Environmental Review Tribunal
Tribunal de l'environnement

Ontario

ISSUE DATE: March 31, 2016 **CASE NO(S):** 15-140 and 15-142

PROCEEDING COMMENCED UNDER section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended

Applicant:	Concerned Citizens of Brant (File No. 15-140)
Applicant:	County of Brant (File No. 15-141)
Instrument Holder:	CRH Canada Group Inc.
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of leave to appeal:	Permit to Take Water from Paris Pit issued under section 34.1 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended
Reference No.:	7115-9VVLJW
Property Address/Description:	Lot 27, Concession 2
Municipality:	Township of South Dumfries
Upper Tier:	County of Brant
ERT Case No.:	15-140
ERT Case Name:	Concerned Citizens of Brant v. Ontario (Environment and Climate Change)

PROCEEDING COMMENCED UNDER section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended

Applicant:	Concerned Citizens of Brant (File No. 15-142)
Applicant:	County of Brant (File No. 15-143)
Instrument Holder:	CRH Canada Group Inc.
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of leave to appeal:	Environmental Compliance Approval issued under section 20.3 of Part II.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 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
Reference No.:	1400-9VNPVY
Property Address/Description:	Lot 26, 27, 1, 2 & 3, Concession 3, 2, WGR
Municipality:	Township of South Dumfries
Upper Tier:	County of Brant
ERT Case No.:	15-142
ERT Case Name:	Concerned Citizens of Brant v. Ontario (Environment and Climate Change)
Heard:	In writing

APPEARANCES:

Parties	**Counsel**
Concerned Citizens of Brant	Joseph F. Castrilli and Ramani Nadarajah
Corporation of the County of Brant	Paula Lombardi
Director, Ministry of the Environment and Climate Change	Isabelle O'Connor and Nicholas Adamson
CRH Canada Group Inc.	Jonathan W. Kahn and Sarah Emery

DECISION DELIVERED BY HEATHER McLEOD-KILMURRAY

REASONS

Background

[1] On October 29, 2015, Belinda Koblik, Director, Ministry of the Environment and Climate Change ("MOECC"), issued Permit to Take Water No. 7115-9VVLJW ("the PTTW") to CRH Canada Group Inc. ("CRH", or its division Dufferin Aggregates ("Dufferin")). Also on October 29, 2015, Fariha Pannu, Director, MOECC issued Environmental Compliance Approval No. 1400-9VNPVY ("ECA") to CRH. Both the

PTTW and the ECA relate to a proposed aggregate washing operation and sewage works at the Dufferin Aggregates Paris Pit in Dumfries, County of Brant.

[2] On November 13, 2015, under the *Environmental Bill of Rights, 1993* ("*EBR*"), the Concerned Citizens of Brant ("CCOB") and the Corporation of the County of Brant ("the County") (the "Leave Applicants"), filed with the Environmental Review Tribunal (the "Tribunal") applications for leave to appeal Director Koblik's decision to approve the PTTW. In summary, the concerns cited in their PTTW-related application are that the proposed water taking:

- may interfere with the water quality/quantity in the neighbouring municipal wells and domestic wells;
- may impact the on-site ponds, Gilbert Creek ["the Creek"] and Grand River ["the River"];
- may cause accumulation of pesticides in the sediment pond and leach through to the groundwater impacting the Grand River and potential drinking water sources downstream.

[3] On November 13, 2015, under the *EBR*, CCOB and the County also filed applications for leave to appeal Director Pannu's decision to approve the ECA. In summary, the concerns cited in their ECA-related application are:

- The location of the sewage works abuts the Paris Gilbert Well Head Protection Area ('WHPA"), in a zone designated as a highly vulnerable aquifer and is immediately upstream from the City of Brantford water intake protection zone
- The ECA does not address the potential for leaching pesticides (e.g. atrazine) from the settling pond into the aquifer
- The ECA does not address the fate of some 24,000 tonnes per year of potentially pesticide-contaminated fines to be washed from the aggregate,

settled in the settling pond and stored on site for later use in site rehabilitation

- The alleged failure of the Director to take into account the SEV and its principles

[4] For the reasons that follow, the Leave to Appeal applications of the PTTW and ECA are granted in part.

Relevant Legislation

[5] *EBR*

> 38. (1) Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:
>
> 1. The person seeking leave to appeal has an interest in the decision.
>
> 2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal.
>
> …
>
> 41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
>
> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

Issues

[6] The two issues on these applications for leave to appeal are:

1) whether the Applicants have standing under s. 38(1) of the *EBR* to bring the applications for leave to appeal; and

2) whether the Applicants meet the two-part test for leave to appeal under s. 41 of the *EBR* (the "Leave Test").

Discussion, Analysis and Findings

Introduction

[7] The Tribunal will combine its analysis of the PTTW and ECA Leave to Appeal applications, since they are so intricately linked and the parties have in most places made similar arguments in relation to both instruments. Where the arguments relate to only one of the instruments, this will be clearly indicated. Although the Tribunal has considered all of the parties' submissions in detail, only the more salient submissions have been summarized in this Decision.

Overview and summary of evidence filed

[8] In 1974 the Province granted a licence to Dufferin under the *Pits and Quarries Act, 1971* to extract aggregate at the Paris Pit. Until August 2014, no extraction took place, and the site was mainly used for agriculture such as the growing of corn, including use of pesticides. The site covers 249 hectares, has relatively flat to rolling topography and is surrounded by agricultural fields to the north, the Gilbert municipal wellfield to the west, the Telfer municipal wellfield to the east, residential areas to the west, a golf course to the south and residences and agricultural land to the east.

[9] Dufferin began extraction operations in the fall of 2014, pursuant to an updated 1990 Licence No. 5601 under the *Aggregate Resources Act* ("the ARA Licence"), and an Operational Site Plan from 1991, both approved by the Ministry of Natural Resources (now the Ministry of Natural Resources and Forests, "MNRF"), and appropriate municipal land use planning and zoning approvals. The original site plans, and all site plans since, have permitted aggregate washing and settling ponds. In September 2014 the MNRF granted permission to Dufferin to remove

aggregate from the Paris Pit to be washed at the Butler Pit located in North Dumfries until a PTTW is obtained for the Paris Pit. Dufferin began shipping aggregate to the Butler Pit in May 2015.

[10] On January 3, 2013, CCOB, in conjunction with the Canadian Environmental Law Association ("CELA"), submitted a request to the Environmental Commissioner of Ontario ("ECO") under the *EBR* for review of the ARA Licence. The ECO sent this request to the MNRF which, on March 12, 2013, issued a Notice of Decision stating that the public interest did not warrant a review of the licence because the MNRF was satisfied that the conditions in the licence and applicable regulatory measures would be enough to appropriately regulate the operation and protect the environment.

[11] On March 12, 2013, Dufferin submitted an application to the MOECC for a Category 3 Permit to Take Water for proposed aggregate washing operations involving an excavated source water pond sustained by a closed loop design system. Once the source pond has been created through excavation, water will be made up from groundwater flow and direct precipitation.

[12] On June 18, 2013, as a companion to the PTTW, Dufferin submitted an application for an Environmental Compliance Approval proposing the closed-loop aggregate washing system under s. 53 of the *Ontario Water Resources Act* ("*OWRA*").

[13] The following are details of the sewage works and water taking:

(1) Preliminary monitoring began in 1988 both on site and in the surrounding area as required by the ARA Licence, providing some baseline understanding of existing conditions at the site.
(2) The aquifer underlying the Pit supplies water for the Town of Paris. Paris was included in the amalgamation of Brant County local municipalities

(except Brantford) on January 1, 1999, and Brant supplies Paris' municipal water system which services approximately 10,000 people and commercial establishments and industry. The municipal water system relies on groundwater from three wells – the Telfer, Gilbert and Bethel wellfields. The Bethel field is remote from the Pit, the Telfer is just to the east of the Pit, and the Gilbert just to the west.

(3) The Pit is mainly above the water table. Limited extraction below the table would create the source pond; and two areas would be designated for extraction below the water table during final aggregate extraction but only if it can be demonstrated in advance that this can be done without adverse impacts to groundwater receptors.

(4) The source pond will be constructed below the water table, by removing aggregate material from above and below the water table and will contain approximately 40,000 to 80,000 cubic metres (m^3) of water.

(5) The PTTW is effective for a term of 10 years, and allows Dufferin to initially take up to a maximum of 14,000 litres per minute ("LPM") or 10,080,000 litres per day ("LPD") for a period of up to three months for the initial drilling of the source pond. The rate of the water taking will then be reduced to 1,400 LPM, and can only revert to 14,000 LPM for a period of one month (however the Tribunal notes that it is not clear whether this means one month per year, one month in total over the operation of the 10 year PTTW, once at the Pit reclamation stage, or other).

(6) Within sixty days following two full years of operation Dufferin must submit a report evaluating water taking needs and making recommendations regarding future water needs and any potential changes to the permitted rates and volumes.

(7) Water taking can only occur to a maximum of 180 days between February 15 and December 15 of each year.

(8) The water taking permitted by the PTTW may also be used for dust suppression.

(9) The ECA is for the establishment, use and operation of a sewage works, i.e. a settling pond (consisting of a settling cell(s) and a recirculation cell) for the collection, transmission, treatment and reuse of wash water from aggregate washing operations.

(10) The source pond will be located between the Grand River (about 1.3 km to the east and 600 m to the south) and Gilbert Creek (about 400 m to the west), The source, settling and recirculation ponds will be located outside the Gilbert Municipal Wellfield WHPA.

