

IN THE MATTER OF SECTION 13 of the
Consolidated Hearings Act, 1981, S.O. 1981, c.20;

- and -

IN THE MATTER OF an application by the
Regional Municipality of Halton for:

(a) the acquisition of land for the construction,
operation and maintenance of a sanitary landfill
site to contain 7.96 million cubic metres of waste in
the Regional Municipality of Halton by one of two
alternative methods as follows:

- (i) landfilling at the site referred to in Halton's
Environmental Assessment as Site "F" in the
City of Burlington;
- (ii) landfilling at the site referred to in Halton's
Environmental Assessment as Site "D" in the
Town of Milton.

APPLICATION OF NSP INVESTMENTS LIMITED
TO THE HONOURABLE, THE LIEUTENANT GOVERNOR IN COUNCIL

R E P L Y

OF

NSP INVESTMENTS LIMITED

TO

THE RESPONSES OF THE REGION OF
HALTON, THE CITY OF BURLINGTON AND
THE WEST BURLINGTON CITIZENS GROUP

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IN THE MATTER OF Sections 2 and 3 and 6(3) of the Consolidated Hearings Act, 1981, S.O. 1981, c.20;

- and -

IN THE MATTER OF Section 12(2) of the Environmental Assessment Act, R.S.O. 1980, c. 140;

- and -

IN THE MATTER OF Sections 30, 35 and 38 of the Environmental Protection Act, R.S.O. 1980, c. 141, as amended;

- and -

IN THE MATTER OF Sections 24 and 61(2) of the Ontario Water Resources Act, R.S.O. 1980, c.361, as amended;

- and -

IN THE MATTER OF Section 28(3) of, and Regulation 164 under, the Conservation Authorities Act, R.S.O. 1980, c.85, as amended;

- and -

IN THE MATTER OF Section 40(12) of the Planning Act, S.O. 1983, c.1, as amended; in connection with site plan control of the sanitary landfill site;

- and -

IN THE MATTER OF Section 22(1) of the Planning Act, 1983 in connection with a referral to this Board by the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, on a request by the Regional Municipality of Halton to amend the Official Plan for the Town of Milton to redesignate a parcel of land comprising Part Lots 3 and 4, Concession 2 N.S. in the Town of Milton from "Agriculture" and "Conservation and Hazard Lands" to permit the construction, operation and maintenance of a landfill site, Minister's File No. 24-OP-0208-A01;

- and -

IN THE MATTER OF Section 34(11) of the Planning Act, 1983 in connection with an appeal to this Board by the Regional Municipality of Halton for an order directing an amendment to By-law 61-85 of the Town of Milton to rezone the lands situated at Lot 3 and part of Lot 4, Concession 2 N.S., in the Town of Milton from "Agriculture" to permit a regional sanitary landfill site and ancillary uses;

- and -

IN THE MATTER OF Section 15(1) of the Planning Act, R.S.O. 1980, c.379 in connection with a referral by the Honourable Claude F. Bennett, Minister of Housing on a request by Tremaine Britannia Citizen's Group for consideration of part of the Official Plan for the Halton planning Area with respect to Sections 1 to 5 inclusive, 7, 9 and 10 of Part III D3 Solid Waste Management, Minister's File No. OPC-0026;

- and -

IN THE MATTER OF Section 64 of the Ontario Municipal Board Act, R.S.O. 1980, c.347, as amended in connection with an application by the Regional Municipality of Halton for an order approving:

- (a) the acquisition of land for the construction, operation and maintenance of a sanitary landfill site to contain 7.96 million

cubic metres of waste in the Regional Municipality of Halton and to do so by one of two alternative methods as follows:

- (i) landfilling at the site referred to in Halton's Environmental Assessment as Site F in the City of Burlington;
- (ii) landfilling at the site commonly referred to in Halton's Environmental Assessment as Site D in the Town of Milton

at an estimated cost of \$12,775,000.00, and the borrowing of money by way of temporary advances not exceeding in the aggregate such estimated cost pending the sale of debentures, and

- (b) the issuance of necessary debentures to a maximum of \$12,775,000.00 for a term not to exceed fifteen years;

- and -

IN THE MATTER OF Section 193(5) and Paragraph 84 of Section 210 of the Municipal Act, R.S.O. 1980, c.302, as amended;

- and -

IN THE MATTER OF Sections 6, 7 and 8 of the Expropriations Act, R.S.O. 1980, c.148;

- and -

IN THE MATTER OF an undertaking of the Regional Municipality of Halton to provide facilities for the purpose of receiving, dumping and disposing of waste as required by section 137 of the REGIONAL MUNICIPALITY OF HALTON ACT, R.S.O. 1980, c.436, as amended, by acquiring the land for, constructing, operating and maintaining a landfill to contain 7.96 million cubic metres of waste in the Regional Municipality of Halton;

R E P L Y

OF

NSP INVESTMENTS LIMITED

TO

**THE RESPONSES OF THE REGION OF HALTON,
THE CITY OF BURLINGTON AND THE WEST
BURLINGTON CITIZENS' GROUP**

To The Honourable, The Lieutenant Governor in Council:

1. This is the Reply of NSP Investments Limited ("NSP") to the Responses delivered by The Region of Halton, The City of Burlington (the "City") and the West Burlington Citizens' Group (the "WBCG") (collectively,

the "Respondents") to the Application of NSP dated March 22, 1989 regarding the Decision of the Joint Board dated February 24, 1989.

2. The Relief requested by NSP, and the grounds therefor, are set out at pages 4 to 8 of its Application. The Responses thereto by the Region of Halton, the City and the WBCG primarily address the following issues, to which Reply is made below:

- I. Public Health and Safety Issues regarding Site "F";
- II. Public Health and Safety Issues regarding Site "D";
- III. Conflict and Non-compliance with the Policies of the Ministry of the Environment;
- IV. Planning Matters;
- V. Economic Comparisons made by the Joint Board;
- VI. Nature of the Relief sought by NSP.

3. In some instances matters raised by one or more of the Respondents in their Responses are not specifically replied to herein. In these instances the submissions made by the Respondents are either not responsive to the issues raised by NSP or, alternatively, have been fully dealt with in NSP's original Application.

I. PUBLIC HEALTH AND SAFETY ISSUES – SITE "F"

(a) THE REJECTION BY THE JOINT BOARD OF ALL EXPERT EVIDENCE THAT SITE "F" IS HYDROGEOLOGICALLY SUITABLE FOR LANDFILLING

4. All of the Respondents in their respective submissions address certain of the evidence before the Joint Board regarding the hydrogeological suitability of Site "F" for landfilling. None of the Respondents deny that the hydrogeology of the two sites was the most critical issue at the Hearing (indeed, this is expressly conceded by the WBCG at p. 5, para. 11, p. 10, para. 24 and p. 32, para. 79 of its Response).

5. More importantly, *none of the Respondents can, or do, deny that:*

- *it was the uncontroverted evidence of every hydrogeologist who testified at the Hearing that Site "F", with proper engineering, was hydrogeologically suitable for landfilling. As acknowledged by the Region of Halton in its Response, (at pp. 39-40, para. 4.6), only Messrs. Petrie (on behalf of the City) and Bowen (on behalf of the WBCG) suggested that a liner should be installed at Site "F" to assure its suitability, but even these witnesses confirmed that with a liner the Site was acceptable and suitable;*
- *the Joint Board, in concluding that Site "F" was not hydrogeologically suitable or acceptable for landfilling, rejected entirely the evidence of all the hydrogeologists;*
- *it was the uncontroverted evidence of every hydrogeologist who testified at the Hearing that Site "F", if used for landfilling, posed no risk to public health or safety; and*
- *at the end of the day, the sole hydrogeological/ engineering issue regarding Site "F", on all the evidence, was whether it should be landfilled with or without a liner; not whether it could appropriately be used for landfilling.*

6. The Respondents argue that the Joint Board was entitled at law to form its own opinion on the hydrogeological suitability of Site "F" and to define its own criteria for determining such suitability, notwithstanding that its ultimate determination in this regard resulted in the rejection of all expert evidence before it on the matter. The point of distinction not addressed by any of the Respondents, simply stated, is this: with regard to Site "D", there was contradictory expert evidence before the Joint Board as to whether the Site as proposed by the Region was hydrogeologically suitable; with regard to Site "F", the experts were unanimous that the Site was or could be made suitable with proper engineering. Thus, as between the two Sites, the Joint Board was confronted with an entirely different set of evidentiary circumstances, in fact and in law.

7. The Supreme Court of Canada, in White v. The King [1947] S.C.R. 268, formulated guidelines to assist in the assessment of the credibility of witnesses. Those guidelines, as approved by the Court, were as follows (per Kerwin J. at p. 273, approving Rex v. Covert (1916) 28 C.C.C. 25):

"... in my opinion it cannot be said without limitation that a judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:



- (1) That the statements of the witness are not in themselves improbable or unreasonable;
- (2) That there is no contradiction of them;
- (3) That the credibility of the witness has not been attacked by evidence against his character;
- (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
- (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

To permit a trial judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence."
(Emphasis added)

8. As noted by the Region of Halton in its Response (p. 24, para. 3.8), the Joint Board made credibility findings against Messrs. Sobanski and Beechinor (the first two hydrogeologists called by the Region as expert witnesses). However, the Joint Board made no such credibility findings against Messrs. Feenstra, Petrie, Crutcher, Bowen, Rowe or Charlesworth with respect to their evidence concerning Site "F" and its suitability for landfilling. }

9. Insofar as may be discerned from the Board's Reasons in this case, the evidence of these latter hydrogeologists regarding the suitability of Site "F" satisfied all of the conditions noted in White v. The King, yet the Joint Board refused to accept their evidence and made adverse findings regarding the suitability of Site "F" with no expert evidence to support such findings. In this respect, the decision of the Joint Board was, in the language of White v. The King, "arbitrary" and not within "the spirit of our system of jurisprudence".)))

10. The error of the Joint Board in this regard is even more pronounced having regard to the fact that it received submissions from counsel for NSP during the course of final legal argument regarding the assessment of credibility. As noted by the City (at pp. 7-9, paras. 2.23 to 2.26) and the WBCG (at pp. 2-3, paras. 6-7) in their Responses, the Joint Board was

provided with legal authorities to assist it in *weighing conflicting opinion evidence*. The Joint Board referred, in its Reasons for Decision, to certain of these legal authorities in support of the proposition that it was entitled to "arrive at its own opinion" in the case.

11. It is respectfully submitted that in so doing the Joint Board, notwithstanding the submissions it received in final argument, misconstrued the import of these legal authorities and the purpose for which they were provided.

