

## **ENVIRONMENTAL REVIEW TRIBUNAL**

**IN THE MATTER OF** sections 38 to 48 of the *Environmental Bill of Rights*, S.O. 1993, c. 28, and sections 9, 27, and 39 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 as amended;

**AND IN THE MATTER OF** an application by the Loyalist Environmental Coalition as represented by Martin J. Hauschild and William Kelley Hineman; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, pursuant to section 38 of the *Environmental Bill of Rights*, S.O. 1993, c. 28, for leave to appeal the decision of the Director, Ministry of the Environment, under section 9 of the *Environmental Protection Act*, in issuing amended Certificate of Approval No. 3479-6RKVHX, dated December 21, 2006, to Lafarge Canada Inc., to burn alternative fuels at the cement manufacturing facility at Lot 5 and 6, Concession 1, Loyalist Township in the County of Lennox and Addington, with EBR Registry Number: IA04E0464;

**AND IN THE MATTER OF** an application by the Loyalist Environmental Coalition as represented by Martin J. Hauschild and William Kelley Hineman; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, pursuant to section 38 of the *Environmental Bill of Rights*, S.O. 1993, c. 28, for leave to appeal the decision of the Director, Ministry of the Environment, under section 39 of the *Environmental Protection Act*, in issuing provisional Certificate of Approval No. 8901-6R8HYF, dated December 21, 2006, to Lafarge Canada Inc., for the operation of a waste disposal site at Lot 3 and 4, Concession Broken Front, Loyalist Township in the County of Lennox and Addington, with EBR Registry Number: IA03E1902.

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**APPLICATION FOR LEAVE TO APPEAL  
BY LOYALIST ENVIRONMENTAL COALITION AS REPRESENTED BY  
MARTIN J. HAUSCHILD AND WILLIAM KELLEY HINEMAN;  
LAKE ONTARIO WATERKEEPER AND GORDON DOWNIE; AND GORDON  
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## I. APPLICATION

1. This is an application filed jointly by the Loyalist Environmental Coalition as represented by Martin J. Hauschild and William Kelley Hineman (collectively the “LEC”); Lake Ontario Waterkeeper (“LOW”) and Gordon Downie (“Downie”); and Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay (collectively the “Landowners”), hereinafter collectively referred to as the Applicants, through their respective solicitors, to the Environmental Review Tribunal for:

- (a) an order granting leave to appeal the decision of Victor Low, P. Eng., Director, under section 9, *Environmental Protection Act*, Ministry of the Environment (“Director Low”) in issuing amended Certificate of Approval No. 3479-6RKVHX, dated December 21, 2006, to Lafarge Canada Inc. (“Lafarge”); and
- (b) an order granting leave to appeal the decision of Tesfaye Gebrezghi, P. Eng., Director, under section 39, *Environmental Protection Act*, Ministry of the Environment (“Director Gebrezghi”) in issuing provisional Certificate of Approval No. 8901-6R8HYF, dated December 21, 2006, to Lafarge.

2. The grounds for this application for leave to appeal are that pursuant to section 41 of the *Environmental Bill of Rights*, 1993 (“EBR”), it appears: (1) there is good reason to believe the decisions of Directors Low and Gebrezghi were unreasonable in that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decisions; and (2) the decisions could result in significant harm to the environment. The particulars of these grounds are set out in Part III.B, below.

## II. FACTS

### A. Background to Lafarge Proposal to Burn Alternative Fuels at Cement Manufacturing Facility at Bath, Ontario

3. On or about December 23, 2003, Lafarge submitted applications to the Ontario Ministry of the Environment (“MOE”) for Certificates of Approval under sections 9 and 27 of the *Environmental Protection Act* (“EPA”), respectively, to burn alternative fuels and to operate a waste disposal site at the Lafarge cement manufacturing facility in Bath, Ontario.

Reference: **Tab 1**, Application for Comprehensive Certificate of Approval (Air) prepared by Conestoga-Rovers & Associates on behalf of Lafarge Canada Inc., Bath Ontario, February 2004, page 1 (only text of report included).

4. The Lafarge applications were later modified such that at the time of notice and comment under the *EBR* on the subject matter of this leave to appeal application, Lafarge, in general, was applying under:

(a) section 9 of the *EPA* to use certain solid non-hazardous waste materials (including tires, animal meal, plastics, shredded tires, solid shredded materials and pelletized municipal waste) to a maximum feed rate of less than 100 tonnes per day as an alternative for up to 30 per cent of primary fuels (coal, coke, natural gas, and bunker C oil) currently used at the Lafarge Bath kiln for the production of Portland Cement; and

(b) section 27 of the *EPA* for a waste disposal site to allow the acceptance, processing and incineration of the above described non-hazardous solid waste material (as alternative fuels) at a rate of less than 100 tonnes per day.

Reference: **Tab 2**, Ontario Ministry of the Environment, Notice of Proposal for an Instrument, (*EPA*, s.9) *EBR* Registry Number IA04E0466, February 1, 2006; **Tab 3**, Ontario Ministry of the Environment, Notice of Proposal for an Instrument, (*EPA*, s.27) *EBR* Registry Number IA03E1902, February 1, 2006.

5. Lafarge proposed to operate the facility 24 hours per day, seven days a week, 365 days per year. The use of pelletized municipal waste would be kept to a maximum of 1.25 tonnes per day.

Reference: **Tab 3**, Ontario Ministry of the Environment, Notice of Proposal for an Instrument, (*EPA*, s.27) *EBR* Registry Number IA03E1902, February 1, 2006.

6. The Lafarge proposal under the combined section 9 and 27 applications, in particular, consisted of the following components:

#### Section 9

- processes and associated air pollution control equipment for the acquisition and handling of raw material for the Portland cement manufacturing process and associated discharges into the atmosphere;
- processes and associated air pollution control equipment for the storage and handling of solid conventional fuel (coal and petroleum coke) for the Lafarge cement kiln and associated discharges into the atmosphere;
- two silos for alternative fuel storage and handling, one for the storage of shredded solid waste, cellulose based waste, and palletized municipal waste and associated discharges to the atmosphere, and a second for the storage of meat and bone meal waste in powder form and associated discharges into the cement kiln during loading;

- kiln feed preparation in connection with two mill furnaces, one a raw mill furnace with burner discharging through two baghouse dust collectors, and one a silica mill furnace with burner discharging through one baghouse dust collector;
- one dry process rotary kiln furnace modified to use as fuel:
  - natural gas;
  - petroleum coke;
  - coal;
  - bunker C oil
  - municipal waste at a maximum rate of less than 100 tonnes per day consisting of (whole and part used tires, shredded solid waste, meat and bone meal waste, and pelletized municipal waste at a total maximum rate of 1.25 tonnes per day with associated air pollution control equipment) discharging to the atmosphere through the cement kiln exhaust stack;
- product (clinker) processing, storage, and transportation and associated air pollution control equipment discharging to the atmosphere;
- processes and associated air pollution control equipment for the collection, transportation and disposal of cement kiln dust discharging to the atmosphere;
- various ancillary and support processes and activities discharging into the atmosphere; and

#### Section 27

- waste disposal site to be used for the receipt, storage, and burning of solid non-hazardous waste categories for use as alternative fuels within the existing cement kiln.

Reference: **Tab 1**, Application for Comprehensive Certificate of Approval (Air) prepared by Conestoga-Rovers & Associates on behalf of Lafarge Canada Inc., Bath Ontario, February 2004, pages 3-6; **Tab 4**, Ontario Ministry of the Environment, Amended Certificate of Approval (Air) Number 3479-6RQVHX, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, pages 1-3; **Tab 5**, Ontario Ministry of the Environment, Provisional Certificate of Approval (Waste Disposal Site) Number 8901-6R8HYF, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, page 1.

### **B. Concerns Expressed by Applicants Regarding Lafarge Proposal**

7. LEC concerns conveyed to the MOE during the comment period regarding the Lafarge proposals included the following:



- the Lafarge proposal is the first, if not one of the first, to propose burning used tires and other municipal waste as fuel; consequently, an independent environmental assessment and hearing should be required given the likelihood of significant public health and environmental impacts at both the local and regional level;
- the Lafarge proposal poses the potential for significant transboundary environmental impacts;
- the Lafarge proposal to burn used tires for fuel is contrary to Ontario laws designed to manage the diversion of designated waste;
- the Lafarge facility was not designed to burn these fuel types and consequently may not be consistent with O. Reg. 419/05 that prohibits the burning of waste or fuel in any fuel burning equipment or incinerator that was not specifically designed for that purpose;
- review of available scientific evidence indicated burning of used tires at a Lafarge facility in Quebec resulted in the substantial increase in release of toxic air pollutants; and
- there is a need for a cumulative impact assessment to analyze the added potential adverse effects on land, water, and air quality arising from the Lafarge proposal in conjunction with other existing sources of pollution in the vicinity of the Lafarge cement manufacturing facility at Bath, Ontario.

Reference: **Tab 6**, Loyalist Environmental Coalition, Submissions filed with the Ontario Ministry of the Environment by Sierra Legal Defence Fund on Lafarge Proposals IA03E1902 (Waste) and IA04E0466 (Air), March 31, 2006.

8. LOW and Downie concerns conveyed to the MOE during the comment period regarding the Lafarge proposals included the following:

- the Lafarge proposals mischaracterize the incineration program, thereby circumventing the public hearing process;
- the Lafarge proposals are vague and incomplete (various materials to be burned not defined, undue reliance placed on point of impingement standards as sole criterion of environmental soundness of proposals, lack of comprehensive baseline data, lack of odour analysis, lack of details surrounding waste disposal site proposal, lack of reference to immediate neighbours who may sustain impacts, failure to address zoning issues);
- granting approvals to the Lafarge proposals would undermine provincial policy in the areas of energy and waste (inconsistency of proposal with: federal policy on virtual elimination of dioxins and furans, potential

reducing sources of air pollution, and MOE Statement of Environmental Values).

Reference: **Tab 7**, Lake Ontario Waterkeeper and Gord Downie, Submissions to the Ontario Ministry of the Environment on Applications for Approval, Air and Waste Disposal Site, Lafarge Canada Inc., EBR Registry # IA04E0466 (Air) & # IA03E1902 (Waste Disposal), March 21, 2006.

9. The concerns the Landowners conveyed to the MOE during the comment period regarding the Lafarge proposals included the following:

- as owners of residential property located near the southeast corner of the Lafarge site and abutting the site to the west, north and east, appear to constitute the closest receptors in the area of potential off-site emission of contaminants from Lafarge facility;
- ability of Lafarge to manage waste stream inputs to the cement kiln;
- ability of Lafarge to manage emissions arising from variable waste composition, moisture and incomplete combustion process;
- ability of Lafarge to manage, for disposal purposes, uncombusted residuals from incineration process;
- potential of release of substances associated with Lafarge proposals to interfere with or have adverse effects on rights and interests of Landowners at common law and as a matter of statute.

Reference: **Tab 8**, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, Submissions filed with the Ontario Ministry of the Environment by Joseph F. Castrilli, Barrister & Solicitor, on Lafarge Canada Inc. Applications for Approval Under the Environmental Protection Act, Sections 9 (Air Discharges) and 27 (Waste Disposal Site) at Bath Cement Plant, EBR Registry Numbers: IA04E0466 (Air); IA03E1902 (Waste Disposal), March 31, 2006.

### **C. Concerns Expressed by Municipal Governments Regarding Lafarge Proposal**

10. At its April 26, 2004 meeting, the Council of the Corporation of Loyalist Township adopted the following motions concerning the Lafarge proposals:

“1. That Council authorize the C.A.O. to inform the Ministry of the Environment that, although Lafarge undertook extensive local public consultation, the Township requests that a public hearing be held with respect to the applications by Lafarge for a waste disposal site for Combustion of Non-Hazardous Solid Industrial Waste @ <100 Tonnes/day, MOE reference number 3008-5UQTF7, and an application for a waste disposal site Alternative Fuels Utilization Plan, MOE reference number 1323-5UPSH7.

