Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: April 19, 2021 **CASE NO.:** 21-010

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

Applicant:	Federation of Tiny Township Shoreline Associations (File No. 21-010)
Applicant:	Corporation of the Township of Tiny (File No. 21-012)
Instrument Holder:	CRH Canada Group Inc.
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of leave to appeal:	Decision to issue Permit to Take Water from a source pond, issued under section 34.1 of the *Ontario Water Resources Act* for the washing of aggregates at the Teedon Pit
Reference No.:	6258-BRDJ2M
Property Address/Description:	90 Darby Road, Lots 79 and 80, Concession 1
Municipality:	Original Township of Tiny
Upper Tier:	County of Simcoe
ERT Case No.:	21-010
ERT Case Name:	Federation of Tiny Township Shoreline Associations v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties	**Counsel/Representative[+]**
Federation of Tiny Township Shoreline Associations	J. Castrilli and R. Nadarajah
Corporation of Tiny Township	S. Hahn
Director, Ministry of the Environment, Conservation and Parks	I. O'Connor and M. Ritchie

CRH Canada Group Incorporated	J. Kahn and M. Jorgensen

HEARD: In writing
ADJUDICATOR(S): Hugh S. Wilkins, Member

DECISION

[1] In January 2018, CRH Canada Group Inc. ("Instrument Holder") applied for a renewal of its Permit to Take Water for the Teedon Pit located at North ½ Lot 79, South ½ Lot 80, Concession 1 WPR ("subject property"), in the Township of Tiny ("Township") in Simcoe County. The pit is operated by Dufferin Aggregates, which is a division of the Instrument Holder.

[2] Under the Instrument Holder's existing permit, it is authorized to take up to 6,873,120 litres of water per day for the washing of gravel and other onsite uses. The water is sourced from a source pond and a production well located on the subject property. Water taking has been authorized there since 2008 when another company, Cedarhurst Quarries and Crushing Ltd., owned the subject property. The Instrument Holder purchased the subject property in 2017.

[3] On January 13, 2021, the Director ("Director"), Ministry of the Environment, Conservation and Parks ("MECP") issued Permit to Take Water No. 6258-BRDJ2M ("Permit"). It subsequently was amended to remedy a typographical error on January 19, 2021. Water taking under the Permit is reduced to 6,605,280 litres per day. The water again is taken from an onsite source pond and a production well and is for the washing of gravel and other onsite uses.

[4] The Permit includes conditions setting out the amount of water that may be taken and other restrictions and requirements. These include the following:

a. Condition 1 contains terms on complying with the Permit, making the Permit available for inspection, its non-transferability, and reporting any address or ownership changes;

b. Condition 2 sets out general conditions and terms regarding the interpretation of the Permit, including clarification that the Instrument Holder must comply with all environmental and legal obligations and stipulations that the Permit does not limit legal claims or rights of action by any person;

c. Condition 3 sets out the parameters of the permitted water taking, including water sources, rates and amounts of water to be taken, and permissible water uses;

d. Condition 4 sets out a groundwater and pond water level monitoring programme, which requires the Instrument Holder to monitor and record groundwater levels at least every four hours, measure water levels in private wells, prepare and annually submit to the Director an annual monitoring report, and make the report available online for public review;

e. Condition 5 requires a response plan to be followed by the Instrument Holder if water takings result in complaints or significant impacts on surrounding waters. In those circumstances, it requires the Instrument Holder to replace water supplies or compensate water users for water losses, or to reduce water takings, if necessary; and,

f. Condition 6 states that the Director may amend the Permit or suspend or reduce water takings, if necessary.

[5] The Director received over 5,000 public comments regarding the Permit when the proposal was posted on the Ontario Environmental Registry.

The Applications for Leave to Appeal the Director's Decision to issue the Permit

[6] On January 27, 2021, the Federation of Tiny Township Shoreline Associations ("FOTTSA") filed an application for leave to appeal the Director's decision under s. 38 of the *Environmental Bill of Rights, 1993* ("*EBR*").

[7] On January 29, 2021, the Township filed an application for leave to appeal the Director's decision under the same section of the *EBR*.

1. Standing to Seek Leave to Appeal

[8] The test for standing to seek leave to appeal is set out in s. 38(1) of the *EBR*. It states:

> 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:
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> 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.

[9] This requires that:

a. the applicant is a person;

b. the applicant is a resident in Ontario;

c. the decision must be whether or not to implement a proposal for a Class I or II Instrument;

d. the applicant must have an interest in the decision; and,

e. another person must have a right of appeal under another Act.

[10] Neither the Director nor the Instrument Holder disputes that the Township satisfies these requirements and has standing to seek leave to appeal.

[11] Regarding FOTTSA's application for leave to appeal, both the Director and the Instrument Holder submit that FOTTSA does not have standing. In particular, they argue that FOTTSA does not have an interest in the decision. The Director submits that FOTTSA is an association of community groups concerned with shoreline issues in the Township. He submits that FOTTSA did not comment on the Permit proposal when it was posted on the Ontario Environmental Registry and the subject property is not located in the community of any of its member groups. He submits that FOTTSA's objectives are to protect shoreline properties, which the subject property is not. The Director argues that although at least one of FOTTSA's individual members submitted comments, those comments were not submitted on behalf of FOTTSA.

[12] The Instrument Holder supports the Director's position and submits that just because an individual member of FOTTSA may have an interest in the matter, this does not result in FOTTSA having an interest in it.

