ERT File No. 12-003

REPLY OF THE APPLICANT

A. OVERVIEW

1. This is the reply of the Concerned Citizens Committee of Tyendinaga and Environs ("the Applicant") to the responses filed by the Director and Waste Management Corporation of Canada ("WMCC") in relation to the application for leave to appeal seven Conditions contained within Environmental Compliance Approval ("ECA") No. A371203.

2. In summary, the Applicant submits that the Director and WMCC have not presented the Environmental Review Tribunal ("ERT") with any cogent evidence or persuasive reasons for refusing to grant the Applicant leave to appeal the impugned Conditions pursuant to sections 38 to 48 of the *Environmental Bill of Rights* ("EBR")

3. On the basis of the evidence and argument contained in the application for leave to appeal, and on the basis of the documents and admissions contained within the responses of the Director and WMCC, the Applicant's position remains that it appears that: (a) there is good reason to believe that the Director's decision was unreasonable, having regard for the relevant law and policies developed to guide such decisions; and (b) the Director's decision could result in significant environmental harm. Accordingly, the Applicant should be granted leave to appeal the impugned Conditions.

4. The Applicant's specific replies to the Director and WMCC are set out below. The Applicant notes that the respondents have not challenged the Applicant's standing to seek leave to appeal in this case, and have not contested the Applicant's submission that the ECA is a prescribed instrument for which leave to appeal may be sought under the EBR. It further appears that the respondents have not raised any serious objections to the Applicant's request that the automatic stay under section 42 of the EBR should be lifted in the event that leave to appeal is granted. Accordingly, the Applicant's submissions below will focus on the main issues raised by the respondents in opposition to the leave application.

B. REPLY TO THE DIRECTOR'S SUBMISSIONS

(i) The Leave Application is not "Premature"

5. In his submissions, the Director argues that the leave application is "premature" because the Environmental Monitoring Plan ("EMP") is only being followed on an interim basis (paragraphs 3 and 4). Significantly, the Director readily concedes that the EMP is "inadequate", "insufficient" and "based on inadequate technical information" (paragraphs 51, 52, and 95). However, the Director contends that the Applicant does not "understand" or "recognize" that there will be opportunities for further public comment on the forthcoming "revised" EMP, which the Director claims will trigger "another

amendment to the ECA and another posting on the EBR Registry, consistent with past practice" (paragraphs 4, 33, 35, 50, 52, and 82).

6. In reply, the Applicant submits that the Director's revisionist interpretation of Condition 8.5 should be firmly rejected by the ERT for several reasons. First, the Director's submissions correctly note that the Applicant had urged him not to accept the EMP as submitted by WMCC (paragraph 4). However, by incorporating the EMP *holus bolus* into Condition 8.5, and by including the EMP in the Schedule A list of supporting documents in the ECA, the Director has done precisely what the Applicant requested him not to do in this case. Accordingly, the Director is incorrect when he suggests that he "concurred" with, and acted upon, the Applicant's views on what should happen in relation to the EMP (paragraph 4)

7. Second, the Director's decision constitutes *de facto* acceptance of the deficient EMP, and when crafting Condition 8.5, the Director inexplicably declined to impose any further conditions which strengthen or improve EMP requirements, despite the detailed recommendations made by the Applicant and its hydrogeological expert Wilf Ruland in relation to EMP content (i.e. monitoring parameters, well locations, contingency measures, etc.). In the Applicant's view, these kinds of amendments could have been easily incorporated into Condition 8.5 to improve the EMP, and clearly should have been imposed in the ECA if the Director was otherwise content to allow the admittedly deficient EMP to be implemented on an indefinite "interim" basis.

8. Third, while the Director places great weight on the fact that the deficient EMP will be implemented only on an "interim" basis, there is no certainty in Condition 8.5 as to when the "addendum report" (or revised EMP) will be prepared, submitted, reviewed and approved. Thus, the Applicant remains highly concerned that the inadequate EMP will continue to be implemented for an indeterminate amount of time, and that the EMP will continue to provide an insufficient basis for ensuring that adverse environmental effects are properly identified, assessed and mitigated. Moreover, given the considerable uncertainty over the timing of the "revised" or "final" EMP, the Applicant submits that it was unreasonable for the Director to defer much-needed improvements to the EMP to the next "iteration" of the EMP, whenever that occurs.