2. That Council request the CAO to inform the Ministry that any approval should be based on best available control technology with appropriate emission monitoring to ensure compliance with all current standards.”

Reference: **Tab 9**, Council of the Corporation of Loyal Township, Motion, April 26, 2004.

11. At its November 8, 2004 meeting the Council of the Corporation of Loyalist Township adopted further motions including a further request that the MOE hold a public hearing under the *EPA* concerning the Lafarge proposals.

Reference: **Tab 10**, Council of the Corporation of Loyal Township, Motion, November 1, 2004.

12. At its August 8, 2006 meeting the Council of the Corporation of Loyalist Township adopted a further motion concerning the Lafarge proposals as follows:

“That the Council of the Corporation of Loyalist Township requests the Province of Ontario to pass a regulation placing a moratorium on the burning of waste derived fuel in all cement kilns until such time that a full environmental assessment as to suitability of using waste derived fuel in cement kilns has been completed; and, if the Province rejects the moratorium on the burning of waste derived fuel in cement kilns, then the application of Lafarge North America, Cement Division, Bath Plant shall be assessed under the provisions of the Environmental Protection Act, with a public hearing.”

Reference: **Tab 11**, Council of the Corporation of Loyal Township, Resolution, August 8, 2006.

13. At its May 24, 2006 meeting the City of Kingston Council adopted a motion requesting that the Director, MOE hold hearings under section 32 of the *EPA* with respect to Lafarge’s waste disposal site application to ensure full participation of members of the public in the approvals process.

Reference: **Tab 12**, City of Kingston Council, Motion, May 24, 2006.

#### **D. Concerns Expressed by an Acting Medical Officer of Health**

14. On or about October 21, 2004, the Acting Medical Officer of Health, on behalf of the Board of Health for the Hastings and Prince Edward Counties Health Unit, wrote to the Minister of the Environment to express numerous concerns about the operation, regulation, and direct and/or cumulative impacts of waste incineration at the Lafarge facility at Bath.

Reference: **Tab 13**, Letter dated October 21, 2004 to the Hon. Leona Dombrowsky from Dr. A.C. Goddard-Hill, Acting Medical Officer of Health.

### **E. Concerns Expressed by Ministry Representatives Regarding the Lafarge Proposal**

15. During the course of MOE consideration of the Lafarge proposals, MOE air scientist Michael Ladouceur expressed concerns to MOE project officer Dave Bell as follows:

“The aspects involving bone meal are somewhat beyond my experience, and my concerns in this area are related to the handling of biological materials. I am unsure of conditions of approval that would adequately protect against the possibility, for example, of leachate toxicity from happening, or worker safety issues relating to the possibility of pathogenic materials entering the process...”

Reference: **Tab 14**, Letter from Michael Ladouceur, MOE to Dave Bell, Environmental Assessment and Approvals Branch, MOE, November 1, 2004.

### **F. Concerns Expressed by Members of the Legislative Assembly of Ontario Regarding Lafarge Proposal**

16. During May and June 2006, Mr. Peter Tabuns, M.P.P. (Toronto-Danforth), environment critic for the Third Party, raised concerns in the Legislative Assembly of Ontario with the Hon. Laurel C. Broten, Minister of the Environment, respecting the Lafarge proposal to burn tires at its cement manufacturing facility, and the potential air emission increases, and corresponding undermining of tire recycling measures, that could result.

Reference: **Tab 15**, Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, May 1, 3, 18, June 6, 2006).

### **G. Expert Reports on Behalf of Lafarge**

17. Expert reports were prepared on behalf of Lafarge in support of its applications and in response to public comments. A summary of some of the findings and conclusions of several of these reports follows.

#### **1. Conestoga-Rovers & Associates**

18. A 2002 air emissions inventory report for Lafarge prepared by Conestoga-Rovers & Associates (“CRA”) concluded that modeling conducted pursuant to Regulation 346 under the *EPA* produced results showing the following:

- the Regulation 346 Point of Impingement (“POI”) limit for particulate of 100 µg/m<sup>3</sup> may be marginally exceeded off site;

- the maximum off-site CO, NO<sub>2</sub>, and SO<sub>2</sub> concentrations under the scenarios set out in the report, would not exceed MOE POI criteria; and
- the estimated maximum ground level concentrations of all contaminants (other than particulate, CO, NO<sub>2</sub>, and SO<sub>2</sub>) potentially emitted from the kiln stack are well below their POI limits.

Reference: **Tab 16**, Air Emissions Inventory, prepared by Conestoga-Rovers & Associates on behalf of Lafarge Canada Inc., Bath Ontario, October 2002, page 8 (only text of report included).

19. The same 2002 report, using AERMOD modeling, concluded that the maximum off-site 24-hour average concentration of total particulate is approximately 85 µg/m<sup>3</sup>, well below the MOE Ambient Air Quality Criterion of 120 µg/m<sup>3</sup>, and occurs at the site property boundary south of the manufacturing operations.

Reference: **Tab 16**, Air Emissions Inventory, prepared by Conestoga-Rovers & Associates on behalf of Lafarge Canada Inc., Bath Ontario, October 2002, page 12.

20. A 2004 report for Lafarge prepared by CRA concluded that the proposed use of alternative fuels at the Lafarge Bath facility will have insignificant impact on the facility-wide air emissions profile.

Reference: **Tab 1**, Application for Comprehensive Certificate of Approval (Air), prepared by Conestoga-Rovers & Associates on behalf of Lafarge Canada Inc., Bath Ontario, February 2004, page i.

## 2. RWDI Air Inc.

21. A February 2006 report for Lafarge prepared by RWDI AIR Inc. (“RWDI”) using AERMOD modelling, concluded the following:

- the maximum off-site ground level concentration for total particulate matter is 52.2 µg/m<sup>3</sup>, and is located in the off-site area that extends into the property line, west of the facility;
- all other parameters that were tested on the kiln exhaust stack meet their respective POI limit; and
- all parameters that were assessed as part of the alternative fuels also meet their respective POI limits.

Reference: **Tab 17**, AERMOD Modelling, prepared by RWDI Air Inc. on behalf of Lafarge Canada Inc., Bath Ontario, February 2006, page 6.

22. A November 2005 report for Lafarge prepared by RWDI respecting fugitive dust management concluded that: “Overall, the risk of nuisance effects from fugitive dust

emissions at the site is low, provided that a reasonable dust management plan is in place.” The report also makes recommendations for the contents of a dust management plan.

Reference: **Tab 18**, Fugitive Dust Management, prepared by RWDI Air Inc. on behalf of Lafarge Canada Inc., Bath Ontario, February 2006, page 6.

### 3. Other

23. After the close of the *EBR* comment periods on the section 9 and 39 approvals, Lafarge supplied further technical reports to the MOE, none of which appears to have been subject to further or formal *EBR* notice and comment opportunities. These documents are relied upon by Lafarge in support of its applications and by the Directors in support of their decisions and listed in the respective section 9 and 39 Certificates of Approval. These documents include:

#### Section 9 Certificate of Approval

- Report entitled, “Design and Operating Manual, Bath Plant Alternative Fuel Management System,” prepared by Lafarge Canada Inc., dated June 26, 2006;
- Letter Report entitled, “Source Testing Report – June 2006, Lafarge Canada Inc., Bath Ontario, RWDI Reference #W06-5219A”, prepared by RWDI Air Inc., dated August 17, 2006;
- Revised ESDM Report prepared by RWDI Inc., and received by the Ministry via email on December 14, 2006;

#### Section 39 Certificate of Approval

- Design and Operations Manual, Bath Alternative Fuel Management System, prepared by Lafarge Canada Inc., dated December 2006.

Reference: **Tab 4**, Ontario Ministry of the Environment, Amended Certificate of Approval (Air) Number 3479-6RKKVHX, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, Schedule “B” – Supporting Documentation, page 24; **Tab 5**, Ontario Ministry of the Environment, Provisional Certificate of Approval (Waste Disposal Site) Number 8901-6R8HYF, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, Schedule “A”, page 18.

### 4. Lafarge Response to Public Concerns

24. On June 8, 2006, Lafarge sent to MOE a report that responded to concerns raised by the public during the *EBR* Registry comment period. The report addressed three categories of issues: (1) air emissions including health questions; (2) kiln and plant operations; and (3) regulatory, policy, and legal questions. The cover letter to the Lafarge

response report signed by Robert Cumming, Resource Recovery Manager for the Lafarge cement manufacturing facility at Bath, noted that the application of MOE's "strict emission standards" would be the "final assurance that the Bath plant's emissions will remain at acceptable levels. Other concerns, in our view, can be similarly addressed through appropriate conditions in a Certificate of Approval."

Reference: **Tab 19**, Letter from Robert Cumming, Resource Recovery Manager, Lafarge Canada Inc., Bath Ontario, to Ian Parrott, P. Eng., Manager, Environmental Assessment and Approvals Branch, Ministry of the Environment, June 8, 2006 attaching Lafarge Alternative Fuels Technical Response Report.

## **H. Directors Issue Air Emissions and Waste Disposal Site Approvals to Lafarge**

25. Notwithstanding the above-noted concerns, including municipal resolutions and submissions by the Applicants, on December 21, 2006 Director Low issued a section 9 Amended Certificate of Approval (Air) to Lafarge containing 27 conditions.

Reference: **Tab 4**, Ontario Ministry of the Environment, Amended Certificate of Approval (Air) Number 3479-6RKVHX, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006.

26. Notwithstanding the above-noted concerns, including municipal resolutions and submissions by the Applicants, on December 21, 2006 Director Gebrezghi issued a section 39 Provisional Certificate of Approval (Waste Disposal Site) to Lafarge containing 68 conditions. This approval was issued by Director Gebrezghi without any public hearings by the Environmental Review Tribunal ("Tribunal") under section 30 or section 32 of the *EPA*.

Reference: **Tab 5**, Ontario Ministry of the Environment, Provisional Certificate of Approval (Waste Disposal Site) Number 8901-6R8HYF, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006.

27. Notices of both these decisions were posted on the *EBR* Registry on the same date. The notices indicated that twenty-eight (28) comments had been received during the comment period on the Lafarge applications. Twenty-six (26) of the responders opposed the Lafarge applications, including a two-thousand (2000) person petition. Two (2) of the responders supported the Lafarge applications. The notices also indicated that "a significant number of comments were received from the public both in opposition to and in favour of the Lafarge" applications "after the formal posting periods had closed." Neither notice indicates the actual numbers of those responding in opposition to, or in favour of, the Lafarge applications during the period following the formal posting periods.

Reference: **Tab 20**, Ontario Ministry of the Environment, Notice of Decision for an Instrument, (*EPA*, s.9) *EBR* Registry Number IA04E0464, December 21, 2006; **Tab 21**, Ontario Ministry of the Environment, Notice of Decision for an Instrument, (*EPA*, s.27) *EBR* Registry Number IA03E1902, December 21, 2006.

28. Accompanying the decisions and notices was a summary of public comments and responses to those comments assembled by MOE.

Reference: **Tab 22**, Ontario Ministry of the Environment, Summary of Public Comments Received Relating to *EBR* Registry Numbers IA03E1902 and IA04E0464, December 21, 2006.

