ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF sections 38 to 48 of the *Environmental Bill of Rights*, S.O. 1993, c. 28; and Part II.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 as amended;

AND IN THE MATTER OF an application by the Concerned Citizens Committee of Tyendinaga and Environs, 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 20.3 of the *Environmental Protection* Act, in issuing Amended Environmental Compliance Approval No. A371203, dated January 9, 2012, to Waste Management of Canada Corporation, for the use, operation and closure of the Richmond Landfill Site located at Lot Pt 1, 2, 3, Concession 4, Town of Greater Napanee, County of Lennox & Addington (EBR Registry Number: 011-0671)

SUBMISSIONS ON APPLICATION FOR LEAVE TO APPEAL BY CONCERNED CITIZENS COMMITTEE OF TYENDINAGA AND ENVIRONS

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CONCERNED CITIZENS COMMITTEE OF TYENDINAGA AND ENVIRONS
EBR REGISTRY NO. 011-0671
MINISTRY REFERENCE NO. 5160-874KTV
AMENDED ENVIRONMENTAL COMPLIANCE APPROVAL NO. A371203

PART I – APPLICATION

1. The Concerned Citizens Committee of Tyendinaga and Environs (hereinafter the "Applicant") hereby applies to the Environmental Review Tribunal ("ERT") under section 38 of the *Environmental Bill of Rights* ("EBR") for an order granting leave to appeal the following Conditions of Amended Environmental Compliance Approval ("ECA") No. A371203:

- Condition 8.5 (Monitoring Programs);
- Condition 9.1 (Groundwater and Surface Water Impact Contingency Plan);
- Condition 9.2 (Leachate Collection System Contingency Plan);
- Condition 9.5 (Public Notification Plan for Contingency Plans); and
- Conditions 14.1, 14.2 and 14.3 (Monitoring Reporting and Annual Reporting).

2. As described below in Part III of these submissions, it appears that the seven above-noted Conditions are substantively deficient, procedurally flawed, and unlikely to provide timely and effective protection of the environment. Accordingly, pursuant to section 41 of the EBR, the grounds for this application are that:

- there is good reason to believe that the Director's decision to impose these inadequate Conditions within the ECA is unreasonable, having regard for the relevant laws and policies developed to guide such decisions; and

- there is good reason to believe that the Director's decision to impose these inadequate Conditions within the ECA could result in significant environmental harm.

PART II – FACTS

A. Overview

3. After approximately five decades of operation, the massive Richmond Landfill Site is now closed, and no more waste is being accepted for disposal at the site. Since 2006, the key regulatory priority has been to ensure that the site is properly capped, carefully maintained, and closely monitored in the post-closure period, and that appropriate contingency plans (and financial assurances) are in place in the event that remedial measures are required over the contaminating lifespan of the Site.

4. Prior to the closure of the Richmond Landfill in 2011, the Ministry of the Environment ("MOE") attempted to require the proponent Waste Management of Canada

Corporation ("WMCC") to prepare an updated and comprehensive Closure Plan to address, *inter alia*, environmental monitoring, contingency plans, and reporting. As described below, the draft Closure Plan (and related documents) submitted by WMCC were unsatisfactory for various reasons, and the Closure Plan was ultimately not approved by the MOE. The Applicant and other stakeholders took an active role in responding to the Closure Plan proposed by WMCC.

5. The MOE then took a different tack, and required WMCC to submit a stand-alone Environmental Monitoring Plan ("EMP") and various contingency plans to address matters which otherwise would have been addressed within the Closure Plan. WMCC submitted these materials to the MOE in June 2010, and the Applicant and other stakeholders took an active role in identifying gaps, flaws and other deficiencies in these documents. MOE reviewers also identified shortcomings in the documentation submitted by WMCC.

6. Despite these serious and continuing concerns about the adequacy of the proposed EMP and the contingency plans, the MOE Director (Ian Parrott, P.Eng) decided to issue the amended ECA on January 9, 2012 with certain Conditions that purport to adopt the EMP, contingency plans, and reporting. Notice of the Director's decision was posted on the EBR Registry on January 16, 2012. For the reasons described below, it is the Applicant's overall position that these Conditions, as currently drafted, appear unreasonable and could result in significant harm to the environment.

> Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012); **Tab 3**: EBR Registry No. 011-0671 (January 16, 2012)

B. Background: Hydrogeological Setting of the Richmond Landfill

7. The existing Richmond Landfill Site is located at Part of Lots 1, 2 and 3, Concession 4, in the Town of Greater Napanee, in the County of Lennox & Addington. The landfill site is located approximately 1 kilometre north of Highway 401, and is northeast of the intersection of County Road 10 and Beechwood Road. This rural area is not serviced by a municipal water system, and local residents, farms and businesses are dependent upon groundwater as a source of drinking water.

8. The general area is characterized by thin overburden soils and highly fractured (and likely karstic) bedrock, thereby rendering local aquifers highly vulnerable to contamination. At the regional scale, a recent Watershed Characterization Report (April 2008) by Quinte Conservation concluded that the region's groundwater resources (including those in the Napanee River Watershed) are highly susceptible to contamination in light of these prevalent hydrogeological conditions:

> In the Quinte Region, the majority of the area is characterized by thin soils over fractured bedrock. As such, this area can be considered to exhibit high aquifer vulnerability conditions (page 226).

9. This Watershed Characterization Report depicts the Richmond Landfill Site as an area underlain by a highly vulnerable aquifer (Map 36), an area of significant recharge (Map 43), an area of high well density (Map 44), a "contamination site" (Map 45), and an "issue or concern" (Map 46).

10. Similarly, an audit of the Richmond Landfill Site conducted for the Town of Greater Napanee concluded:

> The hydrogeology at the Richmond Landfill Site is fairly complex and flow is primarily controlled by the bedrock structure (i.e., faults, fractures)…
>
> The geology and hydrogeology at the Richmond Landfill Site is complex. Groundwater flow primarily occurs with bedrock features. Due to the fractured hydrogeological setting, leachate migration in groundwater is more unpredictable and more difficult to track than it is in other settings.[1]

11. The Government Review prepared in 2006 by the MOE in relation to an environmental assessment ("EA") of the proposed expansion of the Richmond Landfill concluded that the site is located within an area that is highly susceptible to groundwater contamination. In particular, the Government Review found that:

> The entire region, including the Richmond landfill site, has been identified as being underlain by fractured limestone bedrock with minimal soil protection and having aquifers that are highly vulnerable to contamination. The site has no natural attenuation protection and groundwater flows through the subsurface at a fast rate. The existing site is near capacity, with approximately one year of site life remaining. <u>The site has one unlined cell. It is reasonable to assume that this cell is a potential source of groundwater contamination. The unlined cell and its potential for off-site contamination have caused a great deal of public concern</u> (page 5, emphasis added).

12. The surface water context of the Richmond Landfill Site has been summarized in an MOE memorandum as follows:

> The landfill is located entirely within the catchment area of Marysville Creek and the Beechwood Road ditch. Marysville Creek is located immediately north of the existing waste mound. The creek originates to the northeast of the site and flows in a westerly direction through the property... The Beechwood Road ditch is located to the south of the landfill and serves as a drainage feature for the southern portion of the landfill and rural/agricultural lands to the east of the landfill. The Beechwood Road ditch ultimately discharges to Marysville Creek several kilometers downstream of the landfill site.[2]

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[1] Terraprobe, *Audit of Existing Canadian Waste Services Richmond Landfill Operation* (May 12, 2000), pages 7, 25.

[2] Memorandum to C. Dobiech from V. Castro (December 5, 2007), page 2.

C. Establishment and Operation of the Richmond Landfill

13. The Richmond Landfill was first established in the 1950s by the Sutcliffe family. Since that time, the landfill site has been owned and operated by various private companies, as discussed below. Over the course of its 50 year existence, approximately 3 million tonnes of waste have been buried at the Richmond Landfill. The largest and oldest section of the Richmond Landfill is not underlain by a liner.

14. From 1954 to the early 1970s, the landfill was unlicenced and primarily served local residents. In the 1970s, the owners received a series of Provisional Certificates of Approval under the *Environmental Protection Act* ("EPA") which allowed the disposal of domestic, commercial and non-hazardous solid industrial waste from a number of local municipalities.

15. In 1986, the EA Board held a brief public hearing and recommended conditional approval of an EPA application by Sutcliffe Sanitation Services Ltd. to expand the landfill site, and to increase the service area to include all of Ontario.[3] The approved fill rate was 125,000 tonnes/year, and the site life of the expanded landfill was estimated to be 19 to 24 years.[4]

16. In August 1987, Provisional Certificate of Approval No. A371203 was issued by the MOE Director to Sutcliffe Sanitation Services Limited. In March 1988, this Provisional Certificate of Approval was re-issued to Tricil Limited[5] with minor modifications. In summary, this Provisional Certificate of Approval approved a 16.2 hectare landfill within a larger 138 hectare property. The approved height of the landfill was 165 metres above sea level, which is approximately 40 metres above the surrounding ground surface. The landfill was licenced to receive residential, industrial commercial, institutional, construction and demolition waste from an all-Ontario service area. Historically, the incoming waste at the Richmond Landfill has been 50% residential and 50% industrial, commercial, and institutional.

