and protective of human health. Further, the reasons why the ERT arrived at this conclusion are clear from its decision: the ERT accepted the evidence that the standard is based on a scientific risk assessment that sets the standard at a level that is protective of human health *and* that includes an uncertainty factor to ensure that it is precautionary.

37. As discussed above in Part II of these submissions, the ERT is not required to consider explicitly in its reasons every piece of evidence regarding the toxicology of atrazine that was advanced by CCOB. It is simply required to give reasons that allow the Minister to understand why the Tribunal made its decision and permit the Minister to determine whether the conclusion is within the range of acceptable outcomes.

(ii) The soil sampling program

38. CCOB says that the ERT gave insufficient attention to evidence from Dr. Howard regarding alleged deficiencies in the soil sampling program conducted at the Paris Pit.

39. MOECC required CRH to conduct the soil sampling program as a result of the concerns regarding atrazine that CCOB had articulated during the extensive consultations carried out before the ECA was issued. The soil sampling program found no atrazine in the soil.

40. In his evidence, Dr. Howard raised a number of concerns regarding the adequacy of the sampling program. Most significantly, he said that it appeared to him

[14] Exhibit 41 – Director's Book of Documents, Volume 2 at Tab 28

that samples had been taken in the wrong locations, too close to the edges of fields; that it appeared to him that the top layer of soil – the layer most likely to retain atrazine – was not sampled; and that the detection limits used were too high. Several experts gave evidence responding to Dr. Howard: Richard Murphy and Robert Guoth, called by CRH; and Vincent Bulman, called by the Director.

41. In its decision, the ERT considered Dr. Howard's evidence regarding the sampling program and, for clear and sensible reasons, rejected it. The person who actually did the sampling, Richard Murphy, testified that the samples were not taken right at the edge of fields and that they did sample the top layer of soil – although the sampling was focussed on lower portions of the overburden that would actually be mined and washed in the proposed washing operation. In any event, the top layer of soil would not be washed in the wash plant, as the *Aggregate Resources Act* licence for the Paris Pit requires CRH to strip and stockpile the top layer of soil that is rich in organic material and retain it for eventual rehabilitation of the site for agricultural use after the aggregate extraction is finished. Mr. Murphy gave evidence that the detection limits were the lowest available at the time that used certified analytical procedures. On the basis of this evidence, the ERT concluded that any undetected atrazine in the soil at concentrations below the detection limits would be at "extremely low levels" and, based on field studies from Ontario, it would continue to degrade to still lower levels.

42. The Director submits that the Tribunal's findings on this issue were reasonable, well supported by the evidence and protective of human health. The ERT did not explicitly consider in its reasons every piece of evidenced given by Dr. Howard, nor did it explicitly consider every piece of contrary evidence given by Richard Murphy, Robert Guoth or Vincent Bulman. However, as discussed above, the ERT is not required to consider explicitly in its reasons every piece of evidence that was advanced by CCOB. It is simply required to give reasons that allow the Minister to understand why the Tribunal made its decision and permit the Minister to determine whether the conclusion is within the range of acceptable outcomes.

(iii) Sampling for Atrazine in Groundwater

43. CCOB says that the ERT did not adequately assess the evidence regarding sampling for atrazine in the groundwater. In particular, CCOB claims that the ERT failed to appreciate the significance of Exhibit 63. Exhibit 63 is an erratum added to Richard Murphy's witness statement during the hearing in which Richard Murphy explained that the laboratory his firm used to analyze water samples for atrazine had managed to re-analyze samples to a lower detection limit. As a result, samples that had previously shown non-detect readings for atrazine now showed trace amounts of atrazine that were below the previously available detection limit.

44. Mr. Murphy only became aware that the laboratory had done this re-analysis during the hearing. As soon as he became aware of this information, he provided the information to the parties and the Tribunal in the erratum.