29. Prior to issuing the approvals to Lafarge, the Minister of Environment had refused public requests to designate the Lafarge proposal as an undertaking to which the *Environmental Assessment Act* (“*EAA*”) applies. In the result, Lafarge has not been required to prepare an environmental assessment under the *EAA* to identify and evaluate the ecological, social, cultural and economic impacts of the proposal and its alternatives. Similarly, while the *EPA* documentation prepared to date by Lafarge includes various air modelling exercises noted above, it appears that Lafarge has not conducted or commissioned a specific Human Health Risk Assessment (“*HHRA*”), prepared by qualified toxicologists, to examine the potential impacts of burning “alternative fuels” upon the health and safety of nearby individuals and downwind communities. Indeed, nothing in the section 9 or 39 approvals requires the preparation or submission of a *HHRA* during or after the “alternative fuels demonstration project”.

Reference: **Tab 21**, Ontario Ministry of the Environment, Notice of Decision for an Instrument (*EPA*, s.27), *EBR* Registry Number, IA03E1902, December 21, 2006.

30. It should be further noted that in mid-2006, the MOE posted notice on the *EBR* Registry of a related proposal to amend Lafarge’s existing certificate of approval (A710137) regarding a long-term management plan for a 28 hectare on-site landfill used by Lafarge for disposing of cement kiln dust (“*CKD*”) generated during the cement-making process. The proposal described the filling plan for the next 14 years, and outlined final closure requirements for the *CKD* landfill. At the present time, the Lafarge facility generates approximately 30,000 tonnes/year of *CKD*, and the primary components of *CKD* are raw feed materials, fuel ash, and minerals/salts created from the volatile alkali compounds (i.e. sodium, potassium, sulphur, and chloride) released during the heating of the raw feed materials in the kiln. The Applicants *LOW* and *Downie*, and the Applicant Landowners filed comments on the proposed amendment to the *CKD* landfill approval, but to date the MOE has not made or posted any decision respecting the proposed long-term management plan.

Reference: **Tab 23**, Ontario Ministry of the Environment, Notice of Decision for an Instrument (*EPA*, s.27), *EBR* Registry No. IA06E0591, June 14, 2006; **Tab 24**, Golder Associates, *Report on Cement Kiln Dust Management Plan* (March 2006), page 1; **Tab 25**, Lake Ontario Waterkeeper and Gord Downie, Submissions to the Ontario Ministry of the Environment on Application for Amendment of Waste Disposal Certificate of Approval #A710137, Lafarge Canada Inc., *EBR* Registry Number: IA06E0591, July 13, 2006; **Tab 26**, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, Submissions filed with the Ontario Ministry of the Environment by Joseph F. Castrilli, Barrister & Solicitor, on Lafarge Canada Inc. Application for Approval Under the Environmental Protection Act, Section 27 (Waste Disposal Site) at Bath Cement Plant, *EBR* Registry Number: IA06E0591 (Waste Disposal), July 14, 2006.



## **I. Ministry of the Environment Proposed 2-3 Year Ban on Tire Incineration in Ontario Except at Lafarge Cement Manufacturing Facility at Bath, Ontario**

31. On the same date as the decisions of the Directors were posted on the *EBR* Registry, MOE also posted a notice of proposal for a regulation to be developed under the *EPA* that would ban the incineration of tires for a 24 month period possibly starting in the spring of 2007. The ban could be extended to 36 months if sufficient information is not available within the 24-month period. The proposed ban would not apply to any facility with approval to incinerate tires before the ban comes into effect.

Reference: **Tab 27**, Ontario Ministry of the Environment, Notice of Proposal for Regulation, *EBR* Registry Number RA06E0024, December 21, 2006.

32. The *EBR* notice indicates the purpose of the proposal as follows:

“Currently, no facility in Ontario incinerates tires, including those with approval to do so for use as a replacement fuel in a manufacturing process. As a result, MOE has had no experience monitoring the environmental performance of facilities that incinerate tires.

The purpose of the proposed time-limited ban is to allow for the collection of information confirming the environmental performance of facilities using tires as fuel. If a ban is introduced, MOE will not issue any new approvals for the incineration of tires (including for use as fuel) until this information has been obtained.”

Reference: **Tab 27**, Ontario Ministry of the Environment, Notice of Proposal for Regulation, *EBR* Registry Number RA06E0024, December 21, 2006.

33. Accordingly, the province-wide time-limited ban would allow the MOE to collect information regarding the environmental performance of tire-burning facilities. This proposed regulatory ban would apply everywhere in Ontario except for facilities which have already received approval to incinerate tires, such as the Lafarge facility at Bath.

## **J. Expert Reports Prepared for the Applicants**

### **1. Dr. Brian McCarry**

34. Dr. Brian McCarry, Ph.D., Chair of the Department of Chemistry, McMaster University and holder of the Stephen A. Jarislawsky Chair in Environment and Health, reviewed the documentation relating to the Lafarge application for a Certificate of Approval (Air) with particular focus on fugitive dust and odour issues. The key findings and conclusions made by Dr. McCarry include:

Lack of Baseline Air Quality Data for the Area

- There is no baseline air quality data for the Town of Bath, making any determination of current impacts of Lafarge operations on the Town and surrounding areas impossible;
- Without baseline information it is impossible to evaluate the performance of the Lafarge facility under test burn conditions;

#### Lack of Information on Cumulative Effects

- The best scientific information to date suggests that there are cumulative effects from exposures to mixtures of toxic contaminants;
- The section 9 Certificate of Approval makes no mention of the need for any consideration of the cumulative effects of exposures to contaminants from the Lafarge facility before or during a test burn;

#### Available Air Quality Information for the Area and Potential Risks

- The lack of local air quality information makes determination of the health effects impacts on the local community and the attendant health risks impossible to determine;

#### Fugitive Dusts

- The wind speed and wind direction information used in the RWDI AERMOD Modelling report may not be relevant as it is highly probable that the wind data along the shore of Lake Ontario near Bath, Ontario is quite different from the wind data used in RWDI's modeling calculations;
- Bath residents living downwind of the Lafarge operations up to 1.6 km from the site should be considered as having a significant potential for fugitive dust impacts about 25 per cent of the time;
- Fugitive dust production increases dramatically with wind speed and the data show that there was a very low percentage of time when the air was still (wind speeds were less than 3 km/h only 0.6% of the year) in the Bath area;
- RWDI estimates were low by a factor of 2 with respect to the percentage of the time that wind conditions at the Lafarge site exceeded 20 km/h and 30 km/h;
- The Lafarge Bath plant is being operated under high wind conditions about one-quarter of the time, not the one-eighth of the time reported by RWDI;

- The fugitive dust management plan recommended by RWDI lacks provisions for certain types of monitoring;
- The section 9 Amended Certificate of Approval conditions (21-22) appear insufficient to demonstrate through monitoring whether implementation of the RWDI proposed dust management plan will lead to any improvement in fugitive dust releases and constitute severe shortcomings in the approval during either the trial period contemplated by the approval or operationally thereafter;

#### Chemical Impacts and Odour Issues

- The pace of stack testing proposed in the section 9 Amended Certificate of Approval conditions is extraordinarily slow in comparison to similar tests performed in other jurisdictions;
- The list of chemicals in Schedule E to the section 9 Amended Certificate of Approval to be tested or monitored for during the test burn period or operationally thereafter is incomplete;
- Pungent odours from the combustion of tires and biological wastes at the Lafarge site likely will trigger many complaints from residents in the area;
- The conditions of the section 9 Amended Certificate of Approval appear inadequate to monitor or control odours from the combustion of alternative fuels during either the test burn period contemplated by the approval or operationally thereafter;
- Given the significant amount of alternative fuels to be added mid-kiln, the potential for generating large amounts of fugitive gases and particulate matter is a serious issue that is not addressed in the conditions of the section 9 Amended Certificate of Approval for the test burn period or operationally thereafter;

#### Chemical Testing of Incoming Alternative Fuels

- There is a need for routine testing of all loads of alternative fuel materials prior to their arrival at the Lafarge site to ensure waste feedstock does not vary outside the rather narrow parameters authorized by the approvals and cause upset conditions, resulting poor environmental performance, and increased release of toxic substances;
- There is a need for regular testing of bio-waste materials for human and animal pathogens;

- The Certificates of Approval are deficient in regard to both of these concerns during the test period or operationally thereafter;

#### Establishment of a Local Air Sampling Network

- There is little in the section 9 Amended Certificate of Approval to address the monitoring or reduction of fugitive emissions from the Lafarge facility during the test period or operationally thereafter; and
- The section 9 Amended Certificate of Approval fails to require establishment of a sampling network in the community to monitor for particulates of different size ranges and for a suite of organic compounds that are indicative of cement plant activities and local combustion sources during the test period or operationally thereafter.

Reference: **Tab 28**, Dr. Brian McCarry, *Review of Fugitive Dust and Odour Issues Pertaining to the Lafarge Canada Inc. Site near Bath, Ontario*, January 2007, (the “McCarry Report”).

## **2. Dr. Neil Carman**

35. Dr. Neil Carman, Ph.D., a former air pollution control inspector and regional stack sampling chief for the State of Texas Air Control Board, reviewed the documentation relating to the Lafarge application for a Certificate of Approval (Air) with particular focus on kiln process issues, stack emissions, and odours related to alternative fuels. The key findings and conclusions made by Dr. Carman include:

#### Potential for Increases in Emissions

- Certain papers in the technical literature suggest there is a significant potential for increases in emissions from cement kilns burning tires;

#### Continuous Emission Monitoring Upgrades

- There is a need for continuous emission monitoring of the kiln stack for emission of toxics but such monitoring has not been required to date and is not required in the section 9 Amended Certificate of Approval during the test period or operationally thereafter;
- The section 9 Amended Certificate of Approval does not appear to require continuous emission monitoring during the test period or operationally thereafter for PM10 and PM2.5, but rather merely opacity monitoring, though the latter cannot be accurately used to calculate actual PM10 or particulate emissions;
- A crude approximation of the kiln stack’s particulate matter emissions using opacity is inadequate for public health considering the intent of

Lafarge to use large volumes of alternative fuels in the cement kiln that may increase the concentration and change the size, nature, and chemical composition of particulate matter released;

- There are many contaminants that can be continuously monitored but will not be so required under the section 9 Amended Certificate of Approval either during the test period or operationally thereafter;

#### Local Ambient Air Monitoring System

- There has been no PM<sub>10</sub> ambient air monitoring by Lafarge to determine PM<sub>10</sub> levels in the Bath community. Such monitoring also is not required by the section 9 Amended Certificate of Approval either during the test period or operationally thereafter;

#### Continuous Emission Monitoring for Dioxins and Furans in Stack Emissions

- There is a need for continuous emission monitoring of the kiln stack for dioxin and furan emissions but such monitoring has not been required to date and is not required in the section 9 Amended Certificate of Approval either during the test period or operationally thereafter;

#### Kiln Upset Conditions

- Kiln upsets can result in stoppages, excess emission events of particulate matter and gases, and equipment problems;
- Ring formation is an upset condition recognized by the cement industry and which Lafarge admits has occurred at the Bath facility in the past;
- Among other things ring formation can result in hot spots and kiln shell damage; Hot spots can develop in the kiln shell as the refractory suffers physical wear and tear allowing excessive heating of the steel shell;

#### Clinker Cooler System

- The section 39 Amended Certificate of Approval appears inadequate to address, either during the test period or operationally thereafter, odour emissions from meat and bone meal residues in the storage silo when the clinker cooler system is shut down;

#### Odours From Whole Tire Kiln Injection

- Experience in other jurisdictions has demonstrated that use of whole tires as alternative fuels in cement kilns produces strong nuisance odour conditions of “burning rubber” that have been the subject of complaints by

residents and public hearings before legislative committees and regulatory bodies; the section 9 Amended Certificate of Approval allows Lafarge to burn whole tires during the test period and operationally thereafter; and

### Test Burn Period

- The pace of stack testing proposed in the section 9 Amended Certificate of Approval conditions is exceptionally slow – two-years – in comparison to similar tests performed in other jurisdictions.