12. The legal authorities provided to the Joint Board afford guidance as to the matters to be considered in assessing the credibility of witnesses who provide conflicting or contradictory opinion evidence. They do not support the proposition (nor did any legal counsel suggest to the Joint Board) that a hearing tribunal, in assessing credibility, is free to arrive at its own decision in disregard of uncontroverted evidence to the contrary. In all instances, it is submitted, a hearing tribunal must arrive at its decision in reliance on and grounded in the evidence before it.

13. That this is the import and purpose of the legal authorities provided to the Joint Board is confirmed in the following passage from the final legal submissions of counsel for NSP, who introduced such authorities to the Joint Board:

"If I could turn then to the next issue we wish to address; that is what we have termed the *task of weighing conflicting opinion evidence*, the general principles. As I indicated earlier, Mr. Chairman and Dr. Kingham, and indeed it need not in any way come from me, but it is quite clear that there were very extensive challenges to credibility made in this case. I give you by way of example the cross-examination that occurred of Sobanski by the City of Burlington and the Burlington ratepayers. I give you the cross-examination of Mr. Feenstra by the same group. I give you the cross-examination of Mr. Petrie by the Town of Milton and by myself to a lesser extent. It is clear that there are on the issues before you *conflicting expert opinions and legally that requires the weighing of those opinions in accordance with generally established principles and the assessment of which of those opinions in the circumstances you should prefer*.

In our submission the question of *conflicting evidence arises* in two different ways in the context of the hydrogeological evidence and I will

address myself to that in a moment. First with respect to Site "F", it arises squarely on the issue of the need for a liner. You have opinions from experts who have testified before you that a liner is not needed, and you have the evidence and the opinion of Mr. Petrie, and, no doubt, as Ms. Vigod would have it and Mr. Hodgson would not have it, from Mr. Bowen, that a liner would be required. That opinion by Mr. Petrie of CRA must be assessed in light of the fact you have received opinions from other informed qualified experts that a liner is not necessary. I would refer to Mr. Sobanski, I would refer to Mr. Beechinor, I refer to Dr. Charlesworth, Dr. Rowe and Mr. Feenstra. That is the first evidence that requires this kind of a weighing exercise.

The second issue is broader in nature in my submission, and that is whether the Site "D" undertaking as presented to you by the Region in its current form can and should be approved for the purposes of landfilling at that site. It has been suggested to you that this is a question of whether Site "D" can be designed so as to be safe for landfilling. In our respectful submission that is far too narrow a characterization of the issue, but rather the issue is whether on the hydrogeological and design evidence now before the Board the site is suitable for landfilling on the state of the evidence that you have and should be approved for landfilling or whether it is premature to do so.

The evidence before you from the experts on this issue is again divergent. . . It is the conflict in the evidence on this issue that gives rise to the second weighing exercise on the conflict of expert opinion evidence." (Transcript, Vol. 186, pp. 46178 to 46180; Emphasis added)

14. These submissions by counsel for NSP preceded the introduction to the Board of the legal authorities referred to by the WBCG and the City. The submissions made it abundantly clear that *the authorities were to be relied upon in the weighing of conflicting opinion evidence and not as authority for the proposition that the Board was entitled to disregard and wholly reject unanimous opinion evidence.*

(b) SIGNIFICANCE OF LEAKAGE FROM SITE "F"

15. The WBCG in its Response repeatedly emphasizes that Site "D", if operated in accordance with the Region's proposed design, will function as a "total containment" Site, whereas Site "F", it suggests, will leak even if a liner is installed. The Region of Halton has echoed these submissions in its

Response by suggesting that the Joint Board was "unhappy with the fact that all of the hydrogeologists agreed that Site "F" would be a leaky landfill" (p. 26, para. 3.16). The Joint Board itself, at pp. 109 to 112 of its Reasons, places stress on the distinction between landfills which permit leakage and those which do not.

16. It was known from the outset of the Hearing that the design of Site "F", without a liner, would permit some loss of leachate and that, with a liner, such losses would be reduced but not completely eliminated. Indeed, this distinction between the two Sites was well known, based on the hydrogeological studies conducted by the Region's consultants, even before the Council of the Region of Halton confirmed its preference for Site "F" in early March, 1987. Further, it was expressly known to, and taken into consideration by, all of the hydrogeologists who testified at the Hearing, before they gave their evidence to the Joint Board that Site "F" was suitable for landfilling.

17. It is precisely because this distinction between the two Sites was manifest from the outset, that it was critical for the Joint Board to examine the significance, if any, of leakage of contaminants from Site "F" and to evaluate the evidence which it had received regarding the attenuation characteristics of Site "F" and its environs. In short, the concept of leakage at Site "F" required that the Joint Board consider what the consequences of such leakage would be, in assessing the comparative merits of Sites "D" and "F" for landfilling. This, it is respectfully submitted, the Joint Board wholly failed to do. Instead, it rejected Site "F" outright because its design would permit the escape of some contaminants.

18. The attenuation characteristics of Site "F" contributed significantly to the formulation by the various hydrogeologists of their opinions that Site "F" was safe and hydrogeologically suitable for landfilling. In essence, it was their collective view that any contaminants which might leak from Site "F" (with or without a liner) would be so attenuated and diluted as they moved through the ground, that they would pose no risk to public health and safety upon discharge, regardless of precisely where that

discharge should occur (see NSP Application for summary of relevant evidence, pp. 15 to 16, para. 36 and p. 18, para. 44).

19. The Joint Board failed to address itself in its Reasons for Decision and in forming its conclusions on Site "F" to the evidence of all the hydrogeologists regarding the beneficial attenuation properties of the shale at Site "F". That the Joint Board so erred has not been denied by any of the Respondents (see, for example, WBCG Response, p. 16, para. 38, where NSP's submission is discussed but not denied).

(c) JOINT BOARD'S PREFERENCE FOR SITE "D"

20. The Region of Halton maintains in its Response that the Joint Board had ample evidence from which it could conclude that, from a hydrogeological perspective alone, Site "D" should be the new regional landfill (p. 40, para. 4.6 and p. 35, para. 3.45). The City, in turn, has argued in its Response that the "definition of hydrogeological suitability used by the Board was not the same as that used by the witnesses" and that the Board was entitled to establish its own criteria for the determination of "suitability" (p. 17, paras. 3.57, 3.63 and 3.66).

21. *These submissions by the Respondents do not address the fundamental issue raised in NSP's Application, namely, that in formulating its preference for Site "D" and its approach to hydrogeological "suitability", the Joint Board disregarded the uncontroverted evidence of all the hydrogeologists that Site "F" was, in fact, hydrogeologically suitable with properly engineered works. Moreover:*

(a) as acknowledged by all parties, the case before the Joint Board for determination was a site-comparison case: which of two sites was the best site for landfilling? The Joint Board's decision to prefer Site "D" proceeded from a determination by it that Site "F" was unsuitable. *It is submitted that in this case, the basis for the "unsuitable" determination was flawed, and therefore, the preference which flowed from it is unsustainable; and*

(b) assuming, for the purposes of argument only, that the Joint Board was entitled, as alleged by the City of Burlington, to determine its own criteria for "hydrogeological suitability", it must be recognized that *the criteria which it in fact developed differed from those proposed by the parties and by the*

hydrogeologists. This is conceded by the City in its Response (p. 18, paras. 3.64 and 3.65).

The Board, in formulating its criteria, raised matters which had not previously been mentioned by anyone. It is clear from the Joint Board's Decision, that the criteria raised by it formed part of its reasoning in rejecting Site "F" and preferring Site "D".

In these circumstances *there is a duty of "adequate disclosure"* which applies, such that matters which are likely to form the subject of the decision should be exposed for the comments and submissions of the parties. This is a fundamental requirement of the rules of natural justice. De Smith, in Judicial Review of Administrative Action, (3rd Ed.) at pp. 178 and 181 has expressed the principle as follows:

"Statutory tribunals are set up because they already have or can be expected to acquire specialized expertise. Clearly they are entitled to use their expertise to draw inferences from evidence. If a tribunal is under an obligation to observe the rules of evidence it cannot use its own expert opinion as a substitute for evidence, though it may still be able to rely on an extended concept of judicial notice to supplement evidence. A number of special tribunals are not bound by the strict rules of evidence. *They are charged with the task of actively finding the material facts by any appropriate means; ... They are nevertheless obliged to act in accordance with natural justice. And this means that, in the absence of contrary intendment, they must not place a party at a disadvantage by depriving him of an adequate opportunity of commenting on material relevant to their decision* if it is gleaned from an outside source or in the course of their own investigations or from evidence given in earlier cases. As yet the case-law gives no clear indication of the extent to which they will be permitted to abstain from disclosing during the hearing their own expert opinions, or information relevant to the exercise of their discretion insofar as they can take public policy considerations into account. *But it is thought that the courts will lean in favour of imposing judicial standards as far as practicable, so that if a party is misled as to the basis on which the tribunal is likely to decide and it is thus placed at a material disadvantage in putting his case, he may be held to have been denied natural justice.*"
(Emphasis added)

In this case, the Joint Board failed to give any indication to the parties that it proposed to formulate its own criteria for assessing hydrogeological suitability and, more importantly, failed to give any indication that the criteria which it was considering differed from those put forward in evidence and argument.

It cannot be said that the Joint Board's findings regarding the suitability of Site "F" are sustainable on the basis that it was entitled to formulate its own criteria to assess suitability, *when those criteria were never disclosed to the parties and the parties were denied an opportunity to comment upon them.*

II. PUBLIC HEALTH AND SAFETY ISSUES – SITE "D"

(a) FRACTURING OF THE UNWEATHERED UPPER TILL AT SITE "D"

22. In its Application NSP has submitted that the Joint Board erred in rejecting evidence that the unweathered upper till unit at Site "D" may be fractured, without addressing relevant evidence concerning the likelihood of the existence of such fractures and the consequences of their existence (see NSP Application, at pp. 40 to 46). All Respondents address this submission in their Responses in varying detail, focusing on the conduct of the Town of Milton regarding the construction of a test pit at Site "D" and the Town of Milton's later motion before the Joint Board to obtain leave to introduce evidence of the observations made during the opening of the test pit and the potential conclusions to be drawn in light thereof. The Respondents suggest that the Applicants, having failed to cross-examine various witnesses with respect to the potential for fracturing in the unweathered upper till at Site "D", cannot complain now of the Joint Board's failure to entertain further evidence regarding the possibility of such fractures.