45. CCOB claims that the information in the erratum is at odds with the following findings made by the ERT at para. 110 of its decision:

> The Tribunal has no hesitation in finding that there is no credible threat to public or private water supply from past use of pesticides at the Paris Pit Site, primarily because: atrazine has not been applied on the Site since 2014; atrazine in southern Ontario farm fields tends to break down over a 1 to 2.2.5 year period; contaminants move quickly into the groundwater in this area due to the high rate of infiltration of the sand and gravel deposits that characterize the area; no atrazine has been found in the soil on Site; and very low levels (trace concentrations) of atrazine were detected in the groundwater.

46. With respect, not only is the erratum consistent with the ERT's findings in this paragraph, the erratum *supports* the findings. Throughout the hearing, all the witnesses who spoke to the possibility of atrazine in the groundwater, including Dr. Howard, gave evidence that it would be expected that atrazine and its metabolites would be found in trace concentrations in the groundwater in the area, given the widespread use of atrazine in corn farming. The information contained in the erratum confirmed this expectation. Further, the information in the erratum did not raise any concerns about

human health, as the concentrations of atrazine were, as correctly noted by the Tribunal in its decision, “very low levels (trace concentrations).”

47. There is no error here.

(iv) The aggregate washing process

48. CCOB says that the ERT did not adequately assess the evidence regarding the potential for the aggregate washing process to concentrate atrazine. In particular, CCOB says that the ERT did not properly assess (i) evidence regarding Kd, the partition coefficient; (ii) evidence regarding calculations performed to assess the potential for atrazine to concentrate; and (iii) the evidence that the proposed wash operations are outside the wellhead protection area for the Gilbert and Telfer municipal well fields.

49. Once again, while the ERT’s reasons do not review every piece of evidence on these issues, the ERT’s basis for drawing the conclusions that it drew are clear and reasonable in light of the evidence that the Tribunal heard.

50. At paras. 112-113 of its decision, the ERT reviewed the evidence of Mr. Bulman and Mr. Murphy as to why, in the present context, there was no need to determine a partition coefficient and as to why the calculations that Mr. Murphy had performed to assess the risks were adequately conservative. From Mr. Bulman, at para. 112 of the ERT’s decision:

> no atrazine was detected in soil on Site; there are no published studies supporting the notion that pesticides are concentrated in wash sediments; most residual atrazine would be adsorbed to topsoil, which will not be washed; and only trace levels of atrazine have been detected in groundwater.

And from Mr. Murphy, at para. 113 of the decision:

> Mr. Murphy testified that there is no expectation or evidence to support the notion that atrazine will exist in the wash water in a concentration of concern. He added that atrazine degrades more rapidly when moisture is present. Mr. Murphy noted that atrazine is a hydrophobic organic

> compound that partitions between soil and water, and tends to be associated with soil. Mr. Murphy disagreed with Dr. Howard's suggestion that Kd should be calculated through batch tests. Mr. Murphy explained that if the organic content in the wash fines is being concentrated, so too is the adsorption coefficient being concentrated, such that the groundwater concentration does not vary. Mr. Murphy concluded that washing of aggregate will not cause an appreciable change in the concentration of atrazine present in the water. Mr. Murphy explained that CRA's calculations were conservative and used safety factors, and even so resulted in a concentration of at least 11 times lower than the Ontario Drinking Water Quality Standards.

51. On the issue of wellhead protection areas, CCOB says that the ERT failed to adequately take into account evidence that wellhead protections areas are "dynamic". It may well be true that wellhead protection areas are subject to change, but the uncontested evidence at the hearing was that (1) the wash operations are located outside the wellhead protection areas Brant has calculated for the Gilbert and Telfer well fields;[15] (2) the wellhead protection areas are calculated conservatively, with uncertainty factors built in; and (3) the wellhead protection areas are conservative in the further sense that they are based on anticipated future pumping rates, not on the much lower current rates.

52. In the overall context of the evidence regarding location of the proposed washing operations, Dr. Howard's evidence on the dynamic nature of the protection areas was, to be blunt, of marginal significance. While interesting, it was certainly not evidence of the significance that might warrant granting an appeal.