17. Provisional Certificate of Approval No. A371203 was amended from time to time by the Director in relation to matters such as surface water management, organic waste composting, and site monitoring. In addition, several related certificates of approval have been issued under the EPA and *Ontario Water Resources Act* to permit other waste-related activities at the site (i.e. leachate management, stormwater pond, etc.).

18. For example, in December 1993, Provisional Certificate of Approval No. A710003 was issued by the Director to permit the use and operation of a waste processing site to allow the receipt of petroleum contaminated soils at the landfill site. Such soils were used for daily and intermediate cover at the Richmond Landfill Site.

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[3] Board File No. EP-85-02.
[4] *Ibid.*, page 3.
[5] Tricil was subsequently taken over by Laidlaw.

19. In the mid-1990s, WMCC (formerly known as Canadian Waste Services) assumed ownership and operation of the Richmond Landfill Site as well as several other landfills in Ontario. Since then, WMCC has continuously owned and operated the Richmond Landfill Site.

D. MOE Refusal to Approve Richmond Landfill Expansion

20. In the late 1990s, WMCC applied under the *Environmental Assessment Act* ("EA Act") to significantly expand the footprint, capacity and lifespan of the Richmond Landfill. In particular, WMCC applied for a 25-year approval to dispose of an additional 750,000 tonnes/year of various non-hazardous wastes from an all-Ontario service area.

21. The Terms of Reference for the EA of the proposed expansion were approved by MOE in 1999, and the Applicant, Mohawks of the Bay of Quinte ("MBQ"), and other stakeholders participated extensively in the EA process. The EA itself was submitted by WM in 2005, and the MOE Government Review of the EA was published in June 2006. Significantly, the Government Review recommended against EA approval for various environmental reasons:

> The ministry's Review identified that the EA does not adequately describe existing baseline conditions, meet regulatory requirements for satisfying RULs [Reasonable Use Limits] at the property boundary, or provide for a viable leachate control option. Given that the landfill is a potential source of groundwater contamination in a susceptible subsurface environment, the Review has also concluded that there are significant environmental risks associated with expanding the landfill (emphasis added).[6]

22. The Government Review therefore recommended "that the proposed undertaking not be approved due to the concerns identified by the ministry, members of the Government Review Team, the MBQ, and the public."[7] On November 3, 2006, the Minister of the Environment accepted this recommendation, and she refused to approve the proposed expansion on environmental grounds.[8]

E. MOE Orders Closure Plan Preparation and Site Closure

23. Shortly after the Minister rejected the proposed landfill expansion, the Applicant, various residents, local municipalities, and the MBQ called upon the MOE to ensure the prompt, proper and permanent closure of the Richmond Landfill Site. For example, the Applicant and its members wrote to the MOE to request immediate site closure and the imposition of appropriate post-closure requirements, such as monitoring, reporting, remedial work, and contingency measures.

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[6] MOE Government Review, page 27.
[7] *Ibid.*
[8] Letter to WMCC from Minister Broten dated November 3, 2006.

24. In March 2007, the MOE amended Condition 34 of Provisional Certificate of Approval A371203 to require WMCC to prepare an updated Closure Plan. WMCC submitted a proposed Closure Plan dated June 2007, which was then subject to public review and comment in August and September 2007 (EBR Registry No. 010-1381).

25. During the 30 day public comment period on the proposed Closure Plan, the Applicant submitted written comments which detailed the various legal and technical deficiencies within the Plan. For example, the Applicant's legal submission concluded that that the proposed Closure Plan:

- was fundamentally deficient and lacked critically important details on virtually all aspects of closure requirements;

- failed to establish a proper post-closure regime for monitoring, reporting and contingency measures; and

- failed to adequately address environmental impacts caused, or likely to be caused, by the continued operation of the Richmond Landfill.

Reference: **Tab 4**: Letter from CELA to MOE dated September 14, 2007

26. The Applicant's hydrogeologist (Wilf Ruland, P.Geo) prepared a detailed report on the proposed Closure Plan, and he reached the following conclusion:

> Overall, this closure plan does not provide a complete or adequate foundation of information and planning, and I am not persuaded that this document can provide the basis for a successful closure of the landfill.
>
> The closure plan requires considerable further work, including additional information and major revisions. I have provided recommendations for additional information and revisions which I consider necessary to be included in the next draft of the closure plan. The Ministry of the Environment (MOE) upon review may have further requirements for revisions.

Reference: **Tab 5:** Letter to CELA from Wilf Ruland dated May 30, 2009, Attachment 1, "Review of 2007 Closure Plan", page 1

27. In December 2007, the MOE provided WMCC with two memoranda outlining the MOE's groundwater and surface water concerns associated with the proposed Closure Plan. Among other things, these MOE memoranda found that there were a number of outstanding issues which had to be addressed before the Closure Plan could be accepted by MOE.

Reference: **Tab 6**: Letter to WMCC from MOE dated December 13, 2007

28. In July 2008, the MOE prepared its overall response to the Closure Plan proposed by WMCC. Among other things, this MOE response summarized the numerous

agency/public concerns and questions about the Closure Plan (including the significant shortfall in financial assurance provided to date by WMCC), and further indicated that the MOE expected WMCC to respond to such concerns "in detail" (page 1).

Reference: **Tab 7:** Letter to WMCC from MOE dated July 11, 2008

29. In November 2008, the Applicant, the MBQ and Tyendinaga Township jointly filed an EBR Application for Review of the 20 year-old Provisional Certificate of Approval No. A371203. Among other things, this EBR Application for Review requested site closure, comprehensive post-closure requirements, and appropriate groundwater/surface monitoring. However, this Application was denied by the MOE, and the requested review was not undertaken.

30. In his 2008-09 Annual Report, the Environmental Commissioner of Ontario reviewed this matter, and recommended that "the MOE require the immediate closure of the Richmond Landfill" (Recommendation 11). Among other things, the Environmental Commissioner concluded in his supplementary report that:

> The ECO believes that the continued operation of the site poses an unjustified risk to the environment and urges the MOE to require the orderly closure of the site immediately. The geology of the site is inherently unsuitable for waste disposal... Contamination of the groundwater appears to be inevitable. Closure of the site would lessen the amount of leachate entering the groundwater and therefore the risk.
>
> The ECO is concerned that even a robust monitoring program will not reliably detect groundwater contamination and will not provide sufficient lead time to implement protective measures...
>
> In conclusion, the ECO believes that there are compelling environmental reasons for MOE to require the immediate, orderly closure of the site, and no compelling social or economic reasons for continuing to keep it open.
>
> Reference:**Tab 8**: ECO 2008-09 Annual Report, Recommendation 11; and Annual Report Supplement, page 176

31. In February 2009, the MOE's hydrogeologist reviewed various groundwater reports submitted by WMCC, and concluded, *inter alia*, that: (i) "the status of the site with respect to Guideline B-7 compliance has not been determined" (ii) "the EMP can only be developed once issues related to the physical hydrogeology of the site are resolved; (iii) "complex hydrogeological conditions at this site make it difficult to identify and monitor potential leachate impacts"; and (iv) "the physical hydrogeological conceptual model proposed by WM / WESA is not acceptable." To date, WMCC has conducted further fieldwork and refined its Site Conceptual Model (which has been conditionally accepted by the MOE); however, the MOE has still required WMCC to undertake further groundwater investigations at the Richmond Landfill in 2012.

Reference: **Tab 9:** Memorandum from K. Stephenson to C. Dobiech dated February 25, 2009; **Tab 10:** Memorandum from K. Stephenson to C. Dobiech dated April 28, 2010

32. In May 2009, the MOE utilized EBR Registry No.010-1381 to solicit public input on over 100 proposed amendments to Provisional Certificate of Approval No. A371203. Among other things, these amendments proposed to require WMCC to prepare an EMP, various contingency plans, and certain reports. The Applicant's counsel and hydrogeologist filed detailed comments with the MOE in relation to these proposals, and expressed concern about the lack of detail in the amendments regarding the content of various plans and reports to be submitted under the proposed amendments. These comments also conveyed the Applicant's concerns about the role of the public in accessing, reviewing and commenting upon the WMCC reports once submitted to the MOE.

Reference: **Tab 11**: Letter to MOE from CELA dated May 30, 2009; **Tab 5:** Letter to CELA from Wilf Ruland dated May 30, 2009

33. In October 2009, counsel for the Applicant wrote to the Minister of the Environment to request site closure as well as "the provision of appropriate post-closure care (i.e. site maintenance, monitoring, reporting, remedial work, financial assurance, contingency measures, etc.)."

Reference: **Tab 12:** Letter from CELA to the Minister of the Environment dated October 30, 2009, page 2

34. In April 2010, the MOE posted its Decision Notice in relation to EBR Registry No.010-1381. Among other things, the Director decided to amend Provisional Certificate of Approval No.A371203 to prohibit the receipt of waste for disposal at the Richmond Landfill after June 30, 2011,[9] and to specify that the five cells of the site shall be capped with final cover material by September 30, 2011. These steps have since been implemented by WMCC, although there was some minor delay in the placement of final cover material. The amendments further required WMCC to prepare and file various documents with the MOE by June 30, 2010, including an updated EMP, contingency plans, and other reports.

F. Director's Decision regarding EBR Registry No.011-0671

35. Upon receipt of the required WMCC documents, the MOE then posted EBR Registry Notice No. 011-0671 in July 2010, and public comments were solicited by the MOE on these documents for a 30 day period. In particular, the EBR Registry Notice solicited comments on the following documents submitted by WMCC to the MOE in June 2010:

[9] Given that Condition 4.4 prohibits further waste disposal, it is unclear why Conditions 4.5 to 4.10 are still included within the Amended ECA. As a general observation, the Applicant suggests that the ECA requires some housekeeping amendments to modify or delete Conditions which make it appear that the site is still open for business.

- Environmental Monitoring Plan (WESA, June 29, 2010);

- Operations and Procedures Manual (Genivar, June 25, 2010);

- Leachate Collection System Contingency Plan (Genivar, June 25, 2010);

- Memorandum on Groundwater and Surface Water Impact Contingency Plan (WESA, June 29, 2010);

- Landfill Gas Collection System Contingency Plan (Genivar, June 25, 2010);

- Design of Low Permeability Surface/Low Permeability Liner for the Compost Pad and Pond (Genivar, June 25, 2010); and

- Financial Assurance update (contaminating lifespan calculation).

36. These documents were subsequently adopted by cross-reference in Schedule A and certain Conditions of the Amended ECA No.A371203, as discussed below.

> Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012), Condition 1.3

37. During the initial public comment period, counsel for the Applicant requested the MOE to extend the comment period, and then filed preliminary comments on the subject-matter of the Registry posting. Among other things, these comments noted that while the MOE was soliciting public input on the proposed EMP, contingency plans, and other WMCC documents, "the EBR Registry Notice fails to describe the nature, scope or extent of any amendments which are being contemplated in relation to the seven documents referenced in the Notice."

> Reference: **Tab 13:** Letter to MOE from CELA dated August 3, 2010; **Tab 14:** Letter to MOE from CELA dated August 20, 2010, page 2

38. These preliminary comments also identified the Applicant's various legal and technical concerns about the inadequate content of the proposed EMP, contingency plans, and other WMCC documents referenced in the EBR Registry Notice. These comments concluded that:

> For these and other reasons, it is our conclusion that the proposed EMP should not be accepted "as is" by the Ministry, and that considerably more work is required by WM before the EMP can be regarded as a robust and reliable program for monitoring and mitigating the environmental impacts of the Richmond Landfill in the short- and long-term…
>
> In our opinion, the documents filed by WM generally lack sufficient detail or substantive content, and therefore should not be regarded as satisfactory or complete by the Ministry at this time.

Reference: **Tab 14:** Letter to MOE from CELA dated August 20, 2010, page 6

39. During this initial public comment period, members of the Applicant also sent detailed written comments to the MOE about EBR Registry No.011-0671. Some of these comments were sent directly to the Director of the MOE's EA and Approvals Branch at her request.

Reference: **Tab 15:** Letter to Doris Dumais from Ian Munro dated August 17, 2010; **Tab 16:** Letter to Doris Dumais from Jeff Whan dated August 17, 2010

40. Counsel for the Applicant was then notified by the MOE that the public comment period for EBR Registry No. 011-0671 was being extended to October 2010 in recognition that the subject-matter was "complex" and "required additional time" for public review and comment.

Reference: **Tab 17:** Letter from Doris Dumais to CELA dated August 20, 2010

41. In September 2010, the MOE advised the Applicant's counsel that public comments received on the EBR Registry posting would be sent to WMCC, and then draft amendments to the site approval would be posted for public comment:

> Once the Ministry is satisfied with the response from WMCC, a draft amendment to the Certificate of Approval (C of A) will be prepared which will either approve the documents or approve them with additional conditions. It is the Ministry's intention to provide a copy of the draft C of A to interested stakeholders and to post it on the Environmental Registry for a 30 day comment period. All comments received from the public will be considered prior to an amendment to the C of A being issued. The Ministry will post its decision regarding this submission for the Richmond landfill site on the Environmental Registry.

Reference: **Tab 18:** Letter to CELA from MOE dated September 8, 2010

42. To the Applicant's knowledge, the text of proposed amendments to the site approval regarding the WMCC documents were not posted on, or linked to, EBR Registry No. 011-0671, or in a separate EBR Registry posting, for public review and comment.

43. In October 2010, counsel for the Applicant submitted further written comments on the WMCC documents described in EBR Registry No. 011-0671. These comments focused on the hydrogeological aspects of the matters under consideration by the MOE.

Reference: **Tab 19:** Letter from CELA to MOE dated October 18, 2010

44. Appended to the Applicant's legal submissions was a technical report prepared by the Applicant's hydrogeologist, who has been reviewing and commenting upon Richmond Landfill matters for over a decade. Among other things, Mr. Ruland's 2010 report reviewed the most recent annual monitoring reports; the proposed EMP; the proposed groundwater/surface water impact contingency plan; the proposed

operations/procedures manual; and the proposed leachate collection system contingency plan. Mr. Ruland's overarching conclusion was as follows:

> Overall, I am quite concerned as the landfill is less than a year from closure, and there is still a great deal of work to be done to ensure that the landfill monitoring programs in the closure and post-closure periods are adequate to ensure that the landfill does not have unacceptable impacts on off-site water quality.
>
> Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010, page 17.

45. In light of this conclusion, Mr. Ruland made 17 specific recommendations regarding the Richmond Landfill. However, it appears that these recommendations were not adequately acted upon or reflected (or even considered) in the Director's decision to issue Amended ECA No. A371203, as discussed below in Part III of these submissions.

> Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010

46. After the expiry of the public comment period in October 2010, the Applicant's representatives continued to meet and correspond with MOE officials about this matter, particularly in relation to the proposed EMP. In December 2011, counsel for the Applicant wrote directly to the Minister of the Environment to convey the Applicant's concerns that no approved EMP was in place despite the fact that the Richmond Landfill had now been closed for months. This letter also reiterated Mr. Ruland's concerns about WMCC's proposal to drop certain wells from the groundwater monitoring program which had been displaying "anomalous" water quality results, which Mr. Ruland attributed to leachate from the Richmond Landfill. Accordingly, Mr. Ruland has recommended that these wells be retained within the groundwater monitoring program:

> As can be seen from Table 1, 10 of the 14 wells with anomalous water quality would not be sampled under the proposed EMP being put forward by WM's consultants.
>
> This is <u>not</u> what should be happening – the prudent starting point when facing anomalous water quality results is to step up the monitoring program to get a handle on which issue(s) may have led to the anomalous numbers. Not sampling wells with anomalous water quality gives the unfortunate impression of obscuring the landfill's problems from scrutiny by the MOE and the public (original emphasis).
>
> Reference: **Tab 21:** Letter to Minister Bradley from CELA dated December 14, 2011; **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010, pages 4 to 5, and Attachment A, "Detailed Discussion of Groundwater Quality at Wells at the Richmond Landfill"

47. As recently as January 3, 2012, the Applicant's representatives met with local MOE officials to discuss the EMP and related matters. However, the MOE officials did not disclose that the Director's decision regarding the subject-matter of EBR Registry No.011-0671 was imminent.

Reference: **Tab 22:** Minutes of a Meeting between CCCTE and MOE Representatives (January 3, 2012)

48. Counsel for the Applicant then received a letter from the Minister of the Environment dated January 12, 2012. The Minister's letter noted the Applicant's concerns about the EMP, and referenced the recent meeting between the Applicant's representatives and MOE staff. However, this letter made no mention of the fact that the Director had already decided to issue Amended ECA No. A371203 on January 9, 2012.

Reference: **Tab 23:** Letter to CELA from Minister Bradley dated January 12, 2012

49. On January 16, 2012, the MOE posted its Decision Notice on the EBR Registry in relation to Amended ECA No.A371203.

Reference: **Tab 3**: EBR Registry No. 011-0671 (January 16, 2012)

50. Interestingly, this Decision Notice states that the MOE received "0" comments from the public in relation to EBR Registry No.011-0671. This statement is manifestly untrue since the Applicant clearly submitted a number of detailed written comments on these matters before, during and after the public comment period. However, there is little or no evidence that the Applicant's factual, technical and scientific concerns were addressed adequately (or at all) by the MOE Director, particularly when he decided to issue the Amended ECA with deficient Conditions regarding the EMP, contingency plans, and reporting.

Reference: **Tab 3**: EBR Registry No. 011-0671 (January 16, 2012)

PART III – ISSUES AND LAW

51. The Applicant respectfully submits that the main issues arising on this application for leave to appeal are as follows:

- Does the Applicant have standing to seek leave to appeal under section 38 of the EBR?

- Does the Applicant meet the test for leave to appeal under section 41 of the EBR?

52. For the reasons outlined below, the Applicant submits that each of the above-noted questions should be answered by the ERT in the affirmative.

A. The Applicant has Standing to Seek Leave to Appeal

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

> 38(1). Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:
>
> 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."

54. The ERT's jurisprudence 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.

Safety-Kleen Canada Inc. v. Ontario (2006), 21 C.E.L.R. (3d) 88 (Ont. ERT), at para.7

55. As described below, the Applicant submits that its leave application satisfies all four of these requirements.

(i) The Applicant is a Person Resident in Ontario

56. The EBR Registry Notice in relation to the Director's decision in this case clearly stipulates that "any resident of Ontario may seek leave to appeal this decision." A similar statement is found on the final page of Amended ECA No. A371203.

> Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012); **Tab 3**: EBR Registry No. 011-0671 (January 16, 2012)

57. The Applicant (formerly known as "Stop Richmond Dump Expansion/The Citizens' Committee") was incorporated under the laws of Ontario in 2000 (Ontario Corporation No. 1422188) as a not-for-profit corporation to oppose the expansion of the Richmond Landfill, and to ensure the timely and proper closure of the site. The Applicant's membership consists of persons living in Tyendinaga Township, Town of Greater Napanee, Town of Deseronto, and other local communities. However, many of the Applicant's members live beside or near the Richmond Landfill Site, and rely upon private domestic wells for drinking water, household, and agricultural purposes.

> Reference: **Tab 24:** Applicant's Supplementary Letters Patent (2010)

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

Legislation Act, 2006, S.O. 2006, c. 21, Schedule F, section 87

(ii) The Director's Decision Implements a Proposal for a Class II Instrument Requiring Notice under Section 22 of the EBR

59. The MOE Director's decision to issue the Amended ECA No. A371203 implements a Class II proposal requiring notice under section 22 of the *EBR* within the meaning of section 5(2), paragraph 6 of Ontario Regulation 681/94.

O. Reg. 681/94, ss. 5(2)6, para.6

(iii) The Applicant Has an Interest in the Director's Decision

60. 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.

61. Since 2010, the Applicant, through its counsel, experts, officers, and members, has submitted a number of detailed written comments to the MOE in relation to the subject-matter of EBR Registry No. 011-0671. In addition, the Applicant's representatives have met and corresponded with various MOE officials in relation to the subject-matter of EBR Registry Notice No. 011-0671, as described above.

62. Accordingly, it is submitted that the Applicant has an interest in the Director's decision within the meaning of sections 38(1) and (3) of the EBR.

(iv) WMCC Has a Right under Another Act to Appeal The Director's Decision

63. WMCC has a statutory right under section 139 of the EPA to appeal the Director's decision to issue Amended ECA No. A371203. The proponent's right of appeal is specifically mentioned in the final two pages of the Amended ECA. It is therefore submitted that the Director's decision to issue the Amended ECA to WMCC entitles the Applicant to seek leave to appeal the same decision, in whole or in part, pursuant to section 38(1), paragraph 2 of the EBR.

Environmental Protection Act, R.S.O. 1990, c. E.19, section 139; Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

64. For the foregoing reasons, the Applicant respectfully submits that it meets all four requirements for standing to bring this application for leave to appeal under section 38 of the EBR.

B. The Applicant Meets the Test for Granting Leave to Appeal

(i) Overview of the EBR Leave Test

65. Section 41 of the EBR provides that:

> 41. 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.

66. Section 41 does not require the Applicant to establish that no reasonable person could have made the decision, or that significant harm will result, or that the Director acted in a careless or reckless manner. Instead, at this stage of the proceedings, the focus is on the impugned decision itself, and the Applicant 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.

> *Simpson v. Ontario* (2005), 18 C.E.L.R. (3d) 123 (Ont. ERT), paras.7-8, 10; *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 165 (Ont ERT), paras. 12-13, 16, 82; *Protect our Water & Environmental Resources v. Ontario* (2009), 43 C.E.L.R. (3d) 180 (Ont. ERT), paras.31-33

67. The ERT 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.
>
> *Hannah v. Ontario* [1998] O.E.A.B. (Sept.16, 1998), p.2

68. Similarly, the ERT 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.
>
> *Federation of Ontario Naturalists v. Ontario* (1999), 32 C.E.L.R. (N.S.) 92 (Ont. Env. App. Bd.), para. 19

69. Moreover, the ERT is not required to determine at the leave stage whether the Director was actually unreasonable, or determine the likelihood of potential harm materializing. These questions should be left to be determined at the hearing of the appeal.

> *Residents Against Company Pollution Inc., Re* (1996), 20 C.E.L.R. (N.S.) 97 (Ont. Env. App. Bd.), p.114

70. Accordingly, it is not necessary at this stage for the ERT to determine whether the MOE Director's decision in this case was unreasonable, or whether significant harm to the environment will, in fact, materialize at the Richmond landfill in the short- or long-term. Instead, in order to be granted leave to appeal, the Applicant must show that it appears that there is good reason to believe no reasonable person could have made the decision in question, having regard to relevant law and government policies, and that it appears that the decision could result in significant harm to the environment.

> *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123 (Ont. ERT), at para.10; *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176 (Ont. ERT), at paras.17-18

71. Furthermore, while the two-branch test in section 41 is "stringent", it is not "insurmountable" for applicants to achieve. At the leave stage, the standard of proof is a lower standard than a balance of probabilities, and must be applied in conjunction with the stated purposes of the EBR, *viz.*, to ensure environmental protection, enhance governmental accountability, and enable public participation in environmentally significant decision-making.

> *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct), para.42; *Simpson v. Ontario* (2005), 18 C.E.L.R. (3d) 123 (Ont. ERT), para.8; *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176 (Ont. ERT), paras.17-18

72. 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 Applicant to establish that its various concerns "have a real foundation sufficient to give them the right to pursue them through the appeal process."

> *Barker, Re* (1996), 20 C.E.L.R. (N.S.) 72 (Ont. Env. App. Bd.), paras.45-47; *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 (Ont. ERT), para.16; *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct), para.45

73. As the Divisional Court held in the *Lafarge* case:

> On its face, the *EBR* leave test is "stringent" ... Balanced against that is 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. This, in turn, would support an interpretation of s. 41 that facilitates fostering access to justice in environmental matters and permitting appeals where the balance of the test in s. 41 has been met. ...
>
> We are of the view that the Tribunal was not only reasonable, but correct, in stating that the standard of proof was less than a balance of probabilities. At the leave to appeal stage, the standard of proof is an evidentiary one, i.e., leading sufficient evidence to establish a prima facie case, or showing that the appeal has "preliminary merit", or that a good arguable case has been made out, or that there is a serious issue to be tried. Although worded differently, all of these phrases point to a uniform standard which is less than the balance of probabilities, but amount to satisfying the Tribunal that there is a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process. This lesser standard is embodied in the words of s. 41, namely "appears" and "there is good reason to believe". It is not the function of the Tribunal member who is giving leave to determine the actual merits of the appeal; rather, the member must determine whether the stringent threshold in s. 41 has been passed.
>
> *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct), paras.41-42, 45

74. Finally, the Applicant is not required to show how each ground raised for leave to appeal meets both parts of the section 41 test. It is open to the Applicant to list numerous grounds in its 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 Applicant 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 ERT jurisprudence requires each ground or argument raised to simultaneously meet both parts of the leave test.

> *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176 (Ont. ERT), at paras 45-47.

75. For the reasons described below, the Applicant submits that this leave application, and the material appended hereto, satisfies the leave test under section 41 of the EBR.

(ii) The Director's Decision Appears Unreasonable

<u>MOE Statement of Environmental Values</u>

76. In determining whether the MOE Director's decision in this case is "unreasonable", the Applicant submits that the ERT should, *inter alia*, have regard for the MOE *Statement of Environmental Values* ("SEV") issued under the EBR. ERT jurisprudence 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. The *Lafarge* jurisprudence makes it abundantly clear that the MOE SEV should be considering by MOE Directors when making decisions in relation to prescribed instruments under the EBR.

> Reference: **Tab 25**, MOE SEV; *Dillon v. Ontario* (2002), 45 C.E.L.R. (N.S.) 9 (Ont. ERT), para.63; *Dawber v. Ontario,* (2007), 28 C.E.L.R. (3d) 281 (Ont. ERT), para. 30; EBR, sections 7 and 11

77. The MOE's current SEV sets out fundamental principles that are relevant to the MOE Director's decision in this case: (i) the ecosystem approach; (ii) the precautionary science-based approach; and (iii) public participation in environmental decision-making. As described below, the Applicant submits that the MOE Director's decision is inconsistent with, or directly contravenes, these three principles.

> Reference: **Tab 25**, MOE SEV, pages 3 to 4

78. With respect to the ecosystem approach, the MOE SEV provides as follows:

> The Ministry adopts 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.
>
> The Ministry considers the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society.

> Reference: **Tab 25**, MOE SEV, page 3

79. The ERT 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.

> *Dillon v. Ontario* (2000), 36 C.E.L.R. (N.S.) 141 (Ont. Env. App. Bd.), paras.11, 29-32, 34

80. In *McIntosh,* the ERT recognized that a decision based upon deficient technical studies may be regarded as unreasonable:

> It is open to the Tribunal to find that a seriously inadequate scientific foundation can form the basis for concluding that there is good reason to believe that no reasonable person could have issued the PTTW, without specific reference to relevant law and policy. As the Tribunal stated in *Quinte West (City) v. Ontario*

(Director, Ministry of the Environment) (2009), 46 C.E.L.R. (3d) 237 (Ont. Environmental Review Trib.), at para. 23:

> Relying upon technical studies with serious shortcomings could well be something that no reasonable Director could do, and in an appropriate case could result in a finding that it appears there is good reason to believe that no reasonable person could have made the decision being challenged.

McIntosh v. Ontario (2010), 50 C.E.L.R. (3d) 161 (Ont. ERT), para.72

81. In this case, the Applicant submits that the MOE Director's decision fails to comply with the ecosystem approach codified in the MOE SEV. Since WMCC's groundwater investigations are ongoing, it appears that even at this late stage (and despite countless proponent reports over the years), the MOE still does not have sufficient information, at an appropriate level of detail, about the groundwater flow system at the Richmond Landfill, or about the full extent of the landfill's direct or cumulative impacts upon the aquifer or nearby watercourses. The Applicant submits that the continuing gaps in the MOE's understanding of baseline conditions at the site is compounded by the numerous problems identified by Mr. Ruland in the current (and proposed) monitoring regime at the site (see below).

82. In these circumstances, the Applicant submits that it was unreasonable for the Director to issue the impugned Conditions in their current form and content in light of these significant and ongoing evidentiary problems. Moreover, given the clear interrelationship between groundwater quality and surface water quality at and near the site, and given the reliance upon these water resources by local residents, the Applicant submits that the Director's approval of a deficient EMP, and issuance of other inadequate Conditions within the Amended ECA, cannot be construed as being fully consistent with the ecosystem approach.

83. With respect to the precautionary approach, the MOE SEV provides as follows:

> The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment.
>
> The Ministry's environmental protection strategy will place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment.

Reference: **Tab 25**, MOE SEV, page 3

84. Jurisprudence under the EBR has emphasized the importance of undertaking a precautionary approach to environmentally significant decisions, and it has been recognized that the precautionary approach is an important consideration under 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).
>
> *Ridge Landfill Corp., Re*, (1998), 31 C.E.L.R. (N.S.) 190 (Ont. Env. App. Bd.), p.200

85. In *Davidson*, the ERT held that:

> A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be.
>
> *Davidson v. Ontario* (2006), 24 C.E.L.R. (3d) 165 (Ont ERT), para.44

86. In this case, the Applicant submits that the MOE Director's decision fails to comply with the precautionary, science-based approach mandated by the MOE SEV. For example, a prudent or judicious exercise of the precautionary approach would not permit the continuing absence of a rigorous EMP, or an approved groundwater/surface water contingency plan, at the Richmond Landfill. The record is clear that the Applicant and other stakeholders have been advocating the development of a comprehensive EMP and other necessary post-closure measures since 2006, and the available technical and scientific evidence clearly confirms the overwhelming public interest need for such measures.

87. In 2012, however, the EMP still remains essentially incomplete and unsatisfactory, and the impugned Conditions generally give the proponent even more time to prepare and file acceptable documentation. Moreover, there is continuing uncertainty about the particulars of the groundwater flow system, which, in the Applicant's submission, means that it is appropriate to presume environmental harm in the absence of evidence to the contrary. In these circumstances, the Applicant submits that the "merits" of the seven Conditions (and the underlying WMCC documentation) warrant closer examination through an appeal to the ERT.

88. With respect to public participation, the MOE SEV provides as follows:

> The Ministry will encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making…
>
> The Ministry of the Environment believes that public consultation is vital to sound environmental decision-making. The Ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.

Reference: **Tab 25**, MOE SEV, pages 3 and 4

89. The ERT has held that a decision-maker's failure to ensure adequate public participation may render its decision unreasonable, even if the bare minimum of an EBR posting has been provided:

> There may be cases where the bare minimum requirements for notice have been met, but due to particular circumstances the notice may not be considered sufficient. In *Marshall* v. *Ontario (Ministry of the Environment)* (2008), 38 C.E.L.R. (3d) 219 at 307, the Tribunal noted:
>
> > Meaningful public participation is a central feature of the *EBR*. The Tribunal finds that the public process mandated by the *EBR* is one of the relevant laws that may be considered under the first part of the section 41 test. A failure to provide for adequate public participation may give rise to a finding that the first part of the test has been met.

2216122 Ontario Ltd. v. Ontario, [2010] O.E.R.T.D. No.14, para.66

90. As described above, the Amended ECA in this case is classified as a Class II instrument for the purposes of the EBR. However, there appears to be no evidence that the MOE considered "enhanced" public participation (i.e. public meetings or open houses) pursuant to section 24 of the EBR, or that the MOE provided "additional notice" (i.e. news releases, mailings, advertisements, etc.) in order to "facilitate more informed public participation" pursuant to sections 25 and 28 of the EBR. The perfunctory public consultation efforts in this "complex" case stand in sharp contrast to the enhanced public participation undertaken in the *Ramsayville* case, where a Class II instrument proposal for a waste disposal site triggered an extended EBR Registry posting as well as supplementary consultation (i.e. open house and information centre) by the proponent.

> EBR, sections 24, 25 and 28; *Ramsayville Community Association v. Ontario* (2009), 49 C.E.L.R. (3d) 142, para.2

91. The Applicant acknowledges that the MOE posted notice of the WMCC documents in EBR Registry No.011-0671, and that the MOE undertook a last-minute extension of the comment period in order to facilitate public input on the WMCC documents. The Applicant also appreciates the opportunity to meet with MOE officials to discuss the WMCC documents after the public comment period ended.

92. However, the Applicant strongly objects to the fact that the seven Conditions at issue in this leave application were not disclosed to the public as proposals within the posting of EBR Registry No.011-0671, or in any subsequent EBR Registry posting. This non-posting appears to contradict the MOE's above-noted assurance that any proposed amendments to the site approval regarding the WMCC documents would be posted on the EBR Registry, and would be available for public review and comment as proposals.

Reference: **Tab 18:** Letter to CELA from MOE dated September 8, 2010

93. In addition, it appears that WMCC submitted several additional documents to the MOE after the close of the public comment period in October 2010 (see Items 47 to 50 in Schedule A of the Amended ECA). However, the MOE did not re-post the EBR Registry Notice or otherwise solicit public input on these new documents before deciding to incorporate them into the Amended ECA. During the current 15 day EBR appeal period, a member of the Applicant requested copies of these new documents from the MOE, but the MOE refused to disclose them and indicated that an FOI request must be filed in order to obtain the documents.

94. Finally, most of the impugned Conditions require the proponent to submit further "addendum reports" or other documentation on several key matters (i.e. the EMP, groundwater/surface water contingency plan, etc.), but the Conditions make no express provision for meaningful public review and comment, as discussed below. Thus, the Applicant submits that the public participation opportunities in relation to the impugned Conditions themselves were inadequate (or non-existent), and did not comply with the public participation principles entrenched within the MOE SEV or Part II of the EBR. In these circumstances, the Applicant submits that the inadequacy of the public participation process renders the Director's decision unreasonable. In short, the Applicant submits that poor public consultation can and often does lead to poor decision-making, as has occurred in this case.

> Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012), Schedule A, Items 47 to 50; *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 (Ont. ERT), para.68

Common Law Rights of Landowners

95. The *Lafarge* jurisprudence confirms that the common law is part of the "relevant law" that should inform MOE decision-making in relation to prescribed instruments under the EBR.

> *Dawber v. Ontario*, (2007) 28 C.E.L.R. (3d) 281 (Ont. ERT), para.70-74; *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct), paras.63-65

96. In this case, there are a number of residential and farm properties in close proximity to the Richmond Landfill, and many of these properties are either downstream and/or downgradient of the site. As such, these landowners (including members of the Applicant) are the closest potential receptors for any odour, or groundwater/surface water contaminants, which may emanate from the Richmond Landfill over its contaminating lifespan. Such emissions have the clear potential to have adverse effects on the rights and interests at common law of the registered owners and lawful occupiers of the neighbouring properties.

97. The common law causes of action that exist to vindicate such rights include negligence, trespass, private nuisance, riparian rights and strict liability. However, it does not appear on the record that the Director expressly directed his mind to safeguarding the common law rights of nearby landowners when he issued the seven

impugned Conditions, and effectively adopted the deficient documentation submitted by WMCC to date.

Other Relevant Laws, Regulations and Policies

98. When considering the first branch of the section 41 leave test, the ERT should not assess the reasonableness of the overarching legislative regime, or limit itself to questions of whether regulatory emission standards will be met by the proponent. Instead, the ERT should inquire whether – and to what extent – the Director's decision "considered, incorporated, and reflected relevant laws and policies."

Dawber v. Ontario (2007), 28 C.E.L.R. (3d) 281 (Ont. ERT), paras. 28-29, 31

99. In this case, the Director's statutory authority to issue the Amended ECA – and to impose appropriate conditions – is conferred by the EPA. The overall purpose of the EPA is to "provide for the protection and conservation of the natural environment", and it is trite law that the Director's powers should be exercised in a manner that achieves – rather than thwarts – this legislative purpose. Accordingly, the Applicant submits that it appears unreasonable for the Director to issue the Amended ECA with deficient monitoring, contingency plan, and reporting Conditions which are unlikely to adequately protect the environment against the risks posed by the Richmond Landfill. The Applicant's more detailed critique of the seven impugned Conditions is set out below in relation to the "significant harm" branch of the EBR leave test.

EPA, section 3

100. The Applicant understands that WMCC's position is that the updated landfill standards set out in Ontario Regulation 232/98 under the EPA are inapplicable to the Richmond Landfill. Assuming this interpretation is correct, then the Richmond Landfill remains subject to the general requirements of Regulation 347 under the EPA (as well as to the specific terms and conditions in the amended ECA). Among other things, section 11 of Regulation 347 provides that: (i) "drainage passing over or through the site shall not adversely affect adjoining property"; (ii) "drainage that may cause pollution shall not, without adequate treatment, be discharged into a watercourse"; and (iii) "samples shall be taken and tests made by the owner of the site to measure the extent of egress of contaminants and… measures shall be taken…for the prevention of water pollution."

Regulation 347, section 11

101. The public policy objectives underlying these regulatory requirements are to ensure that older landfills do not adversely affect groundwater or surface water, and to ensure that landfills are closely monitored to prevent water pollution or impacts upon neighbouring properties. In this case, the Applicant submits that it was unreasonable for the Director to issue the seven impugned Conditions which appear inconsistent with these public policy objectives. Put another way, it is inherently unreasonable to allow a landfill of this magnitude, at this highly vulnerable location, to continue to exist without a

completed and comprehensive EMP, without an approved groundwater/surface water contingency plan, or without appropriate reporting obligations.

102. The Applicant submits that the MOE has promulgated various policies and guidelines which are relevant in this case. For example, the MOE's "Water Management Policies, Guidelines and Provincial Water Quality Objectives" provides provincial direction to decision-makers on the management of surface water and groundwater in Ontario. Among other things, this document adopts key environmental principles (i.e. ecosystem approach, pollution prevention, etc.) that are similar to those set out in the MOE SEV. In addition, this document states that: (i) the goal of surface water management is to "ensure that the surface waters of the province are of a quality which is satisfactory for aquatic life and recreation"; (ii) in areas which have water quality better than the PWQO, the policy is that "water quality shall be maintained at or above the Objectives"; and (iii) for areas which have water quality that does not meet the PWQO, the policy is that "water quality… shall not be degraded further and all practical measures shall be taken to upgrade the water quality to the Objectives." Similarly, the groundwater policy is to "protect the quality of groundwater for the greatest number of beneficial users." In this case, the Applicant submits that approving deficient monitoring, contingency plan, and reporting Conditions will do nothing to help achieve these goals and policies in the vicinity of the Richmond Landfill. This is particularly true since Mr. Ruland has concluded that the site has already impacted the local aquifer (i.e. leakage of leachate contaminants, upwelling of saline groundwater, etc.) and the local surface watercourse (i.e. PWQO exceedances), as discussed below.

> Reference: **Tab 26**: MOE Water Management Policies, Guidelines and Provincial Water Quality Objectives, pages 2 to 3, 5 to 6, 10

103. Similarly, MOE Guideline B-7 is aimed at protecting "reasonable uses" of groundwater, and states that "provision shall be made for alleviating unacceptable environmental impacts… and "unexpected events or failures shall be dealt with in a contingency plan" (emphasis added). It is difficult to understand how this policy has been achieved in this case when there is still no approved groundwater/surface water contingency plan in place at the Richmond Landfill.

> Reference: **Tab 27:** MOE Guideline B-7: Incorporation of the Reasonable Use Concept into MOEE Groundwater Management Activities, section 4.1

104. In summary, the Applicant submits that the MOE Director's decision appears unreasonable in the circumstances. In particular, the Director's decision-making failed to:

- comply with the MOE SEV by not taking into account the ecosystem approach, by not acting in a science-based precautionary manner, and by not ensuring meaningful public participation on a Class II instrument proposal;

- properly consider or protect the common law rights of landowners in the area; or

- comply with the environmental protection policies reflected in the EPA, Regulation 347, and other relevant MOE guidelines.

(iii) Risk of Significant Harm to the Environment

105. 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.

106. The word "significant" is not defined in the EBR. The EBR jurisprudence establishes that because of the inherent subjectivity of the concept of "significant harm", the ERT 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.

> *Residents Against Company Pollution Inc., Re* (1996), 20 C.E.L.R. (N.S.) 97 (Ont. Env. App. Bd.), p.112

107. In this case, the Applicant submits that the ERT should take a similar "objective approach" for assessing the significance of the environmental harm which may arise from the issuance of an Amended ECA containing inadequate conditions in relation to environmental monitoring, contingency plans, and reporting. For example, despite past monitoring and mitigation efforts by the proponent, Mr. Ruland has identified exceedances of Provincial Water Quality Objectives for surface water in relation to certain leachate-related parameters.

> Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010, pages 5 to 6

108. The Applicant further notes that the Amended ECA is prescribed by the EBR regulations as a Class II instrument, as described above. Accordingly, by definition, the various activities permitted or required under the Amended ECA are environmentally significant, and it is appropriate to presume that the on-the-ground implementation of this instrument (i.e. maintenance and perpetual care of a closed mega-landfill), at the very least, has the <u>potential</u> to cause environmental harm within the meaning of section 41(b) of the EBR. More specifically, the Applicant is greatly concerned that the Conditions relating to environmental monitoring, contingency plans, and reporting are so deficient that current and/or future impacts to surface water or groundwater (on-site or off-site) may go undetected, unmitigated and unreported for the reasons provided by the Applicant's hydrogeologist, Wilf Ruland.

> *Ridge Landfill Corp., Re*, (1998), 31 C.E.L.R. (N.S.) 190 (Ont. Env. App. Bd.), pp. 197, 200

109. Mr. Ruland's expert report (provided to the MOE in 2010 in relation to EBR Registry No.011-0671) raised numerous significant concerns about the proposed EMP, contingency plans, reporting, and the current condition of surface water and groundwater

resources in the vicinity of the Richmond Landfill. Among other things, Mr. Ruland stated that:

- the existing monitoring reports are “inadequate” and “dysfunctional”, and they do not provide a useful or accessible tool for understanding groundwater quality issues at the Richmond Landfill (pages 1 to 2);

- the continuing absence of leachate wells within the waste mound (and the collection of leachate samples only from the collection system) makes it impossible to characterize or track leachate that is leaking into the groundwater flow system (page 2);

- to date, there has been “very limited sampling” for certain leachate indicators (i.e., monochlorobenzene, 1-4 dichlorobenzene and naphthalene) which would provide a “much more definitive indication of contamination from the landfill” (page 3);

- leachate at the Richmond Landfill is relatively strong due to the years of leachate recirculation carried out at the site (page 3);

- additional parameters are required for future monitoring of leachate, groundwater and surface water, starting immediately (page 3);

- “there are potential groundwater quality problems evident on all sides of the Richmond Landfill, with anomalous water quality results at distances of up to hundreds of meters from the landfill” (page 4);

- the EMP inappropriately proposes to stop monitoring many of the wells with anomalous results (pages 4 to 5);

- monitoring data “confirms that the landfill was certainly impacting surface water quality in 2006-2008” (page 6);

- there are strong indicators of the likelihood of a leachate mound inside the landfill, meaning that virtually every monitoring well is downgradient of the landfill footprint (page 8);

- since VOCs volatize rapidly, it is inappropriate to include VOCs as parameters for surface water monitoring (page 11);

- since PAHs are persistent, non-volatile, and exist in leachate, it is inappropriate to exclude PAHs (or dioxins and furans) as parameters for surface water monitoring (page 11);

- it is problematic for the EMP to exclude other additional parameters (i.e., chloride, conductivity and alkalinity) as surface water leachate indicators (page 11);

- it is inappropriate for the EMP to drop certain parameters (i.e., nickel, cobalt, dioxins, furans and most PAHs) from the new leachate monitoring program (page 12);

- the EMP lacks insufficient detail regarding proposed leachate contingency plans for groundwater and surface water (page 13);

- only a limited number of wells will be used as the "trigger" for groundwater contingency plans (page 13);

- there are various errata in the EMP which need to be corrected (pages 13-14);

- there are "major problems" with the leachate mass balance presented within the memorandum on groundwater/surface water contingency plans (pages 14 to 15);

- "given that the landfill has been leaking leachate through the unlined base of Cell 1 since it began operations, and that there is anomalous groundwater chemistry in at least 14 wells around the site, the assertions in Appendix B of the memo (namely that only one well at the landfill has possibly been affected by landfill leachate, and that only prior to 2000) seem mistaken at best" (page 15);

- there is "grave concern" about the proposal to utilize a blast-induced fracture trench as the preferred contingency measure for leachate escaping from the site (page 16); and

- "in my professional opinion, the most likely cause for many of the cases of anomalous water quality is leakage from the nearby Richmond Landfill" (page 18).

Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010

110. In October 2010, consultants for the MBQ also provided the MOE with detailed comments about the various WMCC documents posted in EBR 011-0671. Among other things, this report stated that:

- "in spite of efforts made in recent years by WM and its consultants to reach a clear understanding of the hydrogeology of the area, it is XCG's opinion that the flow patterns in the tortuous bedrock fracture network beneath the site and in the surrounding area are still poorly understood" (page 2);

- "in XCG's opinion, the monitoring plan described in the EMP is not adequate to detect leachate impacts that may be migrating off-site at the Richmond Landfill, or that may migrate in the future" (page 2);

- the number and location of groundwater monitoring wells are inadequate (pages 2 to 3);

- the list of groundwater monitoring parameters is too narrow (page 4);

- the proposed surface water sampling regime is inadequate (page 5);

- the odour monitoring plan lacks sufficient detail (page 6); and

- "XCG does not agree [with WMCC] that there has been an absence of leachate-impacted wells around the perimeter of the landfill (page 8).

Reference: **Tab 28:** Letter from XCG to MBQ dated October 19, 2010

111. The Applicant submits that the Conditions set out in the Amended ECA regarding the EMP, contingency plans and annual reporting do not satisfactorily address the well-founded concerns, criticisms and recommendations made by Mr. Ruland and the MBQ's consultants. More importantly, these Conditions appear wholly inadequate for the purposes of identifying, evaluating, and mitigating significant environmental harm emanating from the Richmond Landfill Site. Specific examples of the serious gaps, flaws, and interpretive difficulties with the impugned Conditions are set out below.

112. In this case, the Director's "decision" was a conditional one; that is, he decided to issue the Amended ECA subject to various terms and conditions. The seven impugned Conditions form part of the Director's decision, and may be the subject-matter of an EBR leave application. On this point, the ERT has held that inadequate terms and conditions may satisfy the section 41 leave test.

2216122 Ontario Inc. v. Ontario, [2010] O.E.R.T.D. No. 14, paras 89-90.

Condition 8.5: The EMP

113. The Amended ECA states the MOE Director's rationale for Condition 8.5 as follows:

> 30. The reason for Condition 8.5 is to demonstrate that the landfill Site is performing as designed and the impacts on the natural environment are acceptable. Regular monitoring allows for analysis of trends over time and ensures that there is an early warning of potential problems so that any necessary remedial/contingency action can be taken.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

114. The Applicant submits that Condition 8.5, as currently drafted, is unlikely to achieve this important objective. For example, Condition 8.5(a) requires WMCC to carry out groundwater and surface water monitoring "in accordance with Item 45 in Schedule A" (i.e. "Final Report – Environmental Monitoring Plan – Richmond Landfill Site" prepared by WESA (June 29, 2010)). This document is, in fact, the very EMP that Mr. Ruland reviewed and found to be incomplete and inadequate for a variety of reasons (i.e.

deletion of “anomalous” wells; absence of leachate monitoring wells; limited domestic well sampling; limited number of wells tested for VOCs; limited (and inappropriate) parameters for surface water sampling; limited frequency of surface water sampling; limited parameters for leachate monitoring; lack of any detailed description of contingency plans; limited “trigger” wells for contingency plans; and errata re mapping, Reasonable Use Limit calculations, etc.).

Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010, pages 8 to 14

115. Indeed, the MOE Director appears to acknowledge that there are key shortcomings in the 2010 EMP, insofar as Condition 8.5 only requires WMCC to implement the EMP “on an interim basis,” pending the receipt of a further “addendum report” from WMCC. However, Condition 8.5 fails to prescribe an actual deadline for the submission of the “addendum report”. Instead, the Condition stipulates that the “addendum report” is due 60 days after MOE officials “accept” the findings of a separate technical report to be prepared by WMCC which details the findings of WMCC’s latest round of groundwater investigations.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012), Condition 8.5(a) and (b)

116. However, there are no dates specified in Condition 8.5 for the delivery of this separate technical report from WMCC, nor is there any indication how long it may take MOE officials to review and “accept” the findings. Moreover, no provision is made in the Condition for the possibility that MOE officials may reject some or all of the findings of the technical report, or may require further groundwater work by WMCC, in which case the 60 day timeframe for the EMP “addendum report” will not have been triggered. Given the decade-long dispute between the MOE, WMCC, the Applicant and other stakeholders about groundwater issues, the prospect of further delay and debate is realistic, if not inevitable, regarding this complex and hydrogeologically sensitive site location.

117. Moreover, even if the technical report is completed and its findings accepted by the MOE, there is no way to predict how long it may take for the EMP “addendum report” to be reviewed and approved by the MOE (assuming the “addendum report” is actually submitted on time by WMCC). In addition, Condition 8.5 makes no provision for any meaningful public review and comment opportunities in relation to the technical report or the EMP “addendum report” before the MOE determines whether the reports are acceptable or approvable.

118. Condition 8.5(c) stipulates that the EMP “addendum report” must include “adequate details” on monitoring locations, frequencies, and parameters, but fails to provide any substantive direction to WMCC in relation to these key matters. In the Applicant’s submission, this Condition should have included prescriptive requirements that reflect Mr. Ruland’s findings and recommendations about monitoring locations, frequencies and parameters at this site. Otherwise, in the circumstances of this case, it is reasonable to anticipate that the forthcoming “addendum report” may be as vacuous and objectionable as the proposed EMP itself.

119. Condition 8.5(d) further stipulates that the EMP "addendum report" must include a monitoring program to "identify odour issues", provide "appropriate" odour abatement activities, and establish a "communication plan for the public." Again, this Condition fails to provide any prescriptive details, and therefore confers excessive discretion upon the proponent. The Applicant submits that this vague Condition is wholly unacceptable since the Richmond Landfill Site has had a lengthy history of odour complaints, and the MOE itself has verified that noxious odours from the site have caused off-site adverse effects. Moreover, an expert report prepared for the Applicant and the MBQ by toxicologist Dr. P.G. Forkert concludes that odour emissions from landfills are not mere annoyances or trifling matters; instead, landfill odours may include various chemical compounds which pose serious risks to public health and safety. In the circumstances of this case, the Applicant submits that Condition 8.5(d) is fundamentally flawed and unlikely to identify, prevent or resolve future odour problems emanating from the Richmond Landfill Site.

> Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012), Condition 8.5(d); **Tab 29:** MOE Odour Survey – Waste Management of Canada Corporation (July 25, 2008); **Tab 30:** Memorandum to J. Allen from M.Ladouceur (June 9, 2006); **Tab 31:** Letter to CELA and MBQ from Dr. P.G. Forkert dated January 12, 2006

120. Condition 8.5(e) provides that exceedances of monitoring parameters shall be reported within 48 hours to the MOE, and an explanatory report shall be submitted to MOE to "detail" results which not are in compliance with MOE guidelines and objectives. This Condition assumes, of course, that the monitoring program includes appropriate parameters and is capable of actually detecting instances of non-compliance; however, there is good reason to believe that the monitoring program is deficient, as described above. In addition, it is unclear why this Condition purports to allow 2 days for reporting problematic incidents. In the Applicant's submission, the timeframe for reporting of problematic test results should be "forthwith", not "48 hours." Alarmingly, this Condition does not even specify upon whom the reporting obligation rests (WMCC? Its consultants?), but we presume this Condition is aimed at the proponent. If so, then this should have been clarified within the Condition.

121. In summary, the Applicant remains highly concerned that the deficient EMP may be in place for an indeterminate amount of time, and that there is considerable uncertainty about when – or if – the substantive problems within the EMP will be fully and effectively rectified by an "addendum report" from WMCC.

<u>Condition 9.1: Groundwater/Surface Water Impact Contingency Plan</u>

122. The Amended ECA states the MOE Director's rationale for Condition 9.1 as follows:

> 31. The reason for Condition 9.1 is to ensure the Owner submits a contingency plan for the Site based on the current soil and groundwater investigation. This is to ensure the environment and public are protected.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

123. The Applicant submits that Condition 9.1, as currently drafted, is unlikely to achieve this important objective. For example, this Condition stipulates that "in conjunction" with the EMP "addendum report", the proponent must also provide an "addendum report" to the memorandum entitled "Groundwater and Surface Water Impact Contingency Plan" (WESA Inc., June 29, 2010). No specific deadline is prescribed for this second "addendum report", but the Applicant assumes that this report may be subject to the same indeterminate timeframe contained in Condition 8.5(b). If so, then the Applicant hereby adopts and repeats its above-noted concerns about the prospect for interminable delay in the preparation, filing and approval of the groundwater/surface water contingency plan "addendum report." The Applicant also objects to the absence of any provisions in Condition 9.1 for meaningful public review and comment in relation to this critically important addendum report.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

124. Furthermore, the Applicant notes that the WESA document in question is not an actual contingency plan for groundwater or surface water. Instead, it is merely a memorandum that generally discusses some contingency-related issues. More importantly, Mr. Ruland's report pinpoints serious problems in the accuracy, reliability and soundness of the various calculations and claims made within this memorandum. For example, Mr. Ruland found stale-dated, missing, incorrect or "highly unlikely" leachate data; questionable or unwarranted assumptions about infiltration rates and leachate composition; "bizarre" assertions about leachate-impacted groundwater; and "irrelevant analyses" related to WMCC's Site Conceptual Model. Accordingly, the Applicant draws no comfort in the requirement in Condition 9.1 for WMCC to produce an addendum to a memorandum that itself is fundamentally deficient.

Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010, pages 14 to 15, and Attachment A

125. It is unclear on the face of Condition 9.1 whether this addendum report is, in fact, just another report to be filed, or whether it is intended to be the actual stand-alone groundwater/surface contingency plan for the Richmond Landfill. Assuming the latter is correct, then the Applicant is greatly concerned about the lack of specificity in this Condition about the content of the forthcoming plan. It goes without saying that a contingency plan should include triggers, timelines, and remedial measures, but Condition 9.1 fails to provide any further directions or particulars about these and other key components of a contingency plan that would be appropriate and effective for this particular site. The Applicant fears that leaving these matters to the discretion of the proponent may result in the submission of further unacceptable work, as occurred in relation to the EMP submitted in 2010, and in relation to the now-defunct Closure Plan submitted in 2007.

126. In summary, the Applicant is astounded by the Director's rather dilatory approach to the pressing need to have a proper groundwater/surface water contingency plan in place for this site. Given the size, location and history of the Richmond Landfill, the Applicant submits that a mere "plan to make a contingency plan" at some unknown point in the future is contrary to the public interest, and exposes the natural environment and local residents to considerable risk, particularly if unexpected leachate-related problems occur before the contingency plan has been approved.

Condition 9.2: Leachate Collection System Contingency Plan

127. The Amended ECA states the MOE Director's rationale for Condition 9.2 as follows:

> 32. The reason for Condition 9.2… is to ensure that the Owner follows a plan with an organized set of procedures for identifying and responding to unexpected but possible problems at the Site. A remedial action/contingency plan is necessary to ensure protection of the natural environment.
>
> Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

128. The Applicant submits that Condition 9.2, as currently drafted, is unlikely to achieve this important objective. For example, Condition 9.2(ii) states that the "conceptual" Leachate Collection System Contingency Plan is "acceptable". This Plan was outlined in the report entitled "Richmond Sanitary Landfill Site – Leachate Collection System Contingency Plan" (Genivar, June 25, 2010). In relation to this report, Mr. Ruland found that most aspects of the Plan were satisfactory, but he strongly recommended against blasting a fracture trench into bedrock as a contingency measure at the Richmond Landfill:

> This is a very poor idea, as the blasting, construction and subsequent pumping from such a trench risks allowing the very saline and poor quality groundwater which is present at depth beneath the site to well up and cause contamination of the shallow and intermediate bedrock aquifers at the site. This sort of problem has arisen with similar leachate collection facilities at other landfills in similar hydrogeological settings in Ontario (eg. the Glenridge Landfill in St. Catherines and the Taro East Quarry Landfill in Hamilton), and should be avoided at all costs.
>
> Reference: **Tab 20:** Letter to CELA from Wilf Ruland dated October 18, 2010, page 16

129. However, there is nothing in Condition 9.2 that would prohibit the use of a blast-induced fracture trench at the Richmond Landfill. More generally, the Applicant is concerned by the provisions in this Condition which require WMCC to submit for MOE approval "detailed design" information for any remedial system required for the contingency plan. No specific timeframe is imposed for the submission of these important details by WMCC, and the Condition fails to ensure meaningful public

review/comment opportunities before the MOE determines whether to approve or reject the WMCC's detailed contingency proposal(s).

Condition 9.5: Public Notification Plan for Contingency Plans

130. The Amended ECA states the MOE Director's rationale for Condition 9.5 as follows:

> 33. The reason for Condition 9.5 is to ensure there is a public notification plan in the event that any contingency plan is activated or engaged.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

131. The Applicant submits that Condition 9.5, as currently drafted, is unlikely to achieve this important objective. First, it is unclear why it would take a full year for WMCC to prepare and submit a public notification plan for MOE approval. Second, Condition 9.5 provides no substantive guidance to the proponent in terms of the minimum content or objectives of the notification plan. For example, this Condition should have specified that the notification plan must include effective measures for ensuring that appropriate public warnings are issued about emergency situations that trigger MOE notice obligations under Condition 12. Third, Condition 9.5 does not make any provision for meaningful public review/comment opportunities. As the presumed beneficiaries of the notification plan, members of the public and other stakeholders should have been provided a clear role in Condition 9.5 in helping produce a workable plan which ensures full and timely public notification.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012), Condition 9.5

132. In the Applicant's submission, the potentially affected individuals and communities themselves are better positioned than WMCC or the MOE to determine the appropriate notification protocols which work best for them in the event that contingency measures become necessary at the Richmond Landfill. Put another way, if the plan is simply crafted behind closed doors by WMCC and rubber-stamped by the MOE, there is no guarantee that the resulting plan will provide adequate or expedited notice to nearby residents that they may need to take protective measures (i.e. stop using wellwater or surface water in the event of leachate-related problems which are significant enough to trigger contingency plans).

133. The need for timely and effective public notification of spills or other unanticipated events at the Richmond Landfill was amply demonstrated by a recent incident involving an unauthorized discharge of impounded water from the stormwater pond into a local surface watercourse. In summary, in December 2010 and January 2011, MOE inspectors observed significant quantities of potentially contaminated stormwater discharging from the on-site pond into the Beechwood Ditch, contrary to the approval for this facility. The MOE issued an order and laid a charge against WMCC, which took steps to stop the discharge. However, no public notification of this free-flowing discharge was provided to local residents, downstream riparian owners, or the MBQ.

Reference: **Tab 32**: CELA Media Release dated February 14, 2011; **Tab 33:** Letter to MBQ from XCG dated March 8, 2011

Conditions 14.1, 14.2 and 14.3: Monitoring Reporting and Annual Reporting

134. The Amended ECA states the MOE Director's rationale for Condition 14.1 as follows:

> 28. The reasons for…Condition 14.1 are to provide for the proper assessment of effectiveness and efficiency of Site design and operation, their effect or relationship to any nuisance or environmental impacts, and the occurrence of any public complaints or concerns. Record-keeping is necessary to determine compliance with this ECA, the EPA and its regulations.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

135. The Amended ECA states the MOE Director's rationale for Conditions 14.2 and 14.3 as follows:

> 38. The reasons for Conditions 14.2 and 14.3 are to ensure that regular review of Site development, operations and monitoring data is documented and any possible improvements to Site design, operations and monitoring programs are identified. An annual report is an important tool used in reviewing Site activities and for determining the effectiveness of Site design.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012)

136. The Applicant submits that Conditions 14.1, 14. 2 and 14.3, as currently drafted, are unlikely to achieve these important objectives. While these Conditions collectively require WMCC to continue reporting upon many standard matters, the Applicant submits that these Conditions are not sufficiently responsive to the serious criticisms and sound recommendations made over the years by Mr. Ruland in his review of WMCC's monitoring reports and annual reports to date. For example, Mr. Ruland has repeatedly recommended that the proponent's monitoring reports and annual reports include improved mapping as well as information on: (i) absence/presence of karst features; (ii) leachate mounding; (iii) leachate quality in the unlined portion of the landfill; and (iv) upwelling of saline groundwater. Unless and until these and other key items are expressly included within the minimum content requirements for monitoring reports and annual reports, the Applicant concludes that these Conditions are inadequate for the purposes of describing or assessing environmental impacts and/or the effectiveness of site design and operation.

Reference: **Tab 2:** Amended ECA No. A371203 (January 9, 2012), Conditions 14.1, 14.2, 14.3
Tab 5: Letter to CELA from Wilf Ruland dated May 30, 2009, Attachment 2, "Review of 2006 Monitoring Report", pages 2 to 3

137. In summary, the Applicant submits that it appears that the MOE Director's decision could result in significant harm to the environment. In particular, the decision to issue an Amended ECA with insufficient safeguards regarding environmental monitoring, contingency plans, and reporting potentially exposes the environment – and local residents – to unnecessary and unreasonable risks. At the leave stage, it is not necessary for the Applicant to precisely quantify or delineate the nature, extent, or duration of the actual environmental effects which may arise from implementing the deficient Conditions. In this case, the Applicant has adduced a substantial information base that establishes the potential for significant environmental harm, and the Applicant should be granted leave accordingly.

> *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 (Ont ERT), para.97; *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct), paras.68-71

PART IV – ORDER REQUESTED

138. For the foregoing reasons, the Applicant respectfully requests an order granting leave to appeal Conditions 8.5, 9.1, 9.2, 9.5, 14.1, 14.2, and 14.3 of Amended ECA No. A371203. For the purposes of greater certainty, the Applicant hereby requests leave at large to appeal these seven Conditions to the ERT on all grounds described above in this application, as well as such further or other grounds as counsel may advise, unless the ERT orders otherwise. At this interlocutory stage, the Applicant submits that the scope of the appeal should not be limited or constrained on the basis of the record filed by the parties in this leave application.

> *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 (Ont ERT), para.99; *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct), paras.75-76

139. If leave to appeal is granted, the Applicant intends to seek an order from the ERT revoking the Director's decision to impose these seven Conditions, and an order directing the Director to impose such further Conditions, and to take other such action, as the ERT may consider appropriate.

140. If leave to appeal is granted, the Applicant submits that the impugned Conditions should not be subject to the automatic stay imposed by section 42 of the EBR. On the facts of this case, the Applicant submits that it would be in the public interest to leave the seven Conditions temporarily in effect until the ERT can hear and decide the proposed appeal. If necessary, the Applicant may bring a motion to have the automatic stay lifted, in whole or in part, upon such terms as may be ordered by the ERT.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 30, 2012

Richard D. Lindgren
Solicitor for the Applicant