23. The Town of Milton has replied at length to the position of the Respondents in this regard. NSP wishes to add the following to the submissions of the Respondents on this issue:

- (a) The Region of Halton has submitted that the Joint Board addressed the relevant evidence concerning the likelihood of the existence of fractures in the unweathered upper till unit at Site "D" and was "unpersuaded thereby" (p. 49, para. 4.33). In fact, the Joint Board only heard Mr. Feenstra's evidence on this issue, called by the Region as its case in reply. The Board declined to hear the evidence sought to be lead by the Town of Milton, through Dr. Eyles, on this issue. The error made by the Joint Board, and forming part of the Application by NSP to the Lieutenant Governor in Council, is the rejection by the Joint Board of the uncontroverted reply evidence of Mr. Feenstra and, the

refusal by the Joint Board to hear the evidence of Dr. Eyles on the matter. The grounds of objection by NSP to the rejection by the Joint Board of Mr. Feenstra's reply evidence on this issue are fully detailed in NSP's Application and are not repeated herein;

- (b) The City of Burlington and the Region of Halton have alleged that it was appropriate for the Joint Board to reject Mr. Feenstra's evidence (and, implicitly, to decline to hear the evidence of Dr. Eyles) having regard to the conduct of the Town of Milton concerning the test pit at Site "D". The City of Burlington has alleged that Town of Milton representatives did not consider the results of the test pit to be "of significant evidentiary value" (p. 10, para. 2.29). It is respectfully submitted that these assertions distort the events at the Hearing.

Legal Counsel for the Town of Milton made it clear to the Joint Board in his submissions supporting the calling of Dr. Eyles as a further witness, that the Town of Milton did not appreciate the significance of the observations made during the digging of the test pit at the time the test pit was dug. As demonstrated by the Chronology of Events filed by the Region of Halton as part of its Response (Schedule "A" at pp. 18-19), Mr. Feenstra's reply Witness Statement was not distributed until August 23, 1988. It was this Witness Statement that disclosed for the first time the work of Mr. Ruland and the conclusions drawn therefrom by Mr. Feenstra. By August 23, 1988 the Town of Milton had completed its reply case in chief; that is, both Mr. Gray and Dr. Rowe had completed their evidence-in-chief, constituting the Town of Milton's reply case, on August 22, 1988. They were scheduled for cross-examination at a later date.

In these circumstances, following the release of Mr. Feenstra's Witness Statement and following his subsequent evidence with respect to that Statement, it was not open to the Town of Milton under the rules of evidence to attempt to re-open the evidence-in-chief of Mr. Gray and Dr. Rowe. In essence, the significance of the test pit dug on Site "D" was not appreciated by the Town of Milton until August 23, 1988 when it was too late to pursue this evidence through its own witnesses absent leave from the Joint Board to do so.

Moreover, according to the rules of evidence which govern the conduct of cross-examination in these circumstances, it was not open to the Town of Milton to suggest in cross-examination of Mr. Feenstra on September 12, 1988 facts relating to the test pit at Site "D" when the Town of Milton might not be in a position to prove those facts by the introduction of positive evidence before the Joint Board. This is so because counsel are prohibited from suggesting affirmative facts in cross-examination, unknown to the witness being cross-examined, that they are unable to or fail to subsequently prove by the introduction of positive evidence. The Town of Milton's reply case was closed. It could introduce no further positive evidence without leave of the Board.

Accordingly, to suggest that the conduct of the Town of Milton in this regard was intentionally improper is, in NSP's respectful submission, unfair and misrepresentative of the rules of conduct and evidence which applied to the Town of Milton in the circumstances;

- (c) The Region of Halton has suggested that Dr. Eyles was not qualified to give opinion evidence as to the significance

of fractures found in the test pit (p. 49, para. 4.34). Contrary to this submission, *Dr. Eyles* (as appears from his Witness Statement filed as Exhibit M-962 before the Joint Board) *was present during the opening of the test pit and made certain personal, first-hand observations of what was present. He was thus in a position to testify, based on first-hand knowledge, as to what occurred at the test pit and as to what he observed.* His observations in this regard would directly have confirmed or negated the existence of fractures in the unweathered upper till unit and their characteristics;

- (d) The Region of Halton is correct in suggesting that the significance of fractures in the unweathered upper till unit becomes important only in the event that the hydraulic trap fails to perform as intended. What the Region fails to mention, however, is that the assessment of the comparative merits of Sites "F" and "D" by the Joint Board necessarily had to take into account the environmental risks in the event of failure of the engineered system at either Site. In other words, *it is precisely in the circumstances of failure of the hydraulic trap (in whole or in part) that the existence of fractures in the unweathered upper till unit becomes gravely important;*
- (e) The Respondents complain of the Town of Milton's failure to disclose the existence of the test pit at Site "D" at an earlier date and, further, suggest that failure to make early disclosure of the test pit in effect precludes the Town of Milton from thereafter seeking to introduce evidence regarding the test pit and observations made in the test pit. *The proceedings before the Joint Board in this case were of an adversarial nature.* In proceedings of this kind pursuant to the Board's governing legislation (or, indeed, in proceedings pursuant to the

Environmental Assessment Act (Ontario)) there is also a fact-finding or investigative component. Nonetheless, the proceedings are essentially adversarial in nature.

That this is a proper characterization of proceedings involving an environmental assessment has been confirmed by the Environmental Assessment Board as recently as June 1, 1989 in a ruling made by that Board in proceedings involving an environmental assessment on another matter. In a Decision released on June 1, 1989, (a copy of which is attached hereto as Appendix "A"), the Board stated (at p. 3):

"When looking at the case authorities one must be cognizant of the nature of the Board's proceedings, which has been characterized by several of the parties in opposition to the applicant's motion as essentially "adversarial". Although the Board does not disagree with this characterization, it must also point out that the Board views its role of protecting the public interest as one which permits the Board to involve itself actively in the process. This involves clarifying the evidence before it and, in some cases, to call witnesses of its own to provide evidence which has been inadequately covered and which the Board deems necessary to adjudicate effectively and completely on the application before it." (Emphasis added)

In adversarial proceedings, there is no obligation on any party to disclose evidence to other involved parties which it believes at that time to be irrelevant, insignificant or of no assistance. Thus, in the circumstances which applied in this case where the Town of Milton indicated to the Joint Board that it did not appreciate the significance of the test pit observations until following the release of Mr. Feenstra's Witness Statement, *it cannot be said that anything improper occurred.*

Conversely, even if the process in this Hearing is to be regarded as not entirely adversarial but also investigative in nature, *the Joint Board, to fulfil an investigatory*

function, had a duty to hear all relevant evidence requested of it by the parties;

- (f) *The facts regarding the test pit at Site "D" have not been tested. That evidence was not received or considered by the Joint Board. It remains true that if fractures exist in the unweathered upper till unit at Site "D" and if the hydraulic trap fails to function as designed for the entire contaminating lifespan of the landfill, there is a material risk both to existing water resources and, as well, to public health and safety in the vicinity of the Site "D".*

(b) THE SUFFICIENCY OF A LINER AT SITE "D" AS A PROTECTION AGAINST THE EFFECTS OF FRACTURING

24. The Region of Halton in its Response, relies on three design alternatives for Site "D" as proposed by Mr. Feenstra in his reply evidence as a solution to the effects of fracturing in the upper unweathered till unit at Site "D". More particularly, the Region in its Response stresses that one of the design alternatives proposed by Mr. Feenstra was the construction of a liner. The Region has suggested that this alternative was accepted by the Joint Board "as the appropriate alternative remedial measure to be adopted" (p. 50, para. 4.36).

25. The difficulty with the argument advanced by the Region of Halton is that *there was no engineering evidence whatsoever before the Joint Board regarding the design alternatives proposed by Mr. Feenstra, including the suggested liner.* Mr. Feenstra was qualified before the Joint Board to give evidence as a hydrogeologist and hydrogeochemist. He is not an engineer and was not qualified as such. His was the only evidence before the Joint Board regarding the efficacy of a liner at Site "D" and regarding its potential as an adequate response to fracturing in the unweathered upper till unit.

26. The Region has suggested that counsel for NSP had an opportunity to take issue, during the cross-examination of Mr. Feenstra, with the suggestion that a liner at Site "D" was an appropriate response to

fracturing. As Mr. Feenstra was not an engineer and could not give engineering evidence as to the adequacy of a liner at Site "D" nor, indeed, even as to the potential for proper construction of a liner at that Site, he could not have addressed these issues either in cross-examination or his evidence-in-chief.

27. Contrary to the suggestion made by the Region, Counsel for NSP did challenge Mr. Feenstra during cross-examination on the suggestion that a liner was a sufficient remedy at Site "D". It was Mr. Feenstra's evidence during this cross-examination that:

"Q. *The issue as to whether or not that till unit is fractured goes to the very integrity of Site "D" for a landfill site, would you agree, Mr. Feenstra, the very fundamental issue regarding the integrity of that Site?*

A. *It's a very fundamental issue for the Site and the monitoring program, as previously stated, yes.*" (Transcript, Vol. 172, p. 42863)

With respect specifically to his three design alternatives, relied upon by the Region in its Response, Mr. Feenstra's first proposal was that detailed monitoring should occur at Site "D", with the introduction of purge wells as a primary engineering feature. This design alternative did not receive approval from the Joint Board. In any event, however, it was Mr. Feenstra's evidence under cross-examination that that option was not preventive in nature but was remedial or reactive and would not prevent the spread of contamination at Site "D". Similarly, he admitted under cross-examination that his second design alternative (to bring in a piped water supply) would not prevent contamination at the Site (Transcript, Vol. 172, pp. 42872 to 42873).

28. More importantly in light of the Response delivered by the Region, Mr. Feenstra testified with respect to his third design alternative (*installation of a liner at Site "D"*) that even that design alternative would not prevent indefinitely contamination of the existing water supply at the Site if fractures existed in the unweathered upper till unit. His pertinent evidence is reflected in the following passage from the Transcript:

"Q. *I am suggesting to you that the option of putting in a liner at Site "D" does not have the effect of preventing contamination long-term?*

A. *In the event of failure of the hydraulic trap, no it does not.*" (Transcript, Vol. 172, p. 42875)

29. The only engineering evidence introduced before the Joint Board by the Region of Halton on the design of a landfill at Site "D", was introduced through James Hiraishi who was qualified to give opinion evidence as an engineer. His was the only engineering evidence before the Joint Board at the end of the Hearing regarding the impact of a liner at Site "D". The Region has argued in its Response that Mr. Hiraishi's opinions regarding a liner at Site "D", as reflected in his memorandum dated November 8, 1987, pertained to a type of liner different from that proposed by Mr. Feenstra in his reply evidence. The Region therefor suggests that Mr. Hiraishi's memorandum is "completely irrelevant" to the evidence of Mr. Feenstra regarding fractures in the unweathered upper till unit at Site "D" (p. 52, para. 4.41).

30. Contrary to these submissions by the Region, there was no evidence from any expert witness, whether a hydrogeologist or an engineer, to support the distinction sought to be drawn by the Region regarding the type of liner contemplated by Mr. Hiraishi and that described by Mr. Feenstra. Mr. Hiraishi was not recalled by the Region in light of Mr. Feenstra's reply evidence, to explain what he meant in his memorandum. In the result, the only engineering evidence before the Joint Board regarding a liner at Site "D" was that set out in Mr. Hiraishi's memorandum, which indicated that a liner at the Site would "contravene the basic underlying philosophy used to develop the design and operations concept".

31. Although legal counsel for the Region and for the WBCG attempted in their final submissions to the Joint Board to interpret Mr. Hiraishi's memorandum differently, so as to distance the opinion expressed in his memorandum from the impact of Mr. Feenstra's reply evidence regarding fractures at Site "D", the fact remains that there was no engineering evidence before the Joint Board dealing with the implications of a liner at Site "D". In these circumstances it is respectfully submitted this it was incumbent upon and required that the Joint Board take into account, in reaching its Decision, the contents of Mr. Hiraishi's memorandum and its

significance, if any, to the suggested "remedial solution" of a liner at Site "D". This the Joint Board failed to do – there is no mention anywhere in the Joint Board's Reasons for Decision or Decision of this evidence nor any indication that it was taken into account.

32. Finally, with respect to the issue of a liner at Site "D", the WBCG has suggested in its Response that the Joint Board had jurisdiction to impose conditions to its approval of landfilling at Site "D" and, further, that its inclusion of a condition requiring, in certain circumstances, a liner at Site "D" was merely an effort by the Joint Board to "cover all possibilities in the conditions proposed" (p. 22, para. 56). It is not disputed that the Joint Board has clear jurisdiction under its empowering statute to impose such conditions to its approval as it considers appropriate where such conditions find support in the evidence.

33. The issue raised by NSP in its Application, however, is different from that to which response was made by the WBCG, namely: the Joint Board, on the one hand, appears through its conditions to be requiring installation of a liner at Site "D" in certain circumstances to respond to the risks inherent if fracturing in the unweathered upper till unit exists; on the other hand, the Joint Board expressly rejected the evidence of Mr. Feenstra regarding such fractures and, further, declined to entertain evidence regarding an actual test of the Site "D" soils concerning such fracturing. It is respectfully submitted that the Joint Board cannot on the one hand reject entirely the suggestion of such fracturing and, on the other, insist upon engineering works to respond to it.

(c) DEPLETION OF THE WATER RESOURCE AT SITE "D"

34. The Region of Halton suggests that Mr. Feenstra proposed what the Region terms a "simple remedy" to the potential for depletion of the water resource at Site "D", namely, the introduction of injection wells to maintain the hydraulic pressure in the granular units beneath Site "D" (p. 50, para. 4.37). The City has adopted the Region's submissions in this regard.

35. What both Responses fail to mention is that there was no evidence before the Joint Board as to the preferred location for such injection wells, as to the number of such wells that would be required in the event that a liner was introduced at Site "D", as to the relationship, if any, between such injection wells and such a liner, as to the potential for failure of such injection wells from an engineering perspective and as to any remedial measures which engineers might take in the event of failure, clogging or break-down of such injection wells. In short, the engineering aspects of such injection wells were again, entirely unaddressed in the evidence before the Joint Board and could not be provided by Mr. Feenstra, a non-engineer.

(d) POTENTIAL FOR INDUCEMENT OF FRACTURES DUE TO LANDFILLING

36. As acknowledged by the Region in its Response, the potential for inducement of fractures at Site "D" due to landfilling, concerns the evidence of Mr. Feenstra that excavation of a landfill at the Site, with resulting stress relief, could open up existing fractures (p. 50, para. 4.38). Also as acknowledged by the Region, Mr. Feenstra in his evidence described this potential as an issue requiring investigation by geotechnical engineers (p. 51, para. 4.38). The Region suggests that the geotechnical engineers called by the Town of Milton to give evidence in reply, testified subsequent to Mr. Feenstra's evidence-in-chief on this matter and that the opportunity therefore existed for these witnesses to be cross-examined on the matter. The Region suggests that the failure to cross-examine these witnesses on this issue should be taken to mean that NSP and other parties "were not concerned"

about the potential for such induced fracturing. The City of Burlington, in its Response, has adopted the Region's submissions in this regard.

37. To assess the reliability of these submissions by the Region of Halton, the sequence of reply evidence must be considered. As set out in the Region's own chronology of this evidence (Schedule "A" at pp. 18 to 19 of its Response), the examination-in-chief of the two geotechnical engineers called by the Town of Milton in reply was completed on August 22, 1988. It was not until the following day, August 23, 1988, that Mr. Feenstra's reply Witness Statement was distributed. Accordingly, the geotechnical engineers called by the Town of Milton did not have the benefit of Mr. Feenstra's Reply Witness Statement when they gave their evidence-in-chief in reply and were not able therefore, and did not consider or opine on, the potential for inducement of fractures at Site "D". It is also fair to assume, it is respectfully submitted, that these witnesses had not had the opportunity to assess the significance of this potential nor the geotechnical engineering implications thereof at the time they gave their evidence when in fact they had not, at that point in time, received or reviewed a copy of Mr. Feenstra's Reply Witness Statement.

38. Whether or not it was then open, after completion of Mr. Feenstra's reply evidence, to any other party to seek leave to introduce geotechnical engineering evidence on this issue, the fact is that such engineering evidence was not introduced and was not received by the Joint Board. There was therefor no evidence before the Joint Board upon which it could reject the concerns expressed by Mr. Feenstra regarding this potential for induced fracturing. The Joint Board, as has not been denied by any of the Respondents, failed to address this issue in any way in its Reasons save to comment upon the timing of the introduction of evidence on the matter. There is no basis apparent from the Joint Board's Decision or Reasons, upon which it can be concluded that the Joint Board addressed this issue in arriving at its conclusions.

III. CONFLICT AND NON-COMPLIANCE WITH MINISTRY POLICY

39. The Region of Halton has argued that the Joint Board accepted the evidence before it that Site "F" would leak and that Site "D" would not. The Region characterizes this as a "simple choice" and suggests that it was open to the Joint Board to prefer a "total containment" site to a "leaky" site (p. 28, paras. 3.22 and 3.23 and p. 42, para. 4.9).

40. The existing policies of the Ministry of the Environment that applied during the course of the Hearing and which continue to apply with respect to Site "F" are those described in paragraph 61 of NSP's Application. These include the Ministry's "Reasonable Use Policy" (Exhibit 154 before the Joint Board). These policies, in particular the Reasonable Use Policy, specifically contemplate that in some circumstances a reasonable use of groundwater is leachate attenuation. This was confirmed by the uncontradicted evidence of Dr. George Hughes from the Ministry of the Environment before the Joint Board (Exhibit 928, paras. 8 and 9).

41. Having regard to the provisions of the Ministry's policies, it is not appropriate, it is submitted, to suggest that the Joint Board was faced with a "simple choice" between a total containment site and a site which, as designed, would permit the escape of some leachate. Having regard to the provisions of the Ministry's policies which apply in this case, it was necessary to examine what the consequences of escape of leachate would be, if any, in order to undertake a complete comparative analysis of the merits of the two Sites. This is so, it is submitted, because *if the fact of potential leakage, without more, is enough to justify elimination of a site for landfilling, this would have been the position of the Ministry of the Environment before the Joint Board and the provisions of the Ministry's policies which contemplate permissible leakage in some circumstances would not exist.*

42. The Region of Halton implicitly acknowledges the dangers of an oversimplification of the issues in this case as they relate to the policies of the Ministry of the Environment when it admits, at page 33 (para. 3.38) of its Response:

"There is much to be said in favour of the application of the policies of the Ministry of the Environment to the hydrogeological circumstances of Site "F"."

43. The City of Burlington and the WBCG have argued in their Responses that the decision of the Joint Board to approve Site "D" is consistent with the objectives of the Ministry of the Environment and with those of the government of the Province having regard to the provisions of the MISA Document (the "Municipal-Industrial Strategy for Abatement" Document). *This Document pertains not to groundwater but, rather, to surface water.* The policy reflected in the Document is designed to eliminate pollution from waterways in the Province. What is at issue in this case, having regard to the Joint Board's conclusions regarding Site "F", is whether landfilling at Site "F", would result in pollution of water resources in the area. *The evidence regarding the attenuation characteristics of the shale at Site "F", ignored by the Joint Board in its Reasons for Decision, established that there is no risk of "pollution" from landfilling at this Site.* It is for this reason that consideration by the Joint Board of the evidence regarding the beneficial attenuation characteristics of the Site was critical.

44. In relying on the MISA Document in its Response, the WBCG suggests that there was evidence before the Joint Board that leakage from Site "F" could impact on the water resources in the area of the Site. What the Response filed on behalf of that party fails to mention is that *its own hydrogeologist, Mr. Bowen, testified before the Joint Board that there would be no significant impact on water quality as a result of landfilling at Site "F" due to the opportunity for dilution of contaminants* (Transcript, Vol. 160, p. 38904). Similar admissions were obtained on cross-examination from the hydrogeologists called to testify on behalf of the City of Burlington (see NSP Application, pp. 18-19).

45. To proceed from the premise, as the Joint Board appears to have done in its Reasons for Decision, that a "total containment" site is inherently to be preferred to a site which permits some leakage of leachate, is to ignore the consequences of such leakage and the degree of risk posed by it. To address only the conceptual issue without consideration of the practical consequences of any escape of contaminants is, it is respectfully submitted,

to ignore the policy directions contained in the existing policies of the Ministry of the Environment in contemplation of which and in reliance on all parties proceeded in this case.

IV. PLANNING MATTERS

46. The Region of Halton and the City have argued that there was no finding by the Joint Board that Site "F" was unacceptable in planning terms (p. 44, para. 4.16 and p. 24, paras. 3.92 and 3.98, respectively). *None of the Respondents deny, however, that on the evidence before the Board Site "F" is acceptable for landfilling from a planning perspective.*

47. *What is also undisputed by the Respondents is that the Joint Board's Reasons do not contain a finding that Site "F" is acceptable for landfilling from a planning perspective, notwithstanding that this was the uncontroverted evidence of all of the planning experts.* To the contrary, despite the appropriateness of Site "F" from a planning perspective, and quite clearly despite the positive evidence of the experts regarding the suitability of Site "F" from a hydrogeological perspective, the Joint Board decided that Site "F" was unacceptable, which was manifestly contrary to and unsupported by the expert evidence before the Board.

48. The Region (pp. 46-47, paras. 4.20-4.26) and the City (p. 25, para. 3.101) have submitted that the Board did not err when it stated that (i) a change to the Regulations of the Parkway Belt West Plan would be required for landfilling at Site "F", and, (ii) that the requirements of Section 6.2.3(q) would not be met by landfilling. Instead, the Region and the City have submitted that the Board was referring to private landfilling when it stated a change in the Regulations was required.

49. It is clear from the Board's Reasons that the Board was referring to a possible private landfill use only in the third paragraph at page 126, when it referred to the use of Site "F" for the receipt of inert rubble. The Board then went on to discuss landfilling at Site "F", without making any reference to a private landfill or to a landfill operated by the Region. In NSP's submission, the Board restricted its discussion of a private landfill to

the third paragraph at page 126, and any other reference to landfilling was clearly a reference to proposed landfilling by the Region. As a result, when the Board stated that changes to the Regulations would be required for landfilling at Site "F", the Board was clearly in error.

50. The WBCG submitted in its Response (p. 9, para. 21) that "the Halton Region Conservation Authority passed a resolution indicating the the Oak/Hickory Forest portion of Site "F" should be designated as an environmentally sensitive area (Exhibit B-106)". *In fact, the Conservation Authority passed a resolution approving in principle landfilling at the NSP Site.* Exhibit B-106, a copy of which is attached to this Reply as Appendix "B", goes on to indicate that the Conservation Authority recommended to the Region that the Regional Municipality of Halton **consider** designating the Oak/Hickory Forest on the NSP property as an environmentally sensitive area. The fact is, this was never done. A review of the City of Burlington's submissions at tab 103 of its Response clearly indicates that Site "F" is listed as (potentially) only 20 hectares of a total of more than 11,000 hectares of lands which have been designated in the Region as being "environmentally sensitive".

51. The City (p. 25, para. 3100) and the WBCG (p. 31, para. 74) have argued that Site "F", if used for landfilling, would have an impact beyond its boundaries, and specifically on Bayview Park and on residents of Aldershot located south of the Site. Burlington submitted that there would be an affect on the horse facilities and the model airplane club. Contrary to these submissions, there was no evidence before the Joint Board that there would be any impact on the model airplane club, which uses open space in the park to fly gasoline powered model airplanes. There is also a gun club located at Bayview Park which is housed in a semi-underground bunker-like facility. Further, Mrs. Reed, who has been involved in the showing of horses at Bayview Park in the past, testified that there is a lot of traffic around Bayview Park, which was one of the parks attractions (Transcript, Vol. 99, pp. 23700-23701).

52. The submission by the WBCG that leachate, visual, dust and traffic impacts do not respect the boundary of the railway tracks which are

located between the residents in Aldershot and Site "F", misses the point. On the evidence of those trained in planning matters, Site "F" is completely isolated from adjacent land uses by physical barriers, both man-made and natural. Site "F" is bounded by a significant railway line, Highway 403, large hydro corridors and a large hydro sub-station. This was confirmed by a number of the Burlington residents: Mrs. Reed, for example, who grew up in the Aldershot area, and whose grandmother lives in one of the houses in Aldershot which is closest to Site "F", testified that you can barely see the current landfill site from Aldershot, because all you can see are the train tracks. Mrs. Reed stated "you cannot see it and you cannot hear it", and predominantly you hear the trains, traffic noises and city noises (Transcript, Vol. 99, p. 23704).

53. What is of relevance from a planning perspective is not merely the fact that the railway tracks, the power corridor and Highway 403 create a psychological barrier between Site "F" and the residents of Aldershot. What is of equal importance is that the evidence demonstrated that the highway and the railway tracks create traffic, dust, noise and visual impacts in and of themselves, which are greater than any impact which could be created by Site "F", and which effectively eliminate any possibility that Site "F" could affect residential areas. In short, it is not just the fact that these physical structures create a barrier between residents and Site "F", but it is also that these structures themselves create significant impacts on the residents, which are greater than any impacts which might be anticipated from landfilling at Site "F".

54. In the end, what emerges from the Reasons of the Joint Board on the planning case before it regarding Site "F", is a failure to address the unanimous expert evidence that the use of Site "F" for landfilling is consistent with proper planning principles. Indeed, the undeniable fact is that the Board failed entirely to address the expert evidence before it from five of the six planning witnesses that Site "F" is to be preferred over Site "D" for landfilling from a planning perspective. Even the sixth and opposition planning witness, whose evidence on this issue is also not addressed by the Joint Board, agreed that Site "F" was suitable for landfilling.

V. ECONOMIC COMPARISONS MADE BY THE JOINT BOARD

55. In its Response the Region of Halton has addressed in detail the errors which NSP suggests were made by the Joint Board in carrying out its comparison of the economics of landfilling at both Sites. The City of Burlington adopts the Region's submissions in this regard.

56. The position of NSP with respect to this issue is set out at pages 54 to 56 of its Application. NSP relies on the submissions made therein. The following matters are relevant to the specific submissions of the Region, as adopted by the City, on this issue:

- (a) The Region has argued that it was open to the Joint Board to analyze the evidence before it and to determine its own view as to a reasonable projection of costs for constructing a landfill at either Site (p. 53, para. 4.45). In NSP's submission, this is a correct characterization of the jurisdiction of the Joint Board on economic issues so long as the Joint Board proceeds, in reaching its conclusions, *on the basis of the evidence before it and grounds its decision in that evidence*. This, it is respectfully submitted, the Joint Board failed to do in several material respects;
- (b) It is NSP's position that in preparing its economic comparison Table found at page 145 of its Reasons, the Joint Board should not have included the cost of a liner at Site "F" without including appropriate costs for such an engineered facility at Site "D", more particularly having regard to the liner condition attaching to the Board's approval of Site "D". The Region of Halton has argued, on the one hand, that the Joint Board accepted the evidence of Mr. Feenstra that installation of a liner at Site "D" was the "appropriate remedial measure" to be adopted to respond to fracturing in the unweathered

upper till unit at that Site (p. 50, para. 4.36). The Region then argues, on the other hand, that it was reasonable for the Board to exclude the cost of a liner at the Site from its assessment of comparative costs because the design for the Site approved by the Joint Board allegedly did not require a liner (p. 54, para. 4.49). It is respectfully submitted that *there is an inherent contradiction between these two submissions*. If the first submission by the Region is to be accepted, it follows that the Joint Board relied on a liner as a full and complete response to the problems associated with fracturing at Site "D", but then ignored the financial consequences of this "solution". It is submitted that it was only reasonable for the Joint Board to exclude the costs of a liner at Site "D" if the Joint Board felt that the Site could be used for landfilling, under all possibilities established in the evidence, without a liner. This, on the evidence, and in the face of the conditions imposed by the Joint Board, was not the case;

- (c) The Region has further argued that inclusion in the conditions imposed by the Joint Board of a condition calling for a liner on a "contingency basis" does not require inclusion of the costs of a liner in the costing of Site "D" (p. 54, para. 4.50). *What the Region of Halton's Response fails to mention in this regard is that the other comparative costs accepted by the Joint Board and included by it in its Table at page 145 of its Reasons specifically incorporated other contingencies*. The site costs estimated by the Region's economic consultants who gave evidence before the Joint Board pertaining to Site "D", were in the sum of \$62.9 million. *This sum, specifically, included other contingencies*. It is therefore submitted, that it is entirely inconsistent and inappropriate for the Joint Board in making a

comparative costing analysis to include, on the one hand, contingency items and, on the other hand, to exclude a contingency item (the cost of a liner) when the effect of such exclusion was to reduce the costs of Site "D" below the costs of landfilling at Site "F";

- (d) None of the Respondents has denied that the Joint Board, in arriving at its cost estimates for a liner at Site "F", neglected to take into account evidence led before it from Mr. Gray and Dr. Rowe, on behalf of the Town of Milton, relating *to cost savings* that could be realized by the use of on-site materials at Site "F" in the construction of a liner;
- (e) The Region has suggested that the Joint Board had no obligation to give the parties notice that it intended to assign a value to the 120 acres of additional land at Site "D", as referred to at page 148 of the Joint Board's Reasons. The Region also acknowledges, however, that its own economist who testified before the Board assigned a nil value to these lands. *The Region does not deny that there was no evidence before the Board to substantiate or support a value of \$500,000 for these lands*, which was the value assigned by the Board. In these circumstances, it is respectfully submitted that the Joint Board assigned a specific value to lands in the vicinity of Site "D" when it had no evidentiary basis for doing so. It is further respectfully submitted that in such circumstances, where the Board intends to apply its own judgment in the absence of evidence to assign an economic value which will then be relied upon to assess the comparative merits of the two Sites, it was clearly incumbent on the Joint Board to so indicate to the parties in order to permit them an opportunity to comment upon and make submissions with reference to the proposed value;

- (f) Finally, the Region has argued that there is nothing to suggest that the costing errors which NSP submits were made by the Joint Board would impact on the overall Decision of the Board. While it is correct to indicate that costs were not regarded during the course of the Hearing as the most important factor to be relied upon in choosing between the two Sites, it is equally true *that it is not possible on the face of the Board's Reasons and Decision for any party to determine what impact a fairer costing comparison might have had on the Board's ultimate Decision*. It is not possible, it is respectfully submitted, to argue that a realistic and fairer cost comparison would not have altered the Joint Board's conclusions regarding Site "F" and hence, regarding Site "D".

VI. NATURE OF RELIEF SOUGHT BY NSP

57. The Region of Halton has confirmed in its Response that it does not object to the request made by NSP for rescission of the following findings made by the Joint Board regarding Site "F":

- (a) the finding that Site "F" is hydrogeologically "unsuitable" and "unacceptable" for landfilling, with or without a liner (pp. 36-37, para. 4.2(i) and (ii)); and
- (b) the finding that Site "F" is otherwise unacceptable in the Public Health and Safety category for landfilling with or without a liner (p. 37, para. 4.2(iii)).

58. Further, the Region acknowledges in its Response that it is open to the Lieutenant Governor in Council to rescind the findings of the Joint Board regarding the hydrogeological suitability of Site "F" and, at the same time, to maintain the approval of Site "D" for regional landfilling (p. 41, para. 4.8).

59. Thus, there are a number of options available to the Lieutenant Governor in Council in light of the Applications received. Among these is the option to rescind the Decision of the Joint Board approving landfilling at

Site "D" and to substitute therefor an approval of Site "F" for landfilling by the Region, in accordance with the design proposed by the Region and subject to the conditions of approval proposed at the Hearing by the Ministry of the Environment. The Region of Halton, in its Response, has urged that the conditions of approval proposed by the Ministry of the Environment for Site "F" should not be imposed without amendment thereto as set out in the submissions made to the Joint Board by legal counsel for the Region during final legal argument. The suggested amendments to the proposed conditions of the Ministry of the Environment, as urged by the Region, are found at Transcript, Vol. 181, pages 44970 to 45004. NSP does not oppose the imposition by the Lieutenant Governor in Council of conditions of approval for landfilling at Site "F" in the form proposed by the Ministry of the Environment, as amended in accordance with the submissions made by the Region of Halton found at the above-noted Transcript reference.

60. In the alternative, a further option open to the Lieutenant Governor in Council in the circumstances is rescission of that part of the Joint Board's Reasons for Decision containing those findings by the Board regarding Site "F" referred to in paragraph 57 above. As noted, the Region of Halton does not oppose such rescission. In addition to NSP, the Town of Milton, Azova Investments Limited and the Milton Area Citizens' Coalition et al. support such rescission.