The ERT decision must be assessed in the context of the totality of the evidence

53. This last point brings us back to a point raised above in Part II of these submissions: appellate adjudicators ought to be deferential to findings of fact made by adjudicators of first instance because, amongst other reasons, the adjudicator of first instance has a deep familiarity with the case as a whole and the totality of the evidence.

[15] This is demonstrated most vividly in Exhibit 37, which is Figure 2.1 from the original application for the ECA.

54. This principle is important to bear in mind in the present appeal. CCOB's appeal materials touch on numerous granular pieces of evidence to which CCOB invites the Minster to attach great significance. However, the ERT was assessing CCOB's proposed amendments to an ECA in light of the whole body of evidence presented to it, and that context must be born in mind when assessing the significance of particular pieces of evidence.

55. Stepping back from CCOB's granular focus, and looking at the totality of the evidence, we must recall that the evidence before the Tribunal included all of the following:

- Sampling found no atrazine in the soil at the site.
- Sampling has found only very low concentrations of atrazine in the groundwater, well below concentrations that pose any risk to human health.
- Any residual atrazine is likely to be in the top layer of soil rich in organic material that will not be washed in the wash operation; rather, it will be stripped and stockpiled for use in eventual rehabilitation of the site for agriculture.
- Any residual atrazine in the overburden will be tightly bound to organic matter and therefore not prone to desorbing into the wash water.
- Any residual atrazine in the soil will continue to degrade now that atrazine is no longer in use at the site.
- The wash operation is outside the wellhead protection areas for the Gilbert and Telfer municipal well fields, meaning that even at predicted future pumping rates, water from the wash operation cannot get to the municipal well fields.
- There is no evidence of any case of an aggregate wash operation ever having concentrated atrazine in wash sediment or in wash water in the manner hypothesized by CCOB.

- Despite all of the above, the ECA includes an extensive and unprecedented monitoring program for pesticides and herbicides in the wash water, in the groundwater, in the surface water and in the wash sediment. A sampling program of this sort has never been included in an ECA for a comparable operation anywhere in Ontario.

56. Given this context, the Director submits that the ERT's ultimate decision to deny CCOB's requests for further amendments to the ECA was appropriate, grounded in the evidence, well-reasoned, and protective of human health and the environment.

IV. ORDER REQUESTED

57. For all of the above reasons, the Director respectfully requests that the Minister dismiss the appeal.

All of which is submitted this 23rd day of June, 2017.

Nicholas Adamson
Counsel for the Director

Appendix 1

Ontario

Ministry of the Environment and Climate Change
Ministère de l'Environnement et de l'Action en matière de changement climatique

ENVIRONMENTAL COMPLIANCE APPROVAL
NUMBER 1400-9VNPVY
Issue Date: October 29, 2015

CRH Canada Group Inc.
2300 Steeles Avenue West, 4th Floor
Concord, Ontario
L4K 5X6

Site Location: Dufferin Aggregates - Paris Pit
Lot 26, 27, 1, 2 & 3, Concession 3,2,WGR,
South Dumfries
County of Brant

You have applied under section 20.2 of Part II.1 of the Environmental Protection Act, R.S.O. 1990, c. E. 19 (Environmental Protection Act) for approval of:

the establishment, use and operation of sewage works for the collection, transmission, treatment and reuse of wash water effluent from an aggregate washing operation, consisting of the following:

- one (1) ***settling pond*** (comprised of the settling cell(s) and the recirculation cell) constructed above the ground-water table receiving wash water from the Processing Wash Plant and make-up water from the source water pond, and returning settled water back to the Processing Wash Plant.

all other controls, electrical equipment, instrumentation, piping, pumps, valves and appurtenances essential for the proper operation of the aforementioned sewage Works.

all in accordance with the supporting documents listed in Schedule 'A' to this environmental compliance approval.

For the purpose of this environmental compliance approval, the following definitions apply:

"Application" means the application for an environmental compliance approval submitted to the Ministry for approval by or on behalf of the Owner and dated June 03, 2013.