[13] FOTTSA submits that for an organization to have an interest in a decision, it only must be required to have members who are impacted by the decision. It submits that the protection of the Township's environment is one of the Association's objects and individual delegated members of FOTTSA who own properties with domestic wells in the vicinity of the subject property face potential adverse impacts arising from water taking under the Permit. FOTTSA also submits that the subject property is located in the Waverley Uplands, which is of concern to the Friends of the Waverley Uplands. It submits that the Friends of the Waverley Uplands is a delegated member association within FOTTSA.

[14] The Tribunal finds that both the Township and FOTTSA satisfy the requirements for standing under s. 38(1) of the *EBR*. They both are corporations based in Ontario, the Director's decision is to implement a proposal for a Class I instrument of which notice was given under s. 22 of the *EBR,* and the Instrument Holder has the right under the *Ontario Water Resources Act* ("*OWRA*") to appeal the Director's decision. The Tribunal finds that the Township submitted comments on the Permit and the Friends of the Waverley Uplands is a delegated member association within FOTTSA that

represents individuals who may be impacted by the Director's decision to issue the Permit. Also, the Tribunal notes that FOTTSA's objects include ensuring the protection of the Township's natural environment. Based on this, the Tribunal finds that the Township and FOTTSA each has an interest in the matter. In this regard, the Tribunal notes the Divisional Court's decision in *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal),* 2008 CanLII 30290 (ON SCDC) ("*Lafarge*"), at para. 38, in which the Court found that an interest in the decision does not need to be a direct interest.

2. The Leave Test

[15] Section 41 of the *EBR* sets out a reasonableness test and a significant environmental harm test. Each of these tests must be satisfied for an applicant to be granted leave to appeal. Section 41 states:

> 41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
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> (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
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> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

These two requirements will be analyzed and applied separately below.

A. The Reasonableness Test

[16] In Lafarge, at para. 46, the Divisional Court set out how the reasonableness test should be applied. It stated:

> … the test mandates reasonable persons to have regard to relevant law and policies and the factual record. If there has been a failure by the Directors to consider relevant law and policies, then, given the effect of the failure to do so, the Tribunal may conclude that there is good reason to believe that no reasonable person could have made the decision in issue.

[17] The Tribunal elaborated on the application of the test in *Corporation of the City of Guelph v. Director, Ministry of the Environment,* 2014 CarswellOnt 5932, [2014] O.E.R.T.D. No. 25 ("***Guelph"***), at paras. 26 and 29. The Tribunal stated:

> [26] First, the wording of the test is not "appears that there is good reason to believe that the decision-maker failed to consider relevant law and policies". Rather, it focuses on whether any reasonable person, having regard to relevant law and policies, could have made the decision. The apparent reasonableness of the decision is the ultimate focus of the test and not just the path used in reaching the decision (including what was considered). If the Legislature had intended that the test could only be met through a "failure to consider" argument, the section would have been drafted in a much more straightforward manner indicating so. Second, given the environmental protection and public participation purposes of the *EBR*, it would run contrary to those purposes to find that persons are prohibited from obtaining leave to appeal if a decision-maker considered relevant law and policies but nevertheless appeared to make a substantively unreasonable decision.
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> […]
>
> [29] … it is within the realm of possibility that a decision-maker could fail to consider a relevant policy but still make a substantively reasonable decision, especially where another policy that was considered provides similar direction to or more environmental protective direction than the one that was overlooked. As noted by the Court in *Lafarge*, the "effect" of the failure to consider a relevant policy is also important to consider in determining whether the test has been met.

[18] As set out in *Lafarge*, at para. 45, the standard of proof to be applied in leave to appeal applications is the establishment of a *prima facie* case. The Divisional Court stated:

> At the leave to appeal stage, the appropriate 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 question 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.

[19] FOTTSA submits that the Director's decision is unreasonable because the Director did not properly consider the MECP's Statement of Environmental Values ("SEV") as required under ss. 7 and 11 of the *EBR*, including:

a. the precautionary principle;
b. environmentally preventive and rehabilitative strategies;
c. cumulative effects;
d. sustainable development;
e. transparency, reporting, and engagement principles; and,
f. common law rights of FOTTSA members.

[20] The Township submits that the Director's decision is unreasonable because the MECP's SEV were not adequately considered with respect to the principles of:

a. the precautionary principle;
b. cumulative effects;
c. sustainable development;
d. transparency, reporting, and engagement principles; and,
e. the ecosystem approach.

The Township argues that the Director did not properly consider: the impacts of the Permit on drinking water of local residents; a recently initiated extensive hydrogeological study being prepared by Michael Powell, William Shotyk, John Cherry and others ("Groundwater Study"); the significance of the watershed; and the need for appropriate safeguards to ensure that the Permit will be revoked or that the water taking is ceased if the Groundwater Study determines that the Permit causes significant environmental risks.

[21] The Tribunal will consider each of these issues below.

1. The SEV

(a) The Precautionary Principle

[22] FOTTSA argues that the Director did not apply the precautionary principle when considering the Permit application. It submits that the MECP has failed to proactively address past complaints of off-site well interference and water losses caused by aggregate washing operations on the subject property. FOTTSA submits that its hydrogeologist, Wilf Ruland, for several years has studied the impacts of water taking at the subject property on groundwater and local well water quality and quantity, and has determined that the Permit will have adverse impacts. It submits that the Instrument Holder's aggregate washing system uses a closed loop system that is supposed to prevent water run-off from the site, but does not. FOTTSA submits that there are conflicting scientific findings regarding well siltation and flooding in the area and these issues are not resolved. The Instrument Holder's aggregate washing system includes several ponds, including a source pond and two settling ponds. FOTTSA submits that pond liners are needed as there is uncertainty whether an aquitard exists at the subject property and, if it does exist, whether it does not have one or more high-permeability "windows" allowing leakage into the aquifer. It submits that there is insufficient evidence to conclude that there is a continuous low-permeability aquitard surrounding the ponds as suggested by the Instrument Holder. FOTTSA submits that this uncertainty is highlighted by conflicting submissions in this regard from the Director and Instrument Holder on whether water that penetrates the bottom of the ponds infiltrates back into the aquifers. Referring to its hydrogeologist's findings, FOTTSA submits that the local hydrogeology surrounding the subject property is extremely complex, with layers of sand and gravel interspersed with layers of silt. It submits the wash water from operations on the subject property does not flow through silty units in the groundwater flow system but through coarse-grained sand and gravel units with pore sizes that allow fine silt and clay particles suspended in the wash water to flow through. Moreover, it submits that despite these issues with the system and uncertainty over why it is not functioning properly, the MECP's hydrologist, Vincent Bulman, states that the "precautionary principle does not need to be applied". It submits that in a technical