(11) The closed loop washing system will re-circulate water through a settling pond to remove particulates and return the water to a recirculation cell. As some water will remain on the sand and gravel and some will evaporate, a small amount of “make-up” water will be taken from the source pond. Once the fine particles have settled, the wash water will be re-circulated through the system. The use of water for aggregate washing and re-circulation is estimated to be approximately 160 L/min (or less than 2% of the maximum permitted withdrawal rate of 18,185 L/min).

(12) The settling pond will be created by constructing one or more cells above the pit floor using excavated and aggregate material, with berms, and will be above the water table. The settling pond will have a maximum overall capacity of 5 to 10 days (12 hours/day) of the maximum volume of water used for washing (approximately 66,000 to 131,000 m^3). It will be sealed by the accumulation of fine materials. Settled fines would periodically be excavated from the settling pond.

(13) A schedule for water conservation measures is included in the PTTW Application as Appendix F. The PTTW Application is included in Schedule A of the PTTW, and the PTTW expressly states that Schedule A forms part of the PTTW.

(14) The wash plant will be used to wash approximately 60% of the Pit’s output. No aggregate washing is expected to occur between December and February annually.

(15) The source and settling ponds are outside the municipal well capture zones and projected WHPAs.

(16) There will be no surface discharge connection from the source or settling ponds to other water bodies in the area, because of the closed-loop system.

[14] In November 2011, Dufferin began pre-consultation with the County about the ECA and PTTW. In February and July 2012, Dufferin conducted two public information sessions about groundwater concerns and the proposed water taking and washing operations. It established a Community Advisory Panel ("CAP") in early 2012, comprised of three CCOB members, two County councilors, a representative of Grand River Conservation Authority ("GRCA") and several local residents. CAP held various meetings where there were lengthy discussions of PTTW and ECA issues. Dufferin attended several of these meetings to explain the applications, studies and related information.

[15] On March 26, 2013, the Notice of the PTTW proposal was e-mailed to the County, the Township of North Dumfries and GRCA. It was also e-mailed to the Six Nations First Nation, the New Credit First Nation and the City of Brantford, although no comments were received from these three parties. On March 30, 2013, the PTTW Proposal was posted on the Environmental Registry for 90 days, instead of the usual 30 days, to increase opportunities for public comment.

[16] The PTTW application was supported by several documents, including:

- 2013 CRA Report on the proposed PTTW : a March 2013 report prepared for Dufferin by Conestoga-Rovers & Associates ["CRA"]. Based on the water use during the operation of the Pit and the nature of the proposed works, the report noted three receptors which might be impacted – the Gilbert and Telfer municipal wellfields, private water supply wells and ecological surface water resources. CRA concluded that "[o]peration of the

proposed water taking is not anticipated to have any appreciable or unacceptable effect on the Paris North municipal water supply system, private water supply wells, or surface water features", but that "[t]he actual versus anticipated conditions will be evaluated through an ongoing monitoring and evaluation program and, in the event of any unanticipated impacts, the water taking conditions can be adjusted." (section 8.0, page 47).

- 2012/13 MMM ecological assessment: This included a review of the background/historical data from the MNRF and the GRCA on sampling of fish community, wildlife inventory of birds, mammals, herptiles/amphibians Lepidoptera/odonata and species at risk by the MMM Group Limited ["MMM"]. The report found that a small impact to local on-site ponds may occur but water fluctuations would be within current seasonal water level reductions already experienced, therefore MOECC found that further ecological work was not required.

[17] The ECA application was supported by several documents, including:

- 2013 CRA Report on the proposed ECA: a June 2013 report prepared for Dufferin by CRA.
- 2014 CRA Assessment of Herbicide and Pesticide Concerns (July 2014)
- 2015 CRA letter re Modification to Works for Existing ECA Application (April 16, 2015)

[18] CCOB also obtained technical reports:

- 2013 ARL Report – The June 2013 ARL Groundwater Resources Ltd. ("ARL") Report was a "review of the Permit to Take Water (PTTW) application and supporting hydrologic and hydrogeologic study report for the proposed water taking … prepared by Conestoga Rovers Associates (CRA, March 2013)" and focused on "the potential impacts of the proposed

water taking on groundwater and surface water users and resources in the area". The 2013 ARL Report raised the following concerns (this was undertaken *prior to* the changes to the design of the aggregate washing system proposed in the companion ECA):

- potential expansion of the source pit and/or potential changes to, or exceedances of, the water consumption rate presented in the CRA 2013 report might increase the risk of an adverse effect on the municipal well fields, and therefore the water quantity/quality available from them;
- potential impact of the permitted water taking on any private water supply wells if they are located downgradient of the proposed source pond;
- potential effect of the proposed water taking on the water regime supporting the onsite pond/wetland;
- "a moderate to high level of risk that the proposed water taking will have an adverse effect on the water regime supporting the existing pond/wetland near the proposed Source Pond and Settling Pond";
- the absence of site specific analysis of conditions at the Creek and south of the source pond;
- absence of specific objectives for the monitoring programme;
- absence of trigger mechanisms and contingency plans

- 2013 Greenacre Report – CCOB obtained a report from one of its members, Nicholas Greenacre, dated June 7, 2013, which raised concerns that excavation of the source pond would create a risk of direct access to the aquifer for any pollutants washed off the aggregate, including atrazine, a known endocrine disruptor banned by the European Union. [Respecting this Report, Dufferin notes that the County's consultant, Stantec Consulting Ltd. ["Stantec"], had an expert toxicologist review Mr. Greenacre's paper who concluded that Mr. Greenacre's sources did not support the position

that the washing process will release agrochemicals into the wash water or aquifer.]

- 2014 Howard letter– In a letter to CELA dated August 28, 2014, Dr. Howard (a university professor and groundwater consultant) analyzed Dufferin's 2014 pesticides assessment at the request of Mr. Greenacre of CCOB. Dr. Howard had many criticisms of the methodologies used in this assessment and as well as its conclusions. Dr. Howard concluded that "[u]ntil such time [as] an appropriate, comprehensive investigation is carried out (with adequate detection limits), I believe that, contrary to the assertions made by CRA, there remains a credible threat to public or private water supply quality from past use of pesticides at the Paris Pit Site."

[19] The County expressed concerns as well. Stantec prepared a report for the County dated March 14, 2014 ("2014 Stantec Report") which provided 11 recommendations for the PTTW and six for the aggregate extraction operations. For the PTTW, Stantec recommended that the County should receive a copy of the Combined Annual Monitoring and PTTW Report. Stantec further recommended the following additional requirements:

- new monitoring wells and monitoring, with improved use of data loggers;
- additional water flow recording;
- the development of water quality parameters for groundwater monitoring;
- additional soil sampling for pesticides before extraction;
- some additional surface quality monitoring;
- analysis of sediment removed from the settling pond: and
- additional assessment of ecological features and an upgraded well inventory.

[20] The Directors note that the 2013 ARL report, the 2014 Stantec report and the 2013 Greenacre letter all predate the amendment to the design in the revised ECA Application.

[21] As a result of comments and concerns raised, the MOECC asked Dufferin to submit two additional technical reports: a Water Well Survey report (April 24, 2014) and an Assessment of Herbicide and Pesticide Concerns (about herbicides such as glyphosate and atrazine) (July 2014). The MOECC's hydrogeologist Vincent Bulman commented on these reports for the Director. In January 2015, Dufferin submitted a report on additional ecological investigations from MMM to address issues raised by the Applicants and their consultants.

[22] On February 5, 2015 a Technical Stakeholders meeting was held to provide a final opportunity to hear additional stakeholder concerns. Attendees included representatives of Dufferin, the County, the Brant County Health Unit, CCOB and Six Nations. The 2014 Howard Letter was also presented at this technical stakeholder's meeting.

[23] On March 24, 2015, the County passed a resolution acknowledging Dr. Howard's opinion on the inadequacy of the study provided by the proponents. This resolution also states that the County "… reaffirms its resolution of May 27, 2014 that no approvals be given or progress be made to open Watts Pond Road, Paris Pit site until the applicants are able to demonstrate through scientific methods that the proposed pit and its activities will not adversely affect the local water supply and aquifer." The resolution expressly referred to the PTTW and the ECA.

[24] Based on the MOECC's technical review of Dufferin's application for the ECA, the MOECC asked Dufferin to modify the aggregate washing works design. The new design was submitted on April 15, 2015, which provided that, after washing, water would be pumped back into the wash plant from a new recirculation pond, to achieve significant water conservation and greater protection for groundwater quality. In May 2015, MOECC staff met separately with County staff and the County's Medical

Officer of Health [“MOH”] to review the draft PTTW and the MOH supported the new design.

[25] On May 11, 2015, the new ECA Instrument Proposal Notice was posted on the EBR Registry for 45 days, again instead of the usual 30 days. A total of 3,018 written comments and 23 electronic comments were received. Most focused on the potential impacts of the sewage works on ground and/or surface water. The Director incorporated specific terms and conditions in the ECA in response to these comments. A total of 515 comments on the proposed PTTW were received from the public, some during the EBR posting period and others up to the time the PTTW was issued.

[26] The PTTW was issued October 29, 2015 for a 10 year period. The ECA was issued the same day, and Decision Notices were posted to the Registry that day.

Issue No. 1: Whether the Applicants have standing under s. 38(1) of the EBR to bring the applications for leave to appeal

[27] The Respondents acknowledge and the Tribunal agrees that both Applicants meet the test for standing to seek Leave to Appeal in s. 38 of the *EBR*.

Issue No. 2: Whether the Applicants meet the two-part test for leave to appeal under s. 41 of the EBR (the “Leave Test”)

Summary of Positions of the Parties

[28] Overall, the CCOB essentially argues that “allowing an operation for the settling and storing of 24,000 tonnes per year of potentially pesticide-contaminated silt, clay and sediments and its subsequent use in site rehabilitation one meter above the water table within or in close proximity to the highly vulnerable wellhead protection areas for the Paris water supply, appears inconsistent with SEV principles” and would “appear to be anything but factually and scientifically

reasonable". It creates the appearance of potentially causing significant environmental harm.

