Environmental Review Tribunal

Case No.: 12-003

Concerned Citizens Committee of Tyendinaga and Environs v. Director, Ministry of the Environment

In the matter of an application by the Concerned Citizens Committee of Tyendinaga and Environs, pursuant to section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended, for Leave to Appeal the decision of the Director, Ministry of the Environment, under section 20.3 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, to issue Amended Environmental Compliance Approval No. A371203, dated January 9, 2012, to Waste Management of Canada Corporation, for the use, operation and closure of the Richmond Landfill Site located at Lot Pt 1, 2, 3, Concession 4, Town of Greater Napanee, County of Lennox & Addington, Ontario; and

In the matter of a written Hearing.

Before: Bruce Pardy, Panel Chair
Helen Jackson, Member
Heather McLeod-Kilmurray, Member

Appearances:

Richard D. Lindgren	-	Counsel for the Applicant, Concerned Citizens Committee of Tyendinaga and Environs
Paul McCulloch and Kristi Cairns	-	Counsel for the Director, Ministry of the Environment
Harry Dahme and Jennifer Danahy	-	Counsel for the Instrument Holder, Waste Management of Canada Corporation

Dated this **30th** day of **March, 2012**.

Reasons for Decision

Background:

The Applicant, the Concerned Citizens Committee of Tyendinaga and Environs ("CCCTE"), pursuant to s. 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), seeks Leave to Appeal the decision of Ian Parrott, Director, Ministry of the Environment ("MOE"), under section 20.3 of the *Environmental Protection Act* ("*EPA"*), to issue Amended Environmental Compliance Approval number A371203 dated January 9, 2012 ("ECA"), to Waste Management of Canada Corporation ("WMCC") for the use, operation and closure of the Richmond Landfill Site (the "landfill"), located at Lot Pt 1, 2, 3, Concession 4, Town of Greater Napanee, County of Lennox & Addington, Ontario (*EBR* Registry Number 011-0671). The Applicant seeks Leave to Appeal seven of the conditions in the ECA: Condition 8.5 (Monitoring Programs); Condition 9.1 (Groundwater and Surface Water Impact Contingency Plan); Condition 9.2 (Leachate Collection System Contingency Plan); Condition 9.5 (Public Notification Plan for Contingency Plans); and Conditions 14.1, 14.2 and 14.3 (Monitoring Reporting and Annual Reporting) (see Appendix A for full wording of challenged conditions).

The landfill is located approximately 1 km north of Highway 401, northeast of the intersection of County Road 10 and Beechwood Road. This rural area does not have a municipal water system and inhabitants rely on groundwater for their drinking water. The area has thin surface soil and highly fractured bedrock, making local aquifers especially vulnerable to contamination. The landfill is located within the catchment area of Marysville Creek, the Creek itself being immediately north of the waste mound, and the Beechwood Road ditch, which is south of the landfill and acts as a drainage feature for the southern portion of the landfill and the agricultural lands to the east. The ditch discharges into the Creek several kilometres downstream of the site.

The landfill was opened in the 1950s by the Sutcliffe family, and later owned by various private companies. Until the early 1970s, the landfill was not licensed and served mainly local residents. In the 1970s, the MOE issued a series of Provisional Certificates of Approval (CofAs), which permitted the landfill to accept domestic, commercial and non-hazardous solid industrial waste from several local municipalities. In 1986, Sutcliffe Sanitation Services Ltd. applied to expand the landfill and to increase the service area to include all of Ontario, and in August 1987, the MOE issued Provisional CofA No. A371203. At the time, the site was expected to operate for a further 19 to 24 years. In

March 1988, this CofA was re-issued to Tricil Limited with modifications that allowed the acceptance of residential, industrial, commercial, institutional, construction and demolition waste from anywhere in Ontario.

In the mid-1990s, WMCC (formerly named Canadian Waste Services) assumed ownership and operation of the site, as well as other landfills in Ontario. In the late 1990s, WMCC proposed to expand the footprint, capacity and lifespan of the landfill, and submitted an environmental assessment ("EA") to that end in 2005. The MOE's review of the EA, released in June 2006, concluded that "[t]he entire region has been identified as being underlain by fractured limestone bedrock with minimal soil protection and having aquifers that are highly vulnerable to contamination," and "[i]t is reasonable to assume that [the unlined] cell is a potential source of groundwater contamination." The review recommended against the proposed expansion, and the Minister issued her decision to refuse the expansion on November 3, 2006.

The Applicant, various residents, local municipalities and the Mohawks of the Bay of Quinte ("MBQ") have for many years asked the MOE to ensure the proper closure of the landfill. On March 21, 2007, the MOE amended Condition 34 of Provisional CofA No. A371203 by requiring submission of an updated Closure Plan. WMCC submitted a Plan in June 2007, which was posted on the *EBR* Registry as No. 010-1381. The Applicant submitted comments September 14, 2007.

In July 2008, the MOE prepared its final response to the Closure Plan, asking WMCC to provide a detailed response. In November 2008, the Applicant, MBQ and Tyendinaga Township jointly filed an *EBR* Application for Review of the 20 year old Provisional CofA No. A371203, requesting site closure, comprehensive post-closure requirements, and appropriate groundwater/surface water monitoring. The MOE denied this application for review. The Environmental Commissioner of Ontario's 2008-09 Annual Report commented on this issue, and recommended the immediate closure of the landfill, stating that "the continued operation of the site poses an unjustified risk to the environment … The geology of the site is inherently unsuitable for waste disposal… Contamination of the groundwater appears to be inevitable…. The ECO is concerned that even a robust monitoring program will not reliably detect groundwater contamination and will not provide sufficient lead time to implement protective measures."