memorandum, dated July 2020, Mr. Bulman wrote that past water taking and aggregate washing has not had adverse effects on domestic water users and the application of the precautionary principle is not needed. FOTTSA submits that Mr. Bulman relies on the Permit's Condition 5.2 as a backstop, which requires the Instrument Holder to supply water to affected neighbouring well users if negative impacts occur. FOTTSA submits that Condition 5.2 is reactive in nature and is an inadequate substitute for the application of the precautionary principle. FOTTSA also submits that the Permit fails to apply the precautionary principles by neglecting to address water quality issues as required in the MECP's water taking regulations and failing to require water quality monitoring.

[23] The Township submits that it was not reasonable for the Director to issue the Permit due to local residents' concerns regarding impacts on local drinking water. It submits that further scientific studies are required to better understand the groundwater systems in the area and determine the impacts of water taking under the Permit. It submits that Dr. Shotyk has found that the general area of the subject property has some of world's cleanest natural waters and that the Groundwater Study will investigate the ages, sources, reservoir capacity, and processes responsible for the groundwater quality in the area. The Township submits that the Groundwater Study will identify how current and future anthropogenic forcing might impact these water resources. It submits that the Permit should include conditions to guarantee its revocation if the Groundwater Study determines that the taking of water has serious impacts on drinking water, the watershed, or the environment. It submits that the large amount of water permitted to be taken over a long ten-year period of time is inappropriate and the amount should have been limited given the Instrument Holder's position that water loss is minimal.

[24] The Director submits that the precautionary principle does not require the refusal of a permit where risks of environmental harm exist, but rather requires the Director to take measures to prevent harm where there is uncertainty. He submits that he took a science-based approach, examined scientific data, applied hydrogeological and hydrological principles and found there is no threat of serious harm from the Permit.

The Director submits that there is a high level of certainty that there is unlikely to be any adverse impacts and he argues that his decision to issue the Permit is consistent with the precautionary principle. He submits that monitoring and reporting are sufficient to identify potential impacts. He also submits that because the Groundwater Study has not been completed does not mean there is scientific uncertainty. He submits that there is always a degree of uncertainty in science; but, in this case, there is sufficient information about the geology and water flow dynamics in the area, which he relied on in making his decision. He submits that water is not lost from the Instrument Holder's production well or source pond as a result of washing aggregate and that the only water that is consumed is that which is evaporated or adheres to aggregate when it is shipped off-site. The Director submits that water is taken from the source pond on the subject property and sent to the wash plant where aggregate is washed and then water and suspended fines are sent to two settling ponds located in series where the fines can settle to the bottom of the ponds. He submits that clarified water from the settling ponds then returns to the source pond and the process starts over again and the water is recycled and recounted leading to the large amount of water being taken. He argues that water infiltrates through the bottom of the settling ponds and through the settled particles and layers of clay, silt, sand and other geological layers before returning to the aquifer. He submits that water quality of water is not a factor when considering proposed water takings and was not relevant to the review of the Instrument Holder's application. The Director submits that he may amend or revoke the Permit if new information emerges and it is deemed necessary to make changes.

[25] The Instrument Holder submits that the fact that FOTTSA and the Township do not agree with the Instrument Holder's scientific findings is not evidence of failure to apply the precautionary principle. It submits that domestic well studies have been undertaken to investigate well water concerns with 78 domestic wells surveyed in 2018 alone. It submits that local well siltation issues have not been attributed in these studies to water taking at the subject property. It submits that the Township had the Instrument Holder's findings on well siltation peer reviewed and the peer reviewer agreed that the operations at the subject property were not causing silt to occur in domestic wells. The Instrument Holder submits that the Permit's monitoring programme

ensures that future issues can be identified and remedied and the programme is more robust than previous ones used at the subject property. It submits that the Permit requires continuous monitoring measures and notification requirements to ensure that the MECP is alerted if significant impacts occur.

Findings on the Precautionary Principle

[26] The precautionary principle requires that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation. In applying of the precautionary principle, the Supreme Court of Canada stated in *Castonguay Blasting Ltd. v. Ontario (Environment),* [2013] 3 S.C.R. 323, at para 20:

> … since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.

[27] The MECP's SEV states that the MECP is to use "a precautionary, science-based approach in its decision-making to protect human health and the environment". In the present case, there is scientific uncertainty regarding the impacts of the water taking authorized under the Permit on local groundwater quality and quantity. Although the Instrument Holder has conducted studies that have found no impacts on local well water, the reviews undertaken by FOTTSA's hydrogeologist have resulted in opposing conclusions. Concern regarding groundwater quality in the general area is also raised by the Township, which highlights the work of Dr. Shotyk and the undertaking of the Groundwater Study which will focus on these issues in the general area of the subject property. This uncertainty is highlighted by the amount of water used in the Instrument Holder's closed loop system. The Director and Instrument Holder argue that the aggregate washing system at the subject property is a closed loop system with little run-off into the natural groundwater system. They argue that it is not possible for silt-laden water to travel from the subject property to neighbouring wells as the geology of the area contains and prevents such water movements. As a result, the Director's hydrogeologist, Mr. Bulman, opines that the use of precaution is not necessary.