[29] The County`s overall argument is that it is unreasonable "to put at risk the water supply for the community of Paris, for the City of Brantford and for the Six Nations without insisting on comprehensive and conclusive studies and with all possible precautions to avoid that risk", including obtaining adequate information and putting in place adequate contingency plans for any potential significant harm to the environment.

[30] The Directors` key position is that extensive expert research and analysis as well as public consultation have been undertaken, and there is little if any scientific uncertainty. The Directors submit that, nevertheless, both the PTTW and ECA have been changed to reflect and respond to concerns raised, and include first of their kind, state of the art conditions that will ensure that any potential risk is detected and prevented before it can cause any significant environmental harm. The Directors state that:

> [i]t would be truly extraordinary if leave were granted in the circumstances of this case given the extensive public consultation, supporting information from external experts (retained by Dufferin and the Applicants), extensive and detailed review by Ministry staff, consideration and application of all relevant laws and policies, and first of their kind conditions imposed in the instruments.

[31] Dufferin agrees with the Directors and also submits there is very little scientific uncertainty in the case. Dufferin submits that there is no evidence that an aggregate operation in Ontario has ever contaminated municipal or local drinking water; all Applicant concerns have been dealt with or are not relevant to this Leave Application; and, the Applicants have not brought sufficient evidence to meet their burden under the s. 41 leave test.

[32] The Applicants raise the following specific arguments in respect of the first part of the Leave Test (Reasonableness) in relation to both the PTTW and the ECA:

- Ground 1: Failure to Consider, Incorporate, Reflect or Apply the Statement of Environmental Values ("SEV")
    - Ground 1(a) – Ecosystem Approach
    - Ground 1(b) – Cumulative Effects Concerns
    - Ground 1(c) – Sustainable Development Principles
    - Ground 1(d) – Precautionary Approach
    - Ground 1(e) – Adaptive Management Principles
- Ground 2 - The Common Law Rights of the Applicants

[33] The Applicants raise the following arguments in respect of the second part of the Leave Test (Potential Environmental Effects):

- Ground 1: Potentially Significant Environmental Harm from Existing Conditions and Arising from Operation of the PTTW and ECA

[34] The analysis that follows is organized according to the above categories. Sub-issue 2(a) will address the first part of the Leave test while sub-issue 2(b) will address the second.

The Leave Test

[35] The s. 41 test has been well-elucidated by the Tribunal and courts in cases such as *Guelph v. Director (Ministry of the Environment),* [2014] O.E.R.T.D. No. 25 (*"Guelph"*), paragraph 14, citing *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.) *("Lafarge*") at para. 45:

> At the leave to appeal stage, the standard of proof is an evidentiary one, i.e., leading sufficient evidence to establish a prima facie case, or showing that the appeal has "preliminary merit", or that a good arguable case has been made out, or that there is a serious issue to be tried. Although worded differently, all of these phrases point to a uniform standard which is less than the balance of probabilities, but amount to satisfying the Tribunal that there is a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process. This lesser standard is embodied in the words of s. 41, namely "appears" and "there is good reason to believe". It is not the function of the Tribunal member who is giving leave to determine the actual merits of the appeal; rather, the member must determine whether the stringent threshold in s. 41 has been passed.

[36] The parties provided submissions on the appropriate application of the leave test. Each has its own gloss on the test, emphasizing some words rather than others and some passages of the applicable case law and not others. There are allegations from one party that another has misapprehended the standard of proof. The Tribunal does not see any utility in canvassing these submissions in detail. Sufficient guidance on the test is found in the wording of the *EBR* and the applicable case law and there is no need here to reanalyze many of the statutory interpretation issues that were conclusively addressed in *Lafarge*. The Tribunal simply follows the approach set out in *Lafarge* in assessing this application for leave to appeal.

[37] The Director argues that this PTTW has “set the bar for this industry”. The Director maintains that “[n]ever before has an aggregate operation been required to test for pesticides and compare the results to another jurisdiction.” The Tribunal notes that, simply because an instrument creates new or additional burdens as compared to other similar instruments, this does not automatically mean that there cannot be a conclusion that it appears that there good reason to believe that no reasonable person could have made the decision, and/or that there cannot be a conclusion that it appears that the decision could result in significant harm to the environment. If, for example, there was insufficient awareness or evidence, in the past, of the need to test for pesticides in aggregate operations, this does not mean that requiring this testing is sufficient to make the instrument reasonable.

[38] A somewhat similar issue was addressed by the Tribunal in *Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Ministry of the Environment)*, [2012] O.E.R.T.D. No. 17 ("*CCCTE*"):

> 44. That the decision taken might be preferable to approvals that existed previously does not establish the reasonableness of the decision. …
>
> 54. In effect, the proposition argued [...] is that, where an existing activity poses environmental risk, any decision of the Director to impose conditions on that activity must necessarily improve the situation, since in the absence of the decision, the situation would remain as it was. Therefore, the argument goes, a decision to impose new conditions cannot by definition pose a risk of environmental harm, and therefore cannot be subject to the second branch of the section 41 test.
>
> 55. The Tribunal disagrees. Whether a decision poses risk of environmental harm is not determined by comparing the effect of the decision with the effect of taking no action at all. That interpretation would effectively exclude from review under the EBR any Director's decision with respect to any established facility or site that contains new requirements or conditions. That result would be contrary to the EBR's purposes, as reflected in section 2(3) of the statute, of providing the means by which residents of Ontario may participate in the making of environmentally significant decisions and increased accountability for government decision-making. Instead, the proper comparison is between the effect of the decision actually taken and the effect of alternative decisions available to the Director under relevant laws and policies. The issuance of an ECA could be said to pose a risk of environmental harm if relevant laws and policies require, prescribe or suggest more stringent conditions or more urgent preventative or remedial action than the ECA provides.

[39] The Tribunal adopts the same approach, even though, in this case, the Director is comparing the instruments to others in the industry as opposed to previous ones for an established facility.

[40] In addition, the Tribunal follows the approach, taken in *Guelph* at paras. 16-17, of limiting its analysis to those aspects of the evidence and argument directly relevant to the s. 41 test:

> A leave to appeal hearing is not meant to be a written version of the ultimate hearing of the merits. While there is inevitably some overlap between the matters that may be raised at the leave stage and those at an appeal hearing, it remains important that the focus remains on the former. For the purposes of this decision, which turns on key threshold

> issues such as the proper scope of the decision under review, the Tribunal has declined to descend into the merits of the appeal..

Sub-issue No. 2(a): The First Branch of the s. 41 Test - Reasonableness

Ground 1*:* Failure to Consider, Incorporate, Reflect or Apply the Statement of Environmental Values ("SEV")

Ground 1(a) - The Ecosystem Approach

The Ecosystem Approach and the PTTW

[41] CCOB relies on the 2013 ARL concerns that an ecosystem approach cannot be applied to insufficient data, such as on: (i) existing conditions in the onsite pond/wetland and potential effects of water taking on its water levels; (ii) the potential for adverse impacts on fish habitat in Gilbert Creek; and (iii) the potential impact of the proposed taking on the Creek (assessment was based only on Dufferin's experience at other sites and in published studies, not on a site-specific assessment). CCOB submits that these information gaps create scientific uncertainty about the potential results of the water taking, which cannot be corrected by collecting, monitoring and reporting after the instrument is issued. CCOB maintains that this amounts to a "study-while-you-operate" approach which, it asserts, is neither precautionary nor sound environmental decision-making. In support of its position CCOB cites *Dillon v. Ontario (Director, Ministry of the Environment)* (2000), 36 C.E.L.R. (N.S.) 141 (Ont. Env. App. Bd.) and *MacIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 (Ont. Env. Rev. Trib.).

[42] CCOB also relies on the ECO's criticisms of how the MOECC implements its PTTW Program in general, identified in ECO documents (such as "Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources", Brief to the Walkerton Inquiry (Toronto: ECO, 2001 at 25 & 30), and the ECO's 2004-2005 Annual Report, at 119). CCOB argues that these weaknesses are also found in the

present case. For example, the Director has discretion to limit analysis of ecosystem function “to the extent information is available”; the Ministry has limited ecological expertise; evidence of applying the SEV is often limited to cursory assertions of the fact by the MOECC; the lack of water budgeting tools and data; minimal data exchanges between the MOECC and Conservation Authorities [“CAs”]; lack of real-time water-taking data for this operation; lack of monitoring data on stream flow and the condition of fish and invertebrates; and the use of simplistic one-size-fits-all threshold limits for in-stream flow protection and management. CCOB asserts that this results in an inability to properly apply an ecosystem approach.

[43] The County agrees with CCOB’s submission that the Director does not appear to have considered the ecological features near the source pond, including the pond/wetland, Creek and the Grand River from which the City of Brantford and Six Nations draw water downstream.

[44] The Directors submit that since most of CCOB’s concerns about the ecosystem approach are based on the ECO’s criticisms of the PTTW Program in general, not the specific PTTW in question, they are not relevant considerations in this proceeding. The Directors submit that they are only bound by, and permitted to act upon, applicable laws and policies, not a “higher standard of environmental protection” that the ECO and CCOB may desire.

[45] The Directors respond to CCOB’s specific criticisms as follows:

- The Director did not limit herself to the available material, but obtained extensive additional information (e.g. updated well survey, herbicide and pesticide report, updated contours for surface water drawdown, etc.).
- The Director relied on experts in hydrology, hydrogeology and pesticides, who relied on others where warranted, such as the MNRF, the Grand River CA, and external experts.

