Case No: 03-053

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 of the *Ontario Water Resources Act*, R.S.O. 1990, C.O. 40;

AND IN THE MATTER OF an application by Friends of Rural Communities and the Environment, 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, pursuant to section 34 of the *Ontario Water Resources Act*, to issue Permit to Take Water 8461-7CFLG5, dated July 8, 2008, to St. Marys Cement Inc. (Canada) authorizing pumping tests at bedrock well TW14 located at Lot 3, Concession 11, East Flamborough, Hamilton, with EBR Registry Number: IA06E1293;

AND IN THE MATTER OF the Environmental Review Tribunal requesting that submissions be made by the parties with respect to the issue of whether the Environmental Review Tribunal has jurisdiction to consider the application above-described.

REPLY SUBMISSIONS OF FRIENDS OF RURAL COMMUNITIES AND THE ENVIRONMENT TO THE SUBMISSIONS OF THE DIRECTOR, MINISTRY OF THE ENVIRONMENT AND ST. MARYS CEMENT ON THE ISSUE OF THE TRIBUNAL'S JURISDICTION

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I - INTRODUCTION

1. Pursuant to the request of the Environmental Review Tribunal (the "Tribunal") we propose herein to reply to the submissions made both by the Director, Ministry of the Environment (the "Director") and St. Marys Cement ("St. Marys") on the jurisdiction of the Tribunal to hear the application of Friends of Rural Communities and the Environment ("FORCE") for leave to appeal the decision of the Director to issue Permit to Take Water 8461-7CFLGS (the "PTTW") to St. Marys.

Preliminary Matter Raised by St. Marys

2. In paragraphs 3 and 4 of the St. Marys' submission, counsel for St. Marys takes issue with the filing by FORCE of its Supplementary Application and reference made thereto in the submissions made by FORCE concerning the jurisdiction of the Tribunal to hear this application for leave to appeal.

3. On July 18, 2008, (the day after it received instructions) counsel for FORCE served a Notice that it intended to seek leave to appeal the PTTW and an interim stay of the PTTW pending the Tribunal's decision on the leave to appeal application. Notice was served on July 18, 2008 because FORCE had been informed that St. Marys intended to conduct the first phase of its water taking pursuant to the PTTW on July 21, 2008. FORCE wanted to inform St. Marys of its intentions hoping that St. Marys would respect the leave to appeal provisions contained in the Environmental Bill of Rights ("EBR") and postpone the first phase of its water taking until the Tribunal determined the leave to appeal application.

4. The EBR provides 15 days from the date of posting of the decision within which time application for leave to appeal can be made. The decision to issue the PTTW was posted on July 8, 2008. In order to preserve its right to seek leave to appeal the PTTW, FORCE served and filed its Supplementary Application on July 22, 2008 (one day before the 15 day appeal period expired) which contained the technical, factual and legal argument which FORCE submitted gave the Tribunal reason to grant it leave to appeal the PTTW.

5. There was nothing sinister nor improper in the filing of the Supplementary Application. It was necessary, within the 15 day window, to preserve FORCE's right to proceed.

6. The references made to the Supplementary Application in the submissions of FORCE with respect to the Tribunal's jurisdiction served and filed on July 25, 2008 were made for ease of reference and expediency. These references could have been made without using the Supplementary Application. Since the material had already been filed it was felt, as indicated above, expedient to make those references in the way in which counsel did.

7. Once again, nothing sinister, nor improper was intended by proceeding in this way.

II - SIGNIFICANCE OF THE POSTING OF THE PTTW

8. The Ministry of the Environment ("MOE") posted on the registry of the EBR the proposal to issue the PTTW several times. Other than the posting of May 7, 2008, those postings indicated that they were being made for a proposal for a Class I instrument under section 22 of the EBR. Both the Director and St. Marys indicate in their submissions that posting the PTTW in this way more than once were "administrative oversights".

Reference: Director's Submissions, para. 43;
St. Marys' Submissions, para. 4(a).

9. With respect to the submissions, this is the first indication anyone has given to FORCE that the way in which the PTTW was posted was an administrative oversight. The Director, in the July 8, 2008 posting, indicated that the instrument was "no longer" a Class I instrument. It is submitted by FORCE that the reference to "no longer" suggests that up until that posting (and maybe including it) the Director considered the PTTW to be a Class I instrument which was posted for that reason.

10. St. Marys adds that there have been numerous instances when the MOE and St. Marys informed the stakeholders that the proposal was not a Class I instrument.

Reference: St. Marys Submissions, para. 5(b).

11. It is interesting to note that the Director makes no such assertion. The slide deck of the presentation made by the Director at the public meeting of April 16, 2008 provides no indication

that the proposal was not a Class I instrument. Members of FORCE attended that meeting. They advise that no one suggested at the meeting or at any other time that the PTTW was not a Class I instrument.

Reference: MOE Slide Deck, attached.

12. FORCE submits that the EBR postings of the PTTW particularly that of July 8, 2008 indicate that the Director treated the PTTW as a Class I instrument from the outset.