"Approval" means this environmental compliance approval, any schedules attached to it, and the Application;

"Director" means a person appointed by the Minister pursuant to section 5 of the EPA for the purposes of Part II.1 of the EPA;

"District Manager" means the District Manager of the Guelph District Office of the Ministry;

"EPA" means the *Environmental Protection Act* , R.S.O. 1990, c.E.19, as amended;

"Ministry" means the ministry of the government of Ontario responsible for the EPA and OWRA and includes all officials, employees or other persons acting on its behalf;

"Owner" means CRH Canada Group Inc., and includes its successors and assignees;

"OWRA" means the *Ontario Water Resources Act* , R.S.O. 1990, c. O.40, as amended; and

"Works" means the sewage works described in the Approval.

You are hereby notified that this environmental compliance approval is issued to you subject to the terms and conditions outlined below:

TERMS AND CONDITIONS

1. GENERAL CONDITION

1.1 The Owner shall ensure that any person authorized to carry out work on or operate any aspect of the Works is notified of this Approval and the terms and conditions herein and shall take all reasonable measures to ensure any such person complies with the same.

1.2 Except as otherwise provided by these terms and conditions, the Owner shall design, build, install, operate and maintain the Works in accordance with this Approval.

1.3 Where there is a conflict between a provision of this environmental compliance approval and any document submitted by the Owner, the conditions in this environmental compliance approval shall take precedence. Where there is a conflict between one or more of the documents submitted by the Owner, the Application shall take precedence unless it is clear that the purpose of the document was to amend the Application

1.4 Where there is a conflict between the documents listed in the Schedule A, and the application, the application shall take precedence unless it is clear that the purpose of the document was to amend the application.

1.5 The terms and conditions of this Approval are severable. If any term and condition of this environmental compliance approval, or the application of any requirement of this environmental compliance approval to any circumstance, is held invalid or unenforceable, the application of such condition to other circumstances and the remainder of this Approval shall not be affected thereby.

2. CHANGE OF OWNER

2.1 The Owner shall notify the District Manager and the Director, in writing, of any of the following changes within **thirty (30) days** of the change occurring:

(a) change of address of Owner or operating authority;

(b) change of Owner or operating authority or both, including address of new Owner or operating authority, or both;

(c) change of partners where the Owner or operating authority is or at any time becomes a partnership, and a copy of the most recent declaration filed under the *Business Names Act, R.S.O. 1990, c. B.17* ; and

(d) change of name of the corporation where the Owner or operator is or at any time becomes a corporation, and a copy of the "Initial Return" or "Notice of Change" filed under the *Corporations Information Act, R.S.O. 1990, c. C.39* , shall be included in the notification to the District Manager.

2.2 In the event of any change in ownership of the Works, the Owner shall notify in writing the succeeding owner of the existence of this Approval, and a copy of such notice shall be forwarded to the District Manager.

2.3 The Owner shall ensure that all communications made pursuant to this condition refer to the number at the top of this environmental compliance approval.

3. OPERATIONS MANUAL

3.1 The Owner shall prepare an operations manual prior to the construction, use and operation of the Works that includes, but is not limited to, the following information:

(a) operating procedures for routine operation of the Works;

(b) inspection programs, including frequency of inspection, for the Works and the methods or tests to be employed to detect when maintenance is necessary;

(c) repair and maintenance programs, including the frequency of repair and maintenance for the Works;

(d) contingency plans and procedures for dealing with a potential spill, bypasses or any other abnormal situations, including notifying the District Manager of the situation; and

(e) procedures for receiving and responding to public complaints.

3.2 The Owner shall review and update the operations manual from time to time and shall retain a copy of the updated manual onsite at the Works. Upon request, the Owner shall make the manual available for inspection and copying by Ministry personnel.

3.3 The Owner shall make all reasonable efforts to promptly develop a seal at the bottom of the settling pond (comprised of the settling cell(s) and the recirculation cell) and to maintain the integrity of the seal when removing excess sediment from the bottom of the settling pond.