61. A further option open to the Lieutenant Governor in Council, it is respectfully submitted, is to both rescind the identified findings of the Joint Board regarding Site "F" and, as well, to vary the Decision and Reasons of the Joint Board to substitute all or any of the findings requested by NSP in its Application at page 6, paragraph C.

62. The Region of Halton has confirmed in its Response that it does not object to the following substituted finding requested of the Lieutenant Governor in Council by the Milton Area Citizens' Coalition et al., which is substantially similar to certain of the substituted findings requested by NSP, [so long as the conditions of approval proposed by the Ministry of the Environment are amended to accord with the suggested amendments urged

by the Region of Halton and found at Transcript, Vol. 181, pp. 44970-45004]:

"Site "F" is hydrogeologically suitable if designed as proposed by the Region of Halton and if made subject to the conditions of approval proposed at the Hearing by the Ministry of the Environment" (Region of Halton Response, p. 21, para. 3.4)

63. NSP supports and urges upon the Lieutenant Governor in Council the substitution of the aforesaid finding for those made by the Joint Board regarding the hydrogeological suitability of Site "F".

64. With respect to the balance of the substituted findings requested by NSP of the Lieutenant Governor in Council, the Region of Halton has suggested that it is inappropriate for Cabinet to substitute its own findings for findings of the Joint Board, save as noted above (p. 39, para. 4.3). The Region suggests that if a further application is made by NSP, a future Joint Board or Environmental Assessment Board should hear and decide that application on its own merits. The City of Burlington has suggested that substitution of findings is inappropriate (para. 3.115) and further, has suggested that there may be some limitation on the power of the Lieutenant Governor in Council to make the suggested alterations to the Joint Board's Decision in this case.

65. With respect to the suggestion that the matter of substituted findings should be left for some future tribunal, NSP urges the rejection of this submission. The Joint Board in this case held a hearing which lasted approximately eighteen months and which involved considerable complex, technical and lengthy evidence from a great variety of experts. NSP, as noted in its Application, specifically deferred the further processing of its private application for landfilling to the hearing stage at the express request of various government officials including the Ministry of the Environment, the Region of Halton and the City of Burlington. To now suggest, after an eighteen month hearing, that NSP should be compelled to obtain findings of hydrogeological suitability of its Site from some future board, at some additional hearing is, it is respectfully submitted, *manifestly unfair to NSP. This is more particularly so, it is submitted, where the existing uncontroverted evidence before this Joint Board both confirms and*

establishes, without contradiction, the substituted findings that have been requested.

66. With respect to the City of Burlington's suggestion that the Lieutenant Governor in Council may not have the power to alter the Joint Board's Reasons for Decision (as distinct from its Decision), regard should be had to subsection 13(1) of the Consolidated Hearings Act, S.O. 1981, c. 20 which specifically provides that, upon application, the Lieutenant Governor in Council by order:

"(a) may confirm, *vary or rescind all or any part of a decision* of a joint board;

(b) may *substitute* for the decision of a joint board such decision as the Lieutenant Governor in Council considers appropriate; or

(c) may require a joint board or a different joint board to hold a new hearing as to all or any part of the matters in respect of which the joint board was established." (Emphasis added)

67. It is respectfully submitted that this statutory mandate clearly extends to variance of any part of a Joint Board's decision. Further, it clearly empowers the Lieutenant Governor in Council to substitute findings for the decision of a Joint Board in appropriate circumstances.

68. In the context of this case and in the context of most cases heard before the courts and administrative tribunals, the reasons for decision of the trier of fact form part of the decision. In support of this submission, reference need only be made to any reported "decision" of any court in this Province wherein the reasons for decision form part of and are regarded as an integral part of the ultimate decision in the case. It is respectfully submitted that a hearing before a Joint Board is no different in this respect from any other formal legal proceeding.

69. It is therefore respectfully submitted that the Relief requested by NSP, in the nature of substituted findings, is authorized under subsection 13(1) of the Consolidated Hearings Act, supra, and may be effected either by a variance order or, directly, by a substitution of findings order.

70. Finally, the City of Burlington has argued that substituted findings, as requested by NSP with respect to Site "F", should not be made in

this case because the Lieutenant Governor in Council has not had an opportunity to hear and see the witnesses to assess their credibility, qualifications and opinions. The City suggests that in these circumstances the specific findings of fact of the Joint Board should not be upset. It is respectfully submitted that the Lieutenant Governor in Council, in this limited respect, is in no different a position than an appellate court upon an appeal from the decision of an administrative tribunal. It is clear at law that on a statutory appeal from an administrative tribunal (subject only to any provisions to the contrary in the statute affording the right of appeal), the reviewing court has authority to substitute its own findings for those of the inferior tribunal whose decision and reasons for decision are under review. This is so notwithstanding that the reviewing court, very frequently, does not conduct a hearing de novo and does not have the benefit of personally observing witnesses during their oral evidence.

71. It is respectfully submitted that in circumstances where a clear jurisdictional error or a breach of natural justice has occurred as, for example, where the uncontroverted evidence of all experts has been rejected on a critical, essential matter, rescission of the impugned finding or findings is warranted as is substitution of the finding or findings substantiated by the uncontradicted evidence.

VII. CONCLUSIONS AND RELIEF SOUGHT

72. For all of the reasons outlined above, NSP hereby repeats the submissions outlined in its Application dated March 22, 1989 and repeats its request for the Relief therein set out at pages 59 to 61.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Eleanore A. Cronk


Leonard J. Griffiths

DATE: June 2, 1989

Of Counsel for NSP Investments Limited

ENVIRONMENTAL ASSESSMENT BOARD
Proposed Class Environmental Assessment by the
Ministry of Natural Resources for Timber Management
on Crown Lands in Ontario

IN THE MATTER OF sections 5(1), 12(2) and 13(3) of the Environmental Assessment Act, R.S.O. 1980, c. 14

- and -

IN THE MATTER OF the Class Environmental Assessment of the undertaking of Timber Management on Crown Lands in Ontario as administered by the Ministry of Natural Resources.

RULING AND REASONS

Forests for Tomorrow, a coalition of five groups and/or organizations in opposition to the Ministry of Natural Resources' application before the Board, brought a motion pursuant to the Board's Rules of Practice and Procedure for:

- (a) an Order compelling the proponent to call a witness or witnesses of its choice qualified to give testimony on the potential human health effects of the pest control products and formulations the proponent proposes to use within the area of the undertaking, after preparation and submission to the Board and the parties of a witness statement or statements for Panels XII and XIII, speaking to the potential human health effects of said products in compliance with section 5(3) of the Environmental Assessment Act, R.S.O. 1980, c. 140 as amended; or
- (b) in the alternative, an Order compelling the proponent to call as its witness Leonard Ritter, to testify on the potential human health effects of the pest control products and formulations the proponent proposes to use within the area of the undertaking, after preparation and submission to the Board and the parties of a witness statement or statements for Panels XII and XIII speaking to the potential health effects of the said control products in compliance with section 5(3) of the Environmental Assessment Act, R.S.O. 1980, c. 140 as amended; or
- (c) in the further alternative, an Order requiring the proponent to withdraw from its statement of evidence for Panel XII the document entitled "Regulation of Pesticides in Canada", prepared by Wayne S. Ormrod and Leonard Ritter, dated December 14th, 1988 and paragraphs 1, 2 and 3 of the witness statement, being pages 66 and 67 of the said Panel, and paragraph 1 of the Panel XIII witness statement, being page 65 of the Panel; and
- (d) such further and other relief as counsel may advise or this Board permit.

In view of the importance of this issue in terms of the undertaking before the Board and the potential impact of the Board's ruling on the hearing process relative to this hearing and others, the Board requested that the applicant and all parties who wished to respond to this motion prepare written statements of fact and law to be filed with the Board and exchanged among the parties receiving full-time correspondence.

The Board thereupon set May 8th as the date for the return of the motion and on May 8th and May 9th, 1989, heard submissions from counsel for Forests for Tomorrow, the Ministry of the Environment (MOE), the Ontario Forest Industry Association and Ontario Lumber Manufacturers' Association (OFIA/OLMA) and the Ministry of Natural Resources (MNR).

In addition, counsel for the Nishnawbe-Aski Nation and Windigo Tribal Council filed a statement of fact and law for consideration by the Board, and indicated through a representative at the hearing that counsel would not be presenting further oral argument.

The applicant's motion raises essentially four fundamental issues:

- (1) Does the Board have the jurisdiction to compel the proponent to adduce evidence to deal with a specific matter either orally by calling a witness or witnesses, or through the filing of a study or report; if so, under what circumstances?;
- (2) Is it incumbent upon the proponent to submit to the Board evidence on the potential human health effects of pest control products and formulations the proponent proposes to use within the area of the undertaking, as part of its environmental assessment, in order to comply with the provisions of section 5(3) of the Environmental Assessment Act?;
- (3) If the answer to question 2 is yes, is the proponent entitled to rely on existing federal and provincial regulatory regimes regarding the registration and use of herbicides and insecticides (hereinafter referred to as "pesticides") without calling further evidence in satisfaction of its obligations under section 5(3) of the Environmental Assessment Act?; and
- (4) Notwithstanding that the particular pesticide in question has received federal and provincial regulatory approval for use in Canada and Ontario, does the Board have the jurisdiction under the provisions of the Environmental Assessment Act to impose more stringent conditions of use or, in the alternative, to prohibit the use of such pesticides by MNR with respect to activities associated with renewal and/or tending within the area of the undertaking?;

The issues enumerated above give rise to further issues concerning the role of intervenors in the environmental assessment process itself. In the event that further evidence on the potential human health effects of pesticides used within the area of the undertaking is deemed relevant and/or necessary by the Board in this application, what, if any, limitations should be placed upon such evidence, bearing in mind that the primary purpose of the proponent's application is not only to seek approval for the use of pesticides.

In the course of rendering its decision on the applicant's motion, the Board proposes to deal with each of the four principal issues and also with collateral process issues, in view of their relative importance to both this class environmental assessment and the environmental assessment process in general.

DISCUSSION OF ISSUES

- (1) Does the Board have the jurisdiction to compel the proponent to adduce evidence to deal with a specific matter either orally by calling a witness or witnesses, or through the filing of a study or report; if so, under what circumstances?

The Board has carefully reviewed the submissions made by the parties on this question and has concluded that it does not have the jurisdiction to compel parties to call witnesses for the following reasons:

Mr. Castrilli, on behalf of Forests for Tomorrow, argued that MNR has the statutory obligation under section 5(3) of the Environmental Assessment Act to include an assessment of the potential human health effects of pesticides to be used by the proponent within the area of the undertaking, and that the Board has the authority under its own Rules of Practice to compel procedural compliance with the statutory obligations imposed upon the proponent.

Setting aside for the moment a determination of the proponent's statutory obligations under section 5(3) of the Environmental Assessment Act and assuming that the proponent does have the statutory obligation to deal with the potential impacts on human health of pesticides used within the area of the undertaking, any authority for the Board to compel the proponent to call witnesses cannot be founded upon an interpretation of its Rule 4, unless this authority is "permitted by law".

Rule 4 of the Board's Rules of Practice and Procedure states:

"Where any matter arises during the course of any proceeding that is not contemplated by these Rules, the Board may do whatever is necessary and 'permitted by law' to enable it to effectively and completely adjudicate on the matter before it."

This Board, as is the case with many other statutory tribunals, must rely on the provisions of the relevant statutes for its powers and authority. There is nothing in either the Environmental Assessment Act or the Statutory Powers Procedure Act which confers upon the Board the authority to compel the proponent to call witnesses, and indeed a review of the relevant case authorities would indicate that such power is not permitted by law.

Clearly Rule 4 was intended to provide some flexibility in terms of the procedural aspects of proceedings before the Board, and cannot be interpreted to confer upon the Board the jurisdiction to exercise powers which are not conferred upon it by statute or are otherwise not permitted by law.

In the Board's view, section 18(9) of the Environmental Assessment Act provides no assistance on this question because it deals with the Board's statutory authority to appoint an expert on behalf of the Board for the purpose of assisting the Board in connection with any matter before it, and that specific provision cannot be interpreted to enable the Board to compel another party to provide evidence by means of calling a witness.

When looking at the case authorities one must be cognizant of the nature of the Board's proceedings, which has been characterized by several of the parties in opposition to the applicant's motion as essentially "adversarial". Although the Board does not disagree with this characterization, it must also point out that the Board views its role of protecting the public interest as one which permits the Board to involve itself actively in the process. This involves clarifying the evidence before it and, in some cases, to call witnesses of its own to provide evidence which has been inadequately covered and which the Board deems necessary to adjudicate effectively and completely on the application before it. To this extent the hearing process before a quasi-judicial administrative tribunal such as the Environmental Assessment Board is different from a court exercising its jurisdiction in the context of a civil case. These distinctions in the Board's view do not affect the general principles set forth in the case law concerning the Board's authority to compel a party to call witnesses.

Counsel for OFIA/OLMA cited an extract from the civil law textbook by Sopinka and Lederman at page 475 for the proposition that "under the adversary system of justice, the calling of witnesses is the function of the parties and not the court". Authority for this proposition was found in the

case of Re Fraser; Fraser v. Robertson; McCormick v. Fraser ((1912) 26 O.L.R. 508), wherein Garrow, J. said at page 512:

"The court has, apparently, no power of its own motion and without the consent of both parties to direct further evidence to be given...the parties, and not the court, are domini litis in all civil proceedings. If a party comes into court with an imperfect case, the proper penalty is dismissal."

This view is further supported in the case of Harwood and Cooper v. Wilkinson ((1929), 64 O.L.R. 658), where Riddell, J.A. said at page 663 that:

"Counsel, not the Judge, is to determine what witnesses he is to call in support of his case;

Further, in the case of Connor v. Township of Brant ((1914) 31 O.L.R. 274) the court stated at page 282:

"It is quite true that the functions of tribunals appointed to determine cases are primarily and essentially judicial, not inquisitorial. The tribunal is to judge and decide; to supply the proofs - the materials for decision - belongs in general to the litigant parties. But, as Mr. Best observes, the inquisitorial principle is recognized thus far, that the tribunal is empowered to extract facts from the instruments of evidence adduced, and in some cases to compel the production of others which have been withheld...but it would appear that a Judge is not hampered by the rule against leading questions, the foundation for which shews that is it not applicable in the case of a presiding Judge."

Although Mr. Castrilli argued that there is no case which specifically extends the application of this general principle of law applicable to the courts to administrative tribunals, the Board is of the view that this principle does apply, and accordingly precludes the Board from compelling a party to call witnesses against the wishes of that party.

The above principle, of course, does not prevent the Board from ordering a party to produce a document, or study within that party's possession, and both the law and rules with respect to the production of documents in this regard are not in question.

- (2) Is it incumbent upon the proponent to submit evidence on the potential human health effects of pesticides which the proponent proposes to use within the area of the undertaking, as part of its environmental assessment, in order to comply with section 5(3) of the Environmental Assessment Act?

Section 5(3) of the Environmental Assessment Act sets out the statutory requirements in general terms of an environmental assessment document submitted to the Minister pursuant to subsection (1) of section 5. The Act specifies that the environmental assessment shall consist of:

- (a) a description of the purpose of the undertaking;
- (b) a description of and statement of the rationale for,
 - (i) the undertaking,
 - (ii) the alternative methods of carrying out the undertaking, and
 - (iii) the alternatives to the undertaking;

(c) a description of,

- (i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
- (ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and
- (iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment,

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and

(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

It is clear, therefore, that the proponent must include, inter alia, within its environmental assessment, a description of the environment that could be affected by the undertaking; the effects either caused or likely to be caused to the environment; a description of the actions necessary to prevent, change, mitigate or remedy these effects; an evaluation of the advantages and disadvantages to the environment of the undertaking; the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

Inasmuch as the definition of "environment" under the Act goes far beyond the natural environment and specifically includes "plant and animal life, including man", there is little doubt, in the Board's view, that the proposed activities of the proponent must be evaluated or assessed in light of the effect or potential effect of these activities upon humans.

The proponent has clearly indicated in its environmental assessment document (filed in these proceedings as Exhibit 4) that it intends to use certain pesticides for the purposes of assisting the proponent in its regeneration and/or tending activities.

The Board is therefore in agreement with Mr. Castrilli that the Act clearly confers an obligation upon the proponent to describe the effects of the use or proposed use of pesticides upon humans and to describe the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects or potential effects caused by the proposed activities associated with the proponent's undertaking.

Members of the Environmental Assessment Board have, on several occasions, articulated the Board's view that the environmental assessment process is an evolving one, and is not confined to only those matters raised in the environmental assessment documentation submitted pursuant to section 5(1) of the Act. Matters pertaining to the environmental assessment, included under the specific heads which are set out in section 5(3) of the Act, may be addressed either in the documentation filed with the Minister or in documentation or other oral evidence admitted by the Board during the course of the hearing itself.

This statement of principle was addressed at length by the Chair of the hearing panel in his dissenting opinion with respect to the Regional Municipality of Hamilton-Wentworth Expressway decision of the Joint Board dated October 24th, 1985 at pages 293-300 (Registrar's File No. CH 82-08) and the reasons set out in that opinion need not be reproduced here. It is a view which has been endorsed in subsequent cases.

The proponent in this case has indicated its intention to address the issue as to whether or not the use of pesticides within the area of the undertaking will result in significant human health

effects on the basis of relying upon the fact that said pesticides have been registered for use in a prescribed manner in accordance with the provisions of federal and provincial regulatory legislation. In reaching a conclusion at this stage of the proceeding that further evidence relating to the potential health effects from the use of pesticides is not necessary, the proponent is exercising its discretion and judgement. This may or may not be held to be deficient by the Board which must ultimately render a decision on the acceptability of the environmental assessment at the conclusion of the case after hearing all of the evidence by all of the parties.

It may well be that the proponent will, as the result of the interrogatory process, scoping sessions, cross-examination by parties in opposition, or, as the result of indications put forward by the Board itself, elect to call more evidence than it originally intended, and there are mechanisms available in terms of the administrative law process to accommodate this end. On the other hand, the proponent may feel that it has satisfied whatever burden of proof may be applicable to the circumstances at hand, and is prepared to "assume the risk" by electing not to call further evidence.

The Board has therefore reached the conclusion that it is premature prior to hearing all of the evidence, to determine whether or not the proponent has met its statutory obligations under section 5(3) of the Environmental Assessment Act, and accordingly will decline to do so.

Likewise, the Board will not direct the proponent as to what to include or not to include within its case, as this surely must remain within the discretion of the party upon whom the burden of proof rests.

Having said this, however, the Board does take the view, particularly in lengthy proceedings, that it is in the public interest for the Board to indicate at an early stage those areas where the Board is concerned about the level of detail or sufficiency of evidence, in order that the party to whom that concern is directed might, if it so wishes, attempt to address those concerns in a timely fashion.

The Board will in fact attempt to provide such guidance with respect to the potential health effects from the use of pesticides later in this ruling.

- (4) Notwithstanding that the particular pesticide in question has received federal and provincial regulatory approval for use in Canada and Ontario, does the Board have the jurisdiction under the provisions of the Environmental Assessment Act to impose more stringent conditions of use or, in the alternative, to prohibit the use of such pesticides by MNR with respect to activities associated with renewal and/or tending within the area of the undertaking?

This question overlaps to some extent with question 3 above, for it is evident from the submissions by counsel that the requirements of the existing federal and provincial regulatory regimes are somewhat different from the requirements of the Environmental Assessment Act set out in section 5(3).

Mr. Castrilli has pointed out that the registration of pesticides under the federal Pest Control Products Act and the Ontario Pesticides Act does not entail a process analogous to an environmental assessment, nor have applications for registration been subject to public scrutiny in the form of a public hearing process. In addition, Mr. Castrilli points out that neither the federal nor provincial regulatory process relating to pesticides requires an evaluation of alternatives to the use of such pesticides as is required under the provisions of the Environmental Assessment Act {section 5(3)}.

MNR, on the other hand, responded by stating that the review, approval, scheduling, licensing and permit systems in place under the federal and provincial regulatory schemes address the issues of

potential human health effects of pest control products and the actions necessary to ensure an acceptable level of risk, and that there is a reasonable presumption that the use of registered products in accordance with that legislation will not result in significant adverse human health effects.

Whether or not this is in fact the case will have to await a decision of the Board after hearing all of the evidence brought before the Board by all parties, including those in opposition. MNR further stated that it did not rely on the "Ritter" document and provided the document as part of its Statement of Evidence for Panel XII for informational purposes only.

On the question of jurisdiction, however, the Board is clearly of the view that the federal and provincial regulatory regimes with respect to the registration of pesticides, do not in any way preclude the Board from considering the potential health effects from the use of these products on the environment, in the context of the provisions of the Environmental Assessment Act. Indeed, none of the parties seriously contests the Board's jurisdiction to consider these potential effects, and the mere fact that the products in question have been registered for use under other legislation does not deprive the Board of jurisdiction under the Environmental Assessment Act.

Having concluded that the Board does in fact have concurrent jurisdiction concerning the use of pesticides within the area of the undertaking, can the Board impose more stringent conditions of use or, in the alternative, prohibit the use of such pesticides by MNR with respect to activities associated with renewal and/or tending within the area of the undertaking?

It is clear that under the provisions of section 12(2) of the Environmental Assessment Act, the Board does have the power to impose terms and conditions when giving approval to proceed with the undertaking, and there is nothing in the Act which fetters the Board's discretion in this regard.

Section 14(1)(b) sets out a list of the types of terms and conditions that might be imposed by the Minister when the Minister is giving approval to proceed with the undertaking; however, in the Board's view, it is not restricted to the items set out on this list, although it may well provide useful guidance to the Board in exercising its discretion under section 12(2)(d)(e).

The Board has also concluded that in exercising its discretion under section 12(2) of the Act, it may go beyond the terms and conditions which may have been imposed in conjunction with the decisions of other regulatory authorities exercising jurisdiction under other legislation. Thus the Board could, if it chose to do so, impose a condition either restricting or prohibiting the use of a particular pesticide within the area of the undertaking, notwithstanding that the said pesticide had been approved for use under the applicable federal and provincial legislation, if the Board felt that such a condition were necessary to fulfill the purposes of the Act, namely:

"to provide for the protection, conservation and wise management in Ontario of the environment".

The degree to which the registration processes of pesticides and other regulatory legislation satisfy the requirements of the Environmental Assessment Act is a matter for the Board to determine on the facts of the specific case before it, and such determination cannot be made until the Board has heard all of the evidence with respect to this issue.

Turning now to process issues of a more general nature, the Board wishes to comment on Mr. Castrilli's submission to the effect that the role of intervenors to these proceedings is to rebut the case of the proponent, and that the nature of rebuttal evidence is that it responds to the case of the proponent.

In advancing this argument Mr. Castrilli stated that it would be highly prejudicial to his client to place upon them by default any evidentiary burden where no burden exists under the statute, and at the same time

to permit the proponent to evade its very clear duties under the Act to prove its case on at least the balance of probabilities.

With respect, the Board disagrees with this interpretation of an intervenor's role in proceedings before this Board. It has always been open to intervenors to call evidence of their own dealing with matters which may not have been raised by the proponent, and indeed, this is one of the principal mechanisms by which intervenors have sought to advance their respective interests in opposing the application before the Board. To preclude relevant evidence from the Board's consideration simply because the proponent failed to address any particular issue does not, in the Board's view, materially assist the hearing process, and would likely lead to a serious impairment of an intervenor's ability to participate effectively in the overall environmental decision-making process.

It must be recognized that although the environmental assessment under the present legislation is proponent-generated, it is virtually impossible for proponents to second guess every issue that might be raised by parties in opposition. Consequently, the process must be flexible enough to allow issues to be introduced or addressed by intervenors, which may not have been addressed in the first instance to the satisfaction of those in opposition.

On the other hand, the Board does not mean to imply that a proponent's failure to fulfill any statutory obligation it might have under the relevant legislation in any way shifts the onus or burden to do so to any party in opposition. The foregoing statement, however, stands for the proposition that an intervenor has the right to lead relevant evidence pertaining to matters before the Board, whether or not the proponent has led evidence on that particular issue.

In this way it is entirely possible that an intervenor may, in effect, remedy a defect in the proponent's application although, of course, there is no obligation or onus upon an intervenor to do so.

To hold otherwise would deprive the parties, the Board, and indeed the public at large of a very significant positive contribution that intervenors can often make to the hearing process.

Having reached the conclusion that the proponent does have a statutory obligation to address the issue of potential health effects on humans from the use of pesticides within the area of the undertaking under the provisions of section 5(3) of the Environmental Assessment Act, and that this obligation may not necessarily have been met in its entirety by the mere fact that the pesticides in question have been registered for use pursuant to other federal and provincial regulatory legislation, the Board wishes to express its concern over what this might mean in the context of this particular hearing.

It is apparent from the submissions made by counsel that the procedures for the registration, classification, and authorization to use pesticides under both the federal Pest Control Products Act and the provincial Pesticides Act, together with the relevant regulations, require prior submission of data in areas such as effectiveness, toxicity, environmental effects and risk assessment which includes, to some degree, potential human health effects.

Bearing in mind that the proponent proposes to use a number of different pesticides in association with its renewal and tending activities within the area of the undertaking, an intensive review at this hearing of all data considered by other regulatory authorities or all other existing sources of data on the products would likely add several months, if not years, to what is already a lengthy, complex and costly proceeding.

The use of pesticides, in the context of the proponent's overall undertaking, although constituting an issue which may have serious environmental effects, is nevertheless one which should not be allowed to turn the present proceeding into one which goes beyond the what is necessary to permit the Board to fulfill its statutory mandate under the Act.

The Board is prepared to indicate to the proponent at this time that it is concerned with the potential effects on human health from the proposed use of these pesticides, and will be endeavouring to satisfy itself after hearing all of the evidence that the proposed use of these pesticides will not have an adverse effect upon the environment.

In addition, the Board would expect that the evidence led by the parties would address alternatives to the proposed use of said pesticides in association with the proposed activities of the proponent within the area of the undertaking.

The degree to which the above concerns require the calling of evidence by the parties must, in the final analysis, be left to the parties themselves, although the Board is primarily interested in evidence which may exist to show that the use of said pesticides within the area of the undertaking will or is likely to cause adverse health effects on humans. In this regard the intervenors will not be precluded from introducing evidence of their own relative to the above concerns.

DISPOSITION OF MOTION

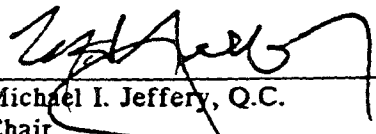
On the basis of the foregoing conclusions, the Board therefore shall:

- (a) decline to order the proponent to call a witness or witnesses of its choice qualified to give testimony on the potential human health effects of the pest control products and formulations the proponent proposes to use within the area of the undertaking;
- (b) decline to compel the proponent to call as its witness Leonard Ritter to testify on the potential human health effects of the pest control products and formulations the proponent proposes to use within the area of the undertaking; and
- (c) decline to order the proponent to withdraw from its statement of evidence for Panel XII the document entitled "Regulation of Pesticides in Canada", prepared by Wayne S. Ormrod and Leonard Ritter, dated December 14th, 1988 and paragraphs 1, 2 and 3 of the witness statement, being pages 66 and 67 of the said Panel, and paragraph 1 of the Panel XIII witness statement, being page 65 of the said Panel.

In the event that MNR wishes to adduce further evidence on the potential effects on human health from the use of pesticides within the area of the undertaking in addition to what is described in the Statement of Evidence for Panels XII and XIII, the Board shall direct it to provide supplementary Statements of Evidence outlining such further evidence no later than June 30th to all parties receiving full-time correspondence. A scoping session with respect to evidence concerning the use of pesticides will be scheduled upon resumption of the hearing on August 8th, 1989, and a date will then be set for the hearing of this evidence.

The Board wishes to express its gratitude to all parties for their very thorough submissions, which the Board found most helpful in arriving at its decision on this motion.

Dated at TORONTO this 1st day of JUNE, 1989.


Michael I. Jeffery, Q.C.
Chair
Environmental Assessment Board



gar Square
10 Main Street,
Hilton, Ont.
9T 1P4
(416) 878-4131 & (416) 826-2855

Proctor and Redfern Limited
20 Hughson St. South
Hamilton, Ontario
L8N 2A1

Dear Sir:

Re: Application by National Sewer Pipe Ltd. to create a sanitary landfill site in Lots 2 and 3, Conc. I, and Pt. Lot 3, Conc. II (E.F.), City of Burlington

The following resolution was passed at the December 1, 1982 meeting of the Resource Planning - Fill and Flood Plain Advisory Board and endorsed by the Executive Committee of the Halton Region Conservation Authority, and will be presented to the Full Authority at their meeting of January 13, 1983:

"THAT the Resource Planning - Fill and Flood Plain Advisory Board recommend to the Authority that the concept of establishing a landfill site as proposed by National Sewer Pipe in Lots 2 and 3, Conc. I, and Pt. of Lot 3, Conc. II, City of Burlington (E.F.), be approved in principle;

AND FURTHER, THAT before finalizing the design of the landfill site, the following investigations should be carried out:

1. groundwater hydrology work by Dr. Cherry for the Region of Halton to be completed
2. program of water quality sampling in the Indian Creek initiated by National Sewer Pipe Ltd.;

AND FURTHER, THAT in the completion of final design drawings and specifications, the following items must be incorporated:

1. final design for storm water management and siltation control works must be satisfactory to the Halton Region Conservation Authority and approved under Regulation 164, R.R.O. 1980; and all ditches, ponds and dikes be designed to include erosion protection;

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Proctor and Redfern Limited
Attn: Mr. B. Tate
December 16, 1982
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2. the measures to be used to protect the Oak-Hickory Forest during the operation of the landfill site be clearly established in the final design and approved by the Ministry of Natural Resources, Halton Region Conservation Authority and Region of Halton;
3. the final rehabilitation plan should include a wildlife corridor connection between the Sassafrass Woods E.S.A. and the Oak-Hickory Forest and the addition of selected wildlife planting around the permanent ponds and watercourses;

AND FURTHER, THAT the Halton Region Conservation Authority recommend to the Region of Halton that the Regional Municipality of Halton consider designating the Oak-Hickory Forest on the National Sewer Pipe property as an Environmentally Sensitive Area in the Region of Halton's Official Plan;

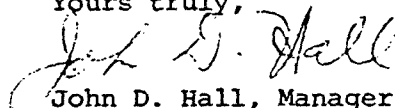
AND FURTHER, THAT the Halton Region Conservation Authority request the Ministry of Natural Resources to revise the rehabilitation plan to conform to the proposed landfill site rehabilitated design so that the rehabilitation plan issued with the present quarry licence is in conformity with the proposed end use of the property;

AND FURTHER, THAT the Halton Region Conservation Authority recommend that the Ministry of Municipal Affairs and Housing be responsible for co-ordinating the final land use plan for the three landfill sites, namely National Sewer Pipe, Bayview Park and Region of Halton (Burlington) landfill sites, into an overall comprehensive final land use plan and that the City of Burlington and Region of Halton be active participants in the finalized and overall plan for their eventual end land use."

I have also attached the staff report which was presented to the Advisory Board and outlines in greater detail the Conservation Authority's concerns with respect to the proposed landfill site and operation.

If you have any questions, please do not hesitate to contact the undersigned.

Yours truly,



John D. Hall, Manager
Resource Planning

JDH/cj; Attach.

c.c. Mr. R. Mohammed, Region of Halton
Mr. D. Perlin, Region of Halton
Mr. G. Goodman, City of Burlington
Mr. M. Boggs, City of Burlington

Mr. P. Niblett, National Sewer Pipe
Mr. A. Latornell, M.N.R.
Mr. Z. Weing, M.O.H.