- The Ministry's hydrogeologist's and hydrologist's reports detailed how the SEV was considered, and the Director also provided a detailed explanation.
- Water budget tools and data are not necessary for an informed decision because this is a closed-loop system with minimal water taking in relation to other users.
- CCOB's concern about lack of real-time water-taking data is dealt with by Condition 4.1 requiring Dufferin to record water takings each day, and keep a separate record of taking for aggregate washing and for dust suppression.
- Since the water is only being taken from groundwater, there is no need to monitor stream flow, the condition of fish and invertebrates, or complex threshold limits for in-stream flow protection and management.

[46] Dufferin agrees with the Directors' submission that the general concerns of CCOB and the ECO in relation to the PTTW Regulation and the PTTW Manual (April 2005) (the "Manual") are not relevant considerations in this proceeding. Dufferin argues that CCOB's concerns about inadequate scientific information are mainly based on concerns in the 2013 ARL Report, but this report assessed the original Application. The Directors emphasize that Dufferin supplied any "missing" information to the MOECC between 2013 and 2015. Director Koblik submits that she considered the potential impact of the water taking on the pond/wetland, Creek and River, as well as the Stantec report and the MOECC staff review, which found that the water taking posed no water quality or quantity threats to the pond/wetland, Creek or River. Finally, Director Koblik emphasizes that Conditions 3 through 6 of the PTTW were expressly included "to protect the quality of the natural environment so as to safeguard the ecosystem…"

Findings on Sub-Issue No. 2(a), Ground 1(a) – The Ecosystem Approach and the PTTW

[47] The parties agree that the SEV is relevant to the analyses of the PTTW and ECA to be undertaken under s, 41(1) of the *EBR,* as are the Regulations and all other relevant laws and policies governing the PTTW and ECA.

[48] CCOB and the respondents disagree over the role that ECO Reports can play in Leave to Appeal applications. As this Tribunal found in *Citizens Against Melrose Quarry v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 57 (“*Melrose*”) at para. 68:

> ECO Reports have been cited in previous Tribunal decisions on applications for leave to appeal, such as *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 238 (Ont. Env. Rev. Trib.) ("*Dawber*") at paras. 41-42. While these Reports alone are insufficient to determine whether the s. 41 test has been met on the facts of a particular case, the findings of the ECO in relation to the PTTW program in Ontario are relevant and useful to the assessment of best practices and reasonableness in determining applications for PTTWs and, as CAMQ argues, they "provide important context and valuable insight into systemic problems and implementation difficulties in the PTTW program, many of which have manifested themselves in this very case". The Tribunal has, therefore, considered the ECO Reports in this case.

[49] While the Tribunal has placed more emphasis on the arguments of the parties relating to the specific PTTW in question in this case, it has also considered the submissions based on ECO reports, for the reasons set out in para. 68 of *Melrose*.

[50] The Tribunal finds that many of the concerns in the 2013 ARL Report pre-date the changes to the proposed PTTW and the changed design of the ECA with the new recirculation pond. The Director obtained and considered considerable additional information (such as the updated well survey, the pesticides report, etc.) in response to concerns raised about the PTTW, and added many conditions to each instrument in response to these concerns.

[51] The Tribunal notes that in reply to the concerns about real-time water-taking data, Condition 4.1 was included, requiring Dufferin to record actual water takings and report these. In addition, Condition 3.6 states that "[w]ithin 60 days following two full years of operation, the Permit Holder shall submit to the Director a report evaluating water taking needs and making recommendations regarding future water needs and potential changes to the permitted rates and volumes." These two conditions seem to support CCOB's view that this may constitute a "study-while-you-operate" approach.

[52] If two years of water taking information is needed to determine final water taking permit levels, an approach more reflective of the ecosystem approach would be to issue the PTTW for two years, and require an application for renewal when this information is available, along with any other up to date information relevant to applying the ecosystem approach. While s. 3.6 may have been intended to allow that permitted rates and volumes may only be *reduced* but not increased as a result of the analysis of two years of water taking data, this is not stated expressly in the PTTW.

[53] In addition, it would appear to be more reflective of the ecosystem approach to make the Amounts of Taking Permitted in Table A of the PTTW the much smaller amount of a maximum of 1,400 Litres per minute for the duration of the Permit, and make it a condition (for example Condition 3.4a) that the rate of taking shall be *increased* to a maximum of 14,000 Litres per minute for the creation of the source pond and for the first three months of operation of the wash plant (in other words, limit the bulk of the PTTW to the predicted smaller rate of water taking necessary and make the maximum amount of water taking needed for the short initial period the exception to that rule).

[54] The Tribunal further notes that Condition 3.4b states that "[t]he rate and amount of water taking from the Source Pond may revert to that in Table A for a period of one month for the purpose of refilling of the settling and recirculation ponds

after the removal of accumulated sediment from these ponds". However, this Condition does not specify how often this may occur – annually, whenever necessary, only at the end of use of the ponds? These alternatives would allow for very different amounts of water takings, therefore creating uncertainty about the overall permitted levels.

[55] In addition, while the PTTW states in Condition 3.3 that "notwithstanding the 'taking Specific Purpose' identified in Table A [namely aggregate washing], the water taking may also be used for dust suppression." The PTTW does not appear to include a limit on the amount of water permitted to be taken for dust suppression activities. Condition 3.3 could be interpreted to mean that the maximum amount of water permitted in Table A of the PTTW includes *both* washing and dust suppression. In other words, if for some reason a very large amount of water needs to be taken for dust suppression on a particular day or week, the amount that may be taken for aggregate washing will be correspondingly reduced.Alternatively, Condition 3.3 could be interpreted to mean that water taking for dust suppression is in addition to that permitted for washing.

[56] The Tribunal therefore finds that it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind (in particular, the ecosystem approach), could have issued a 10 year PTTW with the possibility that the permitted water taking levels could be increased after two years based on two years of water taking reporting, and other uncertainties in the PTTW regarding the actual water takings that are likely to occur.

The Ecosystem Approach and the ECA

[57] Since the parties rely on many of their submissions about the PTTW in relation to the ECA, the Tribunal will only summarize the additional issues that they have raised.

[58] CCOB argues that the MOECC guidance requires a groundwater impact assessment for sewage operations. CCOB has the following concerns about groundwater effects: (which CCOB and Greenacre & Erlich expressed to the MOECC in June 2015):

- the sewage works abut the Paris Gilbert WHPA, a designated highly vulnerable aquifer, immediately upstream from the City water intake zone; and
- the potential leaching of pesticide contaminants from the settling pond into the aquifer, and the fate of 24,000 tonnes per year of potentially pesticide-contaminated fines stored on site and potentially used for site rehabilitation, were not addressed.

[59] CCOB emphasizes that Greenacre's November 2015 report found that the MOECC's conclusion that the aggregate washing was not likely to dissolve or leach atrazine into the water was based on its misinterpretation of a research finding that atrazine remains biologically accessible for 20+ years, and because Dufferin's pesticide study contained few groundwater samples where pesticide residues were detected (only four monitoring wells were used to cover a 600+ acre site, all four wells were near the pit boundary in a mandatory no-spray zone, and, therefore, were unrepresentative, and two of these wells did contain pesticides (one at a level exceeding EU standards)). Finally, Greenacre found that the sewage works will concentrate atrazine in the topsoil and sediment which will be spread only one metre above the water table in planned site remediation.

[60] CCOB submits that, despite its concerns about lack of study and monitoring of the Creek ground- and surface water conditions, the Director did not require Dufferin to undertake such study because the County already monitors the Creek.

[61] The County submits that the ECA application did not address the potential leaching of pesticides into the aquifer and the use of potentially contaminated sediment in site rehabilitation. The County further submits that the decision also does not appear to have considered ecological features such as the pond/wetland, Creek or River.

[62] The Director submits that potential harm from pesticides was carefully considered, pointing out that testing showed low pesticide levels in the "overburden" to be washed. The Director maintains that careful technical evaluation (based on conservative and precautionary assumptions about pesticide concentrations in fines and the capacity to leach into wash water) found that any pesticides in groundwater would not reach levels of concern. The Director emphasizes that, nevertheless, Condition 3.3 was added, requiring Dufferin to "promptly" develop a seal at the bottom of the settling pond and to maintain the seal's integrity when removing excess pond sediment, to reduce the potential for migration of settling pond water into groundwater. The Directors submit that the ECA conditions require an "extensive, first of its kind monitoring program" including periodic sampling for pesticides in the water in the recirculation cell and seven groundwater wells. The Directors note that the MOECC and Stantec reviews concluded that the settling fines would not likely be contaminated with pesticides, however Conditions 4.6 to 4.8 were added, requiring Dufferin to develop and implement a testing program for the settling fines, and discuss suitable uses for sediment in site rehabilitation with the Director.

[63] The Director submits that, even though Mr. Bulman found Mr. Greenacre's concerns to be invalid, extensive monitoring conditions were nonetheless included to address these concerns. The Director submits that the mere fact that Mr. Greenacre does not agree with Mr. Bulman is not sufficient to meet the s. 41 test.

[64] The Director emphasizes that the County's own consultant, Stantec, concluded that washing operations posed no water quality or quantity threats to the Creek or River. The Director further emphasizes that analysis of the ECA and PTTW

were done at the same time, including a detailed review of ecological features, and submits that this demonstrates that an ecosystem approach was taken.

Findings on Sub-Issue No. 2(a) Ground 1(a) – The Ecosystem Approach and the ECA

[65] The Tribunal finds that it appears that the Director appropriately applied an ecosystem approach in relation to the ECA, and was responsive to the concerns of the Applicants. The Director required Dufferin to undertake an assessment of herbicides and pesticides and an updated well survey and considered the criticism of other experts in relation to these assessments prior to making the decision to issue the ECA. The Tribunal is also satisfied that it appears reasonable for the Director to rely on the monitoring of the Creek by the County as a reason not to require Dufferin to duplicate this monitoring.