III - IS THE PTTW A CLASS I INSTRUMENT

The Greenspace Decision

13. Counsel for the Director argues at length that the PTTW is not a Class I instrument and that there is nothing the Director can do to raise an instrument that is not classified so that it becomes a Class I instrument.

Reference: Director's Submissions, paras. 21-34, 35-45.

14. As indicated above, FORCE believes that the tangible evidence indicates that the Director treated the PTTW as a Class I instrument. In any event, FORCE submits that it is the nature of the proposal that determines whether a proposal is a Class I instrument. FORCE has regard to the Tribunal's decision in the case cited below. As a result, whether there is a statutory "bump up" mechanism is not relevant.

15. The Tribunal has found that, "It is the nature of the proposal that determines whether a proposal is a Class I instrument..." The Tribunal held in the case of the *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment* the following:

> Consideration of all these matters requires a realistic assessment of the duration of the water taking based on the purpose for which the water taking is requested. Hence, under the *OWRA* and the *Water Taking Regulation,* the Director has the authority and, indeed, the obligation to determine the nature and extent of a proposed water taking, independent of the time period stipulated in the application as the term for the permit. In other words, the Director is required to determine whether the proposal would require authorization to take water for a time period different than the duration of the permit requested by an applicant.

> In summary, the Tribunal finds that it is the nature of the proposal that determines whether a proposal is a Class I proposal under paragraph 1 of section 3 of the *Classification Regulation* The duration specified in the application as the term for the permit, in and of itself, is not conclusive of whether the proposal "would authorize the taking of water over a period of one year or more". This must be determined through realistic assessment of the undertaking giving rise to the application for the permit, based on the criteria set forth in the *Water Taking Regulation*.
>
> **Reference:** Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment, p. 11.

16. FORCE submits that the nature of the proposal and a realistic assessment of the duration of the water taking based on the purpose for which the water taking is requested, in this case, suggests that the PTTW is a Class I instrument.

The Nature of the Proposal

17. The application for the PTTW envisages three series of pumping tests each lasting for a period of days. In addition, a valuation of the Groundwater Recirculation System ("GRS") will be undertaken. Three wells were to be installed to create the necessary draw down of about 30 metres. A variety of discharge considerations were to be tested. The MOE was to review data and circulate that data to the agencies which have been consulted all along in this process for their comments. The second and third stages of the water taking are only to proceed after the MOE has received and reviewed the data from the previous test considered the comments of the other agencies and approved it. It is intended that the pumping wells are to simulate the effects of quarry dewatering under gravity drainage.

18. It took 18 months for the Director to issue the PTTW from the time the application was made. The PTTW now contemplates two reviews before phase 2 and phase 3 of the water taking can proceed. Those reviews will evaluate the success of the GRS. Those reviews will also evaluate the raw data gleaned from phase 1 of the water taking as well as the reports submitted by St. Marys. In addition, there will be third party independent consultants involved and reviews and comments by the same agencies consulted throughout on whether the PTTW should be issued. FORCE submits it is not unreasonable to suggest that the length of time it will take for those decisions to be made may be as long as the 18 months just mentioned.

19. FORCE submits that on the basis of this information alone, the nature of the proposal indicates that the PTTW may easily apply for more than one year and, therefore, be a Class I instrument.

The First Phase of Water Taking

20. In paragraphs 5 (e) and (g) of the St. Marys' submissions, counsel for St. Marys indicates that the first phase of the water taking approved by the PTTW began on July 21, 2008, as St. Marys indicated that it would (despite the Notice issued by FORCE). She suggests that the program was completed without difficulty and on schedule.

Reference: St. Marys' Submissions, paras. 5(e) and (g).

21. Of note, the Director makes no such assertion as to the "success" of the water taking.

22. The water taking was observed by the President of FORCE, their hydrogeological consultant and others including representations of the MOE. Information from those parties suggests that the phase 1 water taking was not completed without difficulty nor completely on schedule. More than 40 mm of rain fell on July 20th interfering with the baseline data which was to be collected before the pumping test was to begin. The aquifer became saturated making irrelevant the data which St. Marys had collected prior to that date. The one well (not three as planned) which was pumped was only able to sustain a pumping rate of 10 litres per second; much lower than the 50 litres per second for which approval was granted by the PTTW. The water pumped was less than 1 million litres per day; far less than the 4.5 million litres per day for which approval was granted and much much less than the 12.7 million litres per day for which approval was originally sought. St. Marys sought and obtained approval to extend the testing period pursuant to the PTTW. As a result, the aquifer was not stressed and the impact of the pumping on the aquifer was not representative. The rain continued to fall which made other results obtained through the testing, unreliable. Levels in several monitoring wells went up during the testing. There were other issues which certain hydrogeologists who observed the pumping felt made the test unrepresentative.

23. It may be necessary, therefore, to redo phase 1 of the water taking. That will not be known until the data is reviewed, the agencies consulted and a decision is made by the MOE.

24. Paragraph 5(e) of the St. Marys' submissions suggests that the timelines for completion of the full water taking approved by the PTTW will be tight to squeeze into one year.