Reference: **Tab 29**, Dr. Neil J Carman, *Independent Review of Stack Emissions and Odour Issues Relevant to the Lafarge Canada Inc. Site Bath, Ontario*, January 2007, (the “Carman Report”).

### **3. Mr. Wilf Ruland**

36. Mr. Wilf Ruland, P.Geo., is a hydrogeologist retained by LOW to prepare an expert report which identifies and evaluates potential surface water and groundwater impacts associated with Lafarge’s ongoing disposal of CKD at the on-site landfill located upon the Lafarge property. As discussed below, Condition 47 of Lafarge’s section 39 approval purports to authorize the on-site disposal of CKD that results from the “alternative fuels demonstration project”. Thus, for the purposes of this application for leave to appeal, the salient portions of the Ruland Report may be summarized as follows:

- the CKD landfill is located upon weathered (and possibly karstic) limestone bedrock that is covered by a relatively thin layer of fractured silt/clay overburden materials;
- groundwater flow rates are relatively rapid and flow pathways are quite unpredictable due to the presence of fracturing and/or karst features;
- the dominant surface water feature is the Bath Creek, which crosses the Lafarge property along the east side of the CKD landfill, and then flows through the Town of Bath and discharges into Lake Ontario;
- the Bath Creek is fed by local groundwater discharge as well as a number of smaller surface water tributaries upon the Lafarge property which drain into the Bath Creek, including several tributaries that drain the area of the CKD landfill and which are carrying contamination from the landfill;
- most if not all of the leachate (i.e. contaminated liquid) generated by the CKD landfill is being directly or indirectly discharged into the Bath Creek at the present time, and this has been the case since the start of landfilling operations;
- the oldest portions of the CKD landfill are unlined and simply leak leachate into the groundwater flow system, and while the newer landfill

cells, including the current cell used for CKD disposal, contain a low permeability geomembrane liner, they lack an engineered leachate collection system, and their leachate is simply recirculated into the landfill and will ultimately discharge into Bath Creek;

- sampling of monitoring wells downgradient of the CKD landfill has revealed contaminant concentrations far in excess of the MOE's "Reasonable Use" limits in relation to chloride and other parameters;
- sampling of surface water in the Bath Creek downstream of the CKD landfill has revealed numerous exceedances of the MOE's Provincial Water Quality Objectives ("PWQO") for various parameters;
- there is nothing in Lafarge's proposed new landfill management plan that would reduce the amount of leachate discharging to Bath Creek.

Reference: **Tab 30**, Letter dated January 3, 2007 to Mark Mattson, LOW from Wilf Ruland, P. Geo. (the "Ruland Report").

### **III. ISSUES AND THE LAW**

37. The Applicants respectfully submit that the issues arising on this application for leave to appeal are as follows:

- Do the Applicants have standing to seek leave to appeal under section 38 of the *EBR*?
- Do the Applicants meet the test for leave to appeal under section 41 of the *EBR*?

38. For the reasons outlined below, the Applicants submit that each of the above questions should be answered in the affirmative.

#### **A. The Applicants Have Standing to Seek Leave to Appeal**

39. Section 38(1) of the *EBR* sets out the basis for conferring standing on applicants for leave to appeal:

"Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:

1. The person seeking leave to appeal has an interest in the decision.

2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal.”

40. Jurisprudence of the Tribunal has held that section 38 establishes four requirements for standing to bring an application for leave to appeal:

- (1) the application must be brought by a person resident in Ontario;
- (2) the decision must be a decision whether or not to implement a proposal for a Class I or II instrument requiring notice under section 22;
- (3) the applicant must have an interest in the decision; and
- (4) another person has a right under another Act to appeal the decision.

Reference: **Tab 31**, *Safety-Kleen Canada Inc. v. Ontario (Director, Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 88, 91-92 (Ont. Environmental Review Trib.).

41. For the reasons outlined below, the Applicants submit that they meet each of the four elements.

### **1. The Applicants are Persons Resident in Ontario**

42. The *EBR* Registry notices in relation to the decisions of Directors Low and Gebrezghi to issue the Certificates of Approval (Air and Waste Disposal) to Lafarge clearly stipulate that residents of Ontario may seek leave to appeal these decisions.

Reference: **Tab 20**, Ontario Ministry of the Environment, Notice of Decision for an Instrument, (*EPA*, s.9) *EBR* Registry Number IA04E0464, December 21, 2006; **Tab 21**, Ontario Ministry of the Environment, Notice of Decision for an Instrument, (*EPA*, s.27) *EBR* Registry Number IA03E1902, December 21, 2006.

43. LEC is a local unincorporated group whose members are resident in Ontario in the vicinity of the Lafarge facility at Bath. LEC is a coalition that supports, liases with, and includes the participation of, a variety of citizens and other non-profit, non-governmental groups regarding this matter. Some of the groups supporting the LEC submissions include Clean Air Bath, the Toronto Environmental Alliance, Sierra Club of Canada, the Iroquois Group of Central New York, and Friends of the Earth. Martin J. Hauschild (“Hauschild”) is the President of LEC, and William Kelley Hineman (“Hineman”) is the Vice-President. Hauschild is a resident of Amherst Island, Ontario and Hineman is a resident of Bath, Ontario.

44. LOW is incorporated under the laws of Canada as a not-for-profit corporation, and its corporate office is located in Toronto. Downie is a Lake Trustee and representative of LOW who resides in Ontario, and he co-filed with LOW submissions with MOE concerning the Lafarge proposal.



Reference: **Tab 32**, Lake Ontario Waterkeeper, Letters Patent, Under Canada Corporations Act; **Tab 7**, Lake Ontario Waterkeeper and Gord Downie, Submissions to the Ontario Ministry of the Environment on Applications for Approval, Air and Waste Disposal Site, Lafarge Canada Inc., *EBR* Registry # IA04E0466 (Air) & # IA03E1902 (Waste Disposal), March 21, 2006.

45. As a not-for-profit corporation carrying on activities in Ontario pursuant to its objects of incorporation, LOW constitutes a person resident in Ontario.

Reference: **Tab 33**, Interpretation Act, R.S.O. 1990, c. I.11, section 29.

46. The Landowners are residents of Ontario and are the registered owners of residential property at 638 Main Street, Bath, Ontario, K0H 1G0 (Lot 7, Conc. 1). As such, the Landowners constitute persons resident in Ontario.

Reference: **Tab 34**, Excerpts from Abstract Index of Title.

## **2. The Decisions Implement Proposals for a Class I or II Instrument Requiring Notice Under Section 22 of the Environmental Bill of Rights**

47. Director Low's decision to issue a section 9 amended Certificate of Approval (Air) implements a Class I proposal requiring notice under section 22 of the *EBR* within the meaning of sections 1.1, and 2(2) of Ontario Regulation 681/94.

Reference: **Tab 35**, O. Reg. 681/94, ss. 1.1, 2(2).

48. Director Gebrezghi's decision to issue a section 39 provisional Certificate of Approval (Waste Disposal) implements a Class II proposal requiring notice under section 22 of the *EBR* within the meaning of section 5(1)(2).6.i of Ontario Regulation 681/94.

Reference: **Tab 35**, O. Reg. 681/94, s. 5(1)(2).6.i.

## **3. The Applicants Have an Interest in the Decisions of the Directors**

49. Section 38(3) of the *EBR* states that the fact that a person has exercised a right given by the *EBR* to comment on a proposal is evidence that the person has an interest in the decision on the proposal.

50. All the Applicants filed detailed written comments in relation to the proposals that are the subject matter of these decisions.

Reference: **Tab 7**, Lake Ontario Waterkeeper and Gord Downie, Submissions to the Ontario Ministry of the Environment on Applications for Approval, Air and Waste Disposal Site, Lafarge Canada Inc., *EBR* Registry # IA04E0466 (Air) & # IA03E1902 (Waste Disposal), March 21, 2006; **Tab 6**, Loyalist Environmental Coalition, Submissions filed with the Ontario Ministry of the Environment by Sierra Legal Defence Fund on Lafarge Proposals IA03E1902 (Waste) and IA04E0466 (Air), March 31, 2006; **Tab 8**, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, Submissions filed with the Ontario Ministry of the Environment by Joseph F. Castrilli, Barrister & Solicitor, on Lafarge Canada Inc. Applications for Approval Under the

Environmental Protection Act, Sections 9 (Air Discharges) and 27 (Waste Disposal Site) at Bath Cement Plant, EBR Registry Numbers: IA04E0466 (Air); IA03E1902 (Waste Disposal), March 31, 2006.

51. The term “interest” also can mean a pecuniary, proprietary, or personal interest in the matter. The Landowners have such an interest as registered owners of property adjacent to the Lafarge site that is the subject matter of these decisions. The submissions filed on behalf of the Landowners noted that this property appears to constitute the closest receptor in the area of potential off-site emissions of contaminants from the Lafarge facility. The submissions noted further that the release of substances associated with the Lafarge proposals has the potential to have adverse effects on the rights and interests at common law of the registered owners of this property.

Reference: **Tab 8**, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, Submissions filed with the Ontario Ministry of the Environment by Joseph F. Castrilli, Barrister & Solicitor, on Lafarge Canada Inc. Applications for Approval Under the Environmental Protection Act, Sections 9 (Air Discharges) and 27 (Waste Disposal Site) at Bath Cement Plant, EBR Registry Numbers: IA04E0466 (Air); IA03E1902 (Waste Disposal), March 31, 2006.

52. It is submitted that the Applicants have an interest in the decisions within the meaning of section 38(1) and (3) of the *EBR*.

#### **4. Lafarge Has a Right Under Another Act to Appeal These Decisions**

53. Lafarge has a right under section 139 of the *EPA* to appeal the decisions. Accordingly, it is submitted that the decisions of the Directors to issue Certificates of Approval to Lafarge entitle the Applicants to seek leave to appeal these same decisions pursuant to section 38(1).2 of the *EBR*.

Reference: **Tab 36**, *Environmental Protection Act*, R.S.O. 1990, c. E.19, section 139, as amended; **Tab 4**, Ontario Ministry of the Environment, Amended Certificate of Approval (Air) Number 3479-6RQVHX, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, page 37; **Tab 5**, Ontario Ministry of the Environment, Provisional Certificate of Approval (Waste Disposal) Number 8901-6R8HYF, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, page 21.

54. Accordingly, the Applicants respectfully submit that they meet all four requirements for standing to bring this application for leave to appeal under section 38 of the *EBR*.

## **B. The Applicants Meet the Test for Leave to Appeal**

### **1. It Appears There is Good Reason to Believe Decisions of the Directors to Issue Lafarge Certificates of Approval Are Unreasonable**

#### *a. The Test of Unreasonableness Under Section 41 of the Environmental Bill of Rights*

55. Section 41 of the *EBR* states:

“Leave to appeal a decision shall not be granted unless it appears to the appellate body that,

(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and

(b) the decision in respect of which an appeal is sought could result in significant harm to the environment.”

56. Section 41 does not require that the Applicants establish that no reasonable person could have made the decision, or that significant harm will result. Instead, the Applicants must show that it *appears that there is good reason to believe* no reasonable person could have made the decision in question, and that it *appears that the decision could result* in significant harm to the environment. (emphasis in original)

Reference: **Tab 37**, *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123, 127 (Ont. Environmental Review Trib.).

57. The Tribunal, otherwise constituted, has held that there is a close relationship between the “unreasonable” and “significant harm” branches of the *EBR* leave test:

“While the *EBR* does not explicitly deal with the relationship between these two dimensions, there is a strong presumption – inherent in the Preamble and Part I of the Act – that the two aspects of the test are related. The reasonableness of the Director’s decision depends on whether it “could result in significant harm to the environment”. And any decision which could result in significant harm to the environment would be an unreasonable decision.”