FOTTSA contests this. Its hydrogeologist, Mr. Ruland, opines that based on his numerous reviews using similar data to that used by Mr. Bulman, silt-laden water can and does travel through the ground in the area and affects the well water quality and quantity of neighbouring residents. Without the opportunity of testing the evidence at a hearing, the Tribunal finds that there is scientific uncertainty regarding the environmental impacts of the Permit.

[28] As addressed in more detail below in the section on the environmental harm test, the Tribunal finds that given the uniqueness of the water resources in the general area of the subject property, the history of silt infiltration and flooding of neighbouring domestic wells, and the terms and conditions in the Permit, it appears that there is a threat of serious environmental impacts from water takings under the Permit.

[29] The Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the MECP's SEV on the precautionary principle, could have made the decision to issue the Permit.

(b) Environmentally Preventive and Rehabilitative Strategies

[30] FOTTSA submits that the MECP's SEV requires the Director to act preventively, minimize creating pollutants, and rehabilitate the environment where there is significant environmental harm. It submits that these principles were not considered by the Director. It submits that water taking under the Permit will result in pollution in the form of turbidity in neighbouring well waters, which can be a source of disease and can interfere with well water disinfection processes. It submits that turbid water from the Instrument Holder's aggregate washing operations leaks into local groundwater from its ponds, which would have been addressed if the Director had applied environmentally preventive and rehabilitative strategies. FOTTSA argues that ponds at the subject property should be impermeably lined to ensure that the aggregate washing operation truly is a closed-loop system. It submits that there is insufficient baseline data regarding well conditions prior to the commencement of the water takings at the subject property making it impossible to identify changes in water quality and quantity caused

by the water taking and rendering ineffective the Permit's Condition 5.2 requiring the replacement of negatively impacted water supplies. It submits that the Permit's monitoring and reporting requirements are reactive and not preventive in nature.

[31] The Township submits that it was unreasonable for the Director to not limit the use of water under the Permit to specific activities given that onsite uses, such as washing heavy machinery and trucks and dust suppression, may cause contaminants to be released into the environment. This omission arguably demonstrates that the Director did not take a preventive approach when issuing the Permit.

[32] The Director submits that water use on the subject property is subject to requirements under the *Environmental Protection Act*, which prohibit the discharge of harmful contaminated water into the environment. He submits that water uses on the subject property are also subject to requirements under the *OWRA* prohibiting the discharge of materials that may impair the quality of water. He submits that the Instrument Holder will need to comply with these requirements and also may need to obtain an Environmental Compliance Approval to ensure that waste water is properly managed. The Director submits that the Permit does not cause pollution or harm the environment. He submits that there are minimal water losses in the system. He submits that water is only returned to the aquifer in a similar manner as rainwater and snow melt leaking through the ground. He submits that the Permit’s conditions require the Instrument Holder to continuously monitor site conditions and report and respond to complaints. The Director submits that the Instrument Holder also must restore any lost water supplies caused by water takings under the Permit to neighbouring well owners.

[33] The Instrument Holder submits that FOTTSA and the Township have failed to provide supporting evidence on preventive and rehabilitative strategies and that this ground should be dismissed.

Findings on Environmentally Preventive and Rehabilitative Strategies

[34] The MECP's SEV states that the MECP's "environmental protection strategy will place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment". It also states that "in the event that significant environmental harm is caused, the Ministry will work to ensure that the environment is rehabilitated to the extent feasible". Preventive strategies differ from the precautionary approach in that they require action to be taken to protect the environment at an early stage to prevent harm, while the precautionary principle requires that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing the above-noted preventive measures.

[35] Regarding the conditions in the Permit, the Tribunal finds that the monitoring, notification and remediation provisions in the Permit's Conditions are generally reactive in nature, particularly as they only require the Instrument Holder to take steps after complaints or adverse impacts have occurred. They help to ensure that action is promptly taken once harm is detected, but they do not prevent harm in the first place. FOTTSA argues that pond liners and a shorter duration of the Permit are preventive measures that should have been required by the Director. In his affidavit, Mr. Bulman addresses rehabilitation of affected water supplies, but does not address rehabilitation of the environment. The Tribunal notes that there also are no rehabilitative measures incorporated in the Permit's terms and conditions to restore the integrity of the groundwater system, if possible. Given the nature of the water taking at the subject property, the ten-year duration of the permit, the harm alleged by FOTTSA and the Township, and the lack of preventive and rehabilitative conditions incorporated in the Permit, the Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the MECP's SEV on environmentally preventive and rehabilitative strategies, could have made the decision to issue the Permit.

(c) Cumulative Effects

[36] FOTTSA argues that the MECP's SEV requires the Director to take into account cumulative effects when making environmentally significant decisions. In addition, it submits that Principle No. 4 of the MECP's Permit to Take Water Manual, dated April 2005 ("Permit Manual"), states that the MECP must consider the cumulative impacts of water takings, take into account relevant information on watershed/aquifer conditions, and may initiate a watershed scale or aquifer scale assessment beyond a local-scale impact assessment. It submits the Instrument Holder plans to expand its aggregate operations and the impacts of the proposed expansion were not considered by the Director. FOTTSA submits that a local moratorium on aggregate resource approvals should have been required until a hydrogeological study of the Waverley Uplands is completed to address the cumulative potential impacts of proposed aggregate operations on the groundwater in the area. It submits that a ten-year permit should not have been issued given that the lack of data regarding the ability of local aquifers to sustain the effects of the Permit and nearby proposed developments.