4. MONITORING AND RECORDING

4.1 The Owner shall monitor the groundwater through seven (7) groundwater monitoring wells. Existing wells may be used or new wells installed. The groundwater monitoring wells shall meet the following requirements:

(a) the wells shall be screened within the upper sand and gravel aquifer;

(b) three (3) groundwater monitoring wells shall be located along the northern boundary of the Paris South Pit, one (1) of these wells may be located at the south boundary of the Paris North Pit;

(c) three (3) groundwater monitoring wells shall be located along the southern boundary of the Paris South Pit, with one of these monitoring wells located up gradient of the County of Brant's Telfer wells P31 and P32 and another located immediately down gradient of the source water pond; and

(d) existing groundwater monitoring well MW1-12 or a suitable replacement shall be included in the monitoring.

4.2 Within **three (3) months** of the issuance of this Approval, the owner shall submit to the Director and the District Manager a document for approval indicating the location and screened depth intervals for the seven (7) groundwater wells proposed to be used.

4.3 Groundwater samples shall be collected from the seven (7) wells required by Condition 4.1 above in **May**, **August** and **December** of each year and sent for analysis in accordance with the table below:

General Chemistry	**Metals** (1)
Conductivity, pH, Hardness (as CaCO3), Total Suspended Solids (TSS), Total Dissolved Solids, Alkalinity - Bicarbonate (as CaCO3), Alkalinity - Carbonate (as CaCO3), Alkalinity - Hydroxide (as CaCO3), Total - Alkalinity (as CaCO3), Unionized Ammonia, Total Ammonia (as N), Nitrate-N, Nitrite-N, Nitrate & Nitrite (as N), Phosphate-P (ortho), Sulphate, Anion Sum, Cation Sum, Cation - Anion Balance, Dissolved Organic Carbon, Total Organic Carbon, Turbidity.	Aluminium, Antimony, Arsenic, Barium, Beryllium, Bismuth, Boron, Cadmium, Calcium, Chromium, Cobalt, Chloride, Copper, Iron, Lead, Lithium, Magnesium, Manganese, Molybdenum, Nickel, Phosphorus, Potassium, Selenium, Silicon (total and dissolved silicon), Silver, Sodium, Strontium, Thallium, Tin, Titanium, Tungsten, Uranium, Vanadium, Zinc, Zirconium.

(1) - Groundwater samples are analyzed for dissolved metals. Surface water samples are analyzed for total metals.

4.4 Groundwater samples shall also be analysed for pesticides, including organochlorine pesticides and herbicides, as listed in Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario, CRA (2014) (see Schedule A), at detection limits equal to or lower than those listed. In the event of any analytical issue (e.g. matrix interference), reasonably achievable laboratory detection limits will apply.

4.5 Surface water samples shall be collected from SW1B (previously referred to as SW1; see OWRA S53 Environmental Compliance Approval (ECA) Application and Supporting Information, Dufferin Paris Pit, County of Brant, CRA, 2013, See Schedule A) and analysed as follows:

(a) Samples shall be collected three (3) times per year in **May**, **August** and **December**; and,

(b) Samples shall be analysed for: Field Parameters General Chemistry, Metals and Oil and Grease in accordance with the table below:

Field Parameters	**General Chemistry, Metals** (1) **and Oil & Grease**
pH, temperature, conductivity, dissolved oxygen, turbidity	Total Suspended Solids, hardness, alkalinity, nutrients (total phosphorous, total ammonia, total nitrate, total nitrite and calculated unionized ammonia), major ions, metals (unfiltered samples except for aluminium which should be from a clay free sample), Oil and Grease.

(c) Surface water samples shall also be analysed for the suite of pesticides, including organochlorine pesticides and herbicides, listed in Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario, CRA (2014) (see Schedule A).

For pesticides, the analytical detection limits shall be equal to or lower than those listed in Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario, CRA (2014). In the event of any analytical issue (e.g. matrix interference), reasonably achievable laboratory detection limits will apply.