The Provisional CofA A371203 issued March 20, 1988 was based on an Environmental Monitoring Plan developed at that time. To update the plan, a hydrogeological site conceptual model ("SCM") was created prior to 2009 but the observed monitoring was not consistent with the SCM in the opinion of the Ministry's hydrogeologist Kyle

Stephenson. WMCC submitted a revised SCM to the Ministry in October 2009. A peer review of the SCM by the Ministry's independent environmental consultant concluded that additional research was required.

On May 1, 2009 an updated Closure Plan [Environmental Monitoring Plan] ("EMP") was placed on the *EBR* Registry as No. 010-1381 to obtain comments on over 100 proposed amendments to Provisional CofA No. A371203. The MOE accepted WMCC's further revised SCM of April 28, 2010, but required that an updated EMP be submitted by June 20, 2010 to deal with outstanding issues. The Director amended the Provisional CofA to prohibit the receipt of waste for disposal after June 30, 2011 and to require the five cells of the site to be capped with final cover by September 30, 2011. WMCC has since taken these steps, and the landfill no longer accepts waste for disposal. The ECA also set a deadline of June 30, 2010 for submitting to the Director for approval several reports required by conditions 8(b), 19, 84, 88 and 115. These were intended to supplement the Closure Plan and to cure identified deficiencies in the Plan.

On June 29, 2010, these reports were submitted. The Director placed a proposal on the *EBR* Registry as No. 011-0671 on July 21, 2010. The description of the instrument read as follows:

> This application is for an amendment to the existing Certificate of Approval (Waste Disposal Site) No. A371203, issued for the use and operation of a 16.2 hectare waste disposal site within a total site area of 138 hectares. The following items were submitted on June 30, 2010 to the Ministry to fullfil the requirements under the Certificate of Approval: 1) Environmental monitoring plan; 2) Financial Assurance update - includes contaminating life span calculation; 3) Operations and procedural manual; 4) Leachate collection system contingency plan; 5) Landfill gas collection system contingency plan; 6) Groundwater and surface water contingency plan; and 7) Design of low permeable surface and low permeable liner for the compost pad and pond. The daily receiving capacity and maximum storage capacity remains unchanged. The waste disposal site serves the Province of Ontario. ...

The initial 30-day comment period was extended to October 19, 2010. Among the comments submitted to the MOE by the Applicant was a technical report by the Applicant's hydrogeologist Wilf Ruland, who made 17 specific recommendations. In particular, he was concerned about the proposal to drop from the groundwater monitoring program certain wells which had shown "anomalous" water quality results.

The ECA, including the conditions which the Applicant seeks to appeal, was issued on January 9, 2012. Notice of the Director's decision to issue the ECA was posted on the Environmental Registry on January 16, 2012. The Applicant submitted its Application

for Leave to Appeal to the Environmental Review Tribunal (the "Tribunal") on January 30, 2012.

Standing to Seek Leave to Appeal:

Section 38(1) of the *EBR* states:

> 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.

The test for standing found in section 38 has four elements: (1) the applicant must be a resident of Ontario, (2) the decision appealed from must be a Class I or II instrument, (3) the applicant must have an "interest" in the decision, and (4) some other person must have a right to appeal under another statute (*Safety-Kleen Canada Inc. v. Ontario (Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 88 at para. 7 (Ont. Env. Rev. Trib.); *Protect Our Water and Environmental Resources Inc. v. Ontario (Ministry of the Environment)* (2009), 43 C.E.L.R. (3d) 180 at para. 11 (Ont. Env. Rev. Trib.); *Welch v. Ontario (Ministry of the Environment)* (2010), 55 C.E.L.R. (3d) 156 at para. 4 (Ont. Env. Rev. Trib.).

It was common ground amongst the parties that the Applicant has standing to seek Leave to Appeal. The Applicant is a not-for-profit corporation incorporated under the laws of Ontario whose membership consists of persons living in the vicinity of the landfill site, including some who rely upon domestic wells for drinking water, household and agricultural uses. Under section 87 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, a corporation is a person. Since 2010, the Applicant, through its members, officers, counsel and experts, has made a number of written submissions to the MOE with respect to the landfill. The Tribunal finds that the Applicant is a person resident in Ontario with an interest in the Director's decision within the meaning of section 38(1) of the *EBR*.

Under section 5(2) of O.Reg. 681/94 made under the *EBR*, the Director's decision to issue the ECA to WMCC was a decision to implement a Class II proposal, and as such required notice under section 22 of the *EBR.* Under section 139 of the *EPA*, had the Director refused to issue the ECA, WMCC would have had the right to appeal that

decision. Therefore, the requirements of section 38(1) are satisfied and the Applicant has standing to seek Leave to Appeal.

The Test for Granting Leave to Appeal:

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.