[37] The Township submits that no reasonable person could have issued the Permit given that the Groundwater Study is ongoing and there is insufficient information on groundwater systems and watershed impacts from water taking at the subject property. It submits that no reasonable person would have issued the Permit for longer than five years with the knowledge that the Groundwater Study is being undertaken.

[38] The Director submits that a decision to issue a permit is reasonable where the Director has sufficient information to make the decision. He submits that it is reasonable to issue a permit while awaiting the results of studies if the Director currently has sufficiently reliable information to find that the water taking would have only minor environmental effects. He submits that the groundwater in the vicinity of the subject property has been well-studied and the Director had substantial information upon which to determine that the proposed water taking is unlikely to cause environmental harm or to interfere with nearby water users. He submits that this includes twelve years of monitoring data, pumping tests, well surveys and hydrogeological investigations, years

of inspection reports, correspondence and technical reviews, and scientific studies on the environmental conditions in the area. The Director submits that it is unclear whether the Groundwater Study will be definitive or will draw reliable conclusions regarding the impacts of water taking at the subject property. He submits that the scope and objectives are broad and its methodology and timeframe are unknown. The Director states that he was not aware of the Groundwater Study when the Permit was issued and submits that Mr. Bulman considers it highly unlikely that the Study will provide new information on whether the Permit will cause significant harm to the environment. The Director submits that if the Groundwater Study indicates that water takings under the Permit have adverse environmental effects, he can respond by amending or revoking the Permit. He submits that ten years is the standard duration for a permit and reiterates that its conditions allow him to review the Permit on an ongoing basis and amend or revoke it, if necessary. The Director further submits that the Permit does not approve an extension of aggregate extraction beyond the subject property and permit applications for new aggregate operations will need to undergo their own technical reviews, including cumulative impacts associated with the Permit. He submits that Mr. Bulman assessed cumulative impacts and the Director considered water source protection studies in the region, local water level data, and other local water uses, such as permits to take water and wells. He submits that Mr. Bulman concluded that water takings under the Permit would have negligible impacts on the watershed and the local aquifer.

[39] The Instrument Holder submits that existing studies of the Waverley Uplands do not identify any influence caused by water taking at the subject property. It submits that the main focus of the Groundwater Study is several kilometres from the subject property in a different hydrogeologic setting and with a different groundwater geochemical makeup. The Instrument Holder argues that the possible future approval of proposed aggregate developments in the area is beyond the scope of the Permit.

Findings on Cumulative Effects

[40] The MECP's SEV states that the MECP must consider "the cumulative effects on the environment, the interdependence of air, land, water and living organisms, and the relationships among the environment, the economy and society". Cumulative effects are defined in the Canadian Environmental Assessment Agency, *Cumulative Effects Assessment Practitioners Guide* (1999), at 2.1, as the "changes to the environment that are caused by an action in combination with other past, present and future human actions". The assessment of cumulative effects is intended to examine the effects of multiple human activities on the environment. It is to ensure that assessments of environmental harm do not focus solely on the impacts of one project without considering the impacts of other human activities interacting and affecting the environment. This requires an assessment of all sources of harm in an area and consideration of the interdependence of air, land, water and living organisms. In the present case, although he did consult source protection studies, Mr. Bulman appears to have focused on the effects of water taking under the Permit on multiple receptors rather than on the cumulative or combined effects of human activities or projects in the area. However, this may be because, although there is a planned expansion of aggregate operations on lands adjacent to the subject property, there is no evidence before the Tribunal regarding other existing major water users or sources of environmental harm in the area. Although there are residential water users nearby, there is no evidence that these are major users. There is no evidence of other active permits to take water in the immediate vicinity of the subject property. Given the absence of evidence regarding other major water users or sources of harm in the area regarding which cumulative effects should be assessed, the Tribunal finds that FOTTSA and the Township have not provided good reason to believe that the Director's decision to grant the Permit is unreasonable in this regard. The Tribunal notes that if an application is made for a further permit to take water in the area, the cumulative effects of that proposal and the water takings under the Permit would be required and the Permit may need to be amended.

(d) Sustainable Development Principles

[41] FOTTSA argues the MECP's SEV requires the Director to consider the effects of his or her decisions on current and future generations, consistent with sustainable development principles. It submits that this requires the Director to consider water conservation as set out in the Permit Manual. In particular, it submits that the Permit Manual, at page 27, encourages water takers to take "reasonable and practical measures to conserve water and to maximize its availability for existing or potential uses to sustain ecosystem integrity." FOTTSA that, in the present case, the Instrument Holder's aggregate washing operations result in water losses of 50 percent or more. It submits that the Instrument Holder's aggregate washing operation is not a closed-loop system and wash water flows through high-permeability sand and gravel aquifer units resulting in high-volume water losses. It submits that this is not sustainable and does not address the needs of future generations.

[42] The Township submits that the Permit allows significant quantities of drinking water to wash gravel and does not respect the principle of sustainable development. It submits that aggregate should not be held in higher regard than drinking water. The Township further submits that, given the pristine quality of groundwater in the general area, every effort should be made to protect it for future generations. It submits that no reasonable person could have issued the Permit after consideration of the significance of the watershed and the purity of its groundwater.