4.6 Within **three (3) months** of the issuance of this Approval, the Owner shall prepare and submit to the Director for approval a sediment sampling plan for sediment accumulated within the settling cell(s). The purpose of the sediment sampling plan is to determine the distribution and concentration of pesticides within the settling cell(s).

4.7 The sediment shall be sampled for: atrazine, atrazine plus atrazine desethyl, glyphosate and aminomethylphosphonic acid (AMPA) and the pesticides listed in Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario, CRA (2014) (see Schedule A). For pesticides, the analytical detection limits shall be equal to or lower than those listed in Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario, CRA (2014). In the event of any analytical issue (e.g. matrix interference), reasonably achievable laboratory detection limits will apply.

4.8 The results of the sediment samples shall be compared to the lower of the standards for each of the parameters in Condition 4.7 above to those set out in Alberta Tier 1 Soil Remediation Guideline and Nova Scotia Environmental Quality Standards (as updated or replaced), and shall be provided to the Director and the District Manager, future Ontario or Federal guidelines developed for the parameters set out in Condition 4.7 above shall also be used for comparison. Based on the results of the sediment samples, the Director and Owner shall discuss suitable uses for the sediment for on-site rehabilitation.

4.9 Water samples shall be collected from the recirculation cell as follows:

(a) In the <u>first year</u> after operational commencement of the processing wash plant, one (1) sample shall be collected within **one (1) week** of the recirculation cell bottom being sealed and two (2) times thereafter until cessation of aggregate washing for the calendar year. Samples shall be collected at least **thirty (30) days** apart.

(b) In the <u>second year</u> after operational commencement of the processing wash plant, water samples shall be collected three (3) times during the calendar year between **February 15th** and **December 15th** at approximately equally spaced intervals.

(c) For each subsequent year, water samples shall be collected two (2) times during the calendar year, between **February 15th** and **December 15th**, with the first sample taken prior to the start of aggregate washing season and the second taken at the end, with the following exception:

i. if sediment is to be removed from the recirculation cell, the sediment shall be removed prior to the start of the aggregate washing season. A water sample shall be collected **one (1) week** after the bottom of the cell has been sealed and two (2)

times thereafter at approximately equally spaced intervals between the first sample date and December 15th.

4.10 The water samples collected from the recirculation cell shall be sent for analysis of general chemistry, including nutrients, metals and pesticides, including Glyphosate, Atrazine, Atrazine Desethyl and Aminomethylphosphonic Acid (AMPA). The sampling methods shall have detection limits at levels identical to or lower than those described in Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario , CRA (2014) (see Schedule 1). In the event of any analytical issues (e.g. matrix interference), reasonably achievable laboratory detection limits will apply.

4.11 After **three (3) years** of continuous data collection, application may be made to the Director to have the monitoring conditions amended.

5. CONTINGENCY AND POLLUTION PREVENTION PLAN

5.1 The Owner shall prepare a Contingency and Pollution Prevention Plan prior to the commencement of operation of the Works that includes, but is not necessarily limited to, the following information:

(a) the name, job title and address of the Owner, person in charge, management or control of the facility.

(b) the name, job title and 24-hour telephone number of the person(s) responsible for activating the Contingency Plan.

(c) a site plan drawn to scale showing the facility, nearby buildings, streets, maintenance access and the Works (including direction(s) of flow in storm events) and any features which need to be taken into account in terms of potential impacts on access and response (including physical obstructions and location of response and clean-up equipment).

(d) a listing of telephone numbers for: local clean-up company(ies) who may be called upon to assist in responding to spills; local emergency responders including health institution(s); and MOECC Spills Action Centre 1-800-268-6060.

(e) Materials Safety Data Sheets (MSDS) for each hazardous material which may be transported or stored within the area serviced by the Works.

(f) the written procedures by which the Contingency and Pollution Prevention Plan is activated.

(g) a description of the spill response and pollution prevention training provided to employees assigned to work in the area serviced by the Works, the date(s) on which the training was provided and to whom.

(h) the date on which the Contingency and Pollution Prevention Plan was prepared and subsequently, amended.

