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# LEGAL ANALYSIS OF THE PROPOSED TERMS OF REFERENCE UNDER THE *ENVIRONMENTAL ASSESSMENT ACT* RE: SOUTHWESTERN LANDFILL (WALKER ENVIRONMENTAL GROUP)

**Prepared for:** **Oxford People Against Landfill (OPAL) Alliance**

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## PART I - INTRODUCTION

The Canadian Environmental Law Association ("CELA") has been retained as counsel for the Oxford People Against the Landfill ("OPAL") Alliance with respect to the above-noted matter.

CELA has been instructed by OPAL to prepare a legal analysis of the proposed Terms of Reference ("TOR") submitted by the Walker Environmental Group Inc. ("WEG") for an environmental assessment ("EA") of the proposed Southwestern Landfill in Zorra Township, in the County of Oxford.

Accordingly, CELA has carefully reviewed the proposed TOR (dated August 29, 2013), and we have compared it to the applicable requirements of the *Environmental Assessment Act* ("EAA") and relevant Ministry of the Environment ("MOE") guidance documents.

According to the proponent, the proposed TOR is the only documentation that has been submitted to the MOE for formal approval under the EAA. Nevertheless, this legal analysis also includes comments, where appropriate, on certain claims made by the proponent within WEG's "Supporting Documentation" and "Record of Consultation", both of which were submitted by WEG concurrently with the proposed TOR.

This legal analysis by CELA should be read in conjunction with opinion letters submitted to the MOE on behalf of OPAL by Wilf Ruland, P.Geo. regarding the hydrogeological aspects of the proposed TOR, and by Stephen Thorndyke, B.Sc. (Hons), M.Eng., P.Eng. regarding the air quality/odour aspects of the proposed TOR. Additional comments on the proposed TOR have also been submitted by OPAL to the MOE under separate cover.

## PART II - GENERAL COMMENTS ON THE PROPOSED TOR

### *(a) Background: The Proposed Landfill*

WEG proposes to conduct an EA for the proposed Southwestern Landfill, which is to be located in Zorra Township, in the County of Oxford, in close proximity to the Town of Ingersoll, Centreville, Beachville, and Township of South West Oxford.[1]

If approved, this private landfill would be one of the largest in the province, as WEG proposes to dispose of 850,000 tonnes/year of solid, non-hazardous waste from an all-Ontario service area.[2]

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[1] Proposed TOR, page 16.

Projected over the proposed 20 year lifespan of the landfill, this annual fill rate (if approved) would result in the deposit of 17,000,000 tonnes of waste for final disposal at the site. This total figure does not include cover material and presumes that no further expansions will be sought by WEG as the landfill approaches its approved capacity over its operating lifespan.

Significantly, the proposed landfill is portrayed by WEG as a key component of a larger waste management "hub" that not only disposes waste, but also creates energy-from-waste, processes recyclables, composts organic wastes, and includes other on-site diversion activities.[3] However, the proposed TOR is focused primarily on the landfill component of WEG's overall corporate vision of the various waste management activities that might be undertaken at the proposed location.

Aside from the enormous scale, capacity and magnitude of the landfill, the WEG proposal is also noteworthy because of its proposed location on private property owned by a third-party, Carmeuse Lime (Canada) Ltd. ("Carmeuse"). In particular, WEG has apparently acquired contractual rights to "develop environmental businesses, including a landfill" upon the Carmeuse lands,[4] but WEG does not actually own the subject property. This raises serious questions about whether WEG can obtain an Environmental Compliance Approval for the proposed landfill since section 3 of O.Reg.232/98 requires the instrument-holder to own the lands in question:

> 3. The holder of an environmental compliance approval to which a landfilling site is subject must own the entire site in fee simple, unless the site is on Crown land.

Despite this regulatory requirement, the contractual arrangements between WEG and Carmeuse have not been publicly disclosed to date.

In addition, WEG proposes to establish the landfill below-grade on quarry lands licenced under the *Aggregate Resources Act* ("ARA") after Carmeuse has extracted limestone from the area(s) in question. The precise location of the proposed landfill footprint has not been identified in the proposed TOR.[5] Nevertheless, CELA notes that at the present time, the Carmeuse quarry lands are scheduled to be remediated in accordance with the rehabilitation plan developed under the ARA. In short, this plan does not envision the conversion of former quarry lands into a large-scale landfill.

The lands immediately surrounding the proposed landfill are largely rural in nature, but there are number of residences and farms (i.e. along Beachville Road) in close proximity to the Carmeuse lands. Virtually all of the people living close to the proposed landfill rely upon domestic wells for drinking water and livestock watering purposes. The Town of Ingersoll also relies upon groundwater for its municipal water supply. Significantly, the local source water protection planning process under the *Clean Water Act* has identified the Carmeuse quarry lands as being underlain by a highly vulnerable aquifer (and serving as a significant groundwater recharge

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[2] Oxford County has recently passed a resolution directing staff to prepare an Official Plan Amendment which prohibits the importation of waste generated from sources outside the County.
[3] Proposed TOR, page 8.
[4] Proposed TOR, page 7.
[5] Proposed TOR, page 12.

area).[6] In addition, there have been continuing concerns about ambient air quality within the local airshed due to nearby industrial land uses and transportation corridors (i.e. Highway 401).[7]

The southern boundary of the proposed Carmeuse site is bordered by the South Branch of the Upper Thames River. The water quality in this watercourse is currently stressed due to various anthropogenic causes.[8]

*(b) Public and Agency Comments on WEG's Draft TOR*

Despite considerable public and municipal opposition to the proposed landfill, WEG circulated a draft TOR for review/comment by interested stakeholders in the spring of 2013. On behalf of OPAL, CELA submitted a detailed critique[9] of the draft TOR that raised numerous procedural and substantive concerns. OPAL and other residents, groups and municipalities also submitted comments which were highly critical of the draft TOR and the proposed undertaking.

The MOE's Environmental Approvals Branch also provided WEG with a lengthy memorandum[10] that raised various issues about the adequacy of the draft TOR. In addition, this MOE letter specifically recommended that WEG meet with key stakeholders (including OPAL and CELA) to review and discuss their objections to the proposed TOR:

> You are strongly encouraged to work directly with concerned citizens and CELA to discuss how any outstanding concerns can be better addressed in the proposed TOR.[11]

Despite this clear direction from MOE to WEG, no meeting was held between representatives of the proponent and OPAL or CELA, despite our willingness to discuss the numerous concerns raised by OPAL and CELA about the draft TOR.

Instead, the proponent proceeded to finalize and file a proposed TOR that, in our opinion, does not materially differ from the draft TOR, and the serious concerns raised by OPAL and CELA remain outstanding at the present time. In particular, these concerns have not been adequately resolved (or even seriously considered) in the proponent's comment disposition claims made in Table 10 of the proposed TOR.

*(c) The Legal Test for TOR Approval*

Subsection 6(4) of the EAA provides that:

> The Minister shall approve the proposed terms of reference, with any amendments that he or she considers necessary, if he or she is satisfied that an environmental assessment

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[6] Proposed TOR, page 18.
[7] Proposed TOR, page 14.
[8] Proposed TOR, page 18.
[9] Letter dated June 14, 2013 to Joseph Lyng from CELA.
[10] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE).
[11] *Ibid.*, page 2.

