Case No.

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF sections 38 to 48 of the *Environmental Bill of Rights*, S.O. 1993 c. 28 and section 34.1 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 as amended;

AND IN THE MATTER OF an application by the Federation of Tiny Township Shoreline Associations, 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, Conservation and Parks, under section 34.1 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended, in issuing Permit No. 6258-BRDJ2M, dated January 14, 2021, to CRH Canada Group Inc., for the taking of water at the Teedon Pit, 90 Darby Road, Lots 79 and 80, Concession 1, Original Township of Tiny, County of Simcoe.

APPLICATION FOR LEAVE TO APPEAL BY
FEDERATION OF TINY TOWNSHIP SHORELINE ASSOCIATIONS

EBR REGISTRY NUMBER: 013-2282
MECP REFERENCE NUMBER: 0363-AV9PXK

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TABLE OF CONTENTS

I. APPLICATION **4**

II. FACTS **4**

A. CRH PROPOSAL TO CONTINUE TAKING WATER FOR THE TEEDON PIT 4
1. Background *4*
2. Description of CRH Current Water Taking Proposal *4*
3. CRH Conclusions on Potential Environmental Impacts from Water Taking *5*
B. CONCERNS REGARDING CRH PROPOSAL 6
1. Early Critiques of PTTWs at Teedon Pit *6*
2. Critique of the 2018 CRH PTTW Report *7*
C. CRH RESPONSE TO PUBLIC PTTW CONCERNS 11
D. APPLICANTS REPLY TO CRH RESPONSE 11
E. DIRECTOR RENEWAL OF CRH PTTW 13
F. RESPONSE TO PTTW ISSUANCE 13

III. ISSUES AND THE LAW **14**

A. THE APPLICANTS HAVE STANDING TO SEEK LEAVE TO APPEAL 15
1. The Applicants are Persons Resident in Ontario *15*
2. The Decision Implements a Proposal for a Class I or II Instrument Requiring Notice Under Section 22 of the Environmental Bill of Rights *16*
3. The Applicants Have an Interest in the Decision of the Director *16*
4. CRH Has a Right Under Another Act to Appeal the Decision *17*
B. THE APPLICANTS MEET THE TEST FOR LEAVE TO APPEAL 17
1. It Appears There is Good Reason to Believe Decision of the Director to Issue CRH Permit is Unreasonable *17*
a. The Test of Unreasonableness Under Section 41 of the Environmental Bill of Rights 17
i. Burden of Proof 18
ii. Standard of Proof 18
iii. Merits Not Decided at Leave Stage 19
iv. Each Ground Raised Need Not Meet Both Parts of Leave Test 19
b. The Decision of the Director and the Ministry Statement of Environmental Values 20
i. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply the Precautionary Approach 21
ii. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Environmentally Preventive and Rehabilitative Strategies 25
iii. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Cumulative Effects Concerns 25
iv. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Sustainable Development Principles 26
v. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Increased Transparency, Timely Reporting, or Enhanced Engagement Principles 27
c. The Decision of the Director and Common Law Rights 28
d. Summary 30
2. It Appears the Decision of the Director Could Result in Significant Environmental Harm *30*
a. The Test for Assessing Significant Environmental Harm 30
b. Existing Conditions Already Risk Potentially Significant Environmental Harm 31
c. The Potential for Significant Environmental Harm Arising from Operation of the Permit 31
i. The Water Taking Category and Instrument Classification of the Permit 31
(A) Water Taking Category 31
(B) Instrument Classification 32
ii. Potential Environmental Impacts 32
iii. Inadequate Permit Terms and Conditions 33
d. Summary 35

IV. CONCLUSIONS **35**

V. ORDER REQUESTED **36**

I. APPLICATION

1. This is an application filed by the Federation of Tiny Township Shoreline Associations ("FOTTSA" or the "Applicants"), through their solicitors, to the Environmental Review Tribunal for an order granting leave to appeal the decision of Adam Leus, Director ("Director" or "Director Leus"), under section 34.1, *Ontario Water Resources Act* ("*OWRA*"), Ministry of the Environment, Conservation and Parks ("Ministry") in issuing Permit No. 6258-BRDJ2M (the "Permit" or the "PTTW"), dated January 14, 2021, to CRH Canada Group Inc. ("CRH" or the "Permit Holder").

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

II. FACTS

A. CRH Proposal to Continue Taking Water for the Teedon Pit

1. Background

3. In or about January 2018, Dufferin Aggregates, now part of CRH, submitted an application to the Ministry for a renewal of its Category 1 Permit to Take Water ("PTTW" or "Permit") under section 34 of the *OWRA* for the *Aggregate Resources Act* ("*ARA*") licensed Dufferin Aggregates Teedon Pit, in Simcoe County. The Teedon Pit is an above water table aggregate extraction operation, in which extraction occurs a minimum of 1.5m above the water table. The water taking is in connection with aggregate washing operations for the production of aggregate products at the Teedon Pit (GHD, Category 1 Permit-to-Take-Water Renewal Application: Supporting Hydrologic and Hydrogeologic Study, Dufferin Teedon Pit, Township of Tiny, County of Simcoe, Ontario, January 2018, page 3 – hereinafter – "GHD").

4. The Teedon Pit is an 85.45-hectare area site, of which extraction currently occurs on 50.5 hectares of the site. It has been a licensed pit since the early to mid-2000s (GHD, page 2). If approved, the PTTW will also service a proposed extension of aggregate operations at the Teedon Pit currently being sought by CRH pursuant to the *ARA* and the *Planning Act*.

2. Description of CRH Current Water Taking Proposal

5. The CRH application of January 2018 was for a Category 1 PTTW for an excavated source water pond sustained by a closed-loop design system. Water losses

(make-up water) will be made up by groundwater flow and direct precipitation. Excerpts from the description of the current water taking by CRH's consultant, GHD, are as follows:

> Water is required for the purpose of aggregate washing as part of processing operations at the Teedon Pit. Aggregate washing has been conducted since 2009.
>
> …..The wash plant system operates as a recirculating system circulating all the water through the Sump Pond, the wash plant, and the Silt Ponds.
>
> The Sump Pond and Silt Ponds were constructed during the winter of 2008-2009…..
>
> The aggregate wash water is drawn from the Sump Pond through a floating intake located about 1 m below the pond surface. The water is pumped through the wash plant where it is used to wash aggregate. The water is then recirculated back to the Silt Ponds where the fines are allowed to settle before the water is discharged by gravity back to the Sump Pond through a weir and pipe system.
>
> Some loss of water from the system is expected through evaporation and moisture remaining on the aggregate following washing. Some loss to the groundwater flow system may also occur under non-pumping (washing) conditions. A rule of thumb used in the aggregate industry is a loss of about 10 percent of the wash water that must be made up from other sources, whether it be from natural recharge to the Sump Pond and/or supplementation of the water loss through a well or surface water supply (Golder, 2006). The expected maximum amount of daily loss of wash water from the system is 523,728 litres…. (GHD, page 4).

3. CRH Conclusions on Potential Environmental Impacts from Water Taking

6. The January 2018 report in support of the PTTW application, prepared for the Permit Holder by GHD, noted that based on the water use during operation of the Teedon Pit, there were three potential receptors for impacts identified for evaluation: (1) municipal wellfields; (2) private water supply wells; and (3) ecological surface water resources (GHD, page 9).

7. Based on its evaluation, GHD indicated that: "Since Teedon Pit is not located within WHPAs [wellhead protection areas], potential impact to municipal water supply is not a concern. Also, there are no evaluated ecological water resources near the Teedon Pit. The only potential receptor of any influence from the water taking and aggregate washing operations at Teedon Pit would be to groundwater quantity and/or quality at the nearby domestic wells." Overall, the GHD report eventually concluded as follows:

> The following provides a summary of the hydrologic and hydrogeologic assessment in support of the Category 1 PTTW Renewal Application:
> • The Teedon Pit operates a recirculation aggregate washing system which requires a relatively small amount of water for operation.
> • The Teedon Pit is not located within any WHPAs.
> • There are not significant surface water features or environmentally sensitive areas near the Teedon Pit.
> • The hydraulic monitoring data collected historically to present have shown that the Sump Pond and operation of supply PW1-09 do not have a significant effect on nearby groundwater levels. This observation has been also supported by the data collected from a pumping test conducted in 2010.

• Past claims by a small number of nearby residents to the water quality (silt) in their domestic wells have been caused by operation of the aggregate washing operations have been investigated and determined to be unfounded. The MOECC has attributed the domestic well quality issues to the shallow and silty nature of the shallow aquifer and/or poor well maintenance (GHD, pages 10, 15).