(i) any other information the District Manager requires from time to time.

5.2 The Contingency and Pollution Prevention Plan shall be kept in a conspicuous place inside the office building. Upon request, the Owner shall make the manual available for inspection and copying by Ministry personnel.

5.3 The Contingency and Pollution Prevention Plan shall be reviewed and amended from time to time, as needed by changes in the operation of the facility.

6. REPORTING

6.1 **One (1) week** prior to the start-up of the operation of the Works, the Owner shall notify the District Manager (in writing) of the pending start-up date.

6.2 In addition to the obligations under Part X of the *Environmental Protection Act* , the Owner shall, within **ten (10) working days** of the occurrence of any reportable spill as defined in Ontario Regulation 675/98, bypass or loss of any product, by-product, intermediate product, oil, solvent, waste material or any other polluting substance into the environment, submit a full written report of the occurrence to the District Manager describing the cause and discovery of the spill or loss, clean-up and recovery measures taken, preventative measures to be taken and schedule of implementation.

6.3 The Owner shall prepare and submit a report to the District Manager on an annual basis within **ninety (90) days** following the end of the period being reported upon. The first such report shall cover the first annual period following the commencement of operation of the Works and subsequent reports shall be submitted to cover successive annual periods following thereafter. The reports shall contain, but shall not be limited to, the following information:

(a) a summary and interpretation of all monitoring data with a comparison to applicable objectives, guidelines, standards, and modelled predictions;

(b) an overview of the success and adequacy of the Works;

(c) a description of any operating problems encountered and corrective actions taken;

(d) a summary of all maintenance carried out on any major structure, equipment, apparatus, mechanism or thing forming part of the Works; and

(e) any other information the District Manager requires from time to time.

7. SPECIAL CONDITION – PUBLIC ACCESSIBILITY TO REPORT

The Owner shall, make the report required by Condition 6.3 available to the community advisory panel and publicly by posting it on the Company's website at the time specified in Condition 6.3.

SCHEDULE 'A'

This Schedule contains a list of supporting documentation / information received, reviewed and relied upon in the issuance of this Approval.

1. Environmental Compliance Approval Application for Industrial Sewage Works submitted by J. Richard Murphy, P.Eng., of Conestoga-Rovers & Associates Ltd., and signed by Kevin Mitchell, Manager Environment and Properties, of Holcim (Canada) Inc., dated June 03, 2013; and all supporting documentation and information.

2. CRA. 2013. OWRA S53 Environmental Compliance Approval (ECA) Application and Supporting Information, Dufferin Paris Pit, County of Brant, Ontario, signed and stamped by Michael R. Tomka, P. Eng., signed and stamped by Gary Lagos, P. Geo. and signed by J. Richard Murphy, P. Eng. of Conestoga-Rovers & Associates, June 2013, #078410, Report Number: 3.

3. CRA (2014). Assessment of Herbicide and Pesticide Concerns, Dufferin Paris Pit, County of Brant, Ontario; signed and stamped by Gary Lagos, P. Geo. and signed by J. Richard Murphy, P. Eng. of Conestoga-Rovers & Associates, July 2014, #078410, Report Number: 5.

4. CRA. 2015. Re: Modifications to Works for Existing ECA Application Dufferin Paris Pit, Paris, Ontario; letter addressed to Mr. Adedoyin Adenowo, Senior Wastewater Engineer, Ministry of Environment and Climate Change from Michael Tomka, P. Eng. of Conestoga-Rovers & Associates, April 16, 2015, Reference No. 078410.