9. Fourth, the Director suggests that it takes time to develop an appropriate EMP, and that the results of additional testing at the site are required before the next version of the EMP can be produced (paragraph 5). In reply, the Applicant agrees that the site is hydrogeologically complex (see below), but this does not adequately explain why a proper EMP is not already in place, especially in light of the Ministry of the Environment ("MOE") and WMCC claims that the landfill has been "extensively" studied for decades. More recently, the Applicant and other stakeholders have been clamoring since 2006 for effective post-closure requirements at the Richmond Landfill, including a comprehensive EMP. However, it appears that development of the EMP has proceeded at glacial speed, and despite Condition 8.5 (and despite the so-called "action plan" to undertake more testing at the site), it remains unknown in 2012 as to when – or if – an appropriate EMP will finally be in place for the Richmond Landfill.

10. Fifth, the Director strenuously argues that there will be another "opportunity for public comment as the revised EMP must be submitted for approval, triggering another amendment to the ECA, and another posting on the EBR Registry" (paragraph 4). In its submissions, WMCC similarly claims that it is "implicit" in the impugned Conditions that the Applicant will "continue to have the opportunity to be consulted" (paragraph 91). In reply, the Applicant submits that this argument is not supported by the actual wording of Condition 8.5, the other impugned Conditions, or the EBR itself. For example, Condition 8.5 makes no express provision for public participation in the drafting of the revised EMP, or in the MOE's review of the revised EMP once submitted by WMCC. Moreover, since the revised EMP is not a prescribed instrument *per se*, there is no mandatory obligation upon the MOE under Part II of the EBR to post notice of the revised EMP on the Registry for public review and comment purposes. This also means that the third-party appeal rights under the EBR would not be available in relation to the revised EMP itself.

11. The affidavit of MOE review engineer Dale Gable states – without elaboration - that the MOE considers the proponent's submission of reports required by an ECA to be "an application for an amendment" to the ECA (paragraph 27). Mr. Gable further states that it is the "Ministry's interpretation" that the addendum report required by Condition 8.5(b) will have to be posted on the EBR Registry (paragraph 99 and 113). However, no authority or caselaw has been provided to substantiate the MOE's "interpretation", and, as a matter of law, reports submitted by proponents are not "instruments" within the meaning of the EBR.[1]

12. Nevertheless, the Director maintains that approval of the revised EMP will "trigger" further amendments to the ECA. However, there is no guarantee that this will actually happen in a timely manner or at all. In particular, further ECA amendments may or may not occur as suggested by the Director, and there is nothing in Condition 8.5 that would prevent the MOE from again negotiating with WMCC behind closed doors on EMP content (see paragraphs 15 to 18 and 38 below), and approving the revised EMP without any meaningful public involvement or without any further substantive amendments to Condition 8.5. In this regard, the Applicant notes that the final sentence in Condition 8.5(b) already purports to oblige the WMCC to implement the as-yet undrafted "amended" EMP once approved by the Director.

13. To the extent that the Director's submissions and affidavit evidence describe his intentions, expectations or commitments regarding the content of Condition 8.5, the Applicant submits that the ERT should be reluctant to attach much or any weight to such extraneous commentary. In *Harwich Township*, the Divisional Court held that when determining what is required or allowed under landfill approvals, only the wording of the instrument and any underlying supporting documents should be considered. Applying this principle in this case, the Applicant submits that the ERT should not rely upon or accept the Director's *ex post facto* claims about what he envisioned when imposing the legal requirements contained in Condition 8.5. What Condition 8.5 does or does not

[1] Section 1(1) of the EBR defines "instrument" as "any legal document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act."

require is a question of law that must be decided by the Tribunal on the basis of the relevant documentary evidence, not the Director's subjective musings.

> ***Harwich Township v. Ridge Landfill Corporation*** **(1981), 10 C.E.L.R. 148 (Ont.Div.Ct.) [Tab C, *infra*]**

14. In summary, the Applicant's leave application is not "premature," as suggested by the Director. To the contrary, the timing of the leave application is both appropriate and unassailable, particularly since the application has been duly filed during what may well be the first and only opportunity that EMP matters will trigger an EBR appeal right to the ERT. While the Director erroneously suggests that the leave application is based upon a "misunderstanding" of the impugned Conditions (paragraph 50), the Applicant fully understands the deficiencies of the EMP, the inadequacy of the seven Conditions, the complex and sensitive location of the landfill, and the need to pursue the Applicant's legitimate concerns in a timely manner through all available means, including seeking leave to appeal under the EBR. In short, there is a live and serious controversy at the present time between the Applicant, the MOE and WMCC regarding the impugned Conditions and the EMP, and it would serve no useful purpose to delay or defer the resolution of this controversy to some unspecified future date when the revised EMP may actually get drafted.