B. Concerns Regarding CRH Proposal

1. Early Critiques of PTTWs at Teedon Pit

8. A 2015 report prepared for local residents by a hydrogeologist, Wilf Ruland, P.Geo., who is now also retained by the Applicants, identified several problems being experienced by the residents that appear to be associated with earlier PTTWs in connection with existing operations at the site. These include:

- The lack of water level records for the wash pond or nearby wells: (1) The most likely source of the off-site impacts being reported by neighbours of the site is leakage of silt/clay-laden washwater from the wash pond. No records of water levels in the pond or in wells installed in adjacent test pits (which could be used to determine rates and impacts of leakage) are available; (2) In order to confirm that the pond was functioning as designed, Condition 4.3 of the original April 18, 2008 PTTW required daily measurements of water levels in the wash pond and wells in nearby test pits TP1 through TP4. Such measurements should have been taken throughout 2009; (3) When the PTTW was amended in July 2010, the requirement to measure water levels in the wash pond and the wells in nearby test pits was dropped from the PTTW; (4) this was considered by Mr. Ruland to be a significant error on the part of the Ministry, as it has made it very difficult to accurately estimate rates of leakage and assess nearby impacts of leakage from the pond during the 2011 to 2013 period in which there were heavy off-site impacts being reported by neighbours of the site;

- The lack of a record of complaints or details of well interference: (1) the original PTTW and the amended PTTW Mr. Ruland examined for his 2015 report required the Permit Holder (Cedarhurst at the time) to immediately notify the Ministry of any complaint from the taking of water authorized by the PTTW and to report on any action taken or proposed to be taken with regard to the complaint; (2) however, the Complaints Assessment Report (by Cedarhurst) lacked documentation of complaints of each household experiencing problems; (3) despite the fact that the historical situation in the area has been known to include complaints due to a combination of flooding from unusually high groundwater levels and water quality impacts caused by high silt levels in the wells;

- The lack of information on prior water levels and water quality: (1) the PTTW at the time lacked a requirement for baseline monitoring of water quality (or water levels) at any of the wells of the households with complaints of well siltation; (2) as a result there was no information on how water quality had evolved over time; (3) through independent research sources and reporting from well users, Mr.

Ruland determined that pre-2009 water quality in the area was excellent; (4) post 2009 water quality deteriorated significantly through siltation and there were significant fluctuations in groundwater levels leading to periodic flooding; (5) these problems coincided with the commencement of aggregate washing operations at the Teedon Pit; (6) due to the absence of baseline or peak impact testing, the best source of information for the period 2009 to 2013 is the residents themselves;

- The lack of a clear hydrogeological conceptual model for the area of the wash pond: (1) made issuance of earlier PTTWs for the site a mistake as there is a lack of clarity from prior Permit Holders as to where water lost from the aggregate washing operations is going and other omissions from these PTTWs compounded the problem; (2) Mr. Ruland's calculations led him to believe that massive amounts of silt-laden washwater have been leaking from the wash pond to the underlying groundwater system;

- A faulty well monitoring network;

- The combined effect of these limitations in work done for the site led Mr. Ruland to disagree with the impact assessment that had been performed for the Permit Holder of the day;

- Accordingly, Mr. Ruland made numerous recommendations for addressing these problems.

Reference Tab 1: Wilf Ruland, P.Geo., Report on Hydrogeological Impacts Caused by Aggregate Washing at the Teedon Pit near Waverly, Ontario, October 20, 2015, pages 8-11, 15-31.

2. Critique of the 2018 CRH PTTW Report

9. A 2018 report prepared for local residents by hydrogeologist, Wilf Ruland, P.Geo., who is now also retained by the Applicants, identified several problems with the 2018 report prepared in support of the PTTW renewal proposed by CRH, which is the subject matter of this leave Application. The following are Mr. Ruland's conclusions on the viability of the PTTW renewal proposal:

> 1) The Teedon Pit is situated on the flanks of a massive 50+ meter high hill of mainly stratified to substratified sands and gravels, with some incorporated silty till deposits. Groundwater movement through sands and gravels in steep terrain such as is found at the Teedon Pit can be relatively rapid, with flow rates on the order of 10s of meters per day quite possible. Sands and gravels are vulnerable to contamination problems because groundwater moves through them so quickly.
>
> 2) The pit is near the top of the local groundwater flow system, and as such is a "recharge area" for that flow system. This means that water infiltrating into the ground at the pit will move downward and outward into the underlying groundwater flow system, moving off-site in a downgradient (downhill) direction toward lower lying areas.
>
> 3) Rural residences which are 100% dependent on groundwater wells for their water supplies are found throughout the lower lying areas downgradient of the Teedon Pit. They are potential receptors in the

event the operations at the pit are causing problems with respect to groundwater quality or groundwater flows.

4) Aggregate is being mined from the pit, and there have been 2 companies which have owned the Teedon Pit during the period since 2008 when the original PTTW was approved:

- Cedarhurst Quarries and Crushing Limited (hereafter referred to as Cedarhurst) owned and operated the pit from 2008 until mid-2017;
- CRH then purchased the pit from Cedarhurst and has owned and operated it since then.

5a) An aggregate washing operation has been operating on an occasional basis since 2009. The aggregate washing operation requires a Permit to Take Water (PTTW), and several such permits have been granted by the MOECC since 2008.

5b) In my professional opinion, the MOECC was not as careful or precautionary as it needed to be when issuing the PTTWs for the Teedon Pit, and the MOECC's oversight and monitoring of PTTW-related operations at the Teedon Pit have not been adequate. My concerns about these issues are presented in Section 4 of this review.

6) The aggregate washing operation requires a "sump pond" from which fresher wash water is drawn for aggregate washing, and to which silty wash water returns after some clarification. Water in the sump pond can be very cloudy due to the presence of fine silt and clay particles which are in suspension in the waters of the pond.

The sources of the silt/clay particles are silt from the aggregate washing operation and silt-laden runoff from the floor of the pit (all of which is directed into the pond). In effect, what has been created by the past and current owners of the Teedon Pit is an occasional but massive source of silt-laden water which resides in the sump pond at the site. The issue of sump pond water quality is discussed in detail in Section 5c) of this review.

7) There have been unanticipated problems with the aggregate washing operations. These problems center around the fact that the sump pond has been leaking heavily since its construction in 2009. Water losses of almost 50% of the water being pumping for washing have been estimated. These water losses are discussed and described in detail in Section 2d and 5b of this review.

8) Commencing at roughly the same time as the construction of the sump pond and aggregate washing operations at the Teedon Pit (which started in Spring 2009) were negative impacts on nearby local residents' domestic wells, including in particular the wells of my clients.

These impacts generally took the form of episodes during which wells were producing turbid (ie. cloudy) water with elevated levels of very fine-grained particles and/or episodes of abnormally high groundwater levels which caused flooding and/or problems with wells. The complaints of local residents and in particular my clients are discussed and described in detail in Sections 2e and 2f of this review.

9a) The prior owner (Cedarhurst) ran a small and sloppy operation. Non-compliance with PTTW Conditions and with Site Plan Conditions was the norm, and during my first tour of the site on July 7, 2015 I observed that housekeeping practices were poor. My concerns about the operations and monitoring of the Teedon Pit by Cedarhurst are outlined in Section 3 of this review.

9b) The previous PTTW holder's responses to complaints were problematic to say the least, and thus there is an unfortunate history of poor relations with local residents.

10) The earlier owner of the site did not install (and the MOECC did not require them to install) an adequate groundwater monitoring network at the site, and the collection and analysis and retention of monitoring data has generally not been adequate.

As a result, there is insufficient information to properly understand what is happening in the groundwater flow system and the degree to which the Teedon Pit's operations are impacting downgradient wells.

11a) My hydrogeological conceptual model to explain what is happening is presented in Section 5d of this review. I believe that there is significant potential linkage between the massive wash water losses at the Teedon Pit and the well interference impacts being experienced by various residents situated around the pit including my clients.

11b) I am aware that the new owner (CRH) commissioned new hydrogeological investigations including the installation and monitoring of new wells, however further information is not available at this time. Once available, the new information will likely help reshape and refine the understanding of the site hydrogeology by all of the professionals who are involved with this matter.

12) I am also aware that CRH has generally been making a significant effort to run a better aggregate operation than their predecessor. That having been said, I am somewhat disappointed with the January 18, 2018 PTTW Application which has been submitted to the MOECC.

My review comments on the PTTW Application are presented in **Section 6** of this review.

13) In regard to the requested 10-year PTTW extension, this is a site which has had a checkered history under the previous owners - with many instances of non-compliance with PTTW and site license conditions, poor operational practices, and numerous complaints which were often met with hostile responses to complainants. The MOECC has not done well in terms of ensuring that the site was properly designed and monitored - and in particular has been poor in providing oversight, and in dealing with complaints from neighbours.

Given this history I do not feel that a 10-year extension to the PTTW would be appropriate. I am also cognizant of the fact that new boreholes have been drilled at the site and new monitoring wells installed - with considerable new information coming in the 2018 operations season.

In the meantime, I have developed a series of recommendations (presented in Section 9 of this review), which are intended to help improve various aspects of the site's operations and monitoring. If these recommendations are accepted, then I would consider it appropriate for a 1-year extension to the PTTW to be approved by the MOECC. During that year, all parties would have the opportunity to carefully evaluate the new owner's operational and monitoring practices and to consider the additional information coming from the recently commissioned hydrogeological investigation.

Reference Tab 2: Wilf Ruland, P.Geo., Review of an Application for a Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, April 23, 2018, pages 47-49.

10. Arising from the foregoing, Mr. Ruland made the following recommendations in his 2018 report:

Recommendation #1
a) PW1-09 water takings should be recorded on a daily basis and tabulated monthly, together with the water takings from the sump pond.
b) Dedicated flow meters should be used to measure the water taking volumes, and these should be recalibrated at the start of each water taking season.

Recommendation #2
a) Regular water quality monitoring of on-site shallow aquifer wells and the wells of residents reporting silt problems must be a core part of the go-forward groundwater monitoring program.

Regular laboratory testing of water quality should focus on the parameters turbidity and TSS, as these are direct measures of silt contamination of a well.

b) Recruiting the affected residents in a surveillance program to try to determine the longer-term patterns of the silt episodes is recommended. When water quality testing of residents' wells is done, results should be provided to the respective residents as soon as they come back from the laboratory.