[66] While the Greenacre report does challenge the methodology of Dufferin's pesticide report, the Tribunal finds that the Ministry's technical evaluations applied conservative assumptions about the potential concentrations of pesticides in the wash fines and their ability to leach into the water, and despite very limited evidence of pesticides in the information gathered, the ECA contains a pesticides monitoring program that will sample water in the recirculation cell and several groundwater wells for herbicides. The Tribunal finds that the Applicants have not met the burden of proving that it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have issued the ECA based on a failure to apply the ecosystem approach.

<u>Ground 1(b) – Cumulative Effects</u>

Cumulative Effects and the PTTW

[67] CCOB relies on the 2011-12 ECO Annual Report, which specifically identified the Grand River watershed as a location where cumulative effects may be problematic: “the Grand River watershed has over 700 active PTTWs, with permits constantly being issued, renewed and expiring, including significant municipal water takings” (at page 110). CCOB notes that the ECO questioned how the Ministry would assess the new water-taking database and water budgets to reveal cumulative effects.

[68] CCOB argues that Dufferin has not provided adequate information on cumulative effects. CCOB relies both on the Stantec Report, and the fact that the MOECC noted that the removal of aggregate makes sources of drinking water more vulnerable to contamination by removing some protective material over these sources. CCOB submits that the Director’s failure to assess the potential cumulative impacts to water quantity or quality from the aggregate extraction and post-extraction activities and the water taking is unreasonable, particularly given that the Director expects ‘increased numbers of proposals to be submitted to [the MOECC] in the next few years as a result of a new tier of aggregate availability in the Paris Pit area.”

[69] CCOB submits that, since this PTTW introduces a major new water taking source into an already vulnerable area, it is unreasonable to allow Dufferin to submit a report 60 days after two full years of operation evaluating water taking needs and potential changes to the permitted rates and volumes. CCOB argues that this means that

> the alleged conservation success story is in reality an experiment. If [Dufferin] ends up reverting to the default amount of water taking two years after operations under the Permit commence, the opportunity for Applicants to contest a return to the default amount of water taking for the remaining eight years of the Permit could prove legally difficult if not impossible.

[70] The County agrees with CCOB's submission that there has been no study on the cumulative effects of the proposal, including the aggregate extraction operations generally, the taking of groundwater, the aggregate washing operation and the sewage works.

[71] The Director submits that, in relying on ECO reports, the Applicants are trying to impose cumulative impact assessment on the Director in circumstances beyond those set out in the Manual. The Director asserts that the SEV is silent on how to do cumulative impact analysis, but the Manual indicates that if relevant information about watershed/aquifer conditions is available, it will be taken into account in reviewing individual PTTW applications. The Director submits that, where necessary, the Ministry may initiate a watershed scale assessment.

[72] Despite this, the Director submits that cumulative effects *were* considered. In support of this position the Director emphasizes that: MOECC geoscientist Mr. Bulman outlined in detail how he considered cumulative impacts and concluded that the water taking will have no effect on up- or down-gradient users; MOECC surface water scientist Sarah Day outlined how she considered cumulative effects on surface water (she noted that there were no other PTTWs for this site and no surface water features under the zone of influence, considered the potential impacts in drought conditions, and concluded that no significant surface impacts will occur due to the water taking or the operation of the pit - in fact, she opined that the water quality of on-site ponds will improve with cessation of agricultural practices); and Director Koblik outlined her cumulative effects analysis in her affidavit and the SEV Consideration form (she considered the taking of water for washing and dust suppression together and concluded that negative impacts are unlikely).

[73] Dufferin submits that the Director considered the location of the water taking in relation to the WHPAs and associated capture zones and examined the viability of the proposed taking in light of the total water consumption in the WHPA. Dufferin further submits that the alleged failure to consider Stantec's concerns about the potential environmental impact of the aggregate extraction and rehabilitation plans

permitted under the Paris Pit licence are not relevant to the PTTW itself, but the MOECC carefully considered them anyway and reasonably responded to these concerns. Dufferin also argues that the Director conducted concurrent reviews of both the PTTW and ECA applications with both hydrogeology reviews led by the same the MOECC hydrogeologist.

Cumulative Effects and the ECA

[74] CCOB emphasizes that the ECO has noted that when the MOECC modernized its approvals process which created the ECA program, it did not address cumulative effects, further noting that the ECO and non-government organizations call this a “glaring omission” and a “fundamental flaw”. The County repeats its assertion that no study has assessed the cumulative effects of this ECA, including its effects in conjunction with the PTTW, removal of aggregate in the area and extraction operations generally.

[75] The Director argues that ECO’s general concerns about the modernization of the MOECC’s approvals program are not pertinent to this Leave application, and maintains that the CCOB has provided no specifics as to how any defects in that program have impacted this ECA decision. Dufferin argues that since aggregate extraction will preclude agricultural activity, it will result in a net reduction in pesticides in the area’s environment.

Findings on Sub – Issue 2(a) Ground 1(b) - Cumulative Effects and the PTTW

[76] The Tribunal finds that the evidence shows that the Director made significant efforts to consider cumulative effects. However, based on the Tribunal’s finding above in relation to ecosystem analysis and the PTTW that there is no guarantee that after two full years of operation, the permitted rates and volumes of water will not be increased, and CCOB, the County, water users and other affected stakeholders may not be consulted or have the opportunity to submit concerns about any new permitted water taking levels, it appears that it is not possible to fully

assess the cumulative impacts of the water takings until the final permitted water taking limits are determined, which will not be for more than two years. Therefore, the Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have effectively applied a cumulative effects analysis in issuing a 10 year PTTW with the possibility that the permitted water taking levels could be increased after two years.

Findings on Sub – Issue 2(a) Ground 1(b) - Cumulative Effects and the ECA

[77] The Tribunal finds that in relation to the ECA, it is clear that the Director and the MOECC scientists on whose reviews of the ECA the Director relied considered the cumulative effects arising from the interactions of the PTTW and the ECA themselves.

[78] However, it is less clear that the cumulative effects analysis of the ECA included its effects in conjunction with the removal of aggregate in the area and extraction operations generally, and the rehabilitation plans for the Pit. While the aggregate extraction licence and rehabilitation plan are outside the scope of these Leave to Appeal applications, to assess the cumulative effects of the ECA, the effects of the aggregate extraction and site rehabilitation are clearly relevant.

[79] Condition 4.8 of the ECA provides that after sediment in the settlement pond is analyzed, “the Director and Owner shall discuss suitable uses for the sediment for on-site rehabilitation.” Details of the rehabilitation plan therefore remain to be determined, which would make a full assessment of the cumulative effects of the ECA impossible to determine at this time. While it may be reasonable for the ECA to allow the testing of the sediment to be done before determining the appropriate uses for it in the rehabilitation plan, the ECA currently leaves this discretion in the hands of the Director and Owner at the time (which CCOB notes may or may not be Dufferin). It would be more appropriate, for example, to include in the ECA a

condition that if the sediment is found to contain unacceptable levels of pesticides, it shall not be used for on-site rehabilitation. This would provide more assurance that cumulative effects of the ECA will not include the possibility of allowing concentrated levels of pesticides, if any are found, to pose a risk to the surface and ground water in the area. Without such assurance, it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have effectively applied a cumulative effects analysis in issuing the ECA when the ultimate use of the sediment in the site rehabilitation plan remains to be determined decades in the future.

Ground 1(c) – Sustainable Development Principles

Sustainable Development and the PTTW

[80] CCOB submits that water conservation is one indication of sustainable development. CCOB asserts that conflicting opinions in the CRA and ARL reports arose because the CRA report was based on inadequate data (in the opinion of ARL). CCOB points out that, while CRA concluded that pit operations and PTTW water taking will not impact water quality or quantity at the Gilbert wellfield, ARL found that firm conclusions about the influence of municipal pumping near the source pond were impossible due to lack of data (e.g. no continuous groundwater level monitoring records on more than a monthly basis to detect peak water demand periods; scale used in water level hydrographs made differentiating effects of water pumping versus seasonal variations difficult; and the municipal wellfields appeared to be pumping below the forecast demand rate or permitted rate).

[81] CCOB also emphasizes that ARL also found that risk to municipal wellfields would increase if the source pond was expanded due to insufficient water supply during prolonged dry periods, yet low water conditions, requiring reduced user consumption, have already occurred in the Grand River watershed (e.g. in 2012). CCOB relies on ARL's conclusion that, given climate change, new development and

other pressures, it is reasonable to expect such conditions to recur or intensify in the future. COOB therefore submits that granting a PTTW that "effectively provides no margin for error with respect to potential impacts to area water quantity" (paragraph 93, Application for Leave to Appeal PTTW, CCOB) is inconsistent with sustainable development principles.

[82] CCOB relies on the ECO's recommendation in the 2011-12 Annual Report that conditions, such as the imposition of a mandatory water conservation plan, are needed (as required by amendments to the *OWRA* passed in 2007 but never proclaimed into force.) CCOB emphasizes that the Director has failed to impose a mandatory water conservation plan as a condition of the PTTW, which is inconsistent with the *OWRA* and sustainable development principles. The County submits there is no evidence that a water conservation plan was proposed or considered, contrary to the conservation, protection and sustainable use purposes of the *OWRA*.