Reference: **Tab 38**, *Hannah v. Ontario* [1998] O.E.A.B. (Sept.16, 1998).

58. Similarly, the Tribunal, otherwise constituted, has held that in light of the preamble and legislative objectives of the *EBR*, the two branches of the *EBR* leave test should not be considered separately or in isolation from each other:

“Attention has been drawn to these fundamentals of the *EBR* because they underscore the inescapable connection between 41(a) – the reasonableness test, and 41(b) – the “significant harm to the environment” test. The first cannot be addressed separately as if we were engaged in an exercise of pure logic, or behavioural psychology. The environmental criterion is paramount, and it behooves the Board to transcend the contending interests while invoking the spirit and substance of the *EBR*.”

Reference: **Tab 39**, *Federation of Ontario Naturalists v. Ontario* (1999), 32 C.E.L.R. (N.S.) 92, 98 (Ont. Environmental App. Bd.).

59. It is not necessary for the Board [now Tribunal] to determine at the leave stage whether the Director was actually unreasonable or the likelihood of potential harm materializing. These questions should be left to be determined at the hearing of the appeal.

Reference: **Tab 40**, *Residents Against Company Pollution Inc., Re* (1996), 20 C.E.L.R. (N.S.) 97, 114 (Ont. Environmental App. Bd.).

60. Accordingly, it is not necessary at this stage for the Tribunal to determine whether the decisions of the Directors were unreasonable, or whether significant harm to the environment will materialize. Instead, to be granted leave to appeal, the Applicants must show that it appears that there is good reason to believe no reasonable persons could have made the decisions in question, having regard to relevant law and government policies, and that it appears that the decisions could result in significant harm to the environment.

Reference: **Tab 37**, *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123, 128 (Ont. Environmental Review Trib.); **Tab 41**, *Grey (County) Corp. v. Ontario (Director, Ministry of the Environment)* (2005), 19 C.E.L.R. (3d) 176, 188 (Ont. Environmental Review Trib.).

61. Furthermore, while the two-pronged test in section 41 is a stringent one, the standard of proof is a lower standard than a balance of probabilities, and must be applied in conjunction with the stated intent of the *EBR* to enable the people of Ontario to participate in the making of environmentally significant decisions by the Government of Ontario.

Reference: **Tab 37**, *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123, 127 (Ont. Environmental Review Trib.); **Tab 41**, *Grey (County) Corp. v. Ontario (Director, Ministry of the Environment)* (2005), 19 C.E.L.R. (3d) 176, 188 (Ont. Environmental Review Trib.).

62. At this stage of the appeal process, the appropriate standard of proof is a “prima facie” case, “preliminary merits” or serious question. It is sufficient for the Applicants to

establish that their concerns “have a real foundation sufficient to give them the right to pursue them through the appeal process.”

Reference: **Tab 42**, *Barker, Re* (1996), 20 C.E.L.R. (N.S.) 72, 79-81 (Ont. Environmental App. Bd.).

63. Finally, the Applicants are not required to show how each ground raised for leave to appeal meets both parts of the section 41 test. The Applicants may list numerous grounds in their leave to appeal materials. Some may relate solely to the first part of the test. Some may relate to the second part. Some may (but are not required to) relate to both parts. The Applicants must provide arguments that satisfy both parts of the test and those arguments must relate to the decisions being challenged. However, nothing in the *EBR* or in decided case-law requires each ground or argument raised to simultaneously meet both parts of the test.

Reference: **Tab 41**, *Grey (County) Corp. v. Ontario (Director, Ministry of the Environment)* (2005), 19 C.E.L.R. (3d) 176, 195 (Ont. Environmental Review Trib.).

#### ***b. The Decisions of the Directors and the Ministry Statement of Environmental Values***

64. In determining whether the decisions of the Directors in this case are “unreasonable”, the Tribunal should, *inter alia*, have regard for the MOE *Statement of Environmental Values* (“SEV”) issued under the *EBR*. The Tribunal, otherwise constituted, has held that the MOE’s SEV is “an important document” which should be considered whenever MOE staff are proposing to issue or amend instruments which are prescribed under the *EBR*.

Reference: **Tab 43**, Ontario Ministry of the Environment, *Statement of Environmental Values* (“SEV”); **Tab 44**, *Dillon v. Ontario* (2002), 45 C.E.L.R. (N.S.) 1, 27 (Ont. Environmental Review Trib.).

65. The MOE’s SEV is designed to foster public participation and in addition contains commitments to three environmental fundamental principles that are relevant to the Directors’ decisions in this case: (i) the ecosystem approach; (ii) precautionary principle; and (iii) resource conservation. As described below, the Applicants submit that the decisions of the Directors are not consistent with, or directly contravene, the public participation provisions and the three principles.

#### ***i. The Decisions of the Directors Fail to Take Into Account the Ecosystem Approach***

66. The MOE’s SEV under the *EBR* contains a commitment that MOE staff will consider and apply an “ecosystem approach” when making environmentally significant decisions. In this regard, the SEV states:

“The Ministry will adopt an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.

When making decisions, the Ministry will consider: the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the interactions among the environment, the economy and society” (emphasis added).

Reference: **Tab 43**, Ontario Ministry of the Environment , SEV.

67. In the circumstances of this case, the Applicants submit that the decisions of the Directors failed to properly take into account the ecosystem approach when the section 9 and 39 approvals were issued to Lafarge. For example, although the SEV specifically requires the consideration of cumulative effects, it appears on the record that neither Lafarge nor the Directors conducted any cumulative impact analysis prior to the issuance of the section 9 or 39 approvals. Thus, there remains considerable uncertainty over whether – or to what extent – the point source and/or fugitive emissions from the Lafarge facility may act in an additive or synergistic manner with airborne contaminants from other local industrial, commercial, or urban sources. MOE's response to public comments on this matter simply stated that this issue was "beyond the scope" of the Lafarge applications. Similarly, it appears that a specific Human Health Risk Assessment, prepared by qualified toxicologists, was not prepared or considered prior to the issuance of the section 9 and 39 approvals. Moreover, the section 39 approval purports to permit the on-site disposal of “alternative fuels” CKD without proper safeguards to protect groundwater or surface water resources. In the Applicants’ view, this is a classic example of an unintended cross-media impact – the kiln’s electrostatic precipitators may help protect air quality by capturing CKD, but the subsequent disposal of CKD at the on-site landfill may cause or contribute to groundwater or surface water contamination.

Reference: **Tab 22**, Ontario Ministry of the Environment, Summary of Public Comments Received Relating to *EBR* Registry Numbers IA03E1902 and IA04E0464, December 21, 2006, Category 7.

## **ii. The Decisions of the Directors Fail to Take a Precautionary Approach**

68. The MOE’s SEV under the *EBR* contains a commitment that MOE staff will consider and apply the “precautionary principle” when making environmentally significant decisions. In this regard, the SEV states:

“The Ministry’s environmental protection strategy will place priority first on preventing and second on minimizing the creation of pollutants that can damage the environment. When the creation of pollutants cannot be avoided, the Ministry’s priority will be first to prevent their release to the environment and second to minimize their release...

The Ministry will exercise a precautionary approach in its decision-making. Especially when there is uncertainty about the risk posed by particular pollutants or classes of pollutants, the Ministry will exercise caution in favour of the environment” (emphasis added).

Reference: **Tab 43**, Ontario Ministry of the Environment , SEV.

69. In the circumstances of this case, the Applicants submit that the decisions of the Directors failed to properly take into account the precautionary principle when the section 9 and 39 approvals were issued to Lafarge. For example, the MOE has freely admitted its lack of experience in monitoring the environmental performance of tire-burning facilities, and has even proposed a regulatory ban on such facilities in Ontario. Nevertheless, the Directors have issued approvals that allow tire-burning at the Lafarge facility in Bath, ostensibly as a “pilot project” to gain empirical data about tire-burning in cement kilns. However, given the temporal and operational scale of the so-called “pilot project”, the Applicants submit that the Directors have, in fact, granted a “green light” to tire-burning at a sensitive location for a significant period of time. In effect, the “alternative fuels demonstration project” constitutes a grand experiment that poses few (if any) public benefits but creates a number of risks to the local environment and nearby residents. In the circumstances, the Directors’ decision-making does not represent exercising caution in favour of the environment; instead, it represents exercising caution in favour of Lafarge.

70. *EBR* jurisprudence has emphasized the importance of the precautionary principle, and the Tribunal, otherwise constituted, has recognized this principle as an important component of the “significant harm” branch of the *EBR* leave test:

“If there *could* be significant harm resulting from the decision, then give benefit of the doubt to the environment and allow another look through an appeal” (emphasis in original).

Reference: **Tab 45**, *Ridge Landfill Corp., Re*, (1998), 31 C.E.L.R. (N.S.) 190, 200 (Ont. Environmental App. Bd.).

71. In the Applicants’ view, a prudent or judicious exercise of the precautionary principle would not result in the approval of burning tires (and other wastes) at the Lafarge facility for a two-year period, as authorized by the section 9 and 39 approvals. In the circumstances, the Applicants further submit that there are sufficient “red flags” about the Lafarge proposal that raise serious doubts whether the precautionary principle was considered adequately or at all by the Directors. Accordingly, the “merits” of using “alternative fuels” at the Lafarge facility – and the attendant risks and environmental impacts – clearly warrant a closer examination through an appeal.

### **iii. The Decisions of the Directors Fail to Promote Resource Conservation**

72. The MOE's SEV under the *EBR* contains a commitment that MOE staff will promote "resource conservation" when making environmentally significant decisions. In this regard, the SEV states:

"The Ministry will seek to ensure a safe, secure and reasonably priced supply of energy in an environmentally sustainable manner and will place priority on improving energy efficiency. It will also promote energy and water conservation, as well as encourage the use of the 3Rs – reduction, reuse, and recycling – to divert materials from disposal" (emphasis added).

Reference: **Tab 43**, Ontario Ministry of the Environment , SEV.

73. In the circumstances of this case, the Applicants submit that the decisions of the Directors failed to properly take resource conservation into account when the section 9 and 39 approvals were issued to Lafarge. For example, while Lafarge has professed to be targeting non-recyclable materials, there is nothing in the section 9 or 39 approvals that would prevent Lafarge from competing for – and burning – whole used tires that are otherwise recyclable. In addition, while Lafarge has dropped its original proposal to burn waste oil (another recyclable material), it has clearly left the door open to seek approval to do so in the future. Significantly, Lafarge attempts to rationalize its use of "alternative fuels" on the grounds that this switch may displace some of the fossil fuels currently being used, which may, in turn, reduce the emission of nitrogen oxides ("NOx") from the facility. However, the MOE's Air Policy and Climate Change Branch has indicated that while tire-burning by Lafarge may reduce NOx emissions, there may be corresponding increases in other types of contaminants, depending upon the fuel type being burned:

"While there are NOx reductions from the use of tire-derived fuel, it is noted that emissions of other pollutants such as SO<sub>2</sub>, zinc, carbon monoxide (CO) and carbon dioxide (CO<sub>2</sub>) could increase with the use of tire-derived fuel. In addition, the benefits for different pollutants and different alternative fuels (e.g. used oil, animal meal, shredded plastics and cellulose) are highly variable."

Reference: **Tab 46**, Letter dated January 25, 2006 to Tim Edwards, MOE Senior Review Engineer from Rob Cumming, Resource Recovery Manager, Lafarge; **Tab 47**, Memorandum dated November 3, 2004 to Dave Bell, MOE Project Officer from Eric Loi, MOE Air Policy and Climate Change Branch.