Recommendation #3
All new wells should be added to the groundwater monitoring program, with regular monitoring for both water quality (turbidity and TSS) and continuous monitoring of water levels.

Recommendation #4
a) Monthly monitoring of sump pond turbidity and TSS should be done in 2018 - with the monitoring focussed on establishing TSS and turbidity levels both at times of washing, and after long periods of inactivity.
b) Measuring sump pond TSS and turbidity after very heavy storm events (which have involved runoff from the pit floor into the sump pond) is also recommended.

Recommendation #5
The staff gauge water level should be recorded twice daily in 2018 (before pumping and after pumping) from the first day of water taking through to the last day. This will allow wash water losses from the sump pond to be estimated.

Recommendation #6
The elevation of the invert of the sump pond's discharge pipe should be established, and overflows from the pipe should be recorded on every day that they are occurring. Flows rates should be measured as accurately as possible on any date that overflows are occurring.

Recommendation #7
The condition of the sump pond's retention berm should be assessed daily by CRH staff, and monthly by a qualified engineer. Any changes and/or repairs to the berm should be approved in advance if possible and reported to the MOECC within 24 hours of having been undertaken.

Recommendation #8
I recommend that any approval of the PTTW Application be amended to include a requirement for the Permit Holder to provide copies of the annual monitoring reports to members of the public and First Nations upon request.

Recommendation #9
It is recommended that CRH engage in meaningful dialogue with its neighbours and the broader public and with First Nations before considering the possible importation of foreign materials to the site.

Recommendation #10
The MOECC and CRH should take steps to re-establish public confidence in the complaints process. A handout clearly explaining complaints procedures should be developed in consultation with and circulated through the PLC, and to neighbours within 2 km of the site. All complaints to either the Company or the MOECC should be recorded and discussed in Annual Reports for the site - including their resolution, if any.

Recommendation #11
Instead of a 10-year renewal, it is recommended that a PTTW extension of 1 year be granted by the MOECC, subject to acceptance and implementation of my recommendations for improving the site operations and monitoring programs (which are outlined above)

> **Reference Tab 2:** Wilf Ruland, P.Geo., Review of an Application for a Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, April 23, 2018, pages 50-51.

C. CRH Response to Public PTTW Concerns

11. In January 2020, CRH prepared a response to public concerns about the company's proposed extension of the Teedon Pit operations. CRH also commented on certain matters pertaining to PTTW issues. In particular, CRH noted that Mr. Wilf Ruland, P.Geo., had raised concerns regarding intermittent siltation in some residential wells because of operations at the existing Teedon Pit. In response to Mr. Ruland's report and the concerns of local residents, CRH indicated that the pit's owners had undertaken three domestic well surveys (two were done for CRH, and one for the previous owners), and an assessment of certain residential wells. CRH also indicated that the Ministry had reviewed Mr. Ruland's concerns and concluded that the existing Teedon Pit has not caused intermittent siltation of surrounding wells but instead any problems were caused by: (1) the shallow silty nature of the shallow aquifer where the wells are located; and / or (2) poor well maintenance (CRH, Letter to Residents, January 6, 2020, pages 7-8).

D. Applicants Reply to CRH Response

12. In late January 2020, FOTTSA submitted a reply by Mr. Wilf Ruland, P.Geo., to the CRH response of earlier that month. Mr. Ruland noted the following with respect to PTTW issues:

> CRH and its predecessor company have been operating a gravel pit (the Teedon Pit) which includes a leaky aggregate washing operation. During the original application/approval process the proposed aggregate washing operation was described to the Ministry of the Environment, Conservation and Parks (MECP) and neighbours as being "closed loop" - one with minimal water losses.
>
> Instead of the promised water-minimizing "closed loop", the aggregate washing operation in the Teedon Pit has lost vast amounts of water. Even CRH representatives are now characterizing their aggregate washing operation as being "closed loop, with leaky ponds".
>
> By definition, "closed loop" implies no significant leaks. But CRH's aggregate washing operation is characterized by very leaky ponds. When the aggregate is washed, the wash water is very silty. Vast quantities of this silt-laden wash water have leaked into the pristine groundwater system whenever CRH (or its predecessor) have been washing aggregate, and this has been ongoing for the past 10+ years. Moreover, the pit floor is sloped to allow drainage of surface runoff from the pit floor into the leaky wash pond, and this may be exacerbating the problem.
>
> Coincident with the start of construction of the wash ponds and the commencement of aggregate washing operations at the Teedon Pit, residents at the bottom of the upland on which the Teedon Pit is situated started noting unusual effects - in some cases it was dramatic increases in groundwater levels and spring flows (e.g., Steve Ogden's property and well), in others (most notably the Pauze/Pigeon family) it was silt contamination of their wells.
>
> All of the homes and farms at the base of the upland on which the Teedon Pit is situated are dependent upon water from their wells for drinking water and domestic water supplies. When their wells started becoming affected, they did their best to let the operators of the Teedon Pit know.

The pit operators' response was inadequate, and the families raising concerns were told that the problem was that they had poorly constructed/maintained wells. An alternative way of looking at the situation would be to say that CRH has poorly designed and constructed wash ponds, which are leaking vast quantities of silt-contaminated water into the surrounding groundwater flow system.

But instead of listening to their neighbours and taking a precautionary and proactive approach and doing what was needed to end the losses of silt-laden water in their operations (for example, by lining their ponds), CRH and its predecessor company have taken a different approach. Consultants were hired and eventually 3 domestic well surveys were carried out - in 2015, 2017, and 2018. Those surveys are not persuasive.

CRH's predecessor company and the MECP had failed to do any baseline testing of any residents' wells before operations began at the Teedon Pit. So, there was no clear way to prove or disprove the residents' complaints and concerns by comparing well water quality prior to the start of operations to water quality afterwards.

The consultant who carried out the 2015 well survey wrote repeatedly about the "closed loop" system at the Teedon Pit, without mentioning that it was leaking vast amounts of silty water. Overall, the approach was to indicate that problems with construction or maintenance of residents' wells were to blame for their problems. No attempt was made in the 2015 well survey to explain why residents started experiencing impacts coincident with the commencement of operations at the Teedon Pit.

The 2017 well survey is provided in Appendix C.4 of the 2018 PTTW Application. It appears to simply consist of a 1-page questionnaire on which five families/residents with concerns outlined those concerns.

The 2018 well survey identified 11 residents reporting silt issues in their wells. As soon as that fact was established, the rest of the 2018 well survey letter consisted of a listing of reasons why the authors believed the Teedon Pit could not be responsible. There was no mention of the wash ponds at the Teedon Pit leaking vast amounts of silty water.

Missing from each of these well surveys was a more scientific approach, for example, that could have involved an ongoing program of monitoring residents' wells, to see if the intermittent episodes of silt contamination of their wells could be linked to things happening at the Teedon Pit.

A comprehensive summary of concerns about the Permit to Take Water (and past impacts of the aggregate washing operations) was provided by Wilf Ruland (P. Geo.) in a report dated April 23, 2018. This report included detailed analysis, conclusions, and recommendations - there has been no response from CRH to that report and to the issues it raises.

Reference Tab 3: Letter dated January 27, 2020 from Wilf Ruland, P.Geo. to Judith Grant, FOTTSA Regarding Reply to CRH's Letter, pages 2-3.

13. In his reply, Mr. Ruland recommended that his recommendations from his 2018 report should be adopted if there is a renewal or extension of the PTTW for the Teedon Pit.

Reference Tab 3: Letter dated January 27, 2020 from Wilf Ruland, P.Geo. to Judith Grant, FOTTSA Regarding Reply to CRH's January 2020 Letter, page 6.

E. Director Renewal of CRH PTTW

14. Notwithstanding the problems identified by Mr. Ruland, and the concerns expressed by over 5,000 comment submitters to the Ministry who urged rejection of the renewal, Director Leus issued the Permit to CRH for a 10-year period ending in 2031 and authorizing the taking of over 6.6 million litres of water per day from the site.

> **Reference Tab 4:** CRH Canada Group Inc., PTTW 6258-BRDJ2M (January 14, 2021); **Reference Tab 5:** Ministry of the Environment, Conservation and Parks Instrument Decision Notice for ERO 013-2282 (January 15, 2021).

15. The Applicants, by the within application, seek leave to appeal the Director's decision to issue the Permit to CRH.

F. Response to PTTW Issuance

16. In late January 2021, Mr. Wilf Ruland, P.Geo., prepared a review on behalf of the Applicants respecting the Ministry issuance of the PTTW renewal to CRH. Mr. Ruland reiterated many of the problems he had identified in his previous reports and placed them in the context of those that could be created or exacerbated by the new Permit. For example:

- the aggregate washing operations associated with the pit have discharged over 100 million litres of silt-laden wash water into the local groundwater system - and with the new 10-year PTTW, the MECP has now approved the further discharge of more than 1 million litres per day of silt-laden wash water into the groundwater system for 210 days per year for the next 10 years. Thus, instead of having inputs of clean rainwater, in the area of the Teedon Pit the inputs to the local groundwater system are silt-contaminated aggregate wash water - with flows massively higher than had previously been the case;

- CRH and its predecessor company have been operating a gravel pit (the Teedon Pit) which includes a very leaky aggregate washing operation. During the original application/approval process the proposed aggregate washing operation was described to the …. (MECP) and neighbours as one which would be "closed loop" – that is, one with minimal water losses. Instead of the promised water-minimizing "closed loop", the aggregate washing operation in the Teedon Pit has lost vast amounts of water from the start of operations. Even CRH representatives are now characterizing their aggregate washing operation as being "closed loop, with leaky ponds". By definition, "closed loop" implies no significant leaks. But CRH's aggregate washing operation is characterized by very leaky ponds. When the aggregate is washed, the wash water is very silty. Vast quantities of this silt-laden wash water have leaked into the pristine groundwater system whenever CRH (or its predecessor) have been washing aggregate, and this has been ongoing for the past 10+ years. Moreover, the pit floor is sloped to allow drainage of surface runoff from the pit floor into the leaky wash pond, and this may be exacerbating the problem;

- CRH and its predecessor company have no idea where all the disappearing, silt-laden wash water is going….The most recent interpretation from CRH's current consultants is that groundwater is moving west - which happens to be from the area of the wash ponds, toward the area of several impacted residential wells. But there are really not enough wells installed in this complex groundwater flow system to fully understand the hydrogeological big picture, let alone the specific details. This is one of the reasons for FOTTSA's, Dr. Shotyk's and my recommended moratorium on aggregate development, pending a broader hydrogeological study of the Waverley Uplands and surrounding area. In the meantime, the reality will be that groundwater movement from the area of

> the Teedon Pit wash ponds will follow complex subsurface pathways…Where these pathways take the silt-laden wash water to the intake of a domestic well, there will be impacts.

> **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 4-5.

17. Mr. Ruland's January 2021 review also re-summarized problems he had identified in his previous reports respecting such matters as: (1) off-site impacts of the aggregate washing operation; and (2) deficiencies related to previous permits issued for the Teedon Pit.

> **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 6-7.

18. The Ruland review also examined the adequacy of the conditions imposed in the Permit issued by the Ministry on January 14, 2021. He noted, for example, that: (1) only a 1-year period, not a 10-year period for the Permit as set out in condition 3.1, was warranted based on information available to him, which did not include hydrogeological monitoring data for 2018 and 2019 he requested from CRH but was not provided; (2) the volume of water taking permitted by condition 3.2 really constituted an over-taking, or over-reach, in the sense that most of the water being pumped into the source pond ends up contaminated with silt from aggregate washing and is allowed to leak out of the pond into the pristine local groundwater flow system, which was not appropriate; (3) monitoring and reporting requirements needed strengthening in the various sub-provisions of condition 4; and (4) the condition 5.2 requirement to replace any water supplies that were negatively impacted before initial PTTW issuance, would be ineffectual because of the failure of past Permit Holders for this site to have done any off-site testing of well water supplies before the commencement of water taking. In this latter regard, Mr. Ruland again recommended that all wash ponds at the site should be impermeably lined such that the aggregate washing operation truly becomes the "closed-loop" operation which was promised by the original Permit Holder.

> **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 3, 9-15.

III. ISSUES AND THE LAW

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

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

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

A. The Applicants Have Standing to Seek Leave to Appeal

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

> "Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:
>
> 1. The person seeking leave to appeal has an interest in the decision.
>
> 2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal."

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

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

> **Reference Tab 7:** *Safety-Kleen Canada Inc. v. Ontario (Director, Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 88 at para 7 (Ont. Env. Rev. Trib.); **Tab 8:** *McIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 at para 6 (Ont. Env. Rev. Trib.).

23. For the reasons set out below, the Applicants submit that they meet each of the four elements.

1. The Applicants are Persons Resident in Ontario

24. The *EBR* Registry notice in relation to the decision of Director Leus to issue the PTTW to CRH clearly stipulates that residents of Ontario may seek leave to appeal the decision.

> **Reference Tab 5:** Ministry of the Environment, Conservation and Parks Instrument Decision Notice for ERO 013-2282 (January 15, 2021).

25. FOTTSA is incorporated by letters patent under the laws of Ontario as a corporation without share capital.

> **Reference Tab 9**: Federation of Tiny Township Shoreline Associations, Letters Patent, May 23, 1991.

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

> **Reference Tab 10**: *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F. section 87 (definition of person includes corporation).

27. FOTTSA is made up of member and delegated member associations and individuals, consisting of approximately 1,980 households. As such, FOTTSA and its members constitute persons resident in Ontario.

> **Reference Tab 11**: FOTTSA

2. The Decision Implements a Proposal for a Class I or II Instrument Requiring Notice Under Section 22 of the Environmental Bill of Rights

28. The decision of Director Leus to issue an *OWRA* section 34.1 PTTW is one that implements a Class I proposal requiring notice under section 22 of the *EBR* within the meaning of sections 1.1, and 3 of Ontario Regulation 681/94.

> **Reference Tab 12**: *Classification of Proposals for Instruments*, O. Reg. 681/94, ss. 1.1, 3.

3. The Applicants Have an Interest in the Decision of the Director

29. 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. Commenting on a proposal is not a requirement for standing but rather simply evidence of an interest.

> **Reference Tab 13:** *Young v. Ontario (Environment and Climate Change)*, [2016] O.E.R.T.D. No. 43 (Ont. Env. Rev. Trib.) at para 26.

30. Mr. Ruland's detailed report on the PTTW renewal proposal (Reference Tab 2, above) was submitted to the Ministry during the comment period (January 23, 2018 to April 23, 2018), evidencing an interest in the subject matter of the Director's decision.

31. The term "interest" also can mean a pecuniary, proprietary, personal, or health interest in the matter. A number of individual members of associations that are part of FOTTSA have such an interest as property owners with domestic water wells near the Teedon Pit aggregate washing operations that are part of the subject matter of this decision. The PTTW renewal has the potential to have adverse effects on their rights and interests at common law and as a matter of statute.

32. Accordingly, it is submitted that the Applicants have an interest in the decision within the meaning of section 38(1) and (3) of the *EBR*.

4. CRH Has a Right Under Another Act to Appeal the Decision

33. CRH has a right under section 100 of the *OWRA* to appeal the decision. Accordingly, it is submitted that the decision of the Director to issue the PTTW to CRH entitles the Applicants to seek leave to appeal the same decision pursuant to section 38(1).2 of the *EBR*.

> **Reference Tab 14:** *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, section 100, as amended;
> **Reference Tab 4:** CRH Canada Group Inc., PTTW 6258-BRDJ2M (January 14, 2021) at 8.

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

B. The Applicants Meet the Test for Leave to Appeal

1. It Appears There is Good Reason to Believe Decision of the Director to Issue CRH Permit is Unreasonable

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

35. Section 41 of the *EBR* states:

> "Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
>
> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment."

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

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

> **Reference Tab 15:** *Hannah v. Ontario (Ministry of the Environment)*, [1998] O.E.A.B. No. 13 at para 6 (Ont. Env. App. Bd.).

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

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

Reference Tab 16: *Federation of Ontario Naturalists v. Ontario (Ministry of the Environment)*, [1999] O.E.A.B. No. 18 at para 19 (1999) (Ont. Env. App. Bd.).

38. Furthermore, the Tribunal, otherwise constituted, has held that where a proponent's supporting documentation is inadequate, seriously flawed, or contains information gaps, then it would be unreasonable for a director to issue a PTTW. By the same token, if there are such information gaps, leading to uncertainty about the consequences of the water taking, then a decision could result in significant harm to the environment. Moreover, this concern is not assuaged by the collection, monitoring, and reporting of the missing data at some point in the future after the instrument has been issued. 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.

Reference Tab 17: *Dillon v. Ontario* [2000], O.E.A.B. No. 63 at paras 12-13, 32-33, 35 (Ont. Env. App. Bd.).

i. Burden of Proof

39. The Applicants have the onus of establishing that the leave test has been met.

Reference Tab 8: *McIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 para 8 (Ont. Env. Rev. Trib.).

ii. Standard of Proof

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

Reference Tab 18: *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123 at para 8 (Ont. Env. Rev. Trib.); **Tab 19:** *Grey (County) Corp. v. Ontario (Ministry of the Environment)*, [2005] O.E.R.T.D. No. 43, (2005), 19 C.E.L.R. (3d) 176 at para 16 (Ont. Env. Rev. Trib.); **Tab 20:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at paras. 41-42, 45 (Ont. Div. Ct.)

41. At the leave to appeal stage, the appropriate 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 question to be tried. 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 Applicants a right to pursue the matter through the appeal process.

> **Reference Tab 20:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at para 45 (Ont. Div. Ct.); **Tab 21:** *Barker v. Ontario (Ministry of Environment and Energy)*, [1996] O.E.A.B. No. 27 at paras 42-47 (Ont. Env. App. Bd.).

iii. Merits Not Decided at Leave Stage

42. The role of the Tribunal when deciding an application for leave is not to determine the merits of the appeal. Nor is the leave to appeal hearing meant to be a written version of the ultimate hearing on the merits.

> **Reference Tab 8:** *McIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 para 9 (Ont. Env. Rev. Trib.); **Tab 22:** *Corporation of the City of Guelph v. Ontario*, 2014 CarswellOnt 5932 para 16.

43. Therefore, it is not necessary at this stage for the Tribunal to determine whether the decision of the Director was unreasonable, or whether significant harm to the environment will materialize. That is to say, section 41 does not require that the Applicants establish that no reasonable person could have made the decision, or that significant harm will result. These questions should be left to be determined at the hearing of the appeal. Instead, to be granted leave to appeal, the Applicants 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 (emphasis in original).

> **Reference Tab 23:** *Residents Against Company Pollution Inc. v. Ontario (Ministry of Environment and Energy)*, [1996] O.E.A.B. No. 29 at para 54 (Ont. Env. App. Bd.); **Tab 18:** *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123 at para 10 (Ont. Env. Rev. Trib.); **Tab 19:** *Grey (County) Corp. v. Ontario (Ministry of the Environment)*, [2005] O.E.R.T.D. No. 43, (2005), 19 C.E.L.R. (3d) 176 at para 16 (Ont. Env. Rev. Trib.); **Tab 8:** *McIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 para 9 (Ont. Env. Rev. Trib.); **Tab 24:** *Dawber v. Ontario (Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 at para 12 (Ont. Env. Rev. Trib.).

iv. Each Ground Raised Need Not Meet Both Parts of Leave Test

44. Furthermore, the Applicants are not required to show how each ground raised for leave to appeal meets both parts of the section 41 test. The Applicants may list numerous grounds in their leave to appeal materials. Some may relate solely to the first part of the test. Some may relate to the second part. Some may (but are not required to) relate to both parts. The Applicants must provide arguments that satisfy both parts of the test and

those arguments must relate to the decision being challenged. However, nothing in the *EBR* or case-law requires each ground or argument raised to simultaneously meet both parts of the test.

> **Reference Tab 19:** *Grey (County) Corp. v. Ontario (Ministry of the Environment)*, [2005] O.E.R.T.D. No. 43, (2005), 19 C.E.L.R. (3d) 176 at para 42 (Ont. Env. Rev. Trib.).

b. The Decision of the Director and the Ministry Statement of Environmental Values

45. In determining whether the decision of the Director in this case appears "unreasonable", the Tribunal should, *inter alia*, have regard for the Ministry *Statement of Environmental Values* ("SEV") issued under the *EBR*. The Tribunal, otherwise constituted, has held that the Ministry's SEV is "an important document" that should be considered whenever Ministry staff are proposing to issue or amend instruments prescribed under the *EBR*.

> **Reference Tab 25:** Ontario Ministry of the Environment and Climate Change, Statement of Environmental Values (2008); **Tab 26:** *Concerned Citizens of Brant v. Ontario* (2016), 3 C.E.L.R. (4th) 118 at paras 122-125 (Ont. Env. Rev. Trib.).

46. The first branch of the section 41 test may be met where a decision to issue an instrument is made without regard for the impacts of the proposal in light of the guiding principles of the SEV.

> **Reference Tab 24:** *Dawber v. Ontario (Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 at para 31 (Ont. Env. Rev. Trib.).

47. In considering sections 7 and 11 of the *EBR*, it is arguable and, therefore, reasonable for a Tribunal to regard the SEV as relevant policy that should guide the decision of a director. Under s. 7, the Minister is required to prepare an SEV that explains how the purposes of the *EBR* are to be applied when a decision that might significantly affect the environment is made by the Ministry. Moreover, under s. 11 the Minister is to take every reasonable step to ensure that the Ministry SEV is considered whenever a decision that might significantly affect the environment is made in the Ministry. There is no exclusion for a director when he or she is making a decision whether or not to implement a proposal for a Class I or a Class II instrument. The Ministry SEV falls within the section 41 phrase "government policies developed to guide decisions of that kind" and a decision to consider the SEV would be consistent with past jurisprudence of the Tribunal.

> **Reference Tab 20:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at paras 56-57 (Ont. Div. Ct.).

48. The current version of the SEV has been in place since 2008, having replaced the 1994 version of the SEV applicable at the time of the *Lafarge* judgment. The Tribunal, otherwise constituted, has held that the interpretation in *Lafarge* that the SEV applies to Class I and II instruments remains applicable with respect to the 2008 SEV, including in the context of PTTWs issued under the *OWRA*.

Reference Tab 27: *Protect Our Water and Environmental Resources v. Ontario (Director, Ministry of the Environment)* (2009), 43 C.E.L.R. (3d) 180 at paras 49, 55-59 (Ont. Env. Rev. Trib.); **Tab 8:** *McIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 at para 60 (Ont. Env. Rev. Trib.).

49. The Ministry's SEV contains commitments to a number of fundamental environmental principles that are relevant to the Director's decision in this case, including: (i) precautionary approach; (ii) environmental protection and rehabilitation; (iii) cumulative effects; (iv) sustainable development; and (v) increased transparency, timely reporting, and enhanced engagement. The Tribunal, otherwise constituted, has held that in leave applications under section 41 of the *EBR*, applicants can address not only apparent failures by a director to consider applicable laws or policies, such as the SEV, but also can pursue grounds related to whether an impugned decision did not properly incorporate, reflect, or apply relevant laws or policies, or is otherwise unreasonable factually or scientifically. The Applicants submit that it appears these problems exist with the decision of the Director in this case.

Reference Tab 22: *Corporation of the City of Guelph v. Ontario*, 2014 CarswellOnt 5932 paras 22-26, 30 (Ont. Env. Rev. Trib.); **Tab 26:** *Concerned Citizens of Brant v. Ontario* (2016), 3 C.E.L.R. (4th) 118 at paras 120-121 (Ont. Env. Rev. Trib.).

i. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply the Precautionary Approach

50. The Ministry's SEV contains a commitment that the Ministry will apply the "precautionary, science-based approach" when making environmentally significant decisions:

> "The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment".

Reference Tab 25: Ontario Ministry of the Environment and Climate Change, Statement of Environmental Values (2008), section 3, bullet 4.

51. The Tribunal, otherwise constituted, has stated that the term "precautionary approach", used in the Ministry SEV, may be used interchangeably with the term "precautionary principle".

Reference Tab 22: *Corporation of the City of Guelph v. Ontario*, 2014 CarswellOnt 5932 para 68 (Ont. Env. Rev. Trib.).

52. The precautionary principle is an emerging principle of international law that has been adopted by the Supreme Court of Canada in the interpretation of domestic legislation including, most recently, Ontario environmental legislation:

> "This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental

> impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation”.

Reference Tab 28: *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 at para 20.

53. Furthermore, the Supreme Court of Canada has long made it clear that in order to achieve sustainable development [also an SEV principle], environmental policies must be based on the precautionary principle:

> “In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”.

Reference Tab 29: *Spraytech v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 at para 31.

54. However, the principal regulation (*Water Taking and Transfer Regulation*, O. Reg. 387/04) under which the PTTW program operates does not mention the precautionary principle (or approach) as a factor to be considered with respect to the issuance of permits.

55. The Applicants submit that this gap in the regulation underscores a larger historical Ministry failure to describe how SEV principles, like the precautionary approach, are applied to instruments and stems from the Ministry’s long resistance to applying its SEV directly to instruments.

Reference Tab 30: Environmental Commissioner of Ontario, Special Report to the Legislative Assembly of Ontario (Toronto: ECO, 2005) at 4.

56. For example, in April 2008, Ministry Directors vigorously opposed the direct application of the SEV to the instruments at issue in the *Lafarge* case arguing that the SEV: (1) was not intended to guide decisions by directors; (2) reads like a mission statement with wide-sweeping language; (3) provides no guidance to directors as to how to exercise discretion; and (4) provides no assistance to directors as to what kind of conditions should be imposed.

Reference Tab 20: *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at para 54 (Ont. Div. Ct.).

57. Moreover, the Ministry released a new SEV in October 2008 (the one still in effect in 2021) that does not mention instruments, let alone SEV application to them, despite the June 2008 judgment in the *Lafarge* case wherein the Divisional Court held that directors, by operation of section 11 of the *EBR*, are not excluded from having to consider the SEV in relation to instruments.

> **Reference Tab 25:** Ontario Ministry of the Environment, Statement of Environmental Values (2008); **Tab 20:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at para 56 (Ont. Div. Ct.).

58. Furthermore, in 2009, a year after the *Lafarge* decision, the Ministry again argued before the Tribunal, otherwise constituted, and this time in connection with a PTTW, that there is no requirement to consider the SEV with respect to instruments.

> **Reference Tab 27:** *Protect Our Water and Environmental Resources v. Ontario (Director, Ministry of the Environment)* (2009), 43 C.E.L.R. (3d) 180 at paras 44, 55 (Ont. Env. Rev. Trib.).

59. Indeed, in December 2020, the Ministry released for public comment a proposed update to the 2008 SEV, which again is silent on the application of the SEV to instruments issued by the Ministry – twelve years after the Divisional Court judgment to the contrary in *Lafarge*.

> **Reference Tab 31:** Ministry of the Environment, Conservation and Parks, *Draft Statement of Environmental Values*, ERO No. 019-2826 (December 22, 2020).

60. In the circumstances of this case, therefore, the Applicants respectfully submit that it does not appear that the Director considered, incorporated, reflected, or applied the precautionary approach or principle to the CRH PTTW renewal application before issuing the instrument because:

- The Ministry's historic position has been to consistently oppose the application of the SEV directly to instruments, a Ministry position of long-standing concern to the ECO;

- As recently as April 2008, Ministry directors vigorously opposed the application of the SEV directly to the instruments at issue in the *Lafarge* case;

- The Ministry released a new SEV in October 2008 (still in effect), after the *Lafarge* decision was decided (June 2008), that continued to exclude any mention of the application of the SEV to instruments, a position that does not appear consistent with the ruling of the Divisional Court in *Lafarge* or section 11 of the *EBR*;

- In 2009, the Ministry was still arguing before the Tribunal, otherwise constituted, that there is no obligation on a Director to consider the SEV in relation to instruments (PTTWs);

- In December 2020, the Ministry proposed a draft SEV that again is silent on its application to instruments, such as PTTWs; and

- The January 15, 2021 registry notice (ERO 013-2282), respecting the decision on the issuance of the PTTW to CRH in this case, does not

> mention, let alone document, how the SEV was considered in relation to the instrument that had been posted on the registry.

61. The Applicants' concerns in this regard are underscored by the issues respecting the precautionary principle identified by Mr. Ruland, P.Geo. in his various reports, including: (1) the failure of the Ministry in earlier PTTWs issued for the site to require precautionary monitoring of well water levels and well water quality in a representative number of homes around the Teedon Pit, despite the pit's location upgradient of numerous homes and the known massive water losses from the aggregate washing operation; (2) the failure of the Ministry to respond to the complaints of off-site well interference and to the documented massive losses of silt-laden water from the Cedarhurst aggregate washing operation in a proactive and precautionary manner; (3) the failure of the Ministry to be as careful or precautionary as it needed to be when issuing the PTTWs for the Teedon Pit, and its oversight and monitoring of PTTW-related operations at the Teedon Pit have not been adequate; and (4) the failure of CRH and its predecessor company to take a precautionary and proactive approach and doing what was needed to end the losses of silt-laden water in their operations (for example, by lining their ponds); but instead undertook domestic well surveys which, lacking any baseline testing, impeded, rather than assisted in, reaching a protective solution to the problem.

> **Reference Tab 1:** Wilf Ruland, P.Geo., Report on Hydrogeological Impacts Caused by Aggregate Washing at the Teedon Pit near Waverly, Ontario, October 20, 2015, pages 16, 24; **Reference Tab 2:** Wilf Ruland, P.Geo, Review of an Application for a Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, April 23, 2018, pages 24, 29, 47; **Reference Tab 3:** Letter dated January 27, 2020 from Wilf Ruland, P.Geo to Judith Grant, FOTTSA Regarding Reply to CRH's Letter, pages 2-3.

62. In short, the Permit Holder has failed to proactively address, or adaptively manage, the problem caused by its PTTW operations despite its having been pointed out by Mr. Ruland and others over the years. Alternatively, if the Permit Holder has addressed the problem, its adaptive management techniques, if any, have not corrected the problem. The Tribunal, otherwise constituted, has recognized that where uncertainty is not reduced by the adaptive management measures proposed, the precautionary principle should be applied instead.

> **Reference Tab 32:** *Citizens Against Melrose Quarry v. Director, Ministry of the Environment*, (2014), 92 C.E.L.R. (3d) 21, at paras 95-97 (Ont. Env. Rev. Trib.).

63. Accordingly, the Applicants submit the Director failed to consider, incorporate, reflect, or apply, the precautionary approach identified in the Ministry SEV before issuing the Permit and, therefore, this should contribute to a finding that it appears that there is good reason to believe that the decision of the Director is unreasonable in the circumstances.

ii. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Environmentally Preventive and Rehabilitative Strategies

64. The Ministry's SEV also contains commitments that the Ministry will, when making environmentally significant decisions, act preventively, minimize creating pollutants, and rehabilitate the environment when significant environmental harm is caused. In this regard, the SEV states:

> "The Ministry's environmental protection strategy will place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment".
>
> "In the event that significant environmental harm is caused, the Ministry will work to ensure that the environment is rehabilitated to the extent feasible".

Reference Tab 25: Ontario Ministry of the Environment, Statement of Environmental Values (2008), section 3, bullets 5, 7.

65. The concerns identified by Mr. Ruland, summarized, for example, at paragraph 61, also speak to the failure of the Ministry to consider, incorporate, reflect, or apply environmental protection and rehabilitation principles contained in the Ministry's SEV and this should contribute to a finding that it appears there is good reason to believe that the decision of the Director is unreasonable in the circumstances.

iii. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Cumulative Effects Concerns

66. The Ministry's SEV also contains a commitment that the Ministry will take into account "cumulative effects" when making environmentally significant decisions. In this regard, the SEV states:

> "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: Ontario Ministry of the Environment and Climate Change, Statement of Environmental Values (2008), section 3, bullet 2.

67. Cumulative effects have been defined as "changes to the environment that are caused by an action in combination with other past, present and future human actions", and includes the "specific consideration of effects due to other projects".

Reference Tab 33: Canadian Environmental Assessment Agency, Cumulative Effects Assessment Practitioners Guide (CEAA: Ottawa, 1999) at 2.1.

68. The 2005 Ministry Permit to Take Water Manual states:

> "Principle # 4: The Ministry will consider the cumulative impacts of water takings. Where relevant information about watershed/aquifer conditions exists (e.g., water availability and potential impacts to the environment and other uses) the Ministry will take this into account when reviewing individual permit applications. Where the Ministry believes that cumulative impacts need to be considered, the Ministry may initiate a watershed scale or aquifer scale assessment beyond a local-scale impact assessment, and may engage water takers to collectively reduce the burden on the watershed and to better manage the demand for water".

Reference Tab 34: Ontario Ministry of the Environment, *Permit to Take Water Manual* (Toronto: MOE, 2005) at 4.

69. It was the professional opinion of Mr. Ruland that a moratorium should be placed on approvals of aggregate developments (including the Teedon Pit Extension), until a broader hydrogeological study of the Waverley Uplands is carried out which explicitly addresses the cumulative potential impacts of the numerous proposed aggregate operations on the groundwater flow system of the upland and the surrounding area.

Reference Tab 3: Letter dated January 27, 2020 from Wilf Ruland, P.Geo. to Judith Grant, FOTTSA Regarding Reply to CRH's Letter, page 5.

70. However, no such study was performed before the PTTW was issued in this case. In the circumstances, the Applicants respectfully submit that the Director failed to consider, incorporate, reflect, or apply, cumulative effects concerns identified in the Ministry SEV before issuing the Permit and, therefore, this should contribute to a finding that it appears that there is good reason to believe that the decision of the Director is unreasonable in the circumstances.

iv. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Sustainable Development Principles

71. The Ministry's SEV also contains a commitment that the Ministry will apply "sustainable development principles" when making environmentally significant decisions. In this regard, the SEV states:

> "The Ministry considers the effects of its decisions on current and future generations, consistent with sustainable development principles".

Reference Tab 25: Ontario Ministry of the Environment and Climate Change, Statement of Environmental Values (2008), section 3, bullet 3.

72. Sustainable development is not defined in Ontario law but was defined under federal legislation in force until late 2019 to mean development that meets the needs of the present, without compromising the ability of future generations to meet their own needs, based on the 1987 Brundtland Commission Report.

Reference Tab 35: *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 2(1) (repealed August 28, 2019).

73. One indication of sustainable development is water conservation, and the Applicants submit that O. Reg 387/04 and the 2005 PTTW Manual address the former by reference to the latter. The 2005 Manual states, for example, that: "Water conservation will be considered as a factor in decisions regarding permits to take water" and that:

> "Water takers are encouraged to take all reasonable and practical measures to conserve water and to maximize its availability for existing or potential uses to sustain ecosystem integrity."

Reference Tab 36: *Water Taking and Transfer Regulation*, O. Reg. 387/04, s. 4, as am.; **Tab 34:** Ontario Ministry of the Environment, *Permit to Take Water Manual* (Toronto: MOE, 2005) at 27.

74. Moreover, the purposes of the *OWRA* are "to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being".

Reference Tab 14: *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, section 0.1, as amended.

75. In this regard, it was the professional opinion of Mr. Ruland that the aggregate washing operations at the Teedon Pit are not sustainable given the massive water losses of 50% or more from the wash operations. Leakage of silt-laden wash water into the environment at rates averaging about 500,000 liters per day (i.e., about 6 L/second) with peak losses of up to about 1,000,000 liters/day occurred at this site on a regular basis during aggregate washing in 2009 - 2013.

Reference Tab 1: Wilf Ruland, P.Geo., Report on Hydrogeological Impacts Caused by Aggregate Washing at the Teedon Pit near Waverly, Ontario, October 20, 2015, page 28.

76. There is no indication that the situation has materially changed at the site in the intervening years since Mr. Ruland provided his comments on the PTTW application in January 2018. Accordingly, the Applicants respectfully submit that the Director failed to consider, incorporate, reflect, or apply, sustainable development principles identified in the Ministry SEV before issuing the Permit and, therefore, this should contribute to a finding that it appears that there is good reason to believe that the decision of the Director is unreasonable in the circumstances.

v. The Decision of the Director Failed to Consider, Incorporate, Reflect, or Apply Increased Transparency, Timely Reporting, or Enhanced Engagement Principles

77. The Ministry's SEV also contains a commitment that the Ministry will apply the following principles when making environmentally significant decisions:

> "The Ministry will encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making".

Reference Tab 25: Ontario Ministry of the Environment and Climate Change, Statement of Environmental Values (2008), section 3, bullet 10.

78. In this regard Wilf Ruland, P.Geo., notes that CRH did not prepare annual monitoring reports for 2018 and 2019 monitoring information it had which, in Mr. Ruland's view, represented a major gap in the public data record. Moreover, CRH did not provide this information to Mr. Ruland when he requested it for this leave application. Furthermore, while condition 4.3 of the new PTTW requires that an annual monitoring report be prepared going forward, the PTTW does not require that CRH go back and prepare annual monitoring reports for 2018 and 2019 and make them public. In Mr. Ruland's view, the details of the 2018 and 2019 site monitoring information would be useful in determining a relationship, if any, to reported off-site impacts. In the submission of the Applicants, the details would also be useful in determining the reasonableness of issuing the Permit.

Reference Tab 6: Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 3, 11.

79. The Tribunal, otherwise constituted, also has noted that leave applicants may expect to be provided with the documents and information relied upon by the Director in reaching his decision.

Reference Tab 37: *Brimley Progress Development Inc. v. Ontario (Ministry of the Environment)* (2013), 75 C.E.L.R. (3d) 310, at para 39.

80. The failure of CRH to provide this information to the Applicants suggests that an adverse inference should be drawn by the Tribunal that the data had it been provided is not favourable to the issuance of the Permit, and this may be viewed as another indicia of unreasonableness in issuing it.

81. Overall, the Applicants respectfully submit that the Director failed to consider, incorporate, reflect, or apply, increased transparency, timely reporting, or enhanced engagement principles identified in the Ministry SEV before issuing the Permit and, therefore, this should contribute to a finding that it appears that there is good reason to believe that the decision of the Director is unreasonable in the circumstances.

c. The Decision of the Director and Common Law Rights

82. The reports of Wilf Ruland, P.Geo., have identified well-siltation and flooding problems domestic well users have attributed to operations connected to the existing PTTW. The PTTW that is the subject of this leave application has the potential to continue, if not exacerbate, such problems. As a result, it could interfere with their

common law rights and interests. The common law causes of action that exist to vindicate such rights include negligence, private nuisance, riparian rights, and strict liability.

83. In the decision notice, the Ministry was silent on the issue of potential interference with the common law rights and interests of local residents, other than to say that the Ministry's review concluded the water taking: (1) does not have an adverse impact on local wells; and (2) is unlikely to adversely impact groundwater quality. These comments belie the over 5,000 comments the Ministry received during the comment period and the three reports produced to that point by Wilf Ruland, P.Geo., to the contrary.

> **Reference Tab 5:** Ministry of the Environment, Conservation and Parks Instrument Decision Notice for ERO 013-2282 (January 15, 2021).

84. Both the Tribunal, otherwise constituted, and Divisional Court have made it clear that nothing in the *EBR* excludes the common law as relevant law to be considered under section 41(a). Since regulatory approvals may negate common law rights, when a director considers approving activities that might constitute a nuisance or other tort, it may be necessary to consider more stringent conditions and it is unreasonable for a director to ignore such considerations.

> **Reference Tab 24:** *Dawber v. Ontario (Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 at paras 70-74 (Ont. Env. Rev. Trib.); **Tab 20:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at paras 63-65 (Ont. Div. Ct.).

85. Common law rights may be diminished in several ways by the issuance of an instrument, including: (1) approvals protecting facilities from liability; (2) influencing the standard of conduct considered to be negligent; and (3) by courts deferring to regulatory officials' assessments of environmental dangers.

> **Reference Tab 24:** *Dawber v. Ontario (Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 at para 73 (Ont. Env. Rev. Trib.).

86. Thus, even if common law rights are not negated by the issuance of the PTTW because of the operation of the *OWRA*, it is still necessary to consider whether the Director should have imposed conditions to protect against unreasonable interference with the common law rights of members of the public.

> **Reference Tab 38:** *Tomagatick v. Ontario (Director, Ministry of the Environment)*, (2009), 42 C.E.L.R. (3d) 39 at paras 104, 109-111 (Ont. Env. Rev. Trib.).

87. The Director may argue in his response to this leave application that such matters were considered prior to issuing the Permit. However, since the Director did not aver to the common law interests of members of the public prior to making his decision to issue the Permit the Director could hardly be said to have considered the possible interference with their common law rights if the Permit were issued, and whether better conditions were warranted to avoid such interference. In the circumstances, the Applicants submit

that the failure of the Director to consider common law rights and interests of the public appears unreasonable in the circumstances.

d. Summary

88. In summary, the Applicants submit that it appears that there is good reason to believe the decision of the Director is unreasonable in the circumstances. In particular, the decision failed to:

- Consider, incorporate, reflect, or apply the Ministry's SEV, or misapplied the following principles contained in the SEV:

    - Precautionary approach;
    - Environmental protection and rehabilitation;
    - Cumulative effects;
    - Sustainable development; and
    - Increased transparency, timely reporting, or enhanced engagement;

- Consider the common law rights of the public in the area.

2. It Appears the Decision of the Director Could Result in Significant Environmental Harm

a. The Test for Assessing Significant Environmental Harm

89. Under section 41(b) of the *EBR*, the Applicants must establish a *prima facie* case that it appears that "the decision in respect of which an appeal is sought could result in significant harm to the environment". The question for the Tribunal is "whether the decision has the potential to cause significant environmental harm".

> **Reference Tab 39:** *Quinte West (City) v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 49, 46 C.E.L.R. (3d) 237 at para 13 (Ont. Env. Rev. Trib.); **Tab 20:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at para 47 (Ont. Div. Ct.).

90. 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."

91. The word "significant" is not defined in the *EBR*. The Environmental Appeal Board, as it then was, observed that because of the inherent subjectivity of the concept of "significant harm", the Board should attempt to use a test that does not rely on the individual view of its members as to what may be significant. Where possible,

significance should be determined by reference to scientific principle and evidence of legal criteria.

> **Reference Tab 23:** *Residents Against Company Pollution Inc. v. Ontario (Ministry of Environment and Energy)*, [1996] O.E.A.B. No. 29 at para 40 (Ont. Env. App. Bd.).

92. The Applicants submit that the Tribunal should take a similar "objective approach" for assessing the significance of the environmental harm arising from the issuance of the Permit to CRH.

b. Existing Conditions Already Risk Potentially Significant Environmental Harm

93. Based on the work of Mr. Wilf Ruland, P.Geo., over the last six years it appears the operations under the past and existing PTTWs have created conditions at the Teedon Pit that already risk potentially significant environmental harm. The problems identified by Mr. Ruland set out more fully above (see Part II.B.1.2, D, F), and in his reports attached to this leave application (Reference Tabs 1-4), include, but are not limited to: (1) leakage of silt/clay-laden washwater from the wash pond, a problem compounded by the lack of records of water levels in the pond or in wells installed in adjacent test pits (which could be used to determine rates and impacts of leakage); (2) a combination of flooding from unusually high groundwater levels and water quality impacts caused by high silt levels in the wells; (3) unresolved complaints from neighbouring domestic well users about these problems; (4) lack of a clear hydrogeological conceptual model for the area of the wash pond made issuance of earlier PTTWs for the site problematic as there is a lack of clarity from prior Permit Holders as to where water lost from the aggregate washing operations is going and other omissions from these PTTWs compounded the problem; (5) massive amounts of silt-laden washwater appear to have been leaking from the wash pond to the underlying groundwater system; and (6) the lack of a liner for the wash pond to control this problem.

94. These are pre-existing "thin-skulled" site conditions that will only be made worse by operations continued by the Permit. Overall, the Applicants submit that these existing conditions pose potentially significant environmental harm in conjunction with the Permit.

c. The Potential for Significant Environmental Harm Arising from Operation of the Permit

i. The Water Taking Category and Instrument Classification of the Permit

(A) Water Taking Category

95. CRH, as an applicant for a water taking permit, is required to classify its application into one of three categories based on the proposed water taking's anticipated risk to existing users and the environment. It has chosen Category 1. According to the Ministry, a Category 1 permit "is considered low risk and includes renewals where there is no history of complaints". A Category 2 permit has a "greater potential to cause

adverse environmental impact", and a Category 3 permit "is considered high risk". Category 2 and 3 permit applications are subject to additional information requirements (a scoped assessment in the case of Category 2 and a detailed ecological, hydrological, and hydrogeological study in the case of Category 3). According to GHD its "hydrological and hydrogeological assessment", on behalf of CRH's PTTW renewal application, is "voluntary" because it is not a requirement to produce such a report for a section 34 *OWRA* application for a Category 1 permit (GHD, Category 1 Permit-to-Take-Water Renewal Application: Supporting Hydrologic and Hydrogeologic Study, Dufferin Teedon Pit, Township of Tiny, County of Simcoe, Ontario, January 2018, page 1).

> **Reference Tab 40:** Ontario Ministry of the Environment, Conservation and Parks, Permits to Take Water, online (updated January 12, 2021).

96. The Applicants submit the above information is evidence of the potential for significant environmental harm arising from the operation of the PTTW. First, the description of a Category 1 permit requires that there be "no history of complaints". The reports of Mr. Wilf Ruland, P.Geo. (See Part II.B.1.2, D, F; and Reference Tabs 1-4) make it clear that there is a lengthy history of largely, if not completely, unresolved complaints by domestic well users associated with past PTTWs for the Teedon Pit aggregate washing operations. Second, the GHD "hydrological and hydrogeological assessment" on its face, notwithstanding the disclaimer that it is "voluntary", casts doubt on the Category 1 designation, and is a tacit admission by the consultants for CRH that the PTTW has either a "greater potential to cause adverse environmental impact" (Category 2), or "is considered high risk" (Category 3). Third, the Applicants note that the GHD title page entitles its report a "study" not an "assessment", thus placing it even more firmly in Category 3, based on Ministry criteria noted above.

(B) Instrument Classification

97. CRH's Permit is also prescribed by *EBR* regulation as a Class I instrument. Under section 20(2)4 of the *EBR*, a proposal for an instrument is a Class I or II proposal only if it is a type of proposal where the decision to implement the proposal has potential to have a significant effect on the environment. Accordingly, the fact that an instrument has been classified as a Class I or II instrument is an indication of its environmental significance and is a good starting point for undertaking the analysis under section 41(b) (the second branch of the overall section 41 test).

> **Reference Tab 12:** *Classification of Proposals for Instruments*, O. Reg. 681/94, ss. 1.1, 3; **Tab 19** *Grey (County) Corp. v. Ontario (Director, Ministry of the Environment)* (2005), 19 C.E.L.R. (3d) 176 at paras 77-78 (Ont. Env. Rev. Trib.); **Tab 24:** *Dawber v. Ontario (Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 at para 18 (Ont. Env. Rev. Trib.).

ii. Potential Environmental Impacts

98. The PTTW is a renewal of an existing permit that has been associated with well-documented environmental problems, identified by Mr. Wilf Ruland, P.Geo., that are set out above (e.g., an aggregate wash pond that is leaking into the groundwater system and that precipitates periodic flooding and siltation of neighbouring domestic water wells).

There is no reason to assume the problems will go away if the underlying causes of the problems have not been addressed. According to Mr. Ruland, the Permit and its conditions do not address those causes. Therefore, it is submitted that the decision of Director Leus to issue the instrument in question should be regarded as having the potential to cause significant environmental harm.

iii. Inadequate Permit Terms and Conditions

99. While the fact that a proposal for an instrument has been classified as a Class I or II proposal is evidence that a decision to issue the instrument can cause significant environmental harm the Tribunal, otherwise constituted, has held that it must remain open to the possibility that specific conditions contained in the instrument may eliminate environmental harm from a facility.

> **Reference Tab 19:** *Grey (County) Corp. v. Ontario (Director, Ministry of the Environment)* (2005), 19 C.E.L.R. (3d) 176 at paras 77-78 (Ont. Env. Rev. Trib.).

100. However, the Tribunal, otherwise constituted, has also held that inadequate terms and conditions may allow a leave applicant to satisfy the section 41 leave test.

> **Reference Tab 41:** *2216122 Ontario Ltd. v. Ontario*, [2010] O.E.R.T.D. No. 14 at paras 89-90 (Ont. Env. Rev. Trib.).

101. The decision of Director Leus to issue the Permit to CRH was made subject to several terms and conditions. In the submission of the Applicants, the terms and conditions attached to the Permit are not adequate. They do not remove the potential for the instrument to cause significant environmental harm because: (1) there is no condition included in the Permit that would require the installation of an impermeable liner in the wash ponds to eliminate the substantial leaking of the ponds' contents into the groundwater system where it may have been causing periodic flooding and siltation of neighbouring domestic water wells for years; (2) the 10-year permit term to 2031 is far longer than recommended by Mr. Ruland, who would have limited the term to one-year during which more robust monitoring could determine the effectiveness of the conditions imposed in reducing the potential for further significant environmental harm and, consequently, whether the Permit term should be extended; and (3) the Permit is silent on its issuance being conditional on the performing of a study of the cumulative effects of the numerous proposed aggregate operations on the groundwater flow system of the upland and surrounding area.

> **Reference Tab 2:** Wilf Ruland, P.Geo., Review of an Application for a Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, April 23, 2018, page 51; **Reference Tab 3:** Letter dated January 27, 2020 from Wilf Ruland, P.Geo. to Judith Grant, FOTTSA Regarding Reply to CRH's Letter, pages 5-6; **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 4-6, 9, 15-16

102. Furthermore, there are concerns respecting the effectiveness of conditions that were imposed in the Permit in terms of their ability to ensure the identification,

evaluation, prevention, mitigation, or monitoring of the potential for significant environmental harm. For example, the various Permit provisions and sub-clauses of Conditions 1 (compliance with the Permit) and 2 (general conditions and interpretation) constitute 2 of the 6 substantive pages of the Permit. They essentially constitute "boilerplate" found in numerous PTTWs issued by the Ministry over the years. They have not been designed to address the site-specific circumstances of the Teedon Pit. Indeed, the reasons given by the Director for the imposition of these two general conditions are that they are included to ensure compliance and enforcement and clarify legal interpretation of the Permit. Accordingly, for the purposes of the leave test under the *EBR* as interpreted by the Tribunal, Conditions 1 and 2 *per se* do not obviate the risk of environmental harm, nor do they demonstrate that the Director's decision is reasonable.

> **Reference Tab 4:** CRH Canada Group Inc., PTTW 6258-BRDJ2M (January 14, 2021), Conditions 1, 2 (with reasons at page 6).

103. Condition 3.1 indicates that the Permit expires on January 31, 2031. In other words, it is a 10-year permit as requested by CRH. Condition 3.2 and Table A authorize the taking of over 6,600,000 litres per day for up to 210 days per year. The 6,600,000 litres is comprised of the 1,368,000 litres of top up water pumped from a well for the Source Pond and 5,230,000 litres of water pumped from the Source Pond for aggregate washing. Of this volume, approximately 1,368,000 litres constitute the maximum volume of groundwater that can be pumped per day to make up water losses from the Source Pond. Yet, according to GHD, the consultant for CRH, the expected maximum volume of daily loss of wash water from the system is approximately 523,728 litres (GHD, page 4). This constitutes a large discrepancy between the amount needed (523,728 L/day) and the amount granted (1,368,000 L/day). In the respectful submission of the Applicants, there is nothing "precautionary" about the issuance of a 10-year permit for about 260 per cent of the actual water needs of the Permit Holder, given the circumstances of this particular site and its past operations. The reports of the Applicants' consultant, Wilf Ruland, P.Geo., recommended a one-year permit as an alternative to allow site operations and monitoring to improve before determining whether a longer permit term was warranted given the history of this site's operations under past permits.

> **Reference Tab 4:** CRH Canada Group Inc., PTTW 6258-BRDJ2M (January 14, 2021), Conditions 3.1, 3.2 and Table A; **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 9-10.

104. In his detailed review of Condition 4, Wilf Ruland, P.Geo., outlined the extent to which monitoring and reporting requirements were inadequate and needed strengthening in the various sub-provisions of that condition.

> **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 10-14.

105. Conditions 5.1 and 5.2 of the Permit again constitute "boilerplate" language found in countless Ministry issued permits regarding notification and/or remediation of adverse

impacts attributable to the water taking. The Applicants submit these are reactive not preventive in nature, particularly because they are primarily aimed at CRH's obligations after negative impacts have occurred. Furthermore, Mr. Ruland noted the condition 5.2 requirement to replace any water supplies that were negatively impacted before initial PTTW issuance, would be ineffectual because of the failure of past Permit Holders for this site to have done any off-site testing of well water supplies before the commencement of water taking. In this latter regard, Mr. Ruland again recommended that all wash ponds at the site should be impermeably lined such that the aggregate washing operation truly becomes the "closed-loop" operation which was promised by the original Permit Holder.

> **Reference Tab 4:** CRH Canada Group Inc., PTTW 6258-BRDJ2M (January 14, 2021), Conditions 5.1, 5.2; **Reference Tab 6:** Wilf Ruland, P.Geo., Review of the MECP Approval of a 10-Year Permit to Take Water for Aggregate Washing at the Teedon Pit near Waverly, Ontario, Prepared on Behalf of FOTTSA (January 25, 2021), pages 14-15.

106. Condition 6 of the PTTW states that the Director may amend the Permit in future by suspending or reducing the amount of water the Permit Holder may take. The Applicants submit that this discretionary provision simply amounts to a re-statement of the Director's general authority under section 34.1(2)(9) of the *OWRA* and, therefore, adds nothing new, significant, or noteworthy to the Permit as issued.

> **Reference Tab 4:** CRH Canada Group Inc., PTTW 6258-BRDJ2M (January 14, 2021), Condition 6; **Tab 14:** *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, s. 34.1(2), (9).

107. Accordingly, the lack of adequate Permit conditions is a further indication that the decision appears to have the potential for causing significant environmental harm in the circumstances.

d. Summary

108. In summary, the Applicants submit that it appears that the decision of the Director could result in significant harm to the environment because: (1) existing conditions in combination with operations authorized by the Permit have the potential to risk potentially significant environmental harm; and (2) the conditions of the Permit are inadequate to rectify these problems.

IV. CONCLUSIONS

109. The Applicants submit that when all the evidence available at this stage is considered it appears that there is good reason to believe the decision of the Director to issue the Permit to CRH is unreasonable in failing to consider several key principles of the Ministry SEV (precautionary approach, environmental protection and rehabilitation, cumulative effects, sustainable development, and increased transparency, timely reporting, and enhanced engagement) as well as the common law rights of the public in the area. Consequently, the Director's decision appears unreasonable within the meaning of section 41(a) of the *EBR*.

110. The Applicants further submit that it appears that the decision of the Director could result in significant harm to the environment due to existing conditions in the area in conjunction with operations authorized by the Permit, and inadequate terms and conditions under the Permit. Consequently, it appears that the Director's decision could result in significant environmental harm within the meaning of section 41(b) of the *EBR*.

V. ORDER REQUESTED

111. Arising from the foregoing, the Applicants respectfully request an Order granting them leave to appeal the Director's decision to issue the Permit to CRH. The Applicants also request leave to appeal this decision in its entirety, including all general and special conditions contained in the Permit, so that they may seek an Order from the Tribunal on the appeal revoking the decision of the Director to issue the Permit.

112. The Applicants further submit that if leave is granted, the decision of the Director to issue the Permit should be subject to the automatic stay under section 42 of the *EBR*. In the event CRH brings a motion to have the stay lifted in whole or part, the Applicants respectfully request an opportunity to respond to such motion before the Tribunal makes a decision respecting the statutory stay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated: January 27, 2021

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Joseph F. Castrilli
Counsel for the Applicants

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Ramani Nadarajah
Counsel for the Applicants