[83] The Directors define sustainable development as "economic development without depletion of natural resources" (para 94). They state that "[w]ater conservation is a hallmark of this PTTW and ECA." The Directors maintain that, as the aggregate washing will be in a closed loop system, the approved maximum takings are substantially less than originally requested. The Directors emphasize that the PTTW only allows Dufferin to take water for aggregate washing and dust control (and that the benefits of dust control to air quality outweigh the minimal consumptive impacts on water) and Dufferin must also monitor daily takings for washing and dust suppression separately. The Directors assert that permitted net water use will not negatively impact current or future municipal and local water users, noting that aquifer and surface water levels will be monitored so the Ministry can detect any long term trends to aquifer sustainability and determine potential long-term impacts. For these reasons, the Directors assert that this PTTW has "set a precedent for the aggregate sector".

[84] Dufferin submits that the permitted water taking is a tiny fraction of the overall permitted water taking. Dufferin emphasizes that, despite the minimal risks, many aspects of the PTTW reflect concern for water conservation, specifically: (i) inclusion of Appendix F “Schedule for Water Conservation Measures”; (ii) reduction of the permitted taking from 18,175 LPM for 200 days/yr to 14,000 LPM for 180 days/yr; (iii) drastic reduction of the permitted water taking rate for the majority of life of the PTTW (three months after wash operations start, the rate drops from 14,000 LPM to 1,400 LPM) (Condition 3.4(a); (iv) creation of a water level monitoring program including reporting requirements to the MOECC, the County, Community Advisory Panel and public (Conditions 4.1 to 4.7); and (v) inclusion of conditions to “foster efficient use and conservation of waters” and “allow for the beneficial use of waters while ensuring the fair sharing, conservation and sustainable use of waters in Ontario” (Conditions 3 to 6). Dufferin further notes that the Watershed already has a low water response plan which would apply to the Pit in the event of drought. For these reasons, Dufferin submits that there is no evidence that further mandatory water conservation plans are reasonable or necessary.

Findings on Sub-Issue 2(a) Ground 1(c) - Sustainable Development and the PTTW

[85] The SEV refers to both “sustainability” and “sustainable development”. The Director defines sustainable development as “economic development without depletion of natural resources”. However, this is quite different from the well-known definition from the World Commission on Environment and Development (Brundtland Commission) report *Our Common Future* (Oxford: Oxford University Press, 1987), p. 43): “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” A similar definition is found in the *Federal Sustainable Development Act,* S.C. 2008, c. 33. Two statutes directly implicated in these Leave to Appeal applications, the *EBR* and the *OWRA*, refer to sustainability. The purposes of the *EBR*, set out in section 2(1), are to “(a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act; (b) to provide *sustainability of the*

environment by the means provided in this Act; and (c) to protect the right to a healthful environment by the means provided in this Act." [emphasis added] The purpose of the *OWRA,* set out in section 0.1, is "to provide for the conservation, protection and management of Ontario's waters and for their efficient and *sustainable use*, in order to promote Ontario's long-term environmental, social and economic well-being." Based on these definitions, the Tribunal finds that the Directors' definition of sustainable development is too limited: "economic development without depletion of natural resources" places more emphasis on economic development than sustainability *of the environment* as required by the *EBR* and the sustainable use of Ontario's waters, as required by the *OWRA*. In the analysis that follows, the Tribunal focuses on environmental sustainability, whether viewed as a separate principle of its own or an approach to implementing sustainable development principles that emphasizes the importance of environmental sustainability.

[86] It is clear that the Director made significant attempts to respond to concerns about the sustainability of the water taking permitted by the PTTW, for example by including Condition 3.4a to significantly reduce the amount of water permitted to be taken after the first three months and to add monitoring and reporting conditions. However once again, the possibility that the water taking permitted may increase after the two year report is submitted, with no indication of maximum levels that could be permitted, makes it very difficult to conclude that the water taking from the PTTW, and the aquifer and community water supply, will remain sustainable. Again, a two year PTTW, for example, which might be renewed once the data on two years of operation has been obtained and assessed, would be reasonable while a 10 year PTTW appears to be unreasonable. Therefore, the Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have effectively applied sustainable development and/or sustainability principles in issuing a 10 year PTTW with the possibility that the permitted water taking levels could be increased after two years.

Sustainable Development and the ECA

[87] The parties' arguments about sustainable development principles in relation to the ECA focus on environmental assessment ("EA"). CCOB argues that the Director's failure to require an EA of the ECA despite the request of the local Member of Provincial Parliament is another indicator of unreasonableness. The County submits that an EA is a key indicator of sustainable development and should have been required. By contrast, the Directors state that, when the Applicants requested an EA, Dufferin already held a valid aggregate extraction licence. They submit, therefore, that it was reasonable for the Minister to choose not to ask Cabinet to order an EA of the PTTW and ECA, as this would duplicate the full review of the environmental concerns respecting these instruments which had already been done by the MOECC technical staff. Dufferin also argues that the PTTW and ECA are not subject to EA requirements and that the Tribunal lacks jurisdiction on a Leave to Appeal application to question the adequacy of applicable laws and policies.

Findings on Sub-Issue 2(a) Ground 1(c) - Sustainable Development and the ECA

[88] The Tribunal finds that whether or not the PTTW and ECA trigger an EA is outside the scope of these leave to appeal applications and therefore declines to address this issue.

<u>Grounds 1(d) and (e) – The Precautionary Approach and Adaptive Management</u>

Definition and Interaction of the Precautionary and Adaptive Management Principles

[89] The parties dispute the relative importance of, and the relationship between, the precautionary principle and the principle of adaptive management.

[90] CCOB cites *Davidson v. Ontario (Director, Ministry of the Environment)* (2006), 24 C.E.L.R. (3d) 165 (*"Davidson"*) at para 44 (Ont. Env. Rev. Trib.), another case involving a 10-year PTTW:

> A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of the risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, precaution requires that it should be considered to be as hazardous as it could possibly be.

[91] This approach was also adopted in *CCCTE* at para 45.

[92] By contrast, the Directors rely on *Spellman v. Director*, [2007] O.E.R.T.D. No. 67 (*"Spellman"*) at para 73:

> [t]he precautionary principle does not require that an application for a PTTW be refused because risks of environmental harm have been raised. Rather, it requires, in the face of threats of environmental harm and in the presence of some degree of uncertainty, that the Director take appropriate measures to prevent harm.

[93] Dufferin relies on another case, *Greenspace Alliance v. Ontario* (2009), 44 C.E.L.R. (3d) 216 (Ont. Env .Rev. Trib.) ("*Greenspace*") at para. 139 to submit that where environmental risk is not likely, uncertainty is reduced and "it is consistent with the precautionary approach for the Director to approve the activity and include measures to prevent harm or confirm the predictions."

[94] The Director submits that the SEV provides no hierarchal ordering of the precautionary and adaptive management principles. However, CCOB argues that reliance on adaptive management should not be used to "trump" the precautionary principle. In *Pembina Institute v. Canada*, 2008 FC 302 (*"Pembina Institute"*) at para. 32, the Federal Court held that:

> adaptive management permits projects with uncertain, yet potentially adverse environmental impacts, to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts *where there is sufficient*

> *information regarding those impacts and potential mitigation measures already exist* (emphasis added).

[95] CCOB submits that since the information is insufficient in this case, adaptive management should not be relied upon to justify not applying the precautionary principle (citing *Melrose*, at paras. 95-97). The County echoes these concerns, adding, for example, that "since Dufferin denies that any of the concerns about the Creek, pond/wetland and private supply wells are a problem", there is no contingency plan or trigger for implementing one.

[96] The Tribunal finds that the above Tribunal and court cases are not contradictory, yet each party puts the emphasis on the aspects most favourable to their position. Where scientific uncertainty exists as to whether an activity could have an adverse effect, precaution requires that it should be considered to be as hazardous as it could possibly be (*Davidson* and *CCCTE*), *and* the Director must take appropriate measures to prevent possible harm (*Spellman*). This may include refusing approvals until scientific uncertainty can be eliminated. *Greenspace* applies to a different situation where environmental risk is unlikely and, therefore, there is little scientific uncertainty. In such cases, precaution may permit the Director to approve the activity while including measures to prevent harm or confirm the predictions. This is when adaptive management approaches are applied, as clarified in *Pembina Institute.*

[97] The question, therefore, is how much scientific uncertainty exists in relation to the PTTW and ECA.

Precaution, Adaptive Management and the PTTW

[98] In relation to the PTTW, CCOB relies on the ECO's finding that the Manual's requirement to consider various ecological factors "to the extent that information was available" is contrary to a precautionary approach, which puts the burden of proof on proponents to provide lacking data. CCOB submits that the Directors' failure to acknowledge information gaps in key areas of concern about PTTW Application

documents is not precautionary. The County submits that the experts engaged by itself and CCOB found the additional well water survey and pesticides report from Dufferin to be inadequate. The County submits that proceeding without an adequate scientific basis in the face of a serious threat to the environment including the wellfields surrounding the Paris Pit was not precautionary and was, therefore, unreasonable.

[99] CCOB submits that there are also significant problems with the proposed monitoring program, such as: (i) a lack of specific objectives for the various components of the monitoring program; (ii) no monitoring of groundwater and surface water conditions in the Creek; and (iii) no trigger levels or contingency measures to protect the existing pond/wetland, Creek and private water supply wells. CCOB relies on the ARL's observation in its 2013 report that no triggers or contingency measures were in the application documents, and "we are no closer to having such a mechanism and plan than we were in 2013, when the concern was first identified." CCOB maintains that adaptive management requires robust monitoring to enable appropriate adjustments to PTTW conditions over time. CCOB submits that the significant gaps in baseline, remedial response and other elements undermine the position that the PTTW is granted based on the ability to adaptively manage future changes in environmental conditions.