74. In the Applicants' view, there is insufficient evidence demonstrating that permitting Lafarge to burn "alternative fuels" will produce any net gain in terms of improving air quality or reducing overall emissions. Thus, the Applicants submit that it cannot seriously be contended that importing and burning tires (or other wastes) at the Lafarge facility represents a "safe" or "sustainable" energy source. In addition, it appears that there is nothing in the section 9 or 39 approvals that actually requires Lafarge to implement energy efficiency measures or conservation programs at the plant to manage or reduce its overall energy demand. In the circumstances, Lafarge's proposal to burn tires and other waste materials should not be perceived as a laudable energy initiative that



saves the environment; instead, it is best characterized as simply a fiscal maneuver by a private company hoping to save fuel costs.

**iv. The Decisions of the Directors Fail to Foster Public Participation**

75. The MOE's SEV under the *EBR* states that the "Ministry is committed to public participation and will foster an open and consultative process in the implementation of the [SEV]." However, as noted above, after the close of the *EBR* comment periods on the section 9 and 39 approvals, Lafarge supplied further technical reports to the MOE, none of which appears to have been subject to further or formal *EBR* notice and comment opportunities. These documents are relied upon by Lafarge in support of its applications and by the Directors in support of their decisions and listed in the respective section 9 and 39 Certificates of Approval. The Applicants submit that it was unreasonable for the Directors to do so in contravention of the MOE's commitment to public participation in the SEV.

Reference: **Tab 43**, Ontario Ministry of the Environment, SEV; **Tab 4**, Ontario Ministry of the Environment, Amended Certificate of Approval (Air) Number 3479-6RKVHX, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, Schedule "B" – Supporting Documentation, page 24; **Tab 5**, Ontario Ministry of the Environment, Provisional Certificate of Approval (Waste Disposal Site) Number 8901-6R8HYF, issued to Lafarge Canada Inc., Bath Cement Plant, December 21, 2006, Schedule "A", page 18.

**c. The Directors Failed to Obtain Information on Local Airshed and Watershed Conditions**

76. The Tribunal, otherwise constituted, has held that where the proponent's supporting documentation is inadequate, flawed, or contains significant information gaps, then it would be clearly unreasonable for the Director to issue the instrument requested by the proponent. Similarly, where such information problems exist, there will be resulting uncertainty about the environmental impacts, which raises the potential for significant (and possibly unanticipated) environmental harm. This is true even if the missing information is to be collected, monitored and reported at some point in the future after the instrument has been issued.

Reference: **Tab 48**, *Dillon v. Ontario* (2000), 36 C.E.L.R. (N.S.) 141, 146, 153 (Ont. Environmental App. Bd.).

77. Lafarge's *EPA* documentation in relation to the section 9 approval failed to provide Director Low sufficient information, at an appropriate level of detail, regarding local airshed quality or baseline conditions. In the Applicants' view, it was unreasonable for the Director to issue the section 9 approval in light of these significant evidentiary gaps.

78. The McCarry Report, prepared for the Applicants, noted the following gaps in information regarding local airshed conditions in the vicinity of the Lafarge facility including:

- Lack of air quality monitoring stations in, or local air quality data for, Bath;
- Monitoring stations too far to the east and west of the Bath area that would not in any way reflect existing local air pollution impacts of operations from the Lafarge site or from the local electric power generating station to the west of Lafarge and Bath;
- Lack of baseline air quality data for the Town of Bath and lack of ability to compare air quality in Bath to the air quality measured at the closest Air Quality Index (“AQI”) sites operated by MOE; and
- Lack of information on the potential human and ecological health impacts of emissions from the Lafarge plant on the local area.

Reference: **Tab 28**, McCarry Report, page 5.

79. Similarly, Lafarge’s EPA documentation in relation to the section 39 approval failed to provide Director Gebrezghi sufficient information, at an appropriate level of detail, regarding local watershed conditions (i.e. surface water and groundwater resources). For example, even though Condition 47 of the section 39 approval purports to authorize the disposal of “alternative fuels” CKD at the on-site landfill, Lafarge has not to date determined the extent of groundwater contamination plumes from the site. Indeed, the Ruland Report indicates that it is possible that contamination may have crossed downgradient landfill boundaries. Furthermore, Lafarge has not to date sampled or analyzed leachate from the CKD landfill. In addition, it appears that neither Lafarge nor the MOE have considered potential human exposure pathways (i.e. ingestion, dermal exposure, etc.) to leachate being discharged from the CKD landfill into Bath Creek. In the Applicants’ view, it was unreasonable for the Director to issue the section 39 approval (especially Condition 47) in light of these significant evidentiary gaps.

Reference: **Tab 30**, Ruland Report.

***d. The Directors Failed to Consider the Common Law Rights of Landowners in the Area***

80. The submissions filed on behalf of the Landowners noted that their property, which is adjacent to the Lafarge site, appears to constitute the closest receptor in the area of potential off-site emissions of contaminants from the Lafarge facility. The submissions of the Landowners noted further that the release of substances associated with the Lafarge proposals has the potential to have adverse effects on the rights and interests at common law of the registered owners of this property. Accordingly, they submitted that

either the Lafarge proposals should be rejected, or a hearing should be held. The common law causes of action that exist to vindicate such rights, mentioned and defined in the submissions of the Landowners, include negligence, trespass to land, private nuisance, and strict liability.

Reference: **Tab 8**, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, Submissions filed with the Ontario Ministry of the Environment by Joseph F. Castrilli, Barrister & Solicitor, on Lafarge Canada Inc. Applications for Approval Under the Environmental Protection Act, Sections 9 (Air Discharges) and 27 (Waste Disposal Site) at Bath Cement Plant, EBR Registry Numbers: IA04E0466 (Air); IA03E1902 (Waste Disposal), March 31, 2006.

81. In characterizing this matter, MOE stated that “it was suggested that the proposals should be refused due to potential interference with the common law rights of nearby residential property owners” but failed to mention the alternative submission that a hearing be held. Furthermore, MOE’s response to the submissions of the Landowners on this point stated:

“These comments [regarding common law rights] are beyond the scope of the proposals under Part V and Section 9 of the EPA. The applications were reviewed and approved in accordance with all existing legislation, policies and practices including the public notification and participation requirements mandated by the Environmental Bill of Rights.”

Reference: **Tab 22**, Ontario Ministry of the Environment, Summary of Public Comments Received Relating to EBR Registry Numbers IA03E1902 and IA04E0464, December 21, 2006, Category 5.

82. In issuing the Certificates of Approval the Directors completely disregarded the common law rights of the Landowners. The Applicants submit that the failure of the Directors to consider the common law rights of the Landowners, including affording an opportunity for a hearing, was unreasonable in the circumstances.

***e. The Issuance of the Certificates of Approval by the Directors in Conjunction with the 2-3 Year Tire Incineration Ban Announced by the Ministry Discriminates Against the Community of Bath, Ontario***

83. As noted above, on the very same date as the decisions of the Directors were posted on the *EBR* Registry, MOE also posted a notice of proposal for a regulation to be developed under the *EPA* that would ban the incineration of tires for a 2-3 year period possibly starting in the spring of 2007. The proposed ban would not apply to any facility with approval to incinerate tires before the ban comes into effect, such as the Lafarge facility at Bath, Ontario.

Reference: **Tab 27**, Ontario Ministry of the Environment, Notice of Proposal for Regulation, EBR Registry Number RA06E0024, December 21, 2006.

84. The timing of the decisions of the Directors approving the Lafarge proposals in conjunction with the proposed tire incineration ban in the rest of the province, the MOE admission of its lack of experience in monitoring the environmental performance of tire-burning facilities, the lengthy duration of the trial or test burn period under the decisions, and the failure to authorize a hearing leave the overwhelming impression that the community of Bath is being discriminated against while MOE and Lafarge conduct a major scientific experiment in the area. Moreover, as noted elsewhere in this Leave to Appeal Application the content of the conditions of approval associated with this experiment appear inadequate to ensure that MOE obtains answers to the very questions it purports to seek through the test burn process. In the circumstances, the Applicants submit these factors constitute further indicia that the decisions of the Directors appear unreasonable.

#### *f. Summary*

85. In summary, the Applicants submit that the decisions of the Directors appear unreasonable in the circumstances. In particular, the decisions failed to:

- comply with the SEV of the MOE by not: taking into account the ecosystem approach; acting in a precautionary manner; promoting resource conservation; or fostering public participation;
- obtain information on local airshed and watershed conditions;
- consider the common law rights of landowners in the area; and
- avoid discriminating against the community of Bath in authorizing a major scientific experiment without at least first holding a hearing.

## **2. It Appears the Decisions of the Directors Could Result in Significant Environmental Harm**

### *a. The Test for Assessing Significant Environmental Harm*

86. Section 1 of the *EBR* defines harm as follows:

“Harm means any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound vibration or radiation.”

87. The word “significant” is not defined in the *EBR*. The Environmental Appeal Board has stated that because of the inherent subjectivity of the concept of “significant harm”, the Board should attempt to use a test that does not rely on the individual view of

its members as to what may be significant. Where possible, significance should be determined by reference to scientific principle and evidence of legal criteria.

Reference: **Tab 40**, *Residents Against Company Pollution Inc., Re* (1996), 20 C.E.L.R. (N.S.) 97, 112 (Ont. Environmental App. Bd.).

88. The Applicants submit that the Tribunal should take a similar “objective approach” for assessing the significance of the environmental harm arising from the issuance of the Certificates of Approval to Lafarge.

***b. The Potential for Significant Environmental Harm***

89. Lafarge’s section 9 approval is prescribed by *EBR* regulation as a Class I instrument, while Lafarge’s section 39 approval is prescribed by *EBR* regulation as a Class II instrument. Accordingly, by definition, these approvals are environmentally significant instruments, and it is appropriate to presume that such instruments, at the very least, have the potential to cause environmental harm within the meaning of section 41(b) of the *EBR*. More importantly, by any objective standard, burning tires, plastics and other waste materials as “alternative fuel” (section 9), and operating a waste disposal site to accept and store such materials on-site (section 39), are environmentally significant activities with considerable potential to cause off-site impacts to the environment, nearby residents, and public health and safety. Thus, it is clear that the decisions of the Directors to issue the instruments in question could result in significant adverse environmental harm, particularly if the “alternative fuels demonstration project” does not proceed exactly as planned or predicted by the proponent.

Reference: **Tab 45**, *Ridge Landfill Corp., Re*, (1998), 31 C.E.L.R. (N.S.) 190, 197, 200 (Ont. Environmental App. Bd.)

90. The Applicants’ concerns about the potential for adverse impacts arising from the decisions of the Directors are exacerbated by: (i) Lafarge’s apparent lack of any operational experience in waste incineration in Ontario; (ii) the MOE’s admitted lack of any experience in monitoring the environmental performance of tire-burning facilities in Ontario; and (iii) the fundamental inadequacy of the terms and conditions set out in the section 9 and 39 approvals, as described below.

***c. The Existing Air Quality and Water Quality Conditions in the Area Already Risk Significant Environmental Harm***

91. The McCarry Report noted that with respect to existing air emissions in the area:

“The air contaminants which have been identified through large-scale epidemiological studies to cause adverse health effects in humans are fine particulate material, ozone, oxides of nitrogen, oxides of sulfur and carbon monoxide; all of these contaminants, except for ozone, are released in significant

amounts from the Lafarge facility. In addition to these agents, a wide range of organic contaminants and inorganic species have also been identified as toxic agents to humans (see list of toxic substances and a discussion of their harmful effects in Dr. Neil Carman's report). Many of these toxic substances are released from the Lafarge facility currently..."

Reference: **Tab 28**, McCarry Report, page 6.

92. In this regard, the Applicants refer the Tribunal to the submissions of the Landowners, which noted the air releases of toxic substances by the Lafarge cement manufacturing facility at Bath for the period 2001-2003 as reported by Lafarge to Environment Canada pursuant to *Canadian Environmental Protection Act* requirements as part of the National Pollutant Release Inventory.