25. FORCE submits that the results of the first phase of the water taking approved by the PTTW makes it even more likely, when realistically assessing the duration of water taking based on the purpose for which the water taking is requested, that it will take more than one year. The PTTW is a Class I instrument.

The Groundwater Recirculation System (the "GRS")

26. FORCE maintains, despite the position of the Director, that one of the purposes of the PTTW is to evaluate the effectiveness of the GRS, a complex, novel, unproven mitigation system. On its face when considering the nature of this part of the proposal, it is not difficult to envisage a lengthy evaluation period from the MOE and the agencies it consults on this project.

27. In paragraph 29 of its submissions, counsel for the Director notes that in paragraph 48 of its submissions FORCE indicates that "the water taking activities for which approval was sought and granted are complex and novel. Importantly, the purpose of these water taking activities is to test the theoretical, unproven, dewatering mitigation system". The Director submits that the GRS is not novel.

28. In paragraph 5 of his affidavit, the Director notes three other instances where a GRS is used as mitigation. He lists those three circumstances but does not elaborate.

Reference: Affidavit of Carl Slater, Director's Submissions, Tab 6, para. 5.

29. As has been submitted previously, Gartner Lee, consultants for St. Marys, indicated that GRS pilot scale tests were necessary to determine the ability of the mitigation system to control groundwater levels.

Reference: Supplementary Application of FORCE, para. 26.

30. Gartner Lee felt that the testing was necessary because the effectiveness of the GRS had only been determined through the application of a computer model.

Reference: Supplementary Application of FORCE, para. 24.

31. In its letter response of May 22, 2008 to the Hydrogeological Work Plan of Gartner Lee the Combined Aggregate Review Team ("CART") describes the GRS as follows: "[t]he GRS as proposed is still unproven technology without any precedent example, particularly in the Canadian climate".

Reference: Letter of May 22, 2008 from CART to Gartner Lee, p. 5, attached.

32. In his affidavit, the Director does not suggest that the GRS used in Milton or Kirkland or St. Lucie, Florida were successful or had any application to the present case. FORCE submits that if that were the case, the Director would have asserted it. Instead, he suggests that the GRS must be assessed on a case by case basis through an evaluation of a local site condition.

Reference: Affidavit of Carl Slater, Op. Cit.

33. FORCE maintains that the GRS is a theoretical, unproven mitigation system, as it relates to the PTTW. An assessment of its effectiveness may, therefore, be difficult and controversial.

Approvals to Continue with Phases 2 and 3 of the Pumping Tests

34. In paragraph 28 of the Director's submissions, he maintains that only the Director will provide approvals for phases 2 and 3 of the pumping test.

35. In the Gartner Lee letter to the MOE, applying for the PTTW, Gartner Lee indicates that "the construction of the GRS would require a site alteration permit obtained from the City of Hamilton". That is an approval required for the PTTW to progress which will add time to the process. Contrary to the assertion of the Director in his submissions, therefore, the City of Hamilton (through CART) will have an approval function in the PTTW. In addition, Conservation Halton has indicated that since the GRS involves the creation of a trench and open bore holes as well as a temporary discharge structure in the wet land, the works will require approval from Conservation Halton as a result of the works' proxsimity to the regulation limit. These "approvals" in addition to the approval granted by the MOE for the water taking approved by the PTTW to go forward will add to the time to which the PTTW is applicable.

Reference: Director's Submissions, Tab 7, Exhibit 2;
Letter Report to Conservation Halton to CART dated April 29, 2008, para. 3, attached.

36. FORCE submits again, when considering the nature of the proposal it is a Class I instrument.

De Minimis Non Curat Lex

37. The law is not concerned with trivialities. The Director purports to change a Class I instrument from an unclassified instrument by approving it to apply for 8 days less than a year. FORCE submits that when considering the nature of the proposal as suggested in the Greenspace case and when making a realistic assessment of the duration of the water taking based on the purpose for which the water taking is requested those 8 days do not change the proposal. It is a Class I instrument.

The Interim Stay

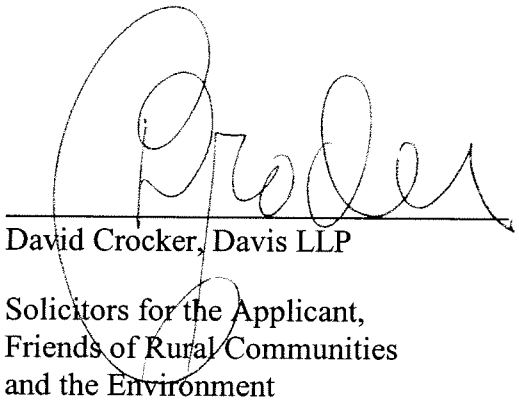
38. The interim stay of proceedings may no longer have any application in light of the fact that St. Marys has completed the first phase of the water taking approved by the PTTW.

IV - CONCLUSION

39. FORCE submits, therefore, that for all of the reasons submitted above the PTTW is a Class I instrument. The Tribunal should accept jurisdiction and consider the application of FORCE to seek leave to appeal it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 1, 2008



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