[100] Dufferin submits that the 2013 ARL report addressed the originally proposed monitoring program, but the actual PTTW addresses these concerns. The Director states that Dufferin responded to concerns about the adequacy of the information in the original PTTW and ECA by providing additional documentation and in consultations, and also in some cases by the County's expert, before the instruments were issued, so that information about the Creek, River and on-site ecology informed the analysis of the MOECC experts. Dufferin relies on Stantec's conclusion (the County's own consultant) which anticipated no impact on water quantity or quality on the Gilbert or Telfer wellfields, private water supplies, Creek or River from water taking at the source pond, leaving little scientific uncertainty.

[101] The redesign of the sewage works to use a recirculation pond – resulting in significant water conservation and additional aquifer protection – is precautionary. Despite all experts finding adverse effects unlikely, conditions were added in both the PTTW and ECA to ensure protection of the ecosystem and water users, including robust monitoring and reporting programmes, which allows for adaptive management. The PTTW also requires a detailed trigger and contingency plan be approved by the Director *prior to* construction of the ponds.

[102] Dufferin maintains that the evidence shows that pesticides are not present in the overburden "in any sufficient quantity to cause concern": it is therefore unlikely they would be found in the sediment or wash water in concentrations significant enough to impact downgradient users. Dufferin submits that the Applicants' concerns about methodologies and analysis are merely concerns, and Stantec itself does not agree that aggregate washing will release pesticides into the wash water. Dufferin re-iterates that, despite this, conditions have been included in the ECA, which are the first of their kind, conditions which require Dufferin to monitor and sample for pesticides in ground- and surface water and sediment accumulated in the settling pond. Dufferin points out that If "concentrations of pesticides of concern" are found, Dufferin must "discuss with the Director the appropriate measures to be taken."

[103] Dufferin submits that ARL's concerns have been addressed by the supplementary information produced during the lengthy consultation process, maintaining that the Applicants could have sampled the soil but did not. Dufferin again emphasizes that, despite findings of minimal risk (as agreed by consultants for the County, Dufferin and the MOECC), the ECA was amended to further eliminate pesticides concerns in relation to the source pond. Dufferin further maintains that, although the concerns were mainly about atrazine, the pesticide evaluation includes many other pesticides. Dufferin submits that, since the evidence shows that harm is unlikely, it is precautionary to address any remaining risk of harm through conditions, which both instruments contain.

[104] Dufferin agrees that CCOB's concerns pertain to the originally proposed monitoring program, but submits that these concerns (lack of trigger and contingency plan; monitoring of the Creek) have been addressed in the PTTW. Dufferin submits that the conditions imposed clearly demonstrate an adaptive management approach. In support of this submission, Dufferin points to the following features:

- a monitoring program for ground- and surface water whose results must be posted to the MOECC, County, and on Dufferin's website;
- a reassessment of future taking after two years of operation;
- the Director can suspend or reduce permitted water taking;
- a Trigger Mechanism and Contingency Plan for both groundwater and surface water must be approved and in place before constructing the source pond;
- the County monitors the Creek as a condition of its own PTTW, while Dufferin must monitor groundwater levels between the west boundary of its property and the Creek;

Precaution, Adaptive Management and the ECA

[105] CCOB submits that, given that the ECA regime is two tiered and this ECA was not assigned to the simplified process for lower risk activities, it must be a higher risk activity. CCOB asserts that the Director failed to address concerns about Dufferin's pesticide soil sampling methods and potential for pesticides leaching, and submits that this indicates that the MOECC's July 2015 review only partially examined and/or misunderstood Dr. Howard's analysis. The County submits that Dr. Howard's evidence shows that the information the MOECC relied on was inadequate. The County submits that granting the ECA without adequate information in the face of a serious environmental threat is neither precautionary nor reasonable. The County maintains that, if the problems with the pesticide assessment are not corrected, there will be an inadequate information base to apply adaptive

management, and therefore a precautionary approach must be taken. The County supports this position, noting that the ECA conditions do not require monitoring of the pond/wetland, Creek or private supply wells, or a contingency plan with trigger.

[106] The Director submits that the ECA conditions require robust monitoring and reporting to detect potential impacts before they can cause harm and the Annual Monitoring Report will enable an adaptive management approach. Dufferin adds that Condition 5 requires that a contingency plan be approved before operating the sewage works, and Condition 4 requires water monitoring, while the County is already required to monitor the Creek.

[107] The Director submits that the Applicants' concerns about the pesticide study methodology are neither substantiated nor shared by the County's expert. The Director emphasizes that the ECA contains first of kind precautionary measures for monitoring for pesticides, and if any are detected, Dufferin must discuss appropriate measures with the Director.

[108] Dufferin argues that it took the precautionary approach of placing the sewage works outside the WPHAs and associated capture zones, and that the Director was precautionary in responding to Dr. Howard's concerns. Dufferin submits that this is not a case of scientific uncertainty, but the Director, nonetheless, included conditions requiring stringent sampling and monitoring to prevent harm from pesticides. Dufferin emphasizes that these programs use analytical detection limits for ground and surface water well below Ontario Drinking Water Standards and normal municipal water quality testing standards in the County, and incorporate sediment decision limits at the lowest achievable levels currently in use in accredited labs. Dufferin submits that these conditions are very precautionary given that harm was found unlikely by multiple technical assessments and there is no factual evidence to support allegations of potential harm.

Findings on Sub-Issue 2(a), Grounds 1(d) and (e) - The Precautionary Principle, Adaptive Management, the PTTW, and the ECA

[109] The Tribunal again finds that the Directors made significant and laudable efforts to apply both precaution and adaptive management as seemed appropriate in the circumstances. The sewage system was redesigned and many new conditions were added to the instruments. It seems clear that the new design will result in significant water conservation and additional aquifer protection and that it is innovative in that these are the first of their kind conditions to deal with concerns expressed by interested parties.

[110] However, two elements of the PTTW and ECA do raise concerns. The Directors and Dufferin repeat in several places in their submissions that significant monitoring requirements have been added and that, if any of the possible risks do materialize, they can be dealt with by a Trigger Mechanism and Contingency Plan (PTTW) or Contingency and Pollution Prevention Plan (ECA). However, there are no specific objectives for the various components of the monitoring program. Dufferin's argument that the overall context of the instruments creates the objective of environmental protection is too vague to provide the kind of information required for adaptive management.

[111] Of greater concern is the fact that these contingency plans have not yet been received or reviewed by MOECC even though several years of analysis and consultation have occurred since these instruments were first applied for. The Trigger Mechanism and Contingency Plan in the PTTW must be reviewed and approved by the MOECC before construction of the Source Pond begins (PTTW Condition 4.7). The Contingency and Pollution Prevention Plan in the ECA must be prepared (but not reviewed or approved by the MOECC) prior to commencement of operation of the sewage works (ECA Condition 5). The ECA does not include a trigger mechanism for the Contingency and Pollution Prevention Plan. Neither the PTTW nor the ECA Plan will be subjected to consideration, analysis and comment

by CCOB, the County or other interested stakeholders. Without knowing what is in the Contingency Plans, for example, it is not clear whether it will be possible to take appropriate measures in the event the kinds of environmental risks of concern to the parties do materialize. As found in *Guelph* at para 49, this appears to be "contrary to the purposes of the *EBR* (especially those that permit public comments to be made regarding proposed instruments) and the *OWRA* if the Director could insulate his decision from scrutiny". In *Guelph* it was by mistakenly limiting the scope of his decision, while in this case it is by leaving crucial elements of the approval for later debate and discussion between only the MOECC and the Proponent. The Tribunal notes that the reasonableness of the Directors' decisions to leave elements of an instrument to be addressed in the future should be assessed on a case-by-case basis in light of the Leave Test. In so doing, the Tribunal considers such factors as: the importance of the element of an approval to be addressed in the future, how that element will be addressed (e.g., only between the MOECC and the instrument holder, or also with other affected parties) and whether it appears unreasonable to take that course of action in comparison to other available options.

[112] In this case, the Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have granted:

- the PTTW (i) without objectives for its monitoring programmes and (ii) without seeing, assessing, making available for public comment as part of the consultation, and approving the PTTW Trigger Mechanisms and Contingency Plan;
- the ECA without seeing, assessing, making available for public comment as part of the consultation, and approving the Contingency and Pollution Prevention Plan, and requiring a trigger mechanism for that Plan.

Ground 2 – Common Law Rights of the Applicants

Common Law Rights and the PTTW

[113] CCOB argues that the PTTW could affect common law rights and interests of CCOB members (e.g. creating causes of action in negligence, private nuisance, riparian rights and strict liability). Instruments such as the PTTW can diminish common law rights because approvals may (1) protect facilities from liability or (2) influence the standard of conduct considered to be negligent, and (3) potentially cause courts to defer to regulatory officials' assessment of environmental dangers.

[114] CCOB relies on the 2014 CRA analysis of the 2013-14 well water survey. The survey found that of 61 property owners surveyed, two properties with downgradient wells (residential, with no historic water quality or quantity issues) could be affected by the water taking. CCOB submits that when a Director considers approving activities that may constitute a tort, more stringent conditions may be necessary. CCOB asserts that the Director's failure "to aver to the common law interests of the Applicants" before making her decision appears unreasonable. (The County makes no submissions on this sub-issue.)

[115] The Directors note that CCOB does not identify which common law rights could be affected by the PTTW. They rely on *Tomagatick v. Ontario (Ministry of the Environment),* [2009] O.E.R.T.D. No. 15, to argue that concerns about interference with common law rights, which do not contradict the Director's statements about potential off-site impacts, are not an adequate evidentiary foundation to meet the s. 41 test. Furthermore, they rely on the PTTW conditions that will ensure that significant adverse impacts do not occur in neighbouring municipal or domestic wells or on site ponds, the Creek or the River, as well as Condition 2.4 which also preserves all legal claims or rights of action against Dufferin.

[116] Dufferin also submits that the PTTW conditions protect against unreasonable interference with common law rights. Dufferin maintains that only two properties with residential wells could potentially be affected and though the Ministry found both were outside the expected zone of influence, Dufferin spoke with both owners, offered to connect them to the municipal water supply and has committed to ongoing water quality monitoring at their homes. Dufferin asserts that no evidence suggests they are owned by CCOB members, and CCOB submitted no further technical or expert evidence after the updated well survey to dispute its conclusions. Dufferin notes that Conditions 4.2 and 5.2 require monitoring in the direction of the two private wells (and other areas) and require Dufferin to provide them a safe alternative water supply, or cover the costs of obtaining one, if existing water supply is adversely impacted. Dufferin submits that there is no evidence in the record to indicate that CCOB members may have rights respecting the municipal wellfields and Creek affected.

Common Law Rights and the ECA

[117] CCOB submits that since the Director did not aver to common law interests in relation to the ECA, it cannot be said to have considered them, which is unreasonable. The Director submits that although the MOECC technical and engineering experts found that the sewage works were unlikely to have adverse impacts on ground or surface water quality, conditions were included to ensure that if pesticides do accumulate in the wash water or sediment, appropriate steps can be taken to prevent adverse effects. The Director asserts that the monitoring and reporting programme and contingency and pollution prevention plan will also prevent adverse effects on municipal or domestic wells, the onsite pond/wetland, Creek and River. Neither the County nor Dufferin made submissions on this issue.

Findings on Sub-Issue 2(a) Ground 2 - Common Law Rights, the PTTW, and the ECA

[118] The Tribunal has found above that the Applicants have met the first part of the Leave Test in respect of specific aspects of the decisions to issue the PTTW and ECA. To the extent that those aspects could also affect common law rights, it is not necessary for the Tribunal to conduct another level of analysis as the Leave Test has been otherwise met for those aspects. To the extent that common law rights could be affected by other aspects of the Directors' decisions, the Tribunal finds that the Applicants have not brought sufficiently precise and detailed evidence in relation to potential infringements of common law rights, and therefore in relation to those other aspects, finds that there does not appear to be good reason to believe that no reasonable person, having regard to the potential common law rights of action of the affected water users, could have made the decisions to issue the PTTW and ECA.

Overall Conclusion on Issue 2(a) - Reasonableness

[119] The Tribunal finds that it appears that there is good reason to believe that no reasonable person could have issued the PTTW and ECA in regard to the following specific aspects of the decisions:

- Condition 3.3 of the PTTW, which does not specify whether the water taking permitted for dust suppression is *in addition to* the maximum amounts set out in condition 3.4a.
- Condition 3.4b of the PTTW, which does not clarify *how often* Dufferin may revert to the maximum rate of water taking in Condition 3.2 "for one month following removal of sediment from the settling pond".
- Condition 3.6 of the PTTW, which states that "[w]ithin 60 days following two full years of operation, the Permit Holder shall submit to the Director a report evaluating water taking needs and making recommendations regarding future water needs and potential changes to the permitted rates and volumes." This means that the permitted water taking for almost eight years of the PTTW is unknown and will not be known for over two years.

- The lack of clear and specific objectives for the monitoring requirements in the PTTW.
- Condition 4.7 of the PTTW (Trigger Mechanism and Contingency Plan) and Condition 5 of the ECA (Contingency and Pollution Prevention Plan). These Plans are not available and will only be subjected to scrutiny by the MOECC and the Proponent, after the instruments have been granted.
- The ECA Contingency and Pollution Prevention Plan, which does not contain a trigger mechanism.
- Condition 4.8 of the ECA, which does not specify future uses of sediment for on-site rehabilitation.

Sub-issue 2(b): The Second Branch of the s. 41 Test – Potentially Significant Environmental Harm

Potentially Significant Environmental Harm from Existing Conditions and Arising from Operation of the PTTW and ECA

Environmental Harm and the PTTW

[120] CCOB is concerned that pesticide residues may enter the aquifer by leaching from the settling and recirculation ponds, or storage and re-use of the sediment in pit rehabilitation. CCOB asserts that significant environmental harms could result from (i) existing geographic conditions in the area (the wetland protection area, drought, and atrazine); (ii) the fact that it is a Category 3 PTTW, and a Class I Instrument; (iii) potential environmental impacts; (iv) inadequate permit terms and conditions; and (v) the MOECC enforcement limitations. CCOB submits that the conditions do not require financial assurances (contrary to the MOECC financial assurance guidelines on PTTWs whose permitted activities could interfere with municipal or private wells or increase health or environmental risk), or clear water conservation measures.

[121] The County submits that if the water quality or quantity of the aquifer is compromised, there will be devastating consequences for the public and private users of aquifer drinking water. The County maintains that: (i) the long term extraction process will increase the existing vulnerability of the aquifer; (ii) there is uncertainty about net water taking from the aquifer; and (iii) potentially contaminated sediment for site rehabilitation may leach agrochemicals to the aquifer, placing the Creek and its wetlands, the heritage Grand River, and the City and the Six Nations who take water from it downstream from the Pit, at significant risk.

[122] The Director's submissions on the second branch of the test are brief. First, the Directors note that the aggregate extraction licence is not in issue. Secondly, the Directors submit that, even if permanent drought-like conditions exist in the Watershed (asserting that there is no evidence of this before the Tribunal), this is irrelevant to the second arm of the s. 41 test, which asks whether the decision to issue these instruments could cause environmental harm. Thirdly, the Director maintains that the evidence shows that the water taking and closed loop sewage works will have no impacts on any of the up- or downgradient users, on-site ponds, Creek or River. The Director asserts that the PTTW and ECA conditions: (i) are designed to eliminate any risk of harm from the instruments; (ii) are protective, preventative, rectify any unanticipated impacts that may occur; and (iii) are unique and precedent setting. Finally, the Director notes that the MOECC's compliance objectives and enforcement capacity are "of no relevance to the analysis of the potential for significant harm".

[123] Dufferin submits that the Applicants have not provided the required information base to meet the s. 41(b) test. Dufferin further submits that the classification of an instrument does not create presumptions about its risk, but rather the Applicant must prove "the potential for environmental harm posed by the particular decision in question" (*Lafarge* para 18). Dufferin maintains that the County's six concerns with the PTTW are either already resolved, unrelated to the

PTTW or unsupported by the record. Dufferin also submits that the MOECC enforcement limitations are not within the scope of the s. 41 test (*Melrose*).

Findings on Sub-Issue No. 2(b) in relation to the PTTW

[124] The two branches of the Leave Test are separate and both must be satisfied in order for leave to be granted. However, the evidence and arguments that may be relevant to the first branch are not necessarily mutually exclusive from those relating to the second branch. Allegations about apparent failures to reflect the ecosystem approach or cumulative effects, for example, may be relevant to both branches. Such failures may ground a finding of apparent unreasonableness while the effect of the failures could also result in environmental harm.

[125] In this case, the Applicants' successful arguments relating to unreasonableness under the first branch include some aspects that also relate to environmental harm under the second branch. Given its findings in relation to the first branch of the test, the Tribunal finds that there are significant informational gaps in relation to both instruments, caused by the inadequacy of specific conditions in the PTTW. If the PTTW does affect the water quality or quantity of this aquifer in a highly vulnerable wellhead protection area, and, as a result, the drinking water supply of the County, City and others, it is clear that the decision to issue the PTTW appears to be a decision that could result in significant harm to the environment.

Environmental Harm and the ECA

[126] The Directors combined their submissions on the PTTW and ECA (listed above). The following summarizes only the additional arguments particular to the ECA made by the other parties.

[127] CCOB submits that the location of the sewage works in a WHPA, the potential for drought conditions and the presence of atrazine pose potentially significant risks, noting that the Class I classification of the ECA by definition suggests significant risk to the environment and human health.

[128] CCOB further submits that the ECA's terms and conditions are inadequate, as detailed above, for example: (i) the operations manual and a contingency and pollution prevention plan required by Conditions 3 and 5 should have been demanded and subjected to public scrutiny before granting approval; (ii) the monitoring program should contain specific objectives, and be based on adequate sampling methods and detection limits; (iii) financial assurance should be a condition; and (iv) clear decisions, triggers, protocols or requirements for reducing or ceasing operations where, e.g., pesticides are detected should be included.

[129] CCOB reiterates its concerns about the MOECC inspection capacity, arguing that a Condition should be added to require Dufferin to hire an inspector who would be on-site daily (but not a CRH employee) to report to the MOECC on compliance (as done in previous instruments such as permits for landfills).

[130] The County supports the submission that the ECA's classification creates a presumption of potential significant environmental harm. The County submits that devastating harm to local users could result if the quality or quantity aquifer water is compromised. The County maintains that it has eight concerns about the ECA that have not been addressed.

Findings on Sub-Issue No. 2(b) in relation to the ECA

[131] As with the PTTW, some of the grounds relating to the ECA are relevant to both the first and second branches of the Leave Test. The Tribunal finds that, given its findings in relation to the first branch of the test, there are informational gaps in relation to the ECA, caused by the inadequacy of specific conditions. If as a result of the ECA there are negative effects on the water quality or quantity of this aquifer in a

highly vulnerable wellhead protection area, and as a result on the drinking water supply of the County, City and others, it is clear that the decision to issue the ECA appears to be a decision that could result in significant harm to the environment.

DECISION

[132] The Tribunal finds that the Applicant has satisfied the two-part test for leave to appeal found in s. 41 of the EBR, in relation to the PTTW and ECA. Leave to appeal is granted in part. The grounds for appeal shall be limited to only those aspects of the instruments set out in paragraph 119 above.

Applications for Leave to Appeal Granted in Part

"Heather McLeod-Kilmurray"

HEATHER McLEOD-KILMURRAY
MEMBER