Reference: **Tab 8**, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, Submissions filed with the Ontario Ministry of the Environment by Joseph F. Castrilli, Barrister & Solicitor, on Lafarge Canada Inc. Applications for Approval Under the Environmental Protection Act, Sections 9 (Air Discharges) and 27 (Waste Disposal Site) at Bath Cement Plant, EBR Registry Numbers: IA04E0466 (Air); IA03E1902 (Waste Disposal), March 31, 2006.

93. In relation to existing water quality conditions, the Ruland Report notes that groundwater and surface water at the Lafarge property have already been severely impaired. The submission of the Acting Medical Officer of Health (see above) similarly notes that the Bay of Quinte portion of Lake Ontario has been designated as an "Area of Concern" by the International Joint Commission.

Reference: **Tab 30**, Ruland Report; **Tab 13**, Letter dated October 21, 2004 to the Hon. Leona Dombrowsky from Dr. A.C. Goddard-Hill, Acting Medical Officer of Health.

94. In addition, the Ruland Report estimates that the CKD landfill currently generates millions of leachate per year, most of which is discharging into the Bath Creek, which flows downstream into areas where local children are known to play in the creek water. By purporting to authorize the disposal of countless tonnes of "alternatives fuel" CKD at the landfill, Condition 47 of the section 39 approval may result in the additional loading of landfill leachate into the already degraded groundwater and surface water resources. In other words, allowing "alternative fuels" CKD to be disposed at what the Ruland Report finds to be an "unsatisfactory" landfill can only perpetuate or compound the existing problems, not fix them.

Reference: **Tab 30**, Ruland Report.

95. The Applicants submit there is sufficient scientific evidence to suggest that even without the burning of alternative fuels at the Lafarge facility there appears to be reason for concern regarding existing air and water quality conditions in the Bath area.

***d. The Terms and Conditions in the Certificates of Approval Do Not Appear Adequate to Prevent Significant Environmental Harm***

96. The experts retained by the Applicants, Drs. McCarry and Carman, and Mr. Ruland, have reviewed the terms and conditions contained in the Certificate of Approvals issued by the Directors. Overall, the Applicants submit that the terms and conditions set out in the section 9 and 39 approvals are inadequate to prevent significant environmental harm. Examples of serious gaps, flaws, and interpretive difficulties with these terms and conditions are set out below.

**i. Section 9 Certificate of Approval**

97. The section 9 approval was issued subject to 27 conditions. Many of the concerns identified below with respect to the section 39 approval also apply to the section 9 approval, including the standard clause, general housekeeping, boiler plate nature of many of the conditions as well as with respect to conditions respecting certain definitions, the design and operations manual, annual reports, and related matters. Accordingly, those concerns will not be repeated here under Part III.B.2.d.i.

98. Moreover, the conditions contained in the section 9 approval are mostly distinguished by what they fail to address. Many of these omissions have been identified in the McCarry and Carman Reports summarized above. Overall, the Applicants submit that the conditions under the section 9 approval, do not appear adequate to avoid significant environmental harm either during the test burn period or operationally thereafter. A review of several of the section 9 conditions of approval follows.

**Continuous Emissions Monitoring**

99. Condition 4 requires Lafarge to install continuous monitor systems to continuously monitor the following parameters in the exhaust gas stream of the cement kiln exhaust stack: carbon monoxide, flue gas volume, nitrogen oxides, opacity, oxygen, sulphur dioxide, and temperature. The Carman Report identifies many deficiencies with Condition 4 including the failure to require continuous monitoring for emission of toxic substances, PM<sub>10</sub>, PM<sub>2.5</sub>, and dioxins and furans.

100. The Carman Report indicates that opacity monitoring required by Condition 4 cannot be accurately used to calculate actual PM<sub>10</sub>, or particulate emissions. Furthermore, the crude approximation of the kiln exhaust stack's particulate matter emissions using opacity is inadequate for public health considering the intent of Lafarge to use large volumes of alternative fuels in the kiln that may increase the concentration and change the size, nature, and chemical composition of particulate matter released.

101. The Carman Report identifies a large number of contaminants that can be continuously monitored. None identified by the Carman Report are identified in Condition 4.

### Source Testing – Baseline Emissions Monitoring and Reporting

102. Condition 6 of the section 9 approval requires Lafarge to perform source testing to determine the rate of emission of the “test contaminants” from the cement kiln exhaust stack while burning conventional fuels only. The test contaminants are defined as those contaminants listed in Schedule “E” to the section 9 approval. The McCarry Report notes that the list of chemicals contained in Schedule “E” is deficient. Accordingly, the summary report on baseline emissions monitoring required by Condition 7 will be similarly deficient.

### Alternative Fuel – Demonstration Period

103. Condition 10 of the section 9 approval addresses the alternative fuel demonstration period. This condition would allow Lafarge to conduct a minimum of three tests over a two-year period. Both Drs. McCarry and Carman characterize a two-year test burn period as extraordinarily and exceptionally slow, respectively, in comparison to tests that have been allowed in other jurisdictions. Given the other concerns raised by the Applicants about the adequacy of other section 9 conditions during the test period and thereafter, Condition 10 appears to be a key source of potentially significant environmental harm.

### Alternative Fuel – Demonstration Period Source Testing and Reporting

104. Conditions 11 and 12 require source testing and reporting, respectively, during the demonstration period (test period). The purpose of these conditions is to determine and report upon the emission rate of the test contaminants from the cement kiln exhaust stack. As noted above, the test contaminants are defined as those contaminants listed in Schedule “E” to the section 9 approval. The McCarry Report notes that the list of chemicals contained in Schedule “E” is deficient. Accordingly, the source testing and reporting required by Conditions 11 and 12 will be similarly deficient.

### Fugitive Dust Control

105. Conditions 21 and 22 of the section 9 approval address fugitive dust control. As noted above, the McCarry Report indicated that these conditions appear insufficient to demonstrate through monitoring whether implementation of the RWDI proposed dust management plan will lead to any improvement in fugitive dust releases and, accordingly, constitute severe shortcomings in the approval during either the test period contemplated by the approval or operationally thereafter.

### Upset Conditions and Equipment Malfunctions Response Procedure

106. Condition 26 of the section 9 approval addresses the procedures to be followed by Lafarge in the event of an upset condition or equipment malfunction. The section 9 approval defines an upset condition as meaning “any condition or incident relating to



changes in the performance in the cement kiln that is likely to cause a negative effect on the emissions from the cement kiln exhaust stack.”

107. The Carman Report sets out the seriousness of cement kiln upsets (e.g. excess emission events of particulate matter and gases) arising from problems well known in the cement industry such as ring formation. The Carman Report also notes that upset conditions due to ring formation have been acknowledged by Lafarge to have occurred in the past at the cement manufacturing facility at Bath. Given the seriousness of the problem and Lafarge’s acknowledgement that it has occurred in the past at this facility, the Carman Report concluded that the problem required a thorough technical evaluation in view of the proposed addition of alternative fuel such as tires, plastics, bone meal, and palletized municipal waste. Moreover, the Carman Report noted at least five problems with Condition 26 as drafted. Accordingly, Condition 26 does not meet the challenge of being proactive either during the test burn period or operationally thereafter, but rather is a condition waiting for an upset to happen. In the circumstances, the Applicants submit that this is simply not good enough.

## **ii. Section 39 Certificate of Approval**

108. The section 39 approval was issued subject to 68 conditions. While at first glance this appears to be an impressive number of conditions, the majority of the conditions are either: (i) standard clauses (i.e. definitions, interpretation sections, etc.); (ii) general “housekeeping” matters (i.e. signage, hours of operation, change of ownership, etc.); or (iii) MOE “boilerplate” provisions (i.e. legal obligations, inspections, record retention, etc.). In the result, there are surprisingly few substantive conditions that appear to have been specifically tailored to address the particulars of the “alternative fuels demonstration project”. More importantly, the Applicants submit that these conditions are likely to be ineffective in preventing significant environmental harm, as discussed below.

### Definition of “Alternative Fuels”

109. Condition 1 of the section 39 approval defines “alternative fuels” as “municipal waste to be used a substitute fuel source”. The definition goes on to provide that this “includes” materials such as whole and part used tires, shredded solid waste, pelletized municipal waste, and meat and bone meal (“MBM”) waste, and provides some further sub-definitions of these terms. However, there is nothing in the section 1 definition of “alternative fuels” that actually limits the types of solid, non-hazardous municipal waste that may be received, stored and burned at the Bath facility. In short, the “alternative fuels” definition in Condition 1 “includes” the specified materials, but is not necessarily limited to them.

110. However, Condition 26(a) of the section 39 approval attempts to limit the “approved waste types” to the four specified materials, as defined by the Condition 1. With respect to “whole and part used tires”, the Applicants note that there is nothing in Condition 1 or 26 that prohibits Lafarge from collecting and burning tires that are capable

of being recycled. The Applicants have the same concern with respect to “shredded solid waste”, as Conditions 1 and 26 fail to prohibit the shredding and burning of solid waste (i.e. plastic) that is otherwise capable of being recycled.

111. The Applicants are aware that Condition 36 of the section 39 approval states that Lafarge shall “restrict” its use of recyclable used tires and waste plastics in accordance with the Design and Operations Manual (see below). However, this “restriction” is not a “prohibition”, and the Manual simply contains vague statements of Lafarge’s intentions regarding recyclables, rather than an enforceable commitment to never burn recyclable tires or plastic at the Bath facility.

112. With respect to “pelletized municipal waste”, the applicants are concerned that this category may open the door to a wide variety of municipal waste being burned, provided that the material has been “pelletized” at an MOE-approved facility. The Condition 1 definition simply refers to solid fuel pellets derived from “municipal waste, including domestic waste”. The Applicants’ concerns in this regard are amplified by the broad definition of “municipal waste” under section 1(1) of Regulation 347:

“municipal waste” means,

- (a) any waste, whether or not it is owned, controlled, or managed by a municipality, except,
  - (i) hazardous waste,
  - (ii) liquid industrial waste, or
  - (iii) gaseous waste; and
- (b) solid fuel, whether or not it is waste, that is derived in whole or in part from the waste included in clause (a)

113. The Applicants’ concerns about MBM waste have been described elsewhere in this Leave to Appeal Application in the context of the section 9 approval.

114. Although the section 39 approval attempts to restrict the types of waste that may be utilized as “alternative fuels”, and although much of the technical debate and *EPA* documentation to date has focused on tires, it appears that the section 39 approval may authorize Lafarge to utilize many different forms of municipal waste and recyclable materials as “alternative fuels” (provided they fall within the Condition 1 definitions) without necessarily seeking further amendments to the section 39 approval.

#### Design and Operation Manual

115. Condition 4 of the section 39 approval requires the site to be designed, developed, built, operated and designed with the supporting documents listed in Schedule “A”, including the Design and Operations Manual (December 2006). The Applicants note that this version of the Manual was produced well after the close of the *EBR* comment period, and it appears to have been supplied to the MOE just before the section 39 approval was issued on December 21, 2006.

116. More importantly, a careful perusal of the Manual reveals that it does not contain many critical engineering specifications, prescriptive operational rules, or technical details regarding the site or equipment. Instead, these important matters are addressed only at a broad or conceptual level, and are accompanied by simplified schematic drawings and over-generalized statements of Lafarge's future intentions. Indeed, much of the Manual reads more like a self-promotional brochure (i.e. touting the "benefits" of "alternative fuels"), rather than a detailed set of mandatory requirements that govern site design and operation. Accordingly, the Applicants derive no comfort from the content of the Manual, and submit that it is not an acceptable basis for issuing the section 39 approval.