(ii) The MOE's "Past Practice" is Unacceptable

15. Having regard for the shortcomings of the MOE's "past practice" regarding the issuance of the ECA, the Applicant draws no comfort from the Director's assurances that the Applicant will have another consultation opportunity in the future. For example, the Applicant had previously received written assurances from the Director of the MOE Approvals Branch that the Applicant would have an opportunity to review and comment upon the ECA amendments before they were issued by the MOE. However, as acknowledged by the Director's submissions (paragraph 81), no such opportunity was provided to the Applicant.

16. As a result, the first time that the Applicant saw the wording of the impugned Conditions was when the Director's decision notice was posted on the EBR Registry in mid-January 2012. Similarly, the first time that Mr. Ruland received a written response from MOE to his technical concerns and recommendations was when the Director filed its response to the leave application. Moreover, upon review of the impugned Conditions, it became readily apparent that virtually all of the recommendations of the Applicant and its expert hydrogeologist have not been reflected adequately or at all in the ECA amendments, particularly Condition 8.5. Given this track record, it is difficult to take seriously the Director's suggestion that the Applicant and other stakeholders will have another opportunity in the future to provide input on the revised EMP and/or related ECA amendments (if any).

> **Letter from Wilf Ruland to CELA dated February 27, 2012, pages 4 to 8 [Tab B, *infra*]**

17. The Director's submissions attempt to blame a "staffing change" as the reason why the MOE inadvertently failed to provide draft versions of the ECA amendments to the Applicant for review and comment purposes (paragraph 81). However, despite the staffing change, the MOE somehow managed to solicit comments from several other stakeholders except the Applicant (paragraph 81). Thus, the Director's *ex post facto* explanation strikes the Applicant as weak and unconvincing, and it certainly does not inspire any confidence in the willingness or ability of the MOE to meaningfully engage the Applicant and its experts in the development of future ECA amendments regarding the revised EMP, the as-yet unapproved groundwater/surface water contingency plan, and other unfinished business.

18. Similarly, the technical exchanges that occurred between MOE and WMCC after the close of the EBR comment period in October 2010 were not disclosed to the Applicant until after this leave application was filed. In addition, the Applicant and its experts were not invited to participate directly in these closed-door discussions between MOE and WMCC to ensure that the Applicant's concerns were being adequately addressed. Indeed, the affidavit of MOE review engineer Dale Gable admits "numerous drafts and comments on the draft Amended ECA went back and forth until both WMCC and the Ministry were satisfied with the final draft" (paragraph 125). In these circumstances, the Applicant cannot be faulted for pursuing its long-standing concerns about the EMP, contingency plans, and reporting at the first available opportunity under section 38 of the EBR.

(iii) Uncertainty, Precaution and the "Conceptual" Understanding of Site Hydrogeology

19. All parties generally agree that the site is hydrogeologically complex, particularly in light of the shallow overburden, fractured bedrock, tri-level groundwater flow system, limited attenuation capacity, and difficulties in monitoring contaminant transport. For example, the Director's submissions repeatedly describe the hydrogeological setting as "complex" or "very complex" (paragraphs 7, 8, 53, 54, 63, 68, 70, and 77). Similarly, the affidavit of MOE hydrogeologist Kyle Stephenson describes the various hydrogeological characteristics underlying the site's complexity (paragraphs 7 to 10). The WMCC submission also describe the hydrogeological setting as "complex" (paragraph 102), and appends WMCC's latest Site Conceptual Model ("SCM") filed with MOE (Tab 1 of Vol. 1 of WMCC's response). Mr. Stephenson further states that "the complex hydrogeological conditions described above have made it challenging to determine whether the landfill is currently in compliance or not with the Ministry's main regulatory tool for groundwater, Guideline B-7" (paragraph 11).

20. However, the submissions of both respondents place a great deal of emphasis upon the SCM, which supplanted the previous conceptual model advocated by WMCC until 2009 (when further testing demonstrated that the conceptual understanding favoured by WMCC at the time was inaccurate: see the affidavit of Kyle Stephenson, paragraphs 18 to 22). In reply, the Applicant submits that the current SCM is just that – a large-scale, conceptualized theory of what may be happening in the subsurface environment. Put another way, the SCM is not an ongoing assembly of detailed, site-specific data about

the existence, significance or duration of any current (or future) groundwater quality or quantity impacts (or airborne, odour or surface water impacts) arising from the Richmond Landfill. These and other matters are precisely the very issues that should be systematically addressed in a comprehensive EMP. In addition, the SCM does not represent an assessment of whether the site currently conforms with MOE requirements (i.e. Reasonable Use guidelines), and should not be regarded as a substitute or proxy for a robust EMP.

21. In any event, at the leave stage, it is not necessary for the ERT to assess whether the current SCM is accurate, credible or requires further refinement. At best, it is just another piece of information that has been developed by the proponent, and that has received qualified endorsement by the MOE as a stepping stone towards an EMP – nothing more, nothing less.

22. The Director contends that the MOE has taken a "progressive" (not precautionary) "science-based approach" to ensure that the Richmond Landfill does not adversely affect groundwater quality (paragraph 70). In reply, the Applicant submits that if the MOE was truly committed to a careful, prudent and science-based approach in this case, then the MOE should have drafted Condition 8.5 in a manner that required specific and immediate EMP improvements, such as those requested by the Applicant and its expert hydrogeologist. However, the MOE has unreasonably failed or refused to do so, and should now be held to account for these significant omissions at an appeal hearing before the ERT.

23. In the Applicant's view, the preferable approach to dealing with site complexity or uncertainty is not to defer key outstanding matters to unspecified dates in the future, particularly when the MOE had a clear opportunity, when drafting Condition 8.5, to require significant improvements in the "interim" EMP. Accordingly, it is submitted that the MOE's ill-advised maneuvers regarding the EMP represent the antithesis of the precautionary approach mandated by the MOE's *Statement of Environmental Values.*

(iv) Non-Compliance with "Reasonable Use" Guidelines and Other MOE Requirements

24. The Director's submissions correctly acknowledge that "a large closed landfill has the potential to pose significant risk to the environment" (paragraph 125). The Director also acknowledges that there are "potential exceedances" of contaminant limits at the southern boundary of the landfill site, which WMCC disputes as being attributable to the landfill; however, WMCC is still supplying water to nearby residents at the direction of the MOE (paragraphs 9, 65 and 132).

25. In his affidavit, MOE hydrogeologist Kyle Stephenson states that his "interpretation of the most recent data is that leachate is potentially extending off-site to the south of the landfill property (south of Beechwood Road) and that the proposed EMP (of June 29, 2010) is not adequate to monitor these potential impacts" (paragraphs 32 and 33). Mr. Stephenson's affidavit then goes on to identify several specific exceedances of Reasonable Use limits at the southern boundary for various parameters (44, 45 and 47).

On this point, the MOE's independent peer reviewer (Franz Environmental) agrees that certain contaminants detected south of the landfill are more likely attributable to the landfill rather than the abbatoir, which WMCC claims is the source (Stephenson affidavit, Tab C, pages 13 to 14).

26. However, the Director's submissions insist that there is "no evidence that the Richmond Landfill is currently out of compliance with MOE requirements (emphasis added)" (paragraphs 9 and 58). Similarly, the Director chastises the Applicant for allegedly failing to demonstrate that "the landfill is currently out of compliance with MOE requirements (emphasis added)" (paragraph 133). The Director further opines that the Applicant has not submitted "substantial evidence of recent odour issues at the landfill site (emphasis added)" (paragraph 105).

27. In reply, the Applicant submits that the Director's questionable defence of the landfill is misplaced and irrelevant. First, the "environmental harm" branch of the section 41 leave test does not require the Applicant to present proof of actual or ongoing environmental harm, or proof of actual or ongoing non-compliance with regulatory requirements. Instead, the ERT just needs to be satisfied that it appears there is potential for significant environmental harm, which the Director readily concedes exists in relation to large closed landfills, such as the Richmond Landfill. The Director's insistence that the impugned Conditions are an effective safeguard against such harm essentially amounts to an argument that the Director likes his own handiwork. While it is hardly surprising that the Director would take this position, it is neither persuasive nor dispositive of the leave application, and the ERT must weigh the Director's claim against the relevant evidence, the actual wording of the impugned Conditions, and the applicable legislative and policy framework.

28. Second, from a groundwater perspective, the Director's assertion that there is no evidence that the site is currently out of compliance with MOE requirements (paragraph 9) is not supported by the affidavit provided by the MOE hydrogeologist Kyle Stephenson. A careful perusal of Mr. Stephenson's affidavit reveals that he does not actually make the broad assertion contained within the Director's submissions. To the contrary, Mr. Stephenson puts forward the same proposition that he has consistently maintained since 2006, *viz.*, that more groundwater monitoring is required in order to ascertain whether – or to what extent – the site conforms with the Reasonable Use guidelines.

29 For example, Mr. Stephenson's affidavit states that "additional investigation is currently underway by WMCC at the site to determine site compliance with Guideline B-7" (paragraph 15). He expresses this view throughout his affidavit (paragraphs 18, 20, 28, 53 and 59). Mr. Stephenson further advises that a finalized EMP is necessary before a Reasonable Use assessment can be completed (paragraph 24 and Tab C, page 1). The affidavit of MOE review engineer Dale Gable similarly advises that determining whether the site complies with the Reasonable Use guideline "is a priority" (paragraph 109). Accordingly, if there is anything "premature" in the context of the EBR leave application, it is the Director's implicit suggestion that all is well at the landfill site from a

groundwater perspective, when, in fact, the additional work needed to substantiate this conclusion is incomplete and ongoing at the present time, and when the available data has already identified Reasonable Use exceedances, according to the MOE's own hydrogeologist.

30. Mr. Stephenson's affidavit further states that he "shared" some of the concerns raised in October 2010 by the Applicant and Mr. Ruland about the EMP and contingency plans (paragraph 52), and he indicates that the Applicant's "relevant" concerns were considered by MOE (paragraph 53). However, it is unclear which of the Applicant's numerous concerns were considered "relevant" (or "irrelevant") by the MOE and, more importantly, the resulting MOE measures are not sufficiently responsive to the Applicant's key concerns and recommendations.

31. For example, Mr. Stephenson notes that the current "action plan" for ongoing hydrogeological work by WMCC includes the installation of 16 new wells for groundwater monitoring purposes (paragraph 53). While this may be a laudable step forward, Mr. Ruland had actually recommended, *inter alia*, the installation of new leachate monitoring wells in the waste mound, and the continued testing of 10 existing wells that WMCC had proposed to delete from the monitoring regime. Mr. Ruland had also recommended expanding the list of parameters for leachate, groundwater and surface water monitoring for all wells at the site. To date, however, it appears that these key recommendations have been resisted by WMCC, and omitted from the impugned Conditions (or deferred indefinitely to the "revised" EMP) by the MOE for unpersuasive reasons, as described below.

Letter from Wilf Ruland to CELA dated February 27, 2012, page 5 [Tab B, *infra*]

(v) No Proof that the Director Considered Relevant Laws

32. The Director's submissions deny that the common law rights of site neighbours were not "reasonably" taken into account (paragraphs 87 to 93). However, the Director's own affidavit does not actually state that he considered common law rights, and does not explain how such rights were incorporated into his decision to issue the impugned Conditions. Instead, the final paragraph of the Director's affidavit simply contains a vague "basket clause" which simply proclaims that he "considered all relevant laws and policies" (paragraph 8).

33. The Director's affidavit provides no further elaboration of this blanket statement, and there are no exhibits attached to the affidavit which would allow the ERT to understand whether, when or how the Director considered the common law (or any other law) when issuing the impugned Conditions. Similarly, the affidavits of MOE hydrogeologist Kyle Stephenson and MOE review engineer Dale Gable do not depose that these affiants considered the common law. As a result, there is not a scintilla of evidence in the affidavit demonstrating that the Director duly considered the common law during his decision-making process in this case.

34. Moreover, the Applicant submits that the ERT should be loath to accept, in the absence of any supporting evidence, self-serving claims by a Director that he considered "all relevant laws and policies." If a Director elects to make such a grandiose claim when responding to EBR leave applications, then, before the claim can be accepted or given weight by the ERT, it should be substantiated by the Director through a proper and traceable paper trail. To hold otherwise - or to wholly accept such claims at face value - defeats the governmental accountability purpose of the EBR.

C. REPLY TO THE WMCC SUBMISSIONS

(i) The Director's Decision was Unreasonable

35. In its submissions, WMCC suggests that the leave application is premised upon a mere "difference of opinion between the Applicant, its hydrogeologist and the MOE," and further notes that the MOE is not required to prefer the Applicant's technical analysis or to impose every term and condition requested by the Applicant (paragraph 4). In reply, the Applicant acknowledges that the Director is free to accept or reject technical input received from the Applicant, WMCC or any other stakeholders, provided that the Director's resulting decision: (a) is consistent with the purpose of the EPA; (b) conforms with applicable laws, regulations, and policies; and (c) contains adequate safeguards to protect against significant environmental harm.

36. In this case, the Applicant submits that the Director's decision does not appear to satisfy these crucial provisos, and the decision therefore warrants closer public scrutiny in an appeal hearing before the ERT. In short, the matters raised in this leave application are not, as suggested by WMCC, merely trivial disputes on inconsequential matters between MOE and the Applicant. To the contrary, the leave application raises fundamental questions of law and fact which go to the heart of the EBR: environmental protection, public participation, and governmental accountability.

(ii) No Proof that the Applicant's Concerns were Considered or Addressed by WMCC or the Director

37. WMCC repeatedly claims that the various concerns raised by third-party reviewers (such as the Applicant's hydrogeologist Mr. Ruland) were "considered" by the MOE and "incorporated" into the Conditions (paragraphs 4, 14 and 25). WMCC's submissions further suggest that its February 2011 letter to MOE (Tab 10 of the WMCC response) regarding Mr. Ruland's October 2010 report (Tab 20 of Vol. 2 of the leave application) is fully responsive to the recommendations made by Mr. Ruland (paragraph 35), and was accepted or adopted by the MOE (paragraph 36).

38. In reply, the Applicant submits that there is no merit to such claims by WMCC. First, it should be noted that the WMCC letter (or the MOE response thereto) was not disclosed by WMCC or the MOE to the Applicant or Mr. Ruland for review and comment prior to the filing of this leave application. Indeed, while the MOE and WMCC were having technical exchanges and effectively negotiating the EMP behind closed

doors, no effort was made by either respondent to include Mr. Ruland in any of those discussions, or to even disclose that such discussions were occurring.

39. Second, and more importantly, Mr. Ruland's opinion letter dated February 27, 2012 (attached as Tab B below) makes it abundantly clear that the WMCC letter (and, by extension, the Director's decision that rests, in part, on the WMCC letter) does not satisfactorily address his 17 recommendations. For example:

- the WMCC response ignored Mr. Ruland's first four recommendations (redesign of groundwater quality database; additional groundwater monitoring parameters; additional surface water and groundwater monitoring parameters; continued testing of wells demonstrating anomalous water quality results), each of which is critical to the success of the EMP;

- the WMCC response to Mr. Ruland's Recommendation 5 (need for leachate monitoring wells in the waste mound) is fatuous, self-serving and unpersuasive. There appears to be no other Ontario landfill of the same size and scale as the Richmond Landfill which does not contain leachate monitoring wells, and if there was any merit to WMCC's professed concern about drilling into the landfill liner, then the appropriate solution is to install such wells in Cell 1, which is the biggest, oldest and unlined portion of the landfill;

- the WMCC response to Mr. Ruland's Recommendation 6 (groundwater quality monitoring wells should include those displaying anomalous groundwater quality results and/or potential leachate impacts) is inconsistent with the current EMP and WMCC's recent site activities. The WMCC response suggests that it will "consider" this recommendation when developing the revised EMP. However, in relation to the Applicant's leave application, WMCC has attempted to defend the existing EMP, which proposes to remove from the monitoring program (and decommission) 10 of 14 wells which have provided evidence of anomalous groundwater results and/or leachate impacts, as described in Mr. Ruland's October 2010 report;

- the WMCC response improperly rejects Mr. Ruland's Recommendation 9 (additional surface water monitoring parameters). If adopted, this Recommendation would ensure, for the first time, that surface water sampling would apply the best possible parameter list. To rationalize this rejection, WMCC argues that Mr. Ruland's proposed parameters are "less mobile" than other key leachate indicators. In reply, Mr. Ruland states that "less mobile" is a hydrogeological term used to describe contaminant movement through the groundwater flow system. However, at the Richmond Landfill, leachate breakouts have occurred on the sideslopes, and there is no reason to believe that such breakouts will not occur now or in the future. Since the leachate contaminants present in such breakouts will be moving through the surface water system, the issue of groundwater mobility is irrelevant; and

- the WMCC response to Mr. Ruland's Recommendation 17 (prohibition against blast-induced fracture trench as a contingency measure) suggests that proponent still adheres to the fracture trench option. As pointed out in his February 27, 2012 opinion letter, Mr. Ruland concludes that such an option, if implemented, will cause groundwater quality impacts which will dwarf and obscure any leachate impacts. In the affidavit of MOE hydrogeologist Kyle Stephenson, there is agreement that a fracture trench would not be an appropriate contingency measure at this site (paragraphs 38 and 62). In the Applicant's view, the prohibition of fracture trenches as a contingency measure would have been an easy and obvious matter to include within Condition 9.1 before it was issued by the Director.

Letter from Wilf Ruland to CELA dated February 27, 2012, pages 1 to 4 [Tab B, *infra*]

(iii) Risk of Environmental Harm from the Closed Landfill

40. WMCC argues that leave should be refused because the instrument-holder is not seeking to commence landfilling or other active disposal operations at the site, and therefore no significant harm can arise from the Director's decision (paragraphs 5 and 95 to 98). In reply, the Applicant submits that the ERT should give no weight or credence to WMCC's untenable and illogical position for several reasons.

41. First, the WMCC's argument ignores the fact that the Director's oft-repeated rationale for imposing the impugned Conditions is to ensure that the environment and public health are protected against impacts arising from the closed landfill site. In the Applicant's view, this underlying rationale is sound, but the parties join issue on whether the seven Conditions, as drafted, are adequate to achieve this public interest purpose by preventing, reducing or mitigating environmental harm. Thus, WMCC's argument that it no longer undertakes waste disposal at the site is neither persuasive nor relevant. In short, the Applicant submits that monitoring a closed mega-landfill under the terms of a deficient EMP (even on an indefinite "interim" basis) is tantamount to wearing a blindfold while attempting to supervise or regulate the situation.

42. Second, it is beyond dispute that the landfill will continue to generate leachate and landfill gas for numerous decades after the site has been closed. This means that everything depends upon the effectiveness and enforceability of the ECA Conditions to ensure that potential adverse effects are carefully monitored, assessed and mitigated in a timely manner over the lengthy contaminating lifespan of the landfill. In this regard, the Applicant notes that the Director's submissions correctly acknowledge that "there is a potential threat of environmental harm as parts of the landfill were established prior to modern landfill standards being developed and, in particular, the first cell does not have any type of liner at all" (paragraph 63).

43. Accordingly, it cannot be seriously contended by WMCC – or accepted by the ERT – that there is no potential for adverse effects from the closed landfill, particularly in light of its complex and highly vulnerable hydrogeological setting. Put another way, if the closed landfill truly posed no environmental risks, then it would have been wholly

unnecessary for the MOE to negotiate the EMP with WMCC, or to impose the various Conditions in the ECA.

44. Third, WMCC argues that *Dawber* and other cases relied upon by the Applicant are distinguishable because in this case, WMCC is not proposing to commence an environmental risky activity (paragraph 96). The Director's submissions make a similar attempt to distinguish this case from the *Dillon*, *McIntosh*, *Davidson* and *Ridge Landfill* decisions of the ERT on the grounds that the Directors' decisions in these other cases purported to authorize future activities (paragraph 74).

45. In reply, the Applicant submits that such observations are immaterial and amount to a distinction without a difference as far as the EBR leave test is concerned. It is self-evident that section 41 of the EBR makes no distinction between instruments aimed at existing conditions which pose environmental risks, and instruments aimed at future activities which pose environmental risks. Instead, regardless of the subject-matter of the instrument, the focus of the leave test is upon the reasonableness of the Director's decision and the potential for significant environmental harm. If anything, instruments aimed at regulating risk-laden existing conditions (i.e. closed landfills) should attract a higher level of scrutiny from the ERT since these conditions actually exist (and pose undeniable environmental risks) in the real world, as opposed to future activities that exist only on paper as proposals which have yet to be undertaken.

46. In addition, ERT jurisprudence has recognized that in some cases, a governmental decision to issue inadequate terms and conditions in a prescribed instrument may be found to be unreasonable and could result in significant environmental harm within the meaning of the section 41 leave test. On the evidence, the Applicant submits that this is such a case.

> ***Dawber v. Ontario*** **(2007), 28 C.E.L.R. (3d) 281 (ERT), paras.85, 90, 97, 100 [Applicant's Book of Authorities, Tab 8];** ***2216122 Ontario Inc. v. Ontario,*** **[2010] O.E.R.T.D. No. 14, paras.89-90 [Applicant's Book of Authorities, Tab 20]**

47. WMCC makes the further argument that the Director's decision "cannot result in significant harm to the environment"; instead, "it can only reduce the risk of harm to the environment" (paragraph 5). In reply, the Applicant submits that this argument is derivative of WMCC's attempted distinction between future activities and existing conditions, and should be rejected accordingly by the ERT. In addition, the paramount question of whether the impugned Conditions are sufficiently protective of the environment, or whether further and better Conditions are required to effectively prevent or reduce environmental harm from the closed landfill, is precisely what the ERT must adjudicate at the appeal hearing if leave to appeal is granted. In accordance with the principle of judicial economy, the ERT's leave decision should only determine what actually needs to be determined at the leave stage pursuant to section 41 of the EBR (see below), and the ERT should refrain from making findings of fact or law which are best left to the appeal hearing.

D. CONCLUSIONS

48. For the foregoing reasons, the Applicant submits that the Director and WMCC have both misconstrued the nature of the section 41 leave test and the extent of evidence required to satisfy the leave test. At the leave stage, it is not necessary for the ERT to find that the Director's decision was actually unreasonable in fact or law, or that significant environmental harm will actually result (or has already resulted) from the Director's decision. Similarly, at the leave stage, it is not necessary for the ERT to determine how the impugned Conditions should be recast, amended or expanded in order to meet their intended purpose. These kinds of findings should await the appeal stage of these proceedings, after all the relevant evidence and arguments have been presented by the parties and potential interveners (if the matter is not otherwise settled before the appeal hearing occurs).