5. AE. 2010. Alberta Tier 1Soil and Groundwater Remediation Guidelines, Alberta Environment, December 2010, ISBN: 978-0-7785-9015-6 (Printed Edition) ISBN: 978-0-7785-9947-0 (On-line Edition), Retrieved May 6, 2015 from: http://environment.gov.ab.ca/info/library/7751.pdf

6. NSE. 2014. Environmental Quality Standards for Contaminated Sites Rationale and Guidance, Nova Scotia Environment, Environmental Quality Standards for Contaminated Sites, April 2014, retrieved May 6, 2015 from: https://novascotia.ca/nse/contaminatedsites/docs/EQS-Contaminated%20Sites-Rationale-and-Guidance-NSE-2014.pdf

The reasons for the imposition of these terms and conditions are as follows:

1. Condition 1 is imposed to ensure that the Works are built and operated in the manner in which they were described for review and upon which approval was granted. This condition is also included to emphasize the precedence of Conditions in the Approval and the practice that the Approval is based on the most current document, if several conflicting documents are submitted for review.

2. Condition 2 is included to ensure that the Ministry records are kept accurate and current with respect to approved Works and to ensure that subsequent owners of the Works are made aware of the Approval and continue to operate the works in compliance with it.

3. Condition 3 is included to ensure that a comprehensive operations manual governing all significant areas of operation, maintenance and repair is prepared, implemented and kept up-to-date by the Owner and made available to the Ministry. Such a manual is an integral part of the operation of the Works. Its compilation and use should assist the owner in staff training, in proper plant operation and in identifying and planning for contingencies during possible abnormal conditions. The manual will also act as a benchmark for Ministry staff when reviewing the Owner's operation of the Works.

4. Condition 4 is included to enable the Owner to evaluate and demonstrate the performance of the Works, on a continual basis, so that the Works are properly operated and maintained and so that the Works do not cause any impairment to the environment. The Condition is also included for the following purposes:

    a) To determine the chemistry of groundwater flowing onto and from that part of the Paris Pit property located south of Watts Pond Road. This area is known as the Paris South Pit.

    b) To determine whether the sedimentation, recirculation and source ponds have an effect on groundwater chemistry.

5. Condition 5 is included to ensure that the Owner will implement the spill contingency plan, such that the environment is protected and deterioration, loss, injury or damage to any person(s) or property is prevented.

6. Condition 6 is included to provide a performance record for future references, to ensure that the Ministry is made aware of problems as they arise, and to provide a compliance record for all the terms and conditions outlined in this Approval, so that the Ministry can work with the Owner in resolving any problems in a timely manner.

7. Condition 7 is included to provide the general public with the report required in Condition 6.3.

In accordance with Section 139 of the Environmental Protection Act, you may by written Notice served upon me and the Environmental Review Tribunal within 15 days after receipt of this Notice, require a hearing by the Tribunal. Section 142 of the Environmental Protection Act provides that the Notice requiring the hearing shall state:

1. The portions of the environmental compliance approval or each term or condition in the environmental compliance approval in respect of which the hearing is required, and;
2. The grounds on which you intend to rely at the hearing in relation to each portion appealed.

The Notice should also include:

3. The name of the appellant;
4. The address of the appellant;
5. The environmental compliance approval number;
6. The date of the environmental compliance approval;
7. The name of the Director, and;
8. The municipality or municipalities within which the project is to be engaged in.

And the Notice should be signed and dated by the appellant.

This Notice must be served upon:

The Secretary*
Environmental Review Tribunal
655 Bay Street, Suite 1500
Toronto, Ontario
M5G 1E5

AND

The Director appointed for the purposes of
Part II.1 of the Environmental Protection Act
Ministry of the Environment and
Climate Change
2 St. Clair Avenue West, Floor 12A
Toronto, Ontario
M4V 1L5

*** Further information on the Environmental Review Tribunal's requirements for an appeal can be obtained directly from the Tribunal at: Tel: (416) 212-6349, Fax: (416) 314-3717 or www.ert.gov.on.ca**

The above noted activity is approved under s.20.3 of Part II.1 of the Environmental Protection Act.

DATED AT TORONTO this 29th day of October, 2015

Fariha Pannu.

Fariha Pannu, P.Eng.
Director
appointed for the purposes of Part II.1 of the
Environmental Protection Act

AA/
c: District Manager, MOECC Guelph District Office
J. Richard Murphy, P.Eng., Conestoga-Rovers & Associates Ltd.