117. This concern is particularly true in relation to Lafarge's oft-repeated claim that the facility will not be competing for recyclable materials. For example, the Manual states that Lafarge will attempt to "target" non-recyclable materials, and it will report on its success in doing so. However, there appear to be no actual consequences under the section 39 approval if the "targeting" approach is not successful, and if otherwise recyclable tires are collected and burned at the Bath facility. Indeed, there appears to be no enforceable prohibition in the Manual or the section 39 approval against burning recyclable tires or other materials technically capable of being recycled, as long as such materials otherwise meet the overly broad definition of "alternative fuels".

#### Procedures Manual

118. Since the Design and Operations Manual is generally devoid of specific operational details, Condition 23 of the section 39 approval requires Lafarge to prepare a "Procedures Manual" which prescribes "detailed standard operating procedures relating to all aspects of the handling of alternative fuels at the site." Unfortunately, there appears to be no legal obligation upon Lafarge to provide public notice and comment opportunities while this important Manual is being drafted. Similarly, there appears to be no legal obligation upon Lafarge to consult with the Community Liaison Committee ("CLC") established under Condition 54 (see below). Alarming, it appears that Lafarge is not even legally obliged to submit the Procedures Manual to the MOE for review and approval before it is implemented. Thus, there is no guarantee that there will be appropriate public and/or regulatory scrutiny of the content of this important Manual, and certainly no assurance at the present time that the as-yet un-drafted Manual will be adequate for environmental protection purposes.

#### Emissions Monitoring

119. Conditions 24 and 25 of the section 39 approval requires Lafarge to conduct certain emissions monitoring programs required under the section 9 air approval. The Applicants' concerns about the inadequacy of the air monitoring requirements are described above.

#### Tonnage Limits

120. Condition 27(a) of the section 39 approval limits the usage of “alternative fuels” to the rate of 100 tonnes per day. Given that the facility is intended to be operated 24 hours/day, 365 days of the year (see Condition 31), this translates into approximately 36,500 tonnes of waste being burned per year. In the Applicants’ view, this large volume goes far beyond a limited pilot project. The Applicants further note that Condition 27(a) limits the use of pelletized municipal waste to 1.25 tonnes, although there appears to be no clear protocol in the Design and Operation Manual for ensuring compliance with this limit.

### Service Area

121. Condition 30 attempts to impose a geographic service area restriction on where the “alternative fuels” may be collected and transported to the Bath facility (i.e. Ontario, Quebec, and New York). As a practical matter, however, it is unclear whether or how MOE officials can enforce this condition *ex juris*. In addition, the Condition is unacceptably vague by failing to specify what is meant by the term “generated”. If, for example, a New York scrap tire dealer or waste transfer station accepts and stockpiles tires from neighbouring states, can these, too, be imported by Lafarge under the section 39 approval? What if the tires from various sources are co-mingled, making it impossible to identify where the scrap tires originated? These and other intractable questions lead the Applicants to seriously question the efficacy of the service area established by the section 39 approval. In the circumstances, the Applicants submit that Condition 30 will likely prove to be an ineffective barrier against the importation of “alternative fuels” from sources outside the delineated service area.

### CKD Disposal

122. Once Lafarge commences to incinerate tires, plastics, and other waste materials under the “alternative fuels demonstration period” authorized under the section 9 approval, Condition 47 of the section 39 approval purports to authorize the disposal of the resulting CKD upon Lafarge’s on-site landfill. The only condition precedent for disposing of this new CKD waste is that Lafarge is required to conduct certain tests to determine whether the CKD is “hazardous waste” for the purposes of Regulation 347 [Condition 47(a)]. Thereafter, Lafarge is only obliged to collect and analyze “representative samples” of the CKD on an ongoing quarterly basis [Condition 47(b)]. No contingency measures are specified, and Condition 47 is silent on what should happen to “alternative fuel” CKD that does not meet Regulation 347 requirements for non-hazardous waste. Indeed, given the paucity of detail in Condition 47, it appears that the disposal of “alternative fuel” CKD was, at best, an afterthought in the section 39 approval.

123. After describing the unsatisfactory design, operation, management and monitoring of the CKD landfill, the Ruland report concludes that Condition 47 is “inadequate to protect human health and the natural environment from the potential consequences of landfilling the CKD resulting from the burning of alternative fuels.”

Reference: **Tab 30**, Ruland Report.

124. The Ruland Report estimates that millions of litres of leachate are being generated by the CKD landfill each year, and finds there is evidence of impairment of groundwater and surface water upon the Lafarge property. The quality of leachate generated from the landfill is affected by the chemical composition of the CKD, which, in turn, is dependent upon the raw materials being used, and the fuel materials being burned, during the cement-making process. However, it appears that current CKD landfill leachate has not been sampled or analyzed to date by either Lafarge or the MOE, and there is nothing in Condition 47 that requires such testing at the landfill once “alternative fuel” CKD begins to be disposed at the landfill. In addition, Lafarge’s proposed (and as yet unapproved) long-term management plan for the CKD landfill fails to address or even mention the switch to “alternative fuels” and its potential implications for leachate composition and management.

Reference: **Tab 30**, Ruland Report.

125. The Applicants submit that Condition 47 is *ultra vires* and fundamentally deficient for several reasons: (i) the condition is a *de facto* amendment of another Certificate of Approval (i.e. A710137) that is intended to govern the operation of the on-site landfill; (ii) the issue of “alternative fuel” CKD disposal was not addressed in Lafarge’s application for the section 39 approval; (iii) there was no public notice or comment opportunity on the form or content of Condition 47; (iv) the condition is, at best, premature since the MOE has not yet decided whether Lafarge’s proposed long-term management plan for the CKD landfill is approvable; (v) the condition is largely redundant since Lafarge is not permitted by law to dispose of hazardous waste on-site in any event; and (v) the condition is wholly incapable of satisfactorily addressing the numerous substantive concerns raised in the Ruland Report regarding on-site CKD disposal (i.e. incomplete information regarding leachate quality/quantity; inadequate leachate management plan; insufficient environmental monitoring/reporting, etc.). In short, unless and until the serious operational problems at the CKD landfill are properly remedied, it is unreasonable and potentially harmful for Condition 47 to permit the on-site disposal of “alternative fuel” CKD, subject only to minimalist sampling requirements.

#### Training Plan

126. Condition 52 of the section 39 approval requires Lafarge to submit a “Training Plan” to the MOE Director. The Applicants note that there is no legal obligation upon Lafarge to consult the CLC or the public at large regarding the development or content of the Training Plan.

#### CLC and Public Information Meetings

127. Condition 54 of the section 39 approval requires Lafarge to use its best efforts to establish a CLC consisting of various stakeholders. Having regard for the CLC’s rather

narrow mandate (as circumscribed by Condition 54), it appears that the CLC is intended to simply serve as an information forum rather than an advisory body or dispute resolution mechanism. Moreover, while the CLC will have access to key Lafarge documentation regarding the site, the Condition does not require Lafarge to provide the CLC with funding to permit independent peer reviews of the Lafarge documentation. In the Applicants' view, the CLC, as presently envisioned by Condition 54, is not likely to be a particularly credible or useful mechanism for ensuring meaningful public participation in assessing the "alternative fuels" project.

128. Condition 55 of the section 39 approval requires Lafarge to advertise and hold public meetings at least once per year to present information to the community on various matters, including the results of emissions monitoring. Again, however, Lafarge is not obliged under Condition 55 to fund peer reviews by independent experts selected by local residents. Accordingly, the Applicants submit that the lack of peer review funding will significantly impair the community's ability to critically review and respond to the detailed technical issues to be addressed at such meetings.

#### Annual Reports

129. Condition 65 of the section 39 approval requires Lafarge to file an annual report with the MOE District Manager. However, the deficiencies of Lafarge's air and water monitoring programs (see above) will significantly affect the utility and completeness of the annual reports. In addition, there appears to be no legal obligation upon Lafarge to provide the annual report to the CLC for review and comment prior to submission to the Director. Similarly, there appears to be no requirement for Lafarge to web-post the annual report so that interested members of the public can easily access the information contained within the reports.

#### Closure Plan

130. Condition 66 of the section 39 approval requires Lafarge to prepare a site closure plan and submit it to the MOE Director for approval. However, this Condition does not place a legal obligation on Lafarge to consult the CLC, or to provide public notice and comment opportunities on the closure plan prior to its submission to the MOE.

#### *e. Summary*

131. In summary, the Applicants submit that it appears that the decisions of the Directors could result in significant harm to the environment. In particular, the decisions constitute authorization of a major experiment on the environment of the community of Bath of inordinate and unprecedented duration with insufficient safeguards during the test burn period. Furthermore, this is coupled with conditions that appear inadequate to provide MOE with the information necessary to make an informed decision on whether burning of alternative fuels should be allowed on a permanent basis at the Lafarge facility at Bath (or elsewhere in Ontario upon expiry of the proposed regulatory ban).

#### IV. ORDER REQUESTED

132. To date, the MOE has:

- refused to subject the Lafarge proposal to the rigorous requirements of the *EAA*;
- failed to refer the Lafarge proposal for a Tribunal hearing under Part V of the *EPA*; and
- relied upon numerous technical documents generated by or for Lafarge after the close of the *EBR* public comment periods, but failed to solicit public input on such documents (contrary to the MOE's SEV commitment to public participation).

133. In the circumstances, the Applicants submit that these MOE acts and omissions have effectively shielded the Lafarge proposal from meaningful public scrutiny, and have failed to ensure the achievement of the public interest purposes of the *EPA* and *EBR*. Because the decisions of the Directors are unreasonable and could result in significant environmental harm, the only appropriate remedy at this stage is to grant the Applicants full leave to appeal under the *EBR* so that the legal, technical and scientific debate over the "merits" of the Lafarge proposal can finally be adjudicated in an independent and procedurally fair forum, *viz.* an appeal hearing by the Tribunal.

134. For the foregoing reasons, the Applicants submit that the public interest is best served by granting leave to appeal the decisions of the Directors to issue the section 9 and 39 Certificates of Approval to Lafarge. Therefore, the Applicants respectfully request that the Tribunal grant leave to appeal the decisions of the Directors to issue the Certificates of Approval to Lafarge in their entirety, including all general and special conditions contained therein. For the purposes of greater certainty, the Applicants are hereby requesting leave at large to wholly appeal the decisions of the Directors to the Tribunal on the grounds described above in this application.

135. If leave to appeal is granted, the Applicants intend to seek an order from the Tribunal revoking the decisions of the Directors to issue the Certificates of Approval.

136. If leave to appeal is granted, the Applicants submit that the decisions of the Directors should be subject to the automatic stay imposed by section 42 of the *EBR*. In the event that the respondents bring a motion to have the stay lifted, in whole or in part, then the Applicants respectfully request an opportunity to respond to such a motion before the Tribunal makes a decision respecting the statutory stay.

137. If leave to appeal is granted, the Applicants request that they be allowed to file a joint appeal or separate appeals as they consider most appropriate in the circumstances,

but in either case, the Applicants intend to be represented each by their own counsel as their respective interests, though similar, are not necessarily *ad idem*. To ensure efficient use of resources, and to avoid any unnecessary duplication or overlap at the appeal hearing the Applicants will continue to act in a cooperative and coordinated manner if leave to appeal is granted.

138. The Applicants further submit that due to the release of the decisions of the Directors over the Holiday period, the Applicants have not been able to complete assembling, printing, and binding of our Book of References. Therefore, the Applicants have not been able to serve this material on Lafarge, MOE, or the Environmental Commissioner, or consequently been able to file this material with the Tribunal. Accordingly, the Applicants undertake or, in the alternative, request an Order from the Tribunal, if necessary, allowing them to serve the Parties and file with the Tribunal the aforementioned Book of References by 4:00 p.m., Wednesday, January 10, 2007.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

January 5, 2007

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