49. The Applicant further submits that it is no answer for the Director (paragraphs 3, 76 and 99) to claim that implementing the deficient EMP is reasonable (or will safeguard against environmental harm) because it is an improvement over the even more deficient monitoring plan that has been in place at the site since the 1980s. Indeed, the acknowledged inadequacy of the previous monitoring regime calls into question the claims made by the Director (paragraph 8) and WMCC (paragraphs 11 and 71) about the number of monitoring wells at the site, the "extensive" investigations conducted at the site since 1977, or the alleged lack of environmental impacts from the Richmond Landfill over the years.

50. In his affidavit, MOE review engineer Dale Gable appears to suggest that the MOE only had two regulatory choices in this case: (a) allow the deficient EMP to be implemented on an "interim" basis; or (b) have no conditions in the ECA requiring the testing or sampling of groundwater monitoring wells in certain areas (paragraph 94). In reply, the Applicant notes that the Director has not provided any authorities or caselaw to support this bizarre proposition.

51. Moreover, the Applicant submits that the MOE has unnecessarily fettered its discretion, and incorrectly interpreted its jurisdiction under section 20.3 of the *Environmental Protection Act* ("EPA"), if the MOE perceived that its only option was the deficient EMP or nothing. Simply put, the MOE has full legal authority and proper factual grounds in this case to impose stringent terms and conditions in the ECA requiring WMCC to carry out environmental monitoring (including parameters, well locations, etc.) as may be specified by the MOE.

52. Mr. Gable's affidavit further opines that the WMCC "appeared to understand" what the MOE wanted in relation to further groundwater investigations, and therefore "it was felt that a prescriptive condition detailing the number of monitoring wells or locations was not necessary at this time" (paragraph 87). In reply, the Applicant notes that this claim is inconsistent with the above-noted MOE position that it was powerless to do anything but accept the deficient EMP. Thus, Mr. Gable appears to recognize that the MOE had the necessary jurisdiction to impose detailed monitoring conditions in the

ECA, but the MOE declined to impose such conditions on the basis of the proponent's "understanding."

53. However, Mr. Gable fails to specify exactly who made this determination (or when, or on what basis) that WMCC's "understanding" obviated the need for further and better monitoring conditions in the ECA. More generally, the Applicant submits that it is poor public policy – and contrary to the purposes of the applicable legislative and policy framework – for the MOE to refuse to exercise its statutory authority to impose appropriate conditions in relation to a potentially hazardous site (in a complex and environmentally sensitive location) on the basis of the MOE's subjective perceptions of a proponent's "understanding."

54. In any event, even if the so-called "interim" EMP is better than the previous monitoring regime, it begs the fundamental question now before the ERT at the leave stage, *viz.*, does it appear, on a *prima facie* or preliminary basis, that the Director's decision was unreasonable and "could" result in significant environmental harm? On the evidence, the ERT should answer this question in the affirmative. It is submitted that the Applicant has satisfied its evidentiary burden by adducing expert evidence and other information which provides a real and substantial foundation for the Applicant's concerns about the seven Conditions in dispute.

55. The fact that there is ongoing technical debate among the parties' experts does not bar the ERT from granting leave to appeal in this case. In the *Dawber* decision, the ERT summarized the conflicting expert evidence adduced by the parties, and concluded that the expert evidence was "diametrically opposed." Nevertheless, the ERT granted leave to appeal after finding that the section 41 leave test was satisfied despite the profound disagreement among the experts, and despite uncertainty over the environmental effects which may result from the Directors' decisions in that case. This precautionary approach was subsequently upheld by the Divisional Court.

> ***Dawber v. Ontario*** **(2007), 28 C.E.L.R. (3d) 281 (ERT), paras.90-95, 98 [Applicant's Book of Authorities, Tab 8]; affd. (2008), 36 C.E.L.R. (3d) 191 (Ont.Div.Ct.), paras. 68-71 [Applicant's Book of Authorities, Tab 14]**

56. The Applicant urges the ERT to adopt a similar approach in this case, and to grant leave to appeal despite (or, alternatively, because of) the wide divergence of expert opinions filed by the parties. By any objective standard, the Applicant's serious concerns about the Director's decision are well-founded and properly supported by probative evidence. Thus, the Applicant submits that it is in the public interest for the ERT to grant leave to appeal in order to take a closer examination of the impugned Conditions at a *de novo* appeal hearing, and to exercise its broad powers under section 145.2 of the *Environmental Protection Act* to impose appropriate remedies in this case.

57. Since both branches of the section 41 leave test have been satisfied in this case, it is respectfully requested that the ERT grant the Applicant leave at large to appeal the seven Conditions in dispute.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 27, 2012

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