[43] The Director argues that any leaked water is returned to the aquifers and recharges them. He submits that this is not a consumptive use and it is consistent with sustainable development principles. He submits that most of the water is recycled through the Instrument Holder's closed loop system. He argues that the Permit requires on- and off-site well monitoring, the submission of an annual monitoring report, and reporting of complaints. He submits that this allows for the assessment of the sustainability of operations over time. The Director submits that neither FOTTSA nor the Township provided evidence or scientific theory indicating that water takings will deplete water volumes or affect water quality or will compromise the ability of future

generations to meet their own needs. He argues that the water is constantly reused, filtered, and returned to the aquifer through natural processes. He further submits that the Township has not provided a basis for its argument that the Director's decision holds aggregate in "higher regard" than water or contravenes the MECP's SEV.

[44] The Instrument Holder submits that FOTTSA's arguments regarding the Instrument Holder's aggregate washing operations are not supported by hydrogeological data. It submits that water taking under the Permit does not have significant impacts on local groundwater and that it is sustainable.

Findings on Sustainable Development Principles

[45] The MECP's SEV requires the Director to consider the effects of his or her decisions on current and future generations, consistent with sustainable development principles. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. A fundamental aspect of this is the balancing of economic development, social development and environmental protection while considering the needs of current and future generations. Resource conservation is an important tool for ensuring that the needs of future generations are addressed and environmental integrity is maintained.

[46] The purposes of the *EBR* include the protection and conservation of natural resources, the encouragement of the wise management of natural resources, and the identification, protection and conservation of ecologically sensitive areas or processes. The Permit Manual requires measures to conserve water and to maximize its availability for existing or potential uses in order to sustain ecosystem integrity. Sustaining environmental integrity necessitates the maintenance of ecological features, particularly those that may be of natural or scientific interest and important for natural heritage, protection, appreciation, scientific study, or education. In the present case, given the alleged pristine quality of groundwater in the general area and the scientific and educational interest expressed in it, the differing scientific opinions regarding water consumption at the subject property, and the terms and conditions in the Permit, the

Tribunal finds that precautionary water conservation and protection measures have not been applied and the effects of the Director's decision on current and future generations have not been considered in a manner that is consistent with the principles of sustainable development. Based on the evidence and submissions before it, the Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the MECP's SEV on sustainable development principles, could have made the decision to issue the Permit.

(e) Transparency, Reporting, and Engagement Principles

[47] FOTTSA submits that the MECP's SEV requires the Director "to encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making". FOTTSA argues that the Instrument Holder did not prepare annual monitoring reports for 2018 and 2019, which would help identify current off-site impacts. It submits that these data are relevant and the Director and Instrument Holder have refused to produce them. It argues that applicants for leave to appeal should expect to be provided relevant documents and information upon which the Director relied in making a decision.

[48] The Township argues that the Director did not consider the principle of timely reporting. It argues that Permit's conditions only require annual reporting and that is not sufficient to prevent significant environmental harm.

[49] The Director submits that there is no basis for an adverse inference to be drawn based on monitoring data not being published. He submits that the publication of annual reports was not required under the previous permit and failures or gaps in previous permits are not relevant to whether the Director considered the SEV. The Director argues that these SEV requirements are satisfied through the Permit's requirements for an annual report, the posting of the annual report online, well monitoring, notification of complaints and environmental issues, and engagement with a community liaison committee to ensure transparency, monitoring, reporting, and community engagement.

[50] The Instrument Holder submits that it was not previously required to prepare annual monitoring reports and there is no basis for requiring it to now prepare them regarding past water takings. It submits that all relevant information was presented to the community liaison committee, posted online, or provided to FOTTSA.

Findings on Transparency, Reporting, and Engagement Principles

[51] The MECP's SEV states that the MECP "will encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making". The Tribunal finds that although the disclosure of baseline data is fundamental to identification of water taking impacts, there is no policy requirement in the MECP's SEV that past data from previous permits must be collected and annual reports on historic water takings must be prepared in order to satisfy transparency, reporting and engagement principles. The SEV requirements on transparency, timely reporting and enhanced engagement do not have a retroactive reach requiring new obligations or responsibilities to be added to those in previous permits. Although it would assist the public in having data and reports prepared regarding past water takings, if those data and reports were not required under previous permits or for the permit application, the MECP's SEV does not require this. Condition 4 of the Permit addresses the preparation and online publication of annual monitoring reports and engagement with a community liaison committee. Based on the evidence before it, the Tribunal finds that FOTTSA and the Township have failed to demonstrate on a *prima facie* basis that it appears that there is good reason to believe that no reasonable person, having regard to the transparency, reporting, and engagement principles in the MECP's SEV, could have made the decision to issue the Permit.

(f) Ecosystem Approach

[52] The Township submits that the Director did not apply the ecosystem approach.

[53] The Director submits that the MECP took an ecosystem approach consistent with the SEV by considering possible impacts of the proposed water taking on the

ecosystem, local water users, onsite natural pond and downgradient wetlands. He submits that he considered hydrological, hydrogeological, cumulative impact, and other studies and monitoring data demonstrating that the cycled nature of the water taking has not impacted neighbouring uses in any significant long-term manner. The Director submits that he also ensured that the Permit includes safeguards in its Condition 5 to ensure that the needs of neighbouring water users, the natural functions of the ecosystem, and any cumulative effects are considered on an ongoing basis.

Findings on the Ecosystem Approach

[54] The MECP's SEV states that the MECP "adopts an ecosystem approach to environmental protection and resource management". It states that "[t]his approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them". It involves the integrated management of land, water and living resources to promote conservation and sustainable use in an equitable way. Principle No. 1 of the Permit Manual addresses the ecosystem approach by stating that "[t]he Ministry will use an ecosystem approach that considers both water takers' reasonable needs for water and the natural functions of the ecosystem".