The nature of the section 41 test has been extensively articulated. In *Protect Our Water and Environmental Resources Inc. v. Ontario (Ministry of the Environment)* (2009), 43 C.E.L.R. (3d) 180, the Tribunal stated (at paras. 31-33):

> Through a series of recent cases, including *Grey (County) v. Ontario (Director, Ministry of the Environment)*, [2005] O.E.R.T.D. No. 43, 19 C.E.L.R. (3d) 176 (Ont. Env. Rev. Trib.) and *Dawber v. Ontario (Director, Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 (Ont. Env. Rev. Trib.), the Tribunal has clarified its approach on Leave to Appeal applications. In 2008, the Divisional Court endorsed this approach in *Lafarge v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191. This approach requires an applicant to lead sufficient evidence to satisfy the Tribunal that there is "a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process." The role of the Tribunal at this stage is not to decide the merits of the appeal, only to determine whether the "stringent threshold in s. 41 has been passed" (*Lafarge*, at para. 45).
>
> The threshold test for granting leave involves two elements: (1) that there appears to be good reason to believe that no reasonable person could have made the decision; and (2) that it appears that the decision could result in significant harm to the environment. The standard of proof required of the Applicants is less than a balance of probabilities. As the court noted in *Lafarge* at paras. 41-42, 45:
>
> > On its face, the *EBR* leave test is "stringent" ... Balanced against that is the stated intent of the *EBR* to enable the people of Ontario to participate in the making of environmentally significant decisions by the Government of Ontario. This, in turn, would support an interpretation of s. 41 that facilitates

> fostering access to justice in environmental matters and permitting appeals where the balance of the test in s. 41 has been met. ...
>
> We are of the view that the Tribunal was not only reasonable, but correct, in stating that the standard of proof was less than a balance of probabilities. At the leave to appeal stage, the standard of proof is an evidentiary one, i.e., leading sufficient evidence to establish a prima facie case, or showing that the appeal has "preliminary merit", or that a good arguable case has been made out, or that there is a serious issue to be tried. Although worded differently, all of these phrases point to a uniform standard which is less than the balance of probabilities, but amount to satisfying the Tribunal that there is a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process. This lesser standard is embodied in the words of s. 41, namely "appears" and "there is good reason to believe". It is not the function of the Tribunal member who is giving leave to determine the actual merits of the appeal; rather, the member must determine whether the stringent threshold in s. 41 has been passed.

The matter of evidence in Leave to Appeal applications has been discussed in a number of Tribunal cases following the *Lafarge* decision. In *Marshall v. Ontario (Director, Ministry of the Environment)* (2008), 38 C.E.L.R. (3d) 291, (Ont. Env. Rev. Trib.), the Tribunal stated (at para. 32):

> ... in some cases, it may be sufficient for an applicant to simply bring to the surface any apparent errors from the available documents, and if the respondents do not adequately refute them, then Leave to Appeal may be granted. In other cases, where possible errors or concerns are not so obvious, more may be needed from an applicant in order to satisfy the section 41 test. At one end of the spectrum, an applicant may uncover errors in the Director's decision based on documents that are already available or reveal that a Director failed to consider an applicable law or policy. At the other, an applicant may commission an expert to raise questions about the reasonableness of the scientific and technical basis of the decision. While the arguments and facts that may be needed to address the section 41 test will depend on the decision at issue, the one constant is that an applicant must satisfy the statutory test.

Issues:

1. The main issue before the Tribunal is whether the Applicant meets the two-part test for Leave to Appeal in section 41 of the *EBR*.
2. In the event that Leave to Appeal is granted, the secondary issue is whether the automatic stay under section 42 of the *EBR* should be lifted.

Issue 1: Leave to Appeal under Section 41 of the *EBR*

Grounds for Leave to Appeal:

The Applicant seeks Leave to Appeal seven of the conditions in the ECA: Condition 8.5 (Monitoring Programs); Condition 9.1 (Groundwater and Surface Water Impact Contingency Plan); Condition 9.2 (Leachate Collection System Contingency Plan); Condition 9.5 (Public Notification Plan for Contingency Plans); and Conditions 14.1, 14.2 and 14.3 (Monitoring Reporting and Annual Reporting) (see Appendix A for full wording of challenged conditions).

Under the first branch of section 41, the Tribunal's approach includes an inquiry into whether and to what extent the Director's decision "considered, incorporated and reflected relevant laws and policies." (*Dawber v. Ontario (Director, Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 (Ont. Env. Rev. Trib.), at para. 28) ("*Dawber*"). The Applicant submits that the Director's decision was one that no reasonable person could have made because it failed to adequately consider, incorporate or reflect relevant laws and policies, including the following:

(a) the Precautionary Approach in the MOE's Statement of Environmental Values (SEV);

(b) MOE Guideline B-7;

(c) Public Participation in the SEV;

(d) the purpose of the *EPA*;

(e) the requirements of section 11 of Regulation 347;

(f) the MOE's "Water Management Policies, Guidelines and Provincial Water Quality Objectives"; and

(g) the common law rights of neighbouring land owners.

Under the second branch of section 41, the Applicant submits that it appears the decision to issue the ECA could result in significant harm to the environment on the grounds that:

(a) conditions in the ECA relating to environmental monitoring, contingency plans, and reporting are so deficient that current and/or future impacts to surface water or groundwater may go undetected, unmitigated and unreported;

(b) conditions in the ECA, as drafted, are unlikely to achieve the environmental objectives they are intended to achieve, and consequently environmental harm could result; and

(c) the overall result of the ECA is to delay and postpone dealing with environmental hazards posed by the site rather than to prevent or mitigate its potential environmental effects.

First Branch of Section 41 – Reasonableness

The essence of the Applicant's argument under the first branch of the section 41 test is that the challenged conditions in the ECA are substantively deficient and procedurally flawed, in that they fail to reflect principles or requirements of relevant laws and policies, and therefore that the decision of the Director to issue the ECA was one that no reasonable person could have made because it failed to adequately consider, incorporate or reflect relevant laws and policies.

Grounds (a) and (b): The Precautionary Approach (SEV) and Guideline B-7

Discussion and Analysis:

It was common ground amongst the Parties that the MOE's SEV and MOE Guideline B-7 are laws or policies relevant to the Director's decision within the meaning of section 41(a). The Tribunal agrees. (See *Dawber; Lafarge v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.))