> carried out in accordance with the approved terms of reference will be consistent with the purpose of the Act and the public interest (emphasis added).

While the mandatory word "shall" is found in this provision, it does not mean that TOR approval should be automatically granted by the Minister. Instead, on a case-by-case basis, the Minister must closely examine a proposed TOR in order to be "satisfied" that the resulting EA will be consistent with the public interest and the purpose statement in section 2 of the EAA.

In other words, the Minister's discretion to approve a proposed TOR is not open-ended or unfettered. To the contrary, the Minister must carefully consider the proposed TOR and reach an informed decision on the record whether a proposed TOR meets the statutory test for approval. If it does not (and if amendments cannot remedy or "save" the proposed TOR), then the Minister must refuse to approve the TOR.

In this case, it is our opinion that there is no reasonable basis upon which the Minister can conclude that an EA conducted in accordance with WEG's proposed TOR will be consistent with the purpose of the EAA and the public interest. To the contrary, CELA concludes that the public interest and the purpose of the EAA will be thwarted or undermined by permitting WEG to proceed with a focused EA that not only avoids key environmental planning issues (i.e. need/ alternatives), but also fails to ensure that the potential (if not inevitable) environmental impacts of the massive undertaking will be fully identified and properly evaluated during the EA process. In CELA's view, the proposed TOR should be rejected accordingly.

We further conclude that no amount of tinkering of the proposed TOR will render it approvable under subsection 6(4) under the EAA. Given the paucity of detail in the proposed TOR, and given the fundamentals gaps in the proposed EA process for the Southwestern Landfill, CELA concludes that this is not an appropriate case for the Minister to amend and approve the proposed TOR. In our view, unless and until the proponent firmly commits to undertaking a full EA pursuant to subsections 6(2)(a) and 6.1(2) of the EAA, TOR approval is premature and should not be granted by the Minister.

*(d) Overview of CELA's Conclusions regarding TOR Approval*

For the reasons outlined in detail below in Part III of this legal analysis, it is CELA's overall opinion that an EA prepared in accordance with the proposed TOR would not be consistent with the public interest and the purpose of the EAA.

More specifically, it is our view that the proposed TOR is fundamentally flawed, essentially incomplete, and generally incapable of ensuring that the forthcoming EA process will adequately address the key environmental and human health concerns associated with the proposed landfill. In this regard, the data collection, modelling, and analytical exercises described in the proposed "work plans" in the proposed TOR are inadequate for the purposes of identifying and evaluating the direct, indirect and cumulative environmental impacts of the landfill proposal. The proposed EA methodology and criteria (Appendix B) are also unacceptable in terms of their nature, scope and weighting.

Similarly, the proponent's initial decision-making, as reflected in the proposed TOR (i.e., the purported exclusion of "need" and "alternatives to" from further consideration in the EA), was not conducted in an open, rational or traceable manner. Furthermore, many of the proponent's underlying assumptions in the proposed TOR (i.e., waste generation predictions, waste diversion rates, etc.) are unreasonable, unverified, or inconsistent with current provincial policies and priorities.

Accordingly, there is no reasonable basis upon which the MOE, local stakeholders, or the public at large can reasonably conclude that a "focused" EA, prepared in accordance with the proposed TOR, "will be consistent with the purpose of this Act and the public interest."[12] Moreover, it is our opinion that the proponent has proposed landfilling at a wholly unsuitable location that is unlikely to be approved under the EAA.

Therefore, the MOE should exercise its discretion under subsection 6(4) of the EAA by refusing to approve (or to amend and approve) the proposed TOR submitted by WEG. In our view, rejecting the TOR and terminating the EA process for this undertaking at the earliest possible opportunity is consistent with the public interest purpose of the EAA,[13] *viz.*, "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management" of the environment.

## PART III - SPECIFIC COMMENTS ON THE PROPOSED TOR

CELA's analysis of the proposed TOR has revealed a number of serious concerns about the content and conduct of the narrow EA process being advocated by WEG. To assist public and agency reviewers, these concerns are presented in this submission in the same chronological order as the proposed TOR.

CELA hastens to add that the following analysis is not intended to be an exhaustive catalogue of every gap, omission or deficiency within the proposed TOR. Instead, we have attempted to highlight illustrative examples of the fundamental problems that plague the proposed TOR and militate against TOR approval under the EAA.

### *Section 1: Introduction*

Section 1 of the proposed TOR vaguely defines the purpose of the proposed undertaking as "the provision of future landfill capacity" at the quarry site for the disposal of solid, non-hazardous waste from an all-Ontario service area.[14] No attempt is made to quantify the proposed site capacity, specify the operating lifespan of the landfill, or to characterize (or breakdown) the various types of MSW and/or ICI wastes that the proponent hopes to dispose at the facility. Even specific property identifiers (i.e. lot/concession number or municipal address) for the quarry location (or footprint location) are conspicuously absent from this upfront introduction.

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[12] EAA, subsection 6(4).
[13] *Ibid.*, section 2.
[14] Proposed TOR, page 1.

In our experience, this cryptic statement of purpose departs from well-established EA practice in Ontario's waste sector, particularly in situations where the proponent is proposing a new "greenfield" landfill of a specific size, scale, capacity and location. In addition, as described below in relation to Section 4 of the proposed TOR, CELA submits that this ambiguous statement of purpose by WEG is inadequate and unacceptable for EA planning purposes.

We are aware that in Section 5 of the proposed TOR, the proponent suggests that the annual fill rate might be 850,000 tonnes/year (plus an unspecified quantity of unknown cover material), and that the service life of the landfill might be 20 years. However, the actual location and "final configuration" of the landfill footprint is not specified in the proposed TOR, as WEG proposes to develop these critically important details after the EA process has been commenced.[15] In our view, this astounding lack of particulars in the purpose statement of the proposed TOR – together with the proponent's open-ended suggestion that the undertaking may change over the course of the EA process – is both unreasonable and unacceptable under the EAA.

*Section 2: Identification of the Proponent*

Section 2 of the proposed TOR identifies the proponent as WEG, and provides some brief contact information for the proponent's representative in relation to this proposed undertaking. The fact that Carmeuse has apparently given WEG permission to construct a landfill on its property raises the question of co-proponency (i.e. whether both companies should be described as proponents), which has not been fully addressed or adequately explained in the proposed TOR.

In this regard, CELA notes that MOE's previous comments on the draft TOR highlighted the need for further information about the precise relationship between WEG and Carmeuse:

> The relationship between Walker and Carmeuse Lime Canada (Carmeuse) is unclear from the information provided in the TOR. Additional detail should be provided to explain why Walker's only potential site for a landfill is located on lands owned by Carmeuse.[16]

Despite this reasonable request from MOE, the proposed TOR still fails to provide adequate information on these key points.

More alarmingly, section 2 of the proposed TOR goes on to claim that WEG has the knowledge, experience and capability" to carry out the EA process.[17] In our view, WEG's apparent intransigence during the TOR process (and the vacuous content of the proposed TOR itself) leads CELA to the contrary conclusion about WEG's self-proclaimed ability to conduct a proper EA in this case.

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[15] Proposed TOR, page 12.
[16] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), page 3.
[17] Proposed TOR, page 1.

Moreover, the proponent's self-aggrandizing claim is irrelevant and has no proper place within a proposed TOR under the EAA. Accordingly, when the MOE assesses the "merits" of the proposed TOR, the MOE should disregard, or give no weight to, WEG's claims about its alleged expertise in EA matters.

*Section 3: How the EA will be Prepared*

Section 3 is arguably one of the most objectionable components of the proposed TOR. Without proper justification or adequate explanation, the proposed TOR simply indicates that it is being submitted pursuant to subsections 6(2)(c) and 6.1(3) of the EAA in order to enable the proponent to undertake a "focused" (or "scoped") EA of the proposed undertaking.[18]

If approved, this proposed TOR effectively means that the proponent's EA process will not have to address the threshold questions of whether there is actually a demonstrable public interest "need" (i.e. rationale) for the proposed landfill, or whether there are safer, environmentally preferable or more sustainable "alternatives to" the undertaking. The proposed TOR also purports to dispense with the obligation upon the proponent to conduct an open, rational and traceable site selection process as part of the "alternative methods" analysis under the EAA.

The proposed TOR attempts to rationalize the exclusion of "need", "alternatives to", and alternative sites on the basis of the proponent's closed-door deliberations regarding the alleged "problems" and perceived "opportunities" within Ontario's waste management sector. However, in our view, the proposed TOR (and Supporting Document No, 3) has failed to provide any compelling reasons or persuasive evidence to justify a "focused" EA process in this case.

On this point, we note that the MOE's previous comments on the draft TOR admonished the proponent for proposing to exclude the rationale for the landfill from further consideration in the EA process:

> This section states that the rationale for the undertaking is not proposed to be examined in the EA, but this is not recommended. Please include a discussion of the rationale for the undertaking in the EA, so there will be an opportunity to test the rationale for proceeding with the project against the detailed assessment of potential environmental effects and comparison of advantages and disadvantages that will take place in the EA.
>
> Note that other recently approved waste management ToRs have required that the rationale for the undertaking be discussed in the EA (emphasis added).[19]

It appears, however, that the proponent has failed to heed the MOE's sound advice, and has simply re-hashed its same tired arguments about undertaking a focused EA which excludes any consideration of the so-called rationale for the proposed landfill. For this reason alone, the proposed TOR should be rejected by the Minister.

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[18] Proposed TOR, page 2.
[19] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), page 3.

More fundamentally, the proposed TOR appears to be premised on the erroneous legal assumption that proponents can freely avail themselves of the "focusing" provisions in the EAA upon request or as of right. In fact, this proposition was firmly rejected by the Ontario Court of Appeal's judgment concerning the "focused" TOR for an ultimately unsuccessful EA application to expand the Richmond Landfill near Napanee. In particular, the Court held that:

> In my view, the proponent is not free to simply design its own environmental assessment without regard to the requirements of the Act. The mandatory language of the provision makes it clear that the generic elements are still the presumptive requirements. The proponent must address those elements, subject only to ministerial approval for any exception. In deciding whether to approve terms of reference, the Minister must also be guided by the terms of the statute (emphasis added).[20]

Thus, in the wake of the *Sutcliffe* decision, the law is clear that the "focusing" provisions of the EAA are the "exception" to the general presumption that individual EAs must address the full set of "generic" content requirements set out in subsection 6.1(2) of the EAA.

The exceptional nature of the EAA's "focusing" provisions has also been confirmed and explained in the MOE's TOR Code of Practice, which states as follows:

> While the EA Act sets out the generic requirements that must be addressed in the EA, the Minister may approve, through the TOR, exceptions to these requirements...
>
> Defining that the EA is to be prepared in accordance with 6(2)(c) and 6.1(3) of the EA Act... is commonly known as "focussing" though the term is not used in the legislation. The elements of the EA that is prepared under subsection 6.1(3) should not differ drastically from the generic elements outlined in subsection 6.1(2), and the proponent must be clear in the TOR about what will be different. Justification for following subsection 6(2)(c) must be provided in the proposed TOR and is subject to the Minister's approval (emphasis added).[21]

Contrary to this direction in the TOR Code of Practice, the proponent's proposed TOR in this case: (i) "differs drastically" from the generic elements in subsection 6.1(2), particularly by excluding rationale and "alternatives to" from the EA process; (ii) does not provide a clear or accurate description of what will be different within the "focused" EA; and (iii) fails to provide proper justification for the significant departure from the generic elements in subsection 6.1(2).

For example, the demonstration of "need" and the consideration of "alternatives to" are two of the most important "generic elements" to be addressed within any EA, particularly in relation to large-scale, complex and environmentally risky undertakings. The issues of "need" and "alternatives to" are particularly relevant and appropriate in the landfill context, as the Joint Board affirmed in the *West Northumberland* case:

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[20] *Sutcliffe v. Ontario* (2004), 9 C.E.L.R. (3d) 1 (Ont. CA) at para.23.

[21] MOE, *Code of Practice: Preparing and Reviewing Terms of Reference for EAs in Ontario* (October 2009), at pages 10, 12.

> Where an undertaking involves the risk of environmental harm, it remains a fundamental and traditional principle that the undertaking should be necessary in order to be approved...
>
> Maintaining the requirement of necessity, although not specifically identified as such in the Act, is founded primarily on its purpose, which is to provide for "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."[22]

In the *West Northumberland* case, the Joint Board further held that a landfill proponent's EA should: (i) consider a reasonable range of alternatives; (ii) assess the environmental effects of such alternatives; and (iii) demonstrate that the preferred alternative is environmentally superior and necessary.[23] Although the Joint Board's decision pre-dates the EAA amendments which created the TOR mechanism, these broad environmental planning principles remain equally valid today, and can only be achieved if the generic elements of "need" and "alternatives to" are included within a landfill EA. Because the proposed TOR in this case unjustifiably attempts to exclude these key matters, CELA concludes that the proposed TOR should not be approved by the MOE.

In addition, the proposed TOR remains unclear (if not confused) about the effect of excluding these key matters from further consideration in the EA process. For example, the proposed TOR claims that the focused EA process will consider together "all generic requirements" stipulated in subsection 6.1(2) of the EAA.[24] In CELA's view, this assertion by the proponent cannot be sustained or taken seriously by the MOE. For example, the proposed exclusion of "alternatives to" from the EA process means that such alternatives will also not be considered in the context of the following "generic elements":

- description of the environment that will or might be affected (subsection 6.1(2)(c)(i));
- description of the environment effects that will or might be caused (subsection 6.1(2)(c)(ii));
- description of the actions necessary to prevent, minimize or mitigate environmental effects (subsection 6.1(2)(c)(iii)); or
- evaluation of advantages/disadvantages to the environment (subsection 6.1(2)(d)).

These exclusions (and their consequential implications for narrowing the EA process) are not described adequately or at all in the proposed TOR.

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[22] *Re West Northumberland Landfill Site* (1996), 19 C.E.L.R. (N.S.) 181 (Ont. Jt. Bd.) at para.88, 90.
[23] *Ibid.,* at para.93-94.
[24] Proposed TOR, page 2.

Similarly, the proposed TOR fails or refuses to explain that the "alternative methods" analysis proposed by the proponent will not include a systematic and robust comparison of potential alternative sites. Despite the proponent's assurance that "all other generic requirements" will be included in the EA, it is readily apparent from the draft TOR that a site selection process will not be part of the EA's "alternative methods" analysis. To the contrary, it appears that the EA process will be fixated on only one property (i.e. the Carmeuse quarry lands), rather than any other potentially suitable (or safer) sites in the region or across the all-Ontario service area proposed by the proponent.

On this point, CELA notes that the proponent claims to have privately reviewed certain other quarry sites for landfilling purposes, and found them to be unsatisfactory for various reasons.[25] At the very least, the proponent's self-serving claims about other potential sites – or about the alleged superiority of the Carmeuse property – should be presented by the proponent and carefully scrutinized by public and agency reviewers as part of the EA process.

In CELA's view, if the proponent believes that its internal site selection process was rational and that the outcome was defensible and replicable, then it should have nothing to fear from including site selection within the EA process. We hasten to add, however, that a proper site selection process in this case should not be limited to a handful of quarry sites owned, optioned or otherwise controlled by the proponent or its affiliates. In any event, the proposed TOR does not adequately describe or justify the significant exclusion of "alternative sites" from the EA process in this case.

Interestingly, the proposed TOR indicates that WEG "believes" that a focused EA in this case will be consistent with the public interest and the purpose of the EAA.[26] However, no evidence or arguments are provided by WEG to explain or substantiate this unfounded belief.

To the contrary, CELA concludes that a focused EA in this case defies common sense, subverts the public interest, and undermines the purpose of the EAA, for the reasons outlined above. Accordingly, the proposed TOR should not be approved by the Minister.

If the proposed TOR is duly rejected by the Minister, but if WEG still wishes to proceed with an EA for this undertaking (despite considerable local opposition), then, at a minimum, the proponent must clearly and unequivocally commit in a new TOR to conduct a full EA that properly addresses all "generic elements" (including "need", "alternatives to", and alternative sites), pursuant to subsections 6(2)(a) and 6.1(2) of the EAA.

*Section 4: Purpose of the Undertaking*

Section 4 of the proposed TOR attempts to rationalize the purpose of the undertaking on two main propositions: (i) that there is a projected shortfall in disposal capacity in Ontario in the coming decades despite diversion efforts; and (ii) that the proponent has obtained a "business" opportunity to address this shortfall by establishing a landfill upon the Carmeuse quarry land. In

[25] Proposed TOR, pages 26-27.

[26] Proposed TOR, page 3.

support of these propositions, the proposed TOR and WEG's supporting documentation[27] provide a number of high-level observations, platitudes, and conjecture about current and future rates of waste generation and diversion in Ontario.

The proponent's internal "research" into these two propositions apparently resulted in the highly questionable stated purpose of the undertaking in section 4.3 of the proposed TOR (i.e., to provide unquantified landfill capacity at the quarry site for an unknown period of time for unspecified types of solid, non-hazardous waste from unidentified generators within the entire province of Ontario). The proposed TOR appears to acknowledge the vagueness and problematic nature of the stated purpose by hinting that the purpose statement may get "refined", "if required", during the forthcoming EA process.

The broad and ever-shifting nature of the stated purpose of the undertaking was correctly criticized by the MOE in its comments on the draft TOR:

> Section 4.3 indicates that the purpose statement will be refined if required in the EA; <u>however, the purpose of the EA should be clearly laid out in the ToR and not subject to change</u> (emphasis added).[28]

However, the purpose statement in the proposed TOR has not been materially changed to address the MOE's recommendation.

In addition, CELA concludes that the purpose statement remains fundamentally flawed and clearly unsupportable for a number of reasons. First, it has long been recognized that a private proponent's "business mandate" alone is not determinative under the EAA, particularly in relation to framing the purpose of the undertaking and determining the range of alternatives that should be considered within the EA process. In this case, even though the proponent wishes to proceed with a particular (and oddly defined) undertaking in order to pursue a "business" opportunity that it perceives to exist, the bottom line is that this proposal still requires review and approval under the EAA.

More importantly, approval of the proposed TOR (or the undertaking itself) cannot be granted under the EAA unless it is clearly demonstrated that granting such approval is consistent with the public interest and the stated purpose of the Act (i.e., "betterment" of the people of Ontario by providing for the protection, conservation and wise management of the environment). Accordingly, the private pecuniary interests of the proponent do not trump, override or displace the public interest considerations that govern approvals under the EAA.

This principle was succinctly stated by the Joint Board in the *SNC* case, where a private proponent had proposed to construct an energy-from-waste incinerator:

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[27] See, for example, Supporting Document No. 2, which purports to prove the "need" for the proposed landfill. However, this brief document is limited to a simplistic mathematical exercise using dated statistics and questionable assumptions (i.e. waste generation rate – waste diversion rate = residual waste volume), and does not contain any independent, peer-reviewed or third-party waste management studies which verify these predictions.

[28] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), page 3.

> The requirements for the description of the undertaking and the purpose of the undertaking should be consistent for private and public sector proponents… To accept the suggestion that the proponent's business mandate alone should determine the definition of the purpose of an undertaking could, in the Board's view, lead to such narrow definitions of purpose as to render the EA Act meaningless…
>
> The identification of alternatives to the undertaking should be determined by the purpose of the functions of the undertaking, not by the purpose of the business aims of the private proponent (emphasis added).[29]

This functional approach to the identification and evaluation of "alternatives to" has not been reflected in the proposed TOR prepared by WEG in this case. To the contrary, the proposed TOR essentially indicates that the sole purpose of the undertaking is to enable the proponent to provide its commercial waste disposal services at a specific location. In our view, this narrow, business-oriented approach not only skews or restricts the range of alternatives that should be considered in this case (see below), but it also gives rise to the above-noted concerns by the Joint Board regarding the avoidance of "meaningless" EA processes.

By way of comparison, CELA notes that the public proponents of the recently approved Durham/York incinerator prepared an EA that evaluated "alternatives to" for the purposes of identifying a preferable approach for managing post-diversion residual waste.[30] We are unaware of any compelling reasons to allow the private proponent in this case to avoid conducting a similarly comprehensive "alternatives to" analysis within the EA process. In short, the proponent in this case should not be held to a lower EA standard (or permitted to undertake a far less rigorous EA process) merely because it is a private proponent.

At the very least, assuming that the overall function of the proposed undertaking in this case is to ensure environmentally sound management of solid waste in the short- and long-term, then a reasonable range of "alternatives to" (i.e., 3Rs, thermal treatment, landfill, export, etc.) ought to be rigorously scrutinized (and compared to the "do nothing" alternative) within an open and transparent EA process. Once an environmentally superior "alternative to" (or combination of alternatives) has been selected (with meaningful public input), then the next iterative step in the EA process would be to systematically evaluate "alternate methods" (including alternate sites) for carrying out the undertaking. If, at any time during the EA process, the emerging preferred alternative was perceived by the proponent to be outside its "business mandate", it can elect to either withdraw the EA, or amend its "business mandate" to include implementation of the preferred undertaking.

The need to fully canvass a reasonable range of alternatives (i.e., "alternatives to" and "alternative methods" in the EA process itself (rather than in the proponent's pre-EA "business" deliberations) is clearly stated in the MOE's EA Code of Practice:

> **A reasonable range of alternatives must be considered.**

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[29] *Re SNC Inc. Proposed Energy from Waste Facility Application* (File No. CH-87-01) at page 30.

[30] *Durham/York Waste Study: EA Study Document* (July 31, 2009, as amended), Section 7.

> During the environmental assessment process, proponents should consider a reasonable range of alternatives. This should include examining "alternatives to" the undertaking which are functionally different ways of approaching and dealing with the defined problem, and "alternative methods" of carrying out the proposed undertaking which are different ways of doing the same activity. Depending on the problem or opportunity identified, there may be a limited number of appropriate alternatives to consider. If that is the case, then there should be clear rationale for limiting the examination of alternatives. Proponents must also consider the "do nothing" alternative (original emphasis).[31]

As further discussed below in Section 7, it is our opinion that WEG's status as a private proponent does not constitute a "clear rationale" for the proposed exclusion of reasonable alternatives from further (or any) consideration in the proposed EA process.

*Section 5: Description of/Rationale for the Proposed Undertaking*

Section 5.1 of the proposed TOR repeats WEG's assertion that it has made a "business decision" to proceed with the proposed undertaking, and that this decision was based upon the proponent's subjective views of the "business opportunity" that it pursued by entering into an agreement with Carmeuse.[32]

In response to such claims, CELA adopts and emphasizes the above-noted submissions regarding the need for private proponents to undertake robust EA's of environmentally risky undertakings. Assuming (without deciding) that the proponent's claims about looming provincial disposal deficits are meritorious, it does not necessarily follow that landfilling activities must occur at the Carmeuse property, or that landfilling is the best (or only) waste management option to address the alleged deficit.

Section 5.2 of the proposed TOR purports to provide a "preliminary" description of the proposed undertaking. Unfortunately, aside from suggesting some potential capacity and lifespan figures, this brief section fails to provide sufficient particulars on the on-site facilities, activities and ancillary infrastructure which are being proposed by the proponent as part of the undertaking.

This profound lack of adequate detail is contrary to the MOE's advice to WEG regarding the draft TOR. In particular, the MOE identified a lengthy list of various items regarding the undertaking (i.e. service area, waste volumes/types/sources, design/operation, closure, rehabilitation, etc.) which required additional detail.[33] While the proposed TOR includes a few new sentences on certain topics, CELA concludes that the overall level of detail remains inadequate, and that there are numerous outstanding questions about the description of the undertaking in the proposed TOR.

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[31] MOE, *Code of Practice: Preparing and Reviewing EAs in Ontario* (October 2009), page 8.
[32] Proposed TOR, page 9.
[33] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE).

For example, what is the projected size and location of the landfill footprint? Where will the on-site access roads be located? What stormwater management facilities, if any, will be established at the site? How much cover material will be imported and what will it consist of (i.e. petroleum-impacted soils)? Given the proponent's statement that the landfill is intended to be the "cornerstone" or "hub" of an integrated waste management system, will there be any waste diversion, recyclables sorting, or organics processing facilities on-site? Will landfill gas be collected and used to generate electricity?[34] Are site decommissioning activities, or afteruse considerations, going to be addressed in the EA and if so, which options will be considered? In CELA's view, the continuing lack of sufficient information in the proposed TOR regarding the description of the undertaking is highly unusual and clearly unacceptable.

CELA also notes the proponent's one-sentence claim that the landfill be will be built, operated and closed in accordance with requirements of O.Reg.232/98 under the *Environmental Protection Act* ("EPA").[35] In our view, no weight or significance should be attached to this claim, primarily because it merely amounts to a promise by WEG to comply with applicable legal requirements, which is expected of all persons in Ontario. Indeed, it already appears as if there is potential non-compliance with section 3 of this regulation, which requires landfill proponents to own the landfill properties in their entirety in fee simple.

Section 5.2 of the proposed TOR suggests that WEG is contemplating the construction of an engineered landfill that may – or may not – feature a site-specific (or generic) liner system as well as an on-site leachate treatment facility (or not). However, CELA concludes that the particulars of these technical options under consideration by WEG should have been described in greater detail in the proposed TOR so that interested persons and agency reviewers have a better understanding of precisely which options will be evaluated (and on what basis) in the EA.

This is particularly true since technical reports, engineering plans/drawings, design specifications or operational details for the various components of the proposed undertaking have not been appended to the proposed TOR, nor web-posted on the proponent's website. The absence of this critical information, even on a conceptual or preliminary basis, represents a fundamental deficiency within the proposed TOR. In CELA's view, it is no answer for the proponent to say that the actual components of the undertaking will be deferred, developed and identified in due course after TOR approval. The EA process should not be a "shell game" where stakeholders are continually trying to guess what the undertaking really is until the late stages of the environmental planning process.

*Section 6: Environment Potentially Affected by the Undertaking*

Section 6.1 of the proposed TOR generally describes some of the biophysical and socio-economic environments which may be affected by the proposed undertaking. These bland descriptions appear unremarkable if not superficial, and do not, in our opinion, contain sufficient detail for TOR or EA purposes.

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[34] On this point, the proposed TOR remains equivocal: landfill gas "may" be flared or combusted for "beneficial uses": see Proposed TOR, page 13.
[35] Proposed TOR, page 12.

In relation to the draft TOR, the MOE had previously commented that greater detail was required in the preliminary description of the environment affected in order to provide context for the undertaking and to determine if the proposed studies will adequately address the potential impacts.[36] While the proponent has added a few additional paragraphs in the proposed TOR on the local setting of the Carmeuse property, it appears to CELA that this description falls considerably short of providing sufficient detail on the environment affected by the undertaking. For example, despite the MOE's request for more information on the number of nearby domestic wells, residences, or other sensitive receptors, the proposed TOR provides little or no data.

Section 6.2 of the proposed TOR briefly describes the various "study areas" that will be used by the proponent to identify and evaluate environmental effects. However, the proposed TOR fails to provide any precise geographic limits on the size, or outer boundaries, of the study areas. In our view, this vague approach (which essentially leaves the delineation of study areas to the discretion of the proponent or its consultants) does not guarantee that the full range of direct, indirect and cumulative effects of the large-scale landfill will be assessed adequately or at all. For example, there is nothing in the proposed TOR that would prevent the proponent from subsequently adopting a "site vicinity" study area that is 50 to 500 metres from the property boundary, which would be far too small to properly assess potential air quality, odour, surface water or groundwater impacts.

In this regard, we note that MOE Guideline D-4 stipulates that the geographic extent of a landfill's influence area will depend upon various site-specific factors, and that in some instances significant impacts can be expected at or beyond 500 metres.[37] Guideline D-4 goes on to indicate that "historical evidence in Ontario has shown that the maximum distance within which adverse effects could be experienced while a landfill is operating is up to 3 kilometres."[38] Indeed, we are aware of instances where landfill impacts (i.e. odour) have been verified by MOE staff over 4 kilometres from an operating site.

Accordingly, CELA submits that the proposed TOR's failure or refusal to delineate appropriate study area boundaries is a fundamental flaw that cannot be deferred to, or rectified within, the EA process. In short, the ill-defined study areas in the proposed TOR appear inadequate for the purposes of properly identifying and evaluating baseline conditions or the environmental and human health effects that may be potentially caused (or contributed to) by the proposed landfill, either by itself or in conjunction with effects emanating from other nearby projects, facilities or activities.

When commenting on the draft TOR, the MOE had expressed similar concerns that the proposed approach to study areas was "unclear", and that WEG should "clarify" and provide additional detail regarding all proposed study areas (i.e. on-site, vicinity, haul routes, wider area.).[39] In our view, the proposed TOR is not responsive to these MOE recommendations, and the TOR remains unsatisfactorily vague on this critically important matter.

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[36] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), page 5.
[37] MOE Guideline D-4.
[38] *Ibid.,* Section 5.4.
[39] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), page 4.

Section 6.3 of the proposed TOR provides a generic description of some of the environmental effects that will be examined in the EA process. For example, while it seems that the proponent intends to assess certain effects related to "Natural Environment and Resources", we see no commitment by WEG in the proposed TOR to prepare an Ecological Health Risk Assessment ("EHRA") to identify and evaluate potential effects upon the connectivity, functionality and overall health of ecosystems on or near the proposed site.

Similarly, while WEG intends to assess effects related to "Public Health and Safety", we see no satisfactory indication in the proposed TOR that commits the proponent to prepare an appropriate Human Health Risk Assessment ("HHRA") to assess baseline human health conditions, or to evaluate the potential health effects of contaminant releases from the proposed landfill upon site personnel as well as persons living, working or travelling in the area. We are aware that in a single brief sentence, the proposed TOR now promises to include an HHRA as part of the technical studies to be undertaken in the future.[40] Indeed, it appears to CELA that WEG's commitment to conduct an HHRA is belated afterthought, rather than a carefully conceived and integral part of the EA process.

Section 6.3 of the proposed TOR refers to the various criteria in Appendix B that the proponent intends to utilize during the EA process. CELA's comments about these assessment criteria are set out below in relation to Section 8 of the proposed TOR.

*Section 7: Consideration of Alternatives*

As the MOE's TOR Code of Practice makes abundantly clear, the consideration and comparison of alternatives is the heart of the EA planning process in Ontario.[41]

Section 7.1 of the proposed TOR describes certain "alternatives to" the undertaking which were privately considered – and summarily rejected – by the proponent during its "pre-launch" corporate deliberations. CELA has a number of concerns about the minimalist "alternatives to" analysis contained with this section of the proposed TOR. These concerns are amplified by the fact that there was no meaningful public consultation during WEG's screening of the alternatives. Instead, the proponent internally reviewed and rejected the "alternatives to", and is now presenting its preferred alternative as a *fait accompli* that is not open to further discussion or public input in the EA process.

For example, the proposed TOR indicates that the proponent predetermined the narrow definition of the proposed undertaking (i.e. to establish a new landfill at the Carmeuse quarry site), and then privately considered four ostensible "alternatives to" (i.e. "do nothing", waste diversion, incineration/thermal treatment, and "other sites"). The results of this internal screening – and the

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[40] Proposed TOR, page 50. See also Section 5.8 of Appendix B, which sets out a bullet point overview of the proposed HHRA; and see the draft HHRA work plan described in the supporting documentation (but does not form part of the proposed TOR being submitted for MOE approval).

[41] MOE, *Code of Practice: Preparing and Reviewing Terms of Reference for EAs in Ontario* (October 2009), page 13.

proponent's attempted rationale for excluding all of these "alternatives to" – are set out in the proposed TOR.[42]

However, it appears to us that in considering these options, the proponent has fundamentally misconstrued what "alternatives to" actually entail under the EAA, namely, functionally different ways of achieving the stated purpose of the undertaking. Accordingly, "other sites" is not a genuine "alternative to"; instead, it is an "alternative method" of carrying out the same proposed undertaking (i.e. landfilling). We also find it highly peculiar that these so-called "other sites" were, in fact, active or inactive quarries currently owned or controlled by the proponent's parent company or Carmeuse, rather than other candidate landfill sites (i.e. greenfield sites or existing/closed waste disposal sites) elsewhere in the proposed service area (i.e., the entire province of Ontario).

In rationalizing this self-imposed constraint, the proposed TOR mentions that the proponent does not have expropriation powers to acquire other sites.[43] This may be true, but this does not justify the excessively narrowing of "other sites" to just quarries currently under the ownership or control of the proponent or its affiliates. Indeed, the proponent, through its actions, has already demonstrated its financial capacity to acquire legal interests in properties owned by third parties.

Accordingly, we see no reason why WEG's status as a private corporation should entitle the proponent to avoid conducting a proper and rational site selection process as part of the EA process. In our opinion, WEG's weak protestations that it is unduly constrained as a private proponent should be given little or no weight. In short, WEG is not entitled to special dispensation from the critically important "alternatives to" or "alternative methods" requirements under the EAA merely because it is a private proponent.

In this regard, we note that the approved TOR for the proposed Capital Region Resource Recovery Centre near Ottawa requires the private proponent (Taggart Miller Environmental Services) to conduct an EA that systematically evaluates and compares <u>two</u> different sites in order to identify a preferred location for the proposed landfill facility. In light of this precedent, we are unaware of any persuasive grounds for permitting WEG to simply fixate on a single site under the proposed TOR for the Southwestern Landfill.

We would further observe that since the proponent defined the purpose of the undertaking so narrowly, it comes as no surprise that WEG claims that none of the identified "alternatives to" can meet the purpose of the undertaking and address the disposal deficit that the proponent claims to have detected. In addition, it is apparent that the proponent has failed to adequately consider another reasonable "alternative to" (i.e. waste export to licenced disposal facilities elsewhere in Ontario or in other jurisdictions).

Moreover, it appears to us that the proponent has summarily dismissed the waste diversion "alternative to" on specious grounds. For example, the proposed TOR alleges – but fails to demonstrate – that even with increased waste diversion rates, there will still be a net deficit of

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[42] Proposed TOR, pages 24-27.
[43] Proposed TOR, page 26.

disposal capacity at the provincial scale. Aside from the proponent's reliance on the dubious claims made within its supporting documentation, the proposed TOR, in our opinion, has not presented a scintilla of credible, current and independent evidence to substantiate this proposition. Moreover, the proponent's "doom-and-gloom" scenario (i.e. escalating waste generation and ineffectual diversion rates) must be immediately revisited in light of the MOE's recent introduction of Bill 91 (*Waste Reduction Act*), which is intended to significantly enhance the 3Rs across the province, particularly in the ICI sector. Surprisingly, Bill 91 – and its short- and long-term implications for the waste stream that WEG hopes to target – is not even mentioned in the proposed TOR.

In summary, CELA concludes that the proponent's "alternatives to" analysis, as reflected in the proposed TOR, is incomprehensible, unpersuasive and unacceptable for EA planning purposes. At the very least, the proponent's self-serving claims that there are no reasonable "alternatives to" the proposed landfill must be subjected to public and agency scrutiny within the EA process. If the proponent had any confidence in its claims about "alternatives to" (or their professed disadvantages), then the proponent should have had no objection to ensuring that the proposed TOR committed to an EA process that included – not excluded – a systematic comparison of "alternatives to".

On this point, we note that the MOE, in commenting on the draft TOR, provided WEG with extensive advice on the importance of conducting a credible alternatives analysis, and advised the proponent to ensure that the screening process was "fully informed, logical and transparent."[44] However, it appears to CELA that this MOE advice was not addressed adequately or at all in the proposed TOR.

Section 7.2 of the proposed TOR then identifies the "alternative methods" that will be carried for further examination within the EA process. Again, CELA has some fundamental concerns about the perfunctory analysis in this very brief – but very important – section of the proposed TOR.

For example, having predetermined that landfilling at the Carmeuse property is the preferred alternative (without even bothering to undertake an EA process to validate this choice), the proponent has generically described some design/operation matters which will be considered in the EA process (i.e. landfill footprint, liner system, leachate treatment, landfill gas management, haul routes, etc.). While these are important technical matters, it seems to us that if the proposed TOR is approved, the resulting EA process will largely be a site-specific impact mitigation exercise that fails to address overarching environmental planning considerations, such as:

- is there a demonstrable "need" for a site of this size, scale and capacity?
- are there environmentally preferable "alternatives to" that can address the waste volumes that the proponent claims to exist throughout Ontario?
- are there safer or more suitable sites for the proposed landfill?

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[44] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), pages 6-7.

By jettisoning these key environmental planning considerations, the proposed TOR is proposing an exercise that is less like EA and more like the narrowly focused approvals process for waste disposal sites under Part V of the EPA. However, it goes without saying that the EPA process will not be addressing need, alternatives to, or alternative sites. For this reason alone, CELA submits that the proposed TOR is inappropriate and unacceptable.

We also note that the MOE had previously "strongly encouraged" WEG to add additional alternative methods to address waste diversion or other sustainability initiatives.[45] It appears that, for whatever reason, the proposed TOR fails to identify, or carry forward, any such alternatives in the EA process.

<u>*Section 8: Assessment and Evaluation Criteria*</u>

Section 8 of the proposed TOR describes the evaluation methodology and assessment criteria that will be used to review the potential environmental impacts of the small handful of "alternative methods" which will be considered in the EA process. Under the proposed TOR, no "alternatives to" or alternative sites will be examined in the EA process, as described above.

In commenting on the draft TOR, the MOE advised WEG that this section of the TOR "should provide as much detail as possible" so that "it can be confirmed that the proposed methodology will result in a decision that is clear, logical and traceable."[46]

In CELA's view, however, the proposed TOR (including Appendix B) does not contain sufficient information, at an appropriate level of detail, about the technical studies, reports and investigations to be undertaken during the EA process. Instead, the proposed TOR merely: (i) sets out the chronological order of the proposed evaluation of alternative methods; (ii) promises that the overgeneralized Appendix B criteria will be applied during the evaluation; and (iii) commits to develop finalized work plans for this evaluation after TOR approval.

In our opinion, the onus is on the proponent to include satisfactory EA methodology upfront in the proposed TOR, rather than promise to develop the necessary details <u>after</u> the TOR is approved. Accordingly, the proposed TOR's suggestion that WEG will develop work plans, at some unknown future date (perhaps with some degree of public input), should not tolerated by the MOE at the TOR stage. Put another way, it is our position that the MOE should not approve a proposed TOR on the speculative basis that incomplete or draft work plans might be fixed or upgraded by the proponent down the road.

CELA further notes that an approved TOR is supposed to establish prescriptive requirements to govern the conduct and content of the EA process, and to ultimately serve as an important benchmark for assessing the adequacy of the EA process. An approved TOR can only fulfill these significant roles if there is a reasonable level of detail in the TOR, as opposed to the collection of ambiguous commitments, imprecise statements, and vaguely defined or incomplete methodology that is contained in the proposed TOR in this case. In short, TORs are intended to

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[45] Memorandum dated July 5, 2013 to Joseph Lyng from Michelle Whitmore (MOE), page 7.
[46] *Ibid.,* page 7.

bring certainty, accountability and predictability to the EA process, rather than provide an infinitely flexible framework regarding the nature, scope or content of technical studies to be undertaken within the EA process.

With respect to Appendix B, CELA concludes that the description of the proposed EA methodology and evaluation criteria is so rudimentary and sparse that it cannot be reasonably concluded that studies produced pursuant to the proposed TOR will result in an EA that includes a comprehensive assessment of baseline conditions, or an informed evaluation of environmental effects, or a meaningful comparison of the limited alternatives under consideration in the proposed EA process. Thus, CELA submits that these substantive deficiencies provide a further reason for concluding that the proposed TOR is inconsistent with public interest and the purpose of the EAA. Further specific concerns about the shortcomings in WEG's proposed groundwater/surface water and air quality/odour methodology are described in the opinion letters prepared by Mr. Ruland and Mr. Thorndyke respectively on behalf of OPAL.

*Section 9: Commitments &Monitoring Framework*

Section 9 of the proposed TOR briefly indicates that the EA will include a list of commitments made by the proponent during the EA process. As this is standard EA practice, we have no further comment about the proponent's intention to catalogue its commitments (if any).

Section 9 also indicates, without further elaboration, that the EA documentation will contain a "monitoring framework for all phases of the undertaking", consisting of compliance monitoring and effects monitoring. No further information or particulars regarding monitoring are provided in the proposed TOR. This presumes, of course, that an effective monitoring regime (or workable contingency plans) can be crafted for this hydrogeologically complex location, but there is no evidence in the proposed TOR that this is technically feasible in the circumstances.

*Section 10: Consultation and Engagement*

The proposed TOR contends that the proponent's consultation on the TOR has been "extensive"[47], and Section 10.1 of the proposed TOR recounts the various types of consultation efforts undertaken by the proponent (i.e. open houses, Community Liaison Committee, municipal peer review, public presentations, newsletters, etc.). CELA does not contest the fact that these consultation events occurred; instead, the more important question is whether such consultation has been meaningful or effective.

For example, it appears that OPAL members, local residents and other stakeholders were effectively excluded from participating in the most significant environmental planning decisions made by the proponent to date, particularly in relation to the purpose/rationale ("need"), "alternatives to", and alternative sites. This closed-door approach is clearly contrary to the following provisions of the MOE's EA Code of Practice:

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[47] Proposed TOR, page 3.

> **Make the planning process a cooperative venture with potentially affected and other interested persons. Early consultation with interested persons is essential...**
>
> The proponent should seek to involve all interested persons as early as possible in the planning process so that their concerns can be identified and considered before irreversible decisions and commitments are made on the chosen approach (original emphasis).[48]

In our view, the proposed TOR record amply demonstrates that virtually all significant decisions were made privately by the proponent before public consultation occurred in relation to the TOR or the proposed landfill. Thus, when TOR consultation events were eventually held, it cannot be seriously contended that members of the public were proactive participants in the planning process; instead, it appears to us that the attendees were used as "sounding boards" to simply provide reaction to planning decisions which had already been predetermined by the proponent.

More importantly, it is CELA's opinion that the adequacy of public consultation efforts is not measured in the number of public events held, or how many people attended, or how many mailings or newsletters were sent out by the proponent. Instead, the litmus test for meaningful consultation is whether the proponent actually addressed or accommodated concerns or issues raised by residents, stakeholders or communities.

In this case, the critical question is whether the proponent has adequately responded to public concerns or criticisms about the draft TOR, the EA process or the proposed undertaking. Based upon our review of Section 10 of the proposed TOR and the record of consultation materials, our answer to this question is "no".

For example, the "comment response" summary in Table 5 of the proposed TOR contains a large number of critical or negative comments received by WEG from OPAL, local residents and other stakeholders about various aspects of the proposed EA process and the proposed undertaking. In our view, the proponent's pat answers to such concerns are unpersuasive, incomplete, and do not constitute responsive replies to serious public concerns about the proposed undertaking and the scope or credibility of the proposed EA process. Accordingly, no credence or weight should be given to the proponent's claim that the only unresolved EA issue at this time pertains to funding of peer review other than the Joint Municipal Coordination Committee.[49]

Section 10.2 of the proposed TOR outlines the consultation program that the proponent proposes to undertake during the EA process. The proposed approach is of considerable concern to CELA because the various elements of the consultation program appear to closely resemble (if not duplicate) the problematic TOR consultation efforts to date. As noted above, for example, WEG representatives failed to meet with CELA and OPAL to discuss our serious objections to the draft TOR. Similarly, WEG refused to allow OPAL's hydrogeologist, Mr. Ruland, to conduct a site visit to the proposed landfill location. Simply put, this track record does not inspire much

[48] MOE, *Code of Practice: Preparing and Reviewing EAs in Ontario* (October 2009), at page 7.
[49] Proposed TOR, page 50.

confidence in WEG's willingness to undertake timely and effective public consultation if the proposed TOR is approved.

*Section 11: Flexibility for New Circumstances*

Section 11 of the proposed TOR states that while the forthcoming EA process will "materially" follow the TOR if approved, the proponent attempts to reserve the right to make changes or adjustments in the EA process in order to accommodate "new" circumstances or information. CELA acknowledges that an EA process should be iterative in nature, but we strongly object to conferring unfettered discretion upon the proponent to vary, waive or dispense with EA requirements imposed by an approved TOR. Where there is a material change in circumstances warranting a change in the EA process, it is our submission that the proponent must be required to return to the MOE for approval of corresponding amendments to the approved TOR.

In this regard, subsection 6.1(1) of the EAA is abundantly clear that an EA shall be prepared by a proponent in strict accordance with the approved TOR. In short, the EAA makes no provision for proponent-led deviations from, or variations of, the EA requirements which are entrenched within an approved TOR.

In our view, the proposed TOR's attempt to create discretionary "flexibility" in the implementation of EA requirements undermines the purpose, credibility and certainty of the EA process. Under the EAA, an approved TOR is intended to serve as a binding and enforceable set of prescriptions which not only direct the conduct and content of the EA process, but also serve as one of the key benchmarks for assessing the adequacy of the EA and determining whether approval to proceed with the undertaking should be granted by the Minister (or the Environmental Review Tribunal).[50]

Accordingly, it is inappropriate and unacceptable for the proposed TOR to empower the proponent to unilaterally change, or refuse to follow, the EA requirements of the TOR if approved. In order to ensure fairness, effectiveness and certainty within the EA process, the proponent in this case must not be permitted to vary, or depart from, binding TOR requirements in the absence of an MOE-approved amendment to the TOR.

*Section 12: Other Approvals Required*

Section 12 of the proposed TOR acknowledges that in addition to EAA approval, the proposed undertaking will require other statutory approvals under provincial law (i.e., EPA, *Planning Act,* and *Ontario Water Resources Act* ("OWRA")). At the present time, given the dearth of information about the description of the undertaking (or its potential environmental impacts), we are unable to comment on whether Section 12 has correctly identified all other provincial or federal legislation that may be applicable to the undertaking.

Section 12 further states that the full suite of necessary statutory approvals will be identified in the EA documentation. What is missing from this statement is any commitment by the proponent

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[50] EAA, subsections 7(4), 9(2), 9.1(3), and 9.2(5)

to concurrently prepare (and seek public input on) these other applications as the EA process moves forward. In our view, this omission is problematic for several reasons.

For example, while subsection 12.2(2) of the EAA prohibits the issuance of other statutory approvals unless EA approval has been obtained, there is nothing in the EAA that prevents the proponent from preparing these other applications concurrently with the EA documentation. In our view, concurrent preparation of the EA documentation and the applications for other statutory approvals (especially the EPA) is the preferable approach in this case since it enables public and agency reviewers to examine and comment upon the detailed design/operational specifications of the proposed facility, rather than just the broad conceptual overviews usually depicted in EA documentation. The proposed TOR offers no rationale or explanation why the EAA, EPA and OWRA applications cannot be prepared concurrently by the proponent.

## PART IV - CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA finds that the proposed TOR is surprisingly sparse, exceedingly superficial, and fatally flawed by numerous gaps, omissions and deficiencies.

Our primary concerns are that the proposed TOR:

- unjustifiably narrows the scope of the proposed EA process;
- improperly excludes key environmental planning considerations; and
- fails to ensure that the MOE will have an appropriate evidentiary basis for making an informed decision at the end of the EA process on whether the undertaking is environmentally sound or in the public interest.

Moreover, CELA concludes that no amount of further tweaking or finetuning of the proposed TOR will make it approvable under subsection 6(4) of the EAA. In our view, the proponent has had ample opportunity – both at the draft TOR stage and the proposed TOR stage – to commit to an EA process that is credible, transparent, and responsive to public and agency concerns about this undertaking. Having failed twice to prepare an approvable TOR, the proponent must now be promptly informed by the Minister that the proposed TOR and the proposed EA process are unacceptable and contrary to the public interest.

In addition, CELA notes that the fundamental condition precedent for MOE approval of a proposed TOR is whether the proponent intends to carry out an undertaking that is actually approvable under the EAA. In this case, it is CELA's opinion that the proponent has proposed a risk-laden undertaking at a vulnerable location which is unlikely to secure approval under the EAA.

Accordingly, CELA concludes that the proposed TOR should be rejected by the Minister, the EA process should be terminated forthwith, and the proponent should formally abandon its proposed landfill at the Carmeuse quarry lands.

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