[55] In the present case, the evidence before the Tribunal is that the Director considered hydrological, hydrogeological, and cumulative impact studies as well as monitoring data in making his decision and included provisions in the Permit to address the needs of other water users and the natural environment. The Township did not make submissions or demonstrate how the Director failed to consider air, land, water and living organisms, including humans, and the interactions among them. Based on the evidence before it, the Tribunal finds that the Township has failed to demonstrate on a *prima facie* basis that it appears that there is good reason to believe that no reasonable person, having regard to the ecosystem approach, could have made the decision to issue the Permit.

2. Common Law Rights

[56] FOTTSA submits that neighbouring domestic well users are experiencing well-siltation and flooding issues due to the Instrument Holder's water takings and that the Permit will increase these problems. FOTTSA submits that common law causes of action, including negligence, private nuisance, riparian rights, and strict liability, may be available to these neighbouring well users. It submits that the Director failed to consider this potential interference with local residents' common law rights and interests. FOTTSA submits that the *EBR* does not exclude the common law as relevant law to be considered in a leave application. It submits that regulatory approvals, such as the Permit, can negate common law rights, diminish protection of facilities from liability, influence the standard of conduct considered to be negligent, or defer to regulatory officials' assessments of environmental dangers. It submits that even if common law rights are not negated, the Director must include conditions to protect against unreasonable interference with common law rights. FOTTSA argues that the Director has not demonstrated the extent that he considered how local water well owners' common law rights could be adversely impacted.

[57] The Director submits that he considered the effects of the Permit on the environment and other water users and included conditions to limit and control the amount of water taken, resolve water quantity interference issues, implement a groundwater and pond water monitoring programme, and require compliance with the Permit and any other applicable legal requirements. In this regard, the Director submits that Condition 2.4 provides that the Permit shall not be construed as limiting the legal claims or rights of action of any person. The Director argues that FOTTSA has failed to establish an evidentiary foundation for how the Permit could have the potential to have adverse effects on the common law rights and interests of its members or how harm from the Permit would be potentially actionable as torts. He submits that it is not sufficient to state that rights might be diminished and not specify what right or how.

[58] The Instrument Holder supports the Director's arguments and submits that FOTTSA has failed to establish an evidentiary foundation for this ground for leave.

Moreover, it submits that as an umbrella organization of shoreline associations, FOTTSA does not have common law rights or interests that would be affected. It submits that the Director considered potential off-site impacts and found that the proposed water taking would not impact local wells and would unlikely adversely impact groundwater quality. It submits that the Director imposed protective conditions in the Permit and FOTTSA's claims in this regard are unsubstantiated and too general in nature.

Findings on Common Law Rights

[59] The Permit's Condition 2.4 preserves the common law rights of action of neighbouring landowners. Its states:

> 2.4 The issuance of, and compliance with this Permit shall not be construed as precluding or limiting any legal claims or rights of action that any person, including the Crown in right of Ontario or any agency thereof, has or may have against the Permit Holder, its officers, employees, agents, and contractors.

The Tribunal finds that Condition 2.4 comprehensively addresses the issue. FOTTSA did not provide submissions demonstrating how this Condition fails to protect the common law rights of FOTTSA members. FOTTSA submits that if common law rights are not negated by the Permit or the *OWRA*, the Director still should have imposed conditions to protect against unreasonable interference with these rights, but it does not demonstrate how the Director specifically failed to do so. Based on this, the Tribunal finds that FOTTSA has failed to demonstrate on a *prima facie* basis that there is good reason to believe that no reasonable person, having regard to the common law rights of FOTTSA members, could have made the decision to issue the Permit.

Conclusions on the Reasonableness Test

[60] Based on the evidence and submissions before it, the Tribunal finds that it appears that there is good reason to believe that no reasonable person, having regard to the MECP's SEV, could have made the decision to approve the Permit.

B. The Significant Harm Test

[61] Section 41(b) of the *EBR* states:

> 41 (b) Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> […]
>
> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

Under this test, applicants for leave must demonstrate that it appears that significant harm to the environment could result.

Evidence and Submissions on the Significant Harm Test

[62] FOTTSA argues that the Permit could result in significant environmental harm based on the alleged facts that there has been environmental harm caused by past water takings at the subject property, which would likely continue, the Permit application was categorized as a Category 1 application, the Permit is a Class I Instrument under the *EBR*, and there are deficiencies in the Permit's terms and conditions. In regard to past water takings, FOTTSA submits that the Permit could cause significant environmental harm because past operations at the subject property have created conditions that risk potentially significant harm, including leakage of silt and clay-laden wash water, well flooding, impacts on neighbouring well users, the absence of a clear hydrogeological conceptual model for the area, leakage of wash water into groundwater, and the lack of pond liners. It submits that these are pre-existing "thin-skulled" site conditions that will be exacerbated by the Permit.

[63] It submits that water loss from evaporation or adherence to aggregate from aggregate washing has been up to 50 percent of the input water and exceeds the industry standard of ten percent. It submits that this has the potential to cause off-site impacts in areas downgradient areas from the subject property. It also submits that in the absence of pond liners, water leakage into the underlying aquifer will continue and

diminish water quality in the aquifer. It submits that groundwater and off-site water use protection is a condition precedent to issuing a permit under the *OWRA* and Ontario Regulation 387/04 and it is unreasonable for the Director not to require pond liners as a condition in the Permit to avoid significant environmental harm. It submits that Mr. Ruland has written several reports on these issues and found significant potential linkages between wash water losses at the subject property and well interference impacts.

[64] FOTTSA submits that the Instrument Holder miscategorized its permit renewal application by classifying it as a Category 1 application, and, along with the Instrument Holder's submission of a supporting study, this is indicative of the potential for significant environmental harm arising from activities under the Permit. It also submits that the Permit could cause significant harm because it is prescribed by the *EBR* regulations as a Class I instrument with the potential to have a significant effect on the environment.