The SEV states in part:

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

In *Davidson v. Ontario (Director, Ministry of Environment)* (2006), 24 C.E.L.R. (3d) 165 ("*Davidson*") at para. 44, the Tribunal stated:

> A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be. The Director concludes that "there is no scientific evidence of impact or potential impact to the environment" rather than "scientific evidence has proven that there is no adverse environmental effect." The latter reflects a precautionary approach, but the former does not because the burden is not reversed.

MOE Guideline B-7 is entitled "Incorporation of the Reasonable Use Concept into MOEE Groundwater Management Activities" (April 1994). Its stated purpose is to "establis[h] procedures for determining what constitutes the reasonable use of groundwater on property adjacent to sources of contaminants and establishes limits on the discharge of contaminants from facilities, approved by the Ministry, that are used for the disposal of waste into the shallow subsurface." Section 4.1(c) states:

> Provision shall be made for alleviating unacceptable environmental impacts, to the extent possible … Unexpected events or failures shall be dealt with in a contingency plan. …

Section 4.1 reflects a precautionary approach. Its language is mandatory: provision "shall" be made to alleviate unacceptable environmental impacts, and unexpected events or failures "shall" be dealt with in a contingency plan.

The Applicant submits that the Director's decision is inconsistent with the precautionary approach and Guideline B-7 because it permits the continuing absence of an adequate Environmental Monitoring Plan (EMP), contingency plan and closure plan in the face of uncertainty about the nature of the groundwater flow system in the vicinity of the landfill and the landfill's effects upon it. The Applicant alleges a failure to develop adequate monitoring or closure plans over a six-year period, and suggests that the challenged conditions in the ECA extend open-ended delay despite the potential that the site is presently causing or will cause environmental harm. The Applicants argue that the Guideline's goal of "protecting 'reasonable uses' of groundwater" cannot be achieved without a contingency plan in place for ground and surface water (para. 103).

In response, the Director submits that the decision to issue the ECA, including the impugned conditions, was consistent with a precautionary approach and the Guideline. He acknowledges both the potential that the landfill may be causing environmental harm

and the evidential uncertainty that exists with respect to the hydrogeology at the site and the state of the landfill. Paragraph 63 of the Director's submissions states:

> … there is a potential threat of environmental harm as parts of the landfill were established prior to modern landfill standards being developed and, in particular, the first cell does not have any type of liner at all. There is also a degree of uncertainty due to the complex hydrogeology in the area.

The potential for environmental harm is confirmed in the affidavit of Kyle Stephenson, an MOE hydrogeologist who has been engaged since 2006 with reviewing hydrogeological information relating to the landfill site. Paragraph 32 of his affidavit states:

> Recent interpretation of groundwater flow and chemistry data by MOE indicates that there are apparent landfill-related groundwater impacts extending to the north of the waste fill area, but still within the landfill boundary, and to the south of the waste fill area which has reached the southern property boundary. It is my interpretation of the most recent data that leachate is potentially extending off-site to the south of the landfill property …

Nevertheless, the Director maintains that the MOE has taken appropriate measures to prevent harm. The Director states:

> [C]ondition 8.6 requires WMCC to operate the site to ensure compliance with the MOE's Guideline B-7 Reasonable Use Concept at monitoring points along the property line that have the potential to be impacted by leachate from the Site. Thus there is an explicit condition requiring compliance with the principle (sic) governing guideline (para. 96).
> …
> [W]here Guideline B-7 limits are exceeded at the property boundary, the Ministry typically takes action to require further assessment of these exceedances and if necessary, mitigation and remedial action can also be required (para. 48).

However the Director also admits in paragraph 109 that no contingency plan is in place in the event there is a failure to comply: "As the EMP has only been approved on an interim basis and must be revised following the additional investigations being carried out, the ground/surface water contingency plan similarly has not been accepted or approved by the Director at this time", although the Director states that once it is submitted it will be posted on the *EBR* Registry for public comment prior to approval. The only mention WMCC makes of Guideline B-7 is to state in paragraph 50 that conditions 14.1, 14.2 and 14.3 of the EMP "require … assessment of compliance with

MOE Guideline B-7 Reasonable Use Concept plus certain other specifically listed items."

Findings:

The Director's position is that the ECA is intended to provide monitoring on an interim basis, rather than constituting a final approval for the landfill's closure plan, and therefore that this application for Leave to Appeal is premature. According to the Director, if the monitoring provided for in the ECA "detects leachate impacts that exceed the Ministry guidelines, WMCC will be required to undertake further actions to address the problem in accordance with the process set out in its contingency plans" (para. 57). Essentially, the Director states that given the state of uncertainty surrounding the landfill, the appropriate approach at the present time is to further monitor and investigate the site. The Director's rationale for this approach is provided in paragraph 58, where the Director states:

> To date, there is no concrete evidence that the Richmond Landfill is out of compliance with any MOE guidelines or requirements. Potential exceedances have been recorded at the southern boundary of the landfill. WMCC disputes that these high contaminant levels are caused by the landfill. Further investigations are being carried out to resolve this issue.

But the Director also acknowledges that the EMP incorporated into condition 8.5 of the ECA is inadequate. Paragraph 51 of the Director's submissions states:

> The Director agrees with CCCTE that the EMP submitted in June 2010 and by extension, the ground and surface water contingency plan, is insufficient and based on inadequate technical information. Therefore, the Director has not accepted these plans on a permanent basis. Instead, the Director has required WMCC to carry out a significant amount of additional groundwater investigations to revise and update the plans accordingly.

Those conditions in the ECA do not provide details or requirements for when the investigations will be complete, or when the plans will be amended, submitted, reviewed or approved. The Applicant alleges that the monitoring provided for by the conditions is spotty and incomplete. The stance of the Director is that the uncertainty about the site is so substantial as to require open-ended monitoring. Yet WMCC maintains that the landfill site has been investigated for many years. Paragraph 8 of its submissions states in part:

> Condition 8.5 was included in the ECA against the backdrop of extensive historic and current investigations of the Site, and extensive review by MOE and third party reviewers. The Site is an existing landfill site where extensive investigations have been undertaken for a long time and where the hydrogeological model has been developed in an iterative way for a considerable period of time.

The Director acknowledges the potential that the landfill may be causing contamination of groundwater, and the MOE's own hydrogeologist confirms apparent groundwater impacts. The landfill poses environmental risk but there is scientific uncertainty about the extent of the harm and the degree of the risk. The purpose of the Director's decision to issue the ECA, including its conditions, is to monitor the site and collect additional information, in spite of the fact that the site has been extensively investigated for many years, and the potential harm being caused by the site is ongoing. The Director's rationale for this approach is that "there is no concrete evidence that the Richmond Landfill is out of compliance with any MOE guidelines or requirements". In effect, the approach described by the Director is to wait until the facts are certain, and then to take action if harm is established.

This rationale does not reflect a precautionary approach. The Director has identified potential harm, and has delayed preventative and remedial action until the harm is established. In the face of potential harm and evidential uncertainty, the rationale that no action will be taken until there is proof of harm is exactly the opposite of the precautionary approach. Where evidence indicates that the landfill may be causing contamination, a precautionary approach requires that the harm be presumed to be occurring unless and until there is concrete evidence that it is not. In situations where scientific uncertainty exists as to whether an activity is having an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could be.

The Director cites the Tribunal's decision in *McIntosh v. Ontario (Ministry of the Environment)* (2010), 50 C.E.L.R. (3d) 161 (Ont. Env. Rev. Trib.) for the proposition that the precautionary approach may be applied differently to existing and future activities. In *McIntosh*, the Tribunal stated (at para. 63):

> A precautionary approach applies when there is scientific uncertainty about the risk of environmental harm from an activity. In essence, the approach provides that scientific uncertainty about environmental harm from an existing activity should not prevent the adoption of measures to protect the environment. In a situation where there is significant uncertainty about the risk of a future activity, the Tribunal has held that a precautionary approach

> "presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of the risk."

The Director submits that this passage endorses the approach taken in this case, namely to provide for monitoring, and to take action in the event that monitoring provides proof of contamination. The Tribunal agrees that the precautionary approach should be applied differently to existing and future activities, but not in the manner the Director describes. Where a proposed future activity carries a risk of harm, a precautionary approach calls for caution in approving the activity by presuming the activity will cause the harm and withholding approval until evidence shows otherwise. Where an existing activity may be causing harm, the precautionary approach presumes the activity is causing the harm until evidence shows otherwise, and calls for prompt action to ensure that no further harm will occur.

The decision to issue the ECA does not reflect such an approach. The landfill is an existing activity that may be causing harm. The Director's own material acknowledges the risk and the uncertainty. In the face of this uncertainty, it is difficult to take at face value the Director's assertion that the approach taken "ensure(s) that the Richmond Landfill does not cause unacceptable environmental impacts" (para. 70). If uncertainty exists as the Director has described, then the Director is not in a position to state that the ECA ensures that the landfill does not cause environmental harm.

While the Applicant submits that the decision of the Director was unreasonable compared to the standards and principles reflected in relevant laws and policies, the Director's position is that the decision was reasonable compared to the approvals that applied to the site previously, and given the state of knowledge about the site. In paragraph 14 of his affidavit, the Director states:

> The EMP is an improvement over historic monitoring plans because it is based on a much improved Site Conceptual Model …. An iterative approach is necessary to gain understanding of the complex hydrogeological conditions … Monitoring wells are established and results can lead to the determination that further wells are required in certain locations.

These conflicting submissions raise the question of what the challenged decision is to be compared to, in assessing whether it appears that there is good reason to believe it to be a decision that no reasonable person could have made. The issuance of an ECA with particular terms and conditions is not necessarily a reasonable decision simply because the ECA is as good or better than the approvals that applied to the site previously. Where an Applicant seeks leave to appeal the conditions in a CofA that

establishes a new activity, the reasonableness of the Director's decision does not depend on whether the conditions are preferable and more reasonable than having no conditions at all. The relevant question is, given the nature of the approval sought, what conditions provide adequate and reasonable environmental protection, given the content of relevant laws and policies? Sometimes doing nothing may be an appropriate and reasonable choice. For example, when the Director has issued a CofA giving approval for air emissions and an applicant seeks leave to appeal that decision, it may be that the reasonableness of the decision to issue the CofA can be assessed relative to not issuing it, since without the approval, there would be no emissions.

In the above scenario, the issuance of the CofA is the decision that creates the source of potential environmental harm. However, the scenario in this application is different: the source of potential environmental harm already exists. Given that it exists, does it appear that there is good reason to believe that the decision to issue the ECA is a decision no reasonable person could have made, given the state of the landfill and the content of relevant laws and policies? In other words, it is appropriate to ask what course of action those laws and policies require, prescribe or suggest, and whether and to what extent the decision "considered, incorporated and reflected" those laws and policies (*Dawber*, para. 28). If there is a comparison to be performed, it is between the Director's decision and the alternative decisions that were open to the Director under relevant laws and policies. That the decision taken might be preferable to approvals that existed previously does not establish the reasonableness of the decision.

In the face of scientific uncertainty, the application of the precautionary approach calls upon the Director to consider the landfill to be as hazardous as it could possibly be, and to place the onus of establishing the absence of environmental harm upon the source of the risk. Instead, the ECA provides for further study, without deadline or urgency, postponing preventative and remedial action until such time as monitoring establishes concrete proof of harm. Such an approach is not consistent with the precautionary principle. Furthermore, the lack of an adequate contingency plan in the EMP is contrary to section 4.1 of the Guideline.

The Director asserts that the Ministry has assumed a worst-case scenario and has therefore required WMCC to supply neighbouring residents with an alternate supply of water (para 65). The Tribunal finds that provision of alternative sources of drinking water, while appropriate, does not mitigate environmental harm. It may alleviate the effects of ecosystem impacts upon local residents, but it does not remedy the occurrence or severity of those impacts upon ecosystems.

Therefore, it appears that there is good reason to believe that the decision to issue the ECA was a decision no reasonable person could have made, having regard for the precautionary approach in the MOE SEV and MOE Guideline B-7. The Tribunal finds that Grounds (a) and (b) meet the first branch of the section 41 test for leave to appeal.

Grounds (c) – (f): Public Participation (MOE SEV); The purpose of the *EPA*; Section 11 of Regulation 347; the MOE's "Water Management Policies, Guidelines and Provincial Water Quality Objectives"; and the common law rights of neighbouring land owners

Having concluded that it appears there is good reason to believe that the Director's decision to issue the ECA with its impugned conditions was a decision no reasonable person could have made, having regard to the precautionary approach in the MOE SEV and MOE Guideline B-7, the Tribunal finds it unnecessary to consider the remaining grounds under the first branch of the section 41 test. However, the Tribunal notes that the Director's affidavit does not refer to section 11 of O. Reg. 347, the purpose of the *EPA*, or the common law rights of local residents. Instead, he simply states in paragraph 20:

> In approving WMCC's submissions with the terms and conditions that I imposed, I considered all relevant laws and policies. It is my opinion that the issuance of the approval is consistent with the protection and conservation of the natural environment.

The Tribunal observes that this kind of blanket assertion does not assist it to determine whether and to what extent the Director considered, incorporated or reflected relevant laws and policies in his decision.

Second Branch of Section 41 – Significant Harm to the Environment

Discussion and Analysis:

The Applicant asserts that the landfill, in its present state, could produce significant harm to the environment. While the Applicant refers to a "substantial and relevant information base" (*Friends of the Jock River v. Ontario (Director, Ministry of the Environment)* (2002), 44 C.E.L.R. (N.S.) 69 (Ont. Env. Rev. Trib.) at para. 3) to establish the reality of this risk, the Director's own materials contain sufficient evidence to confirm it. The Director's submissions acknowledge that a large closed landfill has the potential to pose significant environmental risk (para. 125), and state in paragraph 63:

> … there is a potential threat of environmental harm as parts of the landfill were established prior to modern landfill standards being developed and, in particular, the first cell does not have any type of liner at all. There is also a degree of uncertainty due to the complex hydrogeology in the area.

As canvassed under the first branch of the section 41 test above, the potential for environmental harm is described in the affidavit of Kyle Stephenson, the MOE hydrogeologist. Paragraph 32 of his affidavit states:

> Recent interpretation of groundwater flow and chemistry data by MOE indicates that there are apparent landfill-related groundwater impacts extending to the north of the waste fill area, but still within the landfill boundary, and to the south of the waste fill area which has reached the southern property boundary. It is my interpretation of the most recent data that leachate is potentially extending off-site to the south of the landfill property …

Findings:

The Tribunal finds that the landfill either is currently producing or could in the future produce significant harm to the environment. However, the issue under the second branch of the section 41 test is not whether the landfill could produce significant harm to the environment, but whether it appears that the Director's decision could produce significant harm. The Applicant submits that a decision to issue a prescribed instrument containing inadequate terms and conditions with respect to an existing facility that may be causing significant environmental harm is a decision that itself poses risk of significant environmental harm. Section 41, the Applicant maintains, makes no distinction between instruments aimed at existing conditions that pose environmental risks and those aimed at future activities that may pose environmental risks. In contrast, the significance of that distinction is emphasized by both the Director and WMCC. WMCC's submissions state at paragraph 5:

> The Conditions which are the subject of the Application for Leave to Appeal relate to the Environmental Management Plan which has not yet been finalized, and which will only be finalized upon completion of further investigations. The results of the required investigations to be conducted will determine whether further investigations will need to be undertaken, and whether there is sufficient information to finalize the EMP. This is not a case where a proponent is seeking approval to commence an activity that carries the risk of environmental harm. On the contrary, the decision at issue here cannot result in significant harm to the environment. It can only reduce the risk of harm to the environment.

Similarly, the Director argues that the conditions in the ECA represent an improvement from the conditions that previously applied to the site. The Director's submissions (paras. 76 and 99) state:

> … not incorporating the EMP into the ECA on an interim basis would result in WMCC following an even older and more out of date monitoring plan. …the EMP that WMCC had been following had not been updated since 1988. … The proposed new EMP, despite its shortcomings, still represented a significant improvement over the 1988 plan.

In effect, the proposition argued by WMCC and the Director is that, where an existing activity poses environmental risk, any decision of the Director to impose conditions on that activity must necessarily improve the situation, since in the absence of the decision, the situation would remain as it was. Therefore, the argument goes, a decision to impose new conditions cannot by definition pose a risk of environmental harm, and therefore cannot be subject to the second branch of the section 41 test.

The Tribunal disagrees. Whether a decision poses risk of environmental harm is not determined by comparing the effect of the decision with the effect of taking no action at all. That interpretation would effectively exclude from review under the *EBR* any Director's decision with respect to any established facility or site that contains new requirements or conditions. That result would be contrary to the *EBR*'s purposes, as reflected in section 2(3) of the statute, of providing the means by which residents of Ontario may participate in the making of environmentally significant decisions and increased accountability for government decision-making. Instead, the proper comparison is between the effect of the decision actually taken and the effect of alternative decisions available to the Director under relevant laws and policies. The issuance of an ECA could be said to pose a risk of environmental harm if relevant laws and policies require, prescribe or suggest more stringent conditions or more urgent preventative or remedial action than the ECA provides.

In this respect, on the facts of this case, the resolution of the second branch of the section 41 test is closely linked to the outcome of the first branch. Where there is an established risk of significant environmental harm from an existing facility, and the Director's decision meets the first branch of the section 41 test because it does not reflect a precautionary approach, it is likely that the second branch of the section 41 test will also be satisfied. Under the first branch, the Tribunal concluded that issuance of the ECA was inconsistent with a precautionary approach because it provides for further study, without deadline or urgency, pursuant to an inadequate EMP, postponing preventative and remedial action until such time as monitoring establishes concrete

proof of harm. Therefore, under the second branch of the section 41 leave test, it is appropriate to ask whether the challenged decision could result in significant harm to the environment when compared to other possible decisions providing for more stringent or urgent action. Put another way, given that the present condition of the landfill poses a risk of significant environmental harm, the proper query is whether the challenged decision of the Director appears to prevent the occurrence of that harm, when compared to the preventative or remedial effects of alternative courses of action.

The Tribunal finds that it appears that the decision to issue the ECA could result in significant harm to the environment within the meaning of the second branch of the section 41 test.

Issue 2: Lifting the Automatic Stay under Section 42 of the *EBR*

Section 42(1) of the *EBR* states:

> The granting of leave under section 41 to appeal a decision stays the operation of the decision until the disposition of the appeal, unless the appellate body that granted the leave orders otherwise.

The Applicant requests that in the event Leave to Appeal is granted, the automatic stay provided for in section 42(1) be lifted pending the appeal. Neither the Director nor WMCC objects to this request. Indeed, their submissions and materials are directed at establishing the appropriateness of the ECA, including the impugned conditions, and argue that having the ECA in place is preferable to not having it. Therefore, the Tribunal orders that the automatic stay be lifted until the appeal is disposed of, or until the Tribunal orders otherwise.

Decision

The Tribunal finds that it appears there is good reason to believe that no reasonable person, having regard to relevant law and government policies, could have made the decision to issue the ECA to Waste Management of Canada Corporation, and that it appears that the decision in respect of which an Appeal is sought could result in significant harm to the environment, within the meaning of section 41 of the *EBR*. Pursuant to section 41 of the *EBR* and Rule 60 of the Tribunal's Rules of Practice, the Tribunal grants Leave to Appeal the following conditions in Amended Environmental Compliance Approval No. A371203: Condition 8.5 (Monitoring Programs); Condition 9.1

(Groundwater and Surface Water Impact Contingency Plan); Condition 9.2 (Leachate Collection System Contingency Plan); Condition 9.5 (Public Notification Plan for Contingency Plans); and Conditions 14.1, 14.2 and 14.3 (Monitoring Reporting and Annual Reporting). The scope of the appeal shall not be limited to the grounds on which Leave to Appeal has been granted.

Within 15 days of the release of this Decision, the Applicant, if it wishes to appeal the Director's decision, must serve on the Tribunal, the Director, Waste Management of Canada Corporation, and the Environmental Commissioner, a Notice requiring a Hearing, setting out the grounds for appeal on which it intends to rely.

The automatic stay under section 42(1) of the *EBR* is lifted until the Tribunal issues its decision on the appeal or until the Tribunal orders otherwise.

Application for Leave to Appeal Granted
Stay Lifted

Bruce Pardy, Panel Chair

Helen Jackson, Member

Heather McLeod-Kilmurray, Member

Appendix A – Challenged Conditions of Amended ECA
Appendix B – Relevant Legislation

Appendix A

Challenged Conditions of Amended ECA

(i) **Condition 8.5(a)** – Monitoring programs shall be carried out for groundwater, surface water and landfill gas on an interim basis in accordance with Item 45 Schedule "A" until the report required by Condition 8.5(b) has been approved by the *Director.*

(ii) **Condition 8.5(b)** – The *Owner* of the *Site* must provide an addendum report to the report entitled "*Environmental Monitoring Plan – WM Richmond Landfill Site*" prepared by WESA Inc dated June 29, 2010 to the *Director* for approval, with copies to the *District Manager*, that addresses additional information required as indicated in Item 48 Schedule "A". The report shall be submitted within sixty (60) days upon the Ministry's Eastern Region Technical Support Section acceptance of the findings of a technical report to be prepared by the *Owner* that details the findings of the groundwater investigation. Pending final approval of the *EMP* and the addendum by the *Director,* the *Owner* shall implement the amended *EMP* upon approval by the *Director.*

(iii) **Condition 9.1** – In conjunction with the report required by Condition No. 8.5(b), the *Owner* shall submit for approval to the *Director* an addendum report that provides an update to the memorandum entitled "*Groundwater and Surface Water Impact Contingency Plan*" prepared by WESA Inc. dated June 29, 2010 that incorporates the additional information collected from the groundwater investigations to be conducted as detailed in Items 47 and 50 of Schedule "A". The addendum report for the Groundwater and Surface Water Impact Contingency Plan will include but not be limited to the following:

   i. Trigger mechanisms associated with the groundwater and surface water monitoring programs. These mechanisms, based on water quality monitoring data, will identify when additional measures are required to be implemented in order to ensure on-going compliance with water quality criteria;
   ii. Quantifiable timelines for each step of the impact contingency plans; and
   iii. A plan to deal with any off site groundwater and surface impacts that can be attributed to landfill operations over the long term including during landfill operation and during post-closure.

(iv) **Condition 9.2**

   i. The *Owner* shall initiate the Leachate Collection System Contingency Plan at a minimum when the trigger mechanisms identified in Items 41, 47 and 48 of Schedule "A" have been identified as occurring.
   ii. The conceptual Leachate Collection System Contingency Plans as identified in Item Nos. 41, 47 and 48 in Schedule "A" are considered

acceptable. In the event the *Owner* needs to implement the Contingency Plan, the *Owner* shall submit to the *Director* for approval prior to implementation, with copies to the *District Manager*, detailed design drawings for works or any remedial system required for the contingency plan.

(v) **Condition 9.5** – Within 12 months of issuance of this notice, the *Owner* shall submit to the *Director*, for approval, with copies to the *District Manager*, a public notification plan that shall address the steps to be taken to notify the adjacent property owners, the *PLC*, the Town of Greater Napanee, Township of Deseronto, Tyendinaga Township and the Mohawks of the Bay of Quinte that the *Owner* will be initiating contingency plans as approved by this *ECA.*

(vi) **Conditions 14.1 to 14.3** –

14.1 – By **January 15** and **July 15** of each year, the *Owner* shall submit semi-annual monitoring reports to the *District Office* and post the reports on a publicly accessible website. These semi annual reports shall include:

i. The results and an interpretive analysis of the results from the leachate, groundwater, surface water, and landfill gas monitoring programs approved by this *ECA*, including an assessment of the need to amend the monitoring programs;
ii. An assessment with regards to the compliance of the groundwater quality at the property boundary and compliance points with regards to Guideline B-7 Reasonable Use Concept;
iii. A report on the status of all monitoring wells and a statement as to compliance with Ontario Regulation 903; and
iv. The second semi-annual report will include an Annual Summary section which describes the results from the current calendar year and any data quality changes identified from previous years, or through the current year.

14.2 – A written report on the development, operation, and closure of the Site shall be completed annually (the "Annual Report"). The Annual Report shall be submitted to the *Regional Director*, the *District Manager*, the *PLC*, the Town of Greater Napanee, Township of Deseronto, Tyendinaga Township and the Mohawks of the Bay of Quinte, by **March 31st** of each year and shall cover the year ending the preceding December 31st.

14.3 – The Annual Report shall include the following:

i. an assessment of the operation and performance of all engineered facilities, the need to amend the design or operation of the *Site*, and the adequacy of and need to implement the contingency plans;
ii. an assessment of the efficiency of the leachate collection system;
iii. *site* plans showing the existing contours of the *Site*;
iv. areas of landfilling operation during the reporting period;

v. areas of intended operation during the next period;
vi. areas of excavation during the reporting period;
vii. the progress of final cover, vegetative cover, and any intermediate cover application;
viii. previously existing *Site* facilities;
ix. facilities installed during the reporting period;
x. *Site* preparations and facilities planned for installation during the next reporting period;
xi. calculations of the volume of waste, daily and intermediate cover, and final cover deposited or placed at the *Site* during the reporting period and a calculation of the total volume of *Site* capacity used during the reporting period;
xii. a summary of the quantity of any leachate or pre-treated leachate removed from the *Site* during each operating week;
xiii. a summary of the weekly, maximum daily and total annual quantity (tonnes) of waste received at the *Site*.
xiv. a summary of any complaints received and the responses made;
xv. a discussion of any operational problems encountered at the *Site* and corrective action taken;
xvi. a summary of the amount of wastes refused for disposal at the *Site*, the reasons for refusal and the carrier who brought the waste to the *Site*;
xvii. a summary of the leachate collection system cleaning and inspection activities;
xviii. an update summary of the amount of financial assistance which has been provided to the *Director;*
xix. any other information with respect to the site which the *District Manager* or *Regional Director*, may require from time to time;
xx. a statement of compliance with all conditions of this *ECA* and other relevant *Ministry* groundwater and surface water requirements;
xx. (sic) a confirmation of the *Site* inspection program as required by this *ECA* has been complied with by the *Owner*;
xx. (sic) Any changes in operations, equipment or procedures employed at the *Site*; and
xx. (sic) Recommendations regarding any proposed changes in operations of the *Site.*

Appendix B

Relevant Legislation

Environmental Bill of Rights, 1993, S.O. 1993, c. 28:

> 38. 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.
>
> 41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
>
> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.
>
> 42. (1) The granting of leave under section 41 to appeal a decision stays the operation of the decision until the disposition of the appeal, unless the appellate body that granted the leave orders otherwise.

Environmental Protection Act, R.S.O. 1990, c. E.19:

> 3. (1) The purpose of this Act is to provide for the protection and conservation of the natural environment.
>
> 20.3. (1) After consideration of an application for approval under section 20.2 in respect of one or more activities, the Director may,
>
> (a) issue or refuse to issue an environmental compliance approval in respect of one or more of the activities;
>
> (b) if the Director issues an environmental compliance approval,
>
> (i) impose terms and conditions in the approval, and
>
> (ii) incorporate any environmental compliance approvals that are in effect into the new approval and revoke the approvals that have been incorporated;

(c) amend an environmental compliance approval that is in effect and impose, alter or revoke terms and conditions or expand the scope of the approval to other activities or sites;

(d) revoke an environmental compliance approval in whole or in part, with or without issuing a new approval; and

(e) suspend an environmental compliance approval in whole or in part.