[65] Regarding the Permit's terms and conditions, FOTTSA argues that they are inadequate and do not remove the potential for significant environmental harm. It submits that there is no condition requiring the installation of pond liners to eliminate water leakage into the groundwater system. It submits that there also needs to be provisions to eliminate the potential for flooding and siltation of local water wells. It submits that the ten-year term is too long and that a one-year term during which monitoring could determine the effectiveness of the conditions would be appropriate. It also submits that the Permit should be conditional on the undertaking of a cumulative effects study of the groundwater effects of proposed nearby aggregate operations. FOTTSA questions the effectiveness of the conditions and their ability to ensure the identification, evaluation, prevention, mitigation, or monitoring of the potential for significant environmental harm. It submits that the Permit's conditions do not address site-specific aspects of the subject property and if there is minimal leakage, as argued by the Director and Instrument Holder, the amount of water being taken under the Permit is much more than what is needed.

[66] The Township reiterates that the subject property is within Waverley Uplands watershed containing some of the world's cleanest water and it should be provided protection from exploitation. Given their nature, it submits that any harm to these resources would be significant.

[67] The Director submits that aggregate washing at the subject property is not linked to siltation or flooding of local wells, there is scientific consensus that silt plumes cannot travel from the subject property through a silt and sand aquifer to the neighbouring wells, and it is unnecessary to install pond liners. The Director submits that there is no evidence that aggregate washing at the subject property is linked to well owner complaints regarding flooding and siltation and that FOTTSA's hydrogeologist's opinions in this regard are unsubstantiated. He submits that the Instrument Holder's hydrogeological studies demonstrate that water taking at the subject property is not the cause of environmental harm. The Director submits that no negative inference should be drawn from the categorization of the application, or the Instrument Holder's submission of an assessment of the subject property, which was included in order to comply with a condition in the previous permit and not due to environmental risk related to the water taking at the subject property. Regarding the classification of the Permit as an environmentally significant Class I Instrument, the Director submits that FOTTSA's argument would lead to every Class I and II proposal satisfying the significant environmental harm test and make it subject to a lower standard of proof than a *prima facie* case.

[68] The Director submits that the ten-year length of the Permit is appropriate as there have been no environmental issues caused by water takings at the subject property and there is no reason to require a shorter term. He submits that the Permit requires the Instrument Holder to provide an annual report after one year of operations and the MECP can assess monitoring data at that time and decide if amendments or the revocation of the Permit is needed. The Director submits that the Permit's monitoring and reporting requirements are more stringent and thorough than those in previous permits for water taking at the subject property, which themselves have adequately protected the environment. The Director submits that the Permit's

conditions on remediation and notification act as a backstop that ensure that any environmental problems are mitigated and environmental harm is avoided.

[69] Regarding potential alleged harm to the Waverley Uplands watershed, the Director submits that the Township has not provided evidence that water taking under the Permit could harm this watershed. The Director submits that the quality of water is not a factor when considering proposed water takings and there is no prohibition on taking high quality water for purposes other than drinking water. He submits that there is no evidence or reason that the act of taking high quality water could cause harm to the environment. He submits that the Township's argument in this respect is entirely speculative and is not sufficient to establish a *prima facie* case showing the potential for significant harm to the environment. He further submits that any water that may end up in the deeper confined aquifers of Waverley Uplands watershed will not contain any substances that might contaminate the water. He reiterates that there is no risk that the quantity of water in this watershed will be impacted in any significant way because the closed-loop nature of the aggregate washing process ensures that any water losses are minimal and environmentally insignificant.

[70] The Instrument Holder submits that its studies have found that operations at the subject property are not causing siltation problems at local wells, the complaints of local residents have been resolved based on the these studies, hydrogeological modelling in relation to previous permits is not relevant, and there is no evidence supporting the need for installation of pond liners because of the low permeability aquitard below the ponds, which prevents significant leakage. It submits that flooding near the subject property in 2009 predates the Instrument Holder's ownership of the subject property and is not relevant to the Permit. It argues that the Township's submissions that the impacts of water taking have not been adequately assessed and no contingency plan has been created are not supported by evidence.

Analysis and Findings on the Significant Harm Test

[71] FOTTSA has provided evidence of the contamination and flooding of nearby domestic wells, which it alleges, backed by hydrogeological reviews completed by Mr. Ruland, have been caused by water takings at the subject property. The Township has made submissions regarding the quality of groundwater in the general area of the subject property and the undertaking of the Groundwater Study to further investigate it. Given the allegedly pristine nature of these waters, the Township's view is that their contamination would constitute significant environmental harm.

[72] The issue to be determined by the Tribunal under the environmental harm test is whether that it appears that the Director's decision to issue the Permit could result in significant harm to the environment. In the present case, there is substantial opposing scientific opinion on this issue. As noted in *Guelph*, at para. 109, where there are competing expert opinions that have not been fully tested, the test is met if there is sufficient information for the Tribunal to conclude that significant harm could result even if it is not clear that it will. Given the uniqueness of the water resources in the general area of the subject property, the history of silt infiltration and flooding of neighbouring domestic wells, and the opposing opinions regarding the effectiveness of the Permit's conditions in addressing these issues, the Tribunal finds that it appears that the Director's decision to issue the Permit could result in significant harm to the environment.

CONCLUSIONS

[73] The Tribunal finds that FOTTSA and the Township have satisfied the tests for standing and leave to appeal under ss. 38 and 41 of the *EBR*.

DECISION

[74] The Tribunal grants leave to appeal the Director's decision in its entirety to FOTTSA and the Township.

Applications for Leave to Appeal Granted

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER