

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.

**SUBMISSIONS OF
FRIENDS OF RURAL COMMUNITIES AND THE ENVIRONMENT**

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I - OVERVIEW

1. In September, 2006, St. Marys Cement Inc. (Canada) (“St. Marys”) applied for a permit to take water for the purposes of conducting pumping tests to understand the impacts of quarry dewatering on the aquifer and watershed and to test its proposed theoretical groundwater recirculation mitigation system for its proposed quarry operations in Flamborough, a rural community located in the amalgamated City of Hamilton.
2. The Ministry of the Environment (the “MOE”) notified the public of St. Marys’ application by posting an “Instrument Proposal Notice” on the *Environmental Bill of Rights* (the “EBR”) Registry (the “Registry”). The MOE invited the public to make comments on St. Marys’ application. The MOE received 532 comments on the proposed instrument, including comments from Friends of Rural Communities and the Environment (“FORCE”) objecting to the PTTW being issued in the manner proposed.
3. On July 8, 2008, the MOE granted a permit to take water to St. Marys for the purposes of conducting pumping tests to understand the impacts of quarry dewatering on the aquifer and watershed and to test its proposed groundwater recirculation mitigation system for its proposed quarry operations (the “PTTW”). The PTTW was issued for a duration of approximately 11 months and 3 weeks. The Registry posting notifying the public of the PTTW states that no leave to appeal provisions are provided on the decision because the PTTW is for less than one year, and therefore, is “no longer” considered a classified instrument under the *EBR*.
4. On July 18, 2008, FORCE applied to the Tribunal for leave to appeal the Director’s decision to issue the PTTW, and for an interim stay of the PTTW pending the Tribunal’s decision on FORCE’s application for leave to appeal.
5. After receiving FORCE’s application, the Tribunal requested that the parties make submissions on the issue of whether the Tribunal has jurisdiction to consider an application for leave to appeal a permit to take water which applies for a period of less than one year. FORCE makes these submissions in response to the Tribunal’s request.

6. FORCE respectfully submits that the Tribunal has jurisdiction to consider FORCE's application for leave to appeal, and for an interim stay of the PTTW, on the basis that the nature of the PTTW is such that it is a Class I instrument.

II - FACTS

BACKGROUND

7. FORCE is a federally-incorporated not for profit corporation with its registered head office in Freelton, Ontario. It is a citizen-based advocacy group which was formed to protect the environment in the face of a large-scale aggregate development in Flamborough, a development which would, if approved, involve the removal of aggregate from below the established water table.

Reference: Supplementary Application for Leave to Appeal of FORCE ("Supplementary Application"), at paras. 7 and 9.

8. St. Marys owns the property on which the proposed aggregate extraction operations are to be developed (the "Property").

Reference: Supplementary Application, at para. 10.

9. The Property is located within the Natural Heritage System of the Greenbelt, and contains significant provincially, regionally and municipally designated natural features, including Environmentally Sensitive Areas and a provincially significant wetland complex, that contribute to the biological diversity and ecological integrity of the site and the broader region.

Reference: Supplementary Application, at paras. 13-15.

10. St. Marys proposes to establish on the Property a quarry in the Amabel Formation dolostone from which aggregate will be taken (the "Proposed Quarry"). The proposed quarry operations will result in an open excavation that will extend below the water table.

Reference: Supplementary Application, at paras. 19-20.

11. Residents who live in the vicinity of the Property, including members and supporters of FORCE, draw their water from the Amabel Formation aquifer (the "Aquifer"), the same aquifer from which St. Marys is expected to draw water for its proposed quarry operations. The community of Carlisle also has a municipal well system which relies on the Aquifer. The

proposed aggregate development is within the two year Time of Travel (“TOT”) to the Carlisle municipal wellhead protection area (“WHPA”) and its significant recharge area, two zones that are afforded protections under the *Clean Water Act, 2006*.

Reference: Supplementary Application, at paras. 10, 16 and 18.

12. Unmitigated dewatering operations associated with the Proposed Quarry are expected to have “unacceptable” impacts on groundwater levels and on the flow and quality of the surface water in Mountsberg Creek, which traverses the Property.

Reference: Supplementary Application, at paras. 21-22.

13. To mitigate these effects, St. Marys proposes using a Groundwater Recirculation System (“GRS”). Conceptually, the GRS would allow for the release of groundwater and surface water collected within the quarry into a trench from which it would infiltrate into the Aquifer with a goal of sustaining the groundwater level between the quarry and the adjacent wetland features and nearby residential water supplies.

Reference: Supplementary Application, at para. 23.

14. The GRS has never been used in the manner proposed by St. Marys and its application has only been evaluated through the application of computer modelling. As such, St. Marys proposes to conduct pumping tests in the field to simulate dewatering in proximity to the quarry face, and to construct a pilot of the proposed GRS through which the extracted water is to be reintroduced to the Aquifer.

Reference: Supplementary Application, at para. 24.

THE PTTW APPLICATION AND REGISTRY POSTINGS

15. On September 28, 2006, St. Marys applied to the MOE pursuant to section 34 of the *Ontario Water Resources Act* (the “OWRA”) for a permit to take water in order to allow it to conduct pumping tests for the proposed GRS (the “Application”).

Reference: Supplementary Application, at para. 25.

16. St. Marys proposed to conduct three pumping tests to demonstrate the ability of the GRS to control groundwater levels in proximity to the Proposed Quarry. During the first test, water is to be pumped from wells into Mountsberg Creek in order to assess the dewatering response

during pumping without mitigation. During the second test, water is to be pumped from wells into a trench, with any overflow directed to Mountsberg Creek. During the third test, water is to be pumped from the wells into a trench bearing boreholes to determine the influence of open boreholes on groundwater recharge through the trench.

Reference: Supplementary Application, at paras. 26-27.

17. On October 13, 2006, the MOE posted an Instrument Proposal Notice (the "Instrument Proposal") on the Registry, notifying the public of the Application. The Instrument Proposal was posted for a 49-day public review and comment period starting October 13, 2006 and ending on December 1, 2006. In total, the MOE received 532 comments from the public on the Instrument Proposal.

Reference: Supplementary Application, at para. 28.

18. On November 30, 2006, FORCE made submissions to the MOE, supported by experts' reports, in which it objected to the PTTW being granted in the manner proposed. The City of Hamilton, Conservation Halton, and the City of Hamilton Public Health Services also expressed concerns with St. Marys' proposal, including the potential impact on adjacent wells and water users.

Reference: Supplementary Application, at paras. 29-30.

19. On April 16, 2008, St. Marys held, at the recommendation of the MOE, a public information session with respect to the PTTW. Several hundred members of FORCE and the community attended the meeting.

Reference: Supplementary Application, at para. 31.

20. On May 7, 2008, the MOE posted in draft the PTTW which it was proposing to issue to St. Marys. The MOE invited the public to make comments on this draft, which FORCE did again with the support of expert reports. There were more than 460 public submissions made to the MOE in response to the draft PTTW.

Reference: Supplementary Application, at para. 32.

21. On July 8, 2008, almost two years after St. Marys submitted the Application, the MOE granted the PTTW to St. Marys for water taking from bedrock well TW 14 located at Lot 3,

Concession 11, East Flamborough, Hamilton. The MOE posted its decision to issue the PTTW on the Registry on July 8, 2008 as an “Instrument Decision Notice”.

Reference: Supplementary Application, at para. 34.

22. The July 8, 2008 Registry posting indicated, however, that no leave to appeal provisions are provided on the decision. Specifically, it stated that:

The permit that was issued is for less than a year and therefore, is **no longer** considered a “classified instrument” under the Environmental Bill of Rights. [emphasis added]

Reference: Supplementary Application, at para. 35.

23. The PTTW was issued for a duration of approximately 11 months and 3 weeks (approximately 357 days). It authorizes St. Marys to conduct three pumping tests. Approval was given at the time the PTTW was issued for the first of these tests.

Reference: Supplementary Application, at paras. 36-37.

24. On July 18, 2008, FORCE applied to the Tribunal for leave to appeal the decision to issue the PTTW, and an interim stay of the PTTW pending the Tribunal’s decision on the leave to appeal application. FORCE delivered a Supplementary Application on July 23, 2008 containing substantive technical submissions in support of its leave to appeal application.

25. St. Marys began its first pumping test on July 21, 2008, less than two weeks after the PTTW was issued, despite having been served with FORCE’s application for leave to appeal, and letter on behalf of FORCE requesting that the testing not be commenced until the issues before the Tribunal were resolved, and a letter from the Tribunal requesting that submissions be made with respect to whether the Tribunal has jurisdiction to hear FORCE’s application.

Reference: Supplementary Application, at para. 39.

26. Although St. Marys is required, pursuant to the PTTW, to provide written notification of the testing to well owners in the vicinity of the Property, some residents who should have been notified have complained to the MOE that no such notice was provided to them.

Reference: Supplementary Application, at paras. 38, 40.

PART III - ISSUES AND THE LAW

27. The issue for the Tribunal to decide is whether it has jurisdiction to consider an application for leave to appeal a permit to take water which applies for a period of less than one year.

28. FORCE submits that the Tribunal has jurisdiction to consider FORCE's application for leave to appeal the decision of the Director to issue the PTTW, and for an interim stay of the PTTW pending the Tribunal's decision on FORCE's application.

GENERAL LEGAL PRINCIPLES

29. Standing to seek leave to appeal is set out in subsection 38(1) of the *EBR* which states that:

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

1. The person seeking leave to appeal has an interest in the decision.
2. Another person has a right under another Act to appeal.

30. There are, therefore, four criteria which have to be considered in determining whether FORCE has standing to seek leave to appeal, and conversely, in determining whether the Tribunal has jurisdiction to consider FORCE's application for leave to appeal and for an interim stay of the PTTW. These criteria are as follows:

- (a) the party seeking leave to appeal must be a person resident in Ontario;
- (b) the decision being appealed from must be 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 of the *EBR*;
- (c) the person seeking leave to appeal has an interest in the decision; and
- (d) another person has a right under another Act to appeal.

31. FORCE respectfully submits that it meets all of these criteria. FORCE will, however, only address herein criteria (b) as set out above. The other three criteria are addressed in FORCE's Supplementary Application for Leave to Appeal.

32. O. Reg. 681/94, made pursuant to the *EBR* (the "Classification Regulation"), determines whether a proposal is a proposal for a Class I, Class II, or Class III instrument. If it is a Class I, Class II or Class III proposal for an instrument then subsection 22(1) of the *EBR* requires that the Minister do everything in his power to give notice to the public of that proposal at least thirty days before a decision is made whether or not to implement the proposal.

33. As expressed by the Tribunal, the underlying purpose of identifying a "proposal for an instrument" is to ensure that the public receives notice of the proposal and is afforded the opportunity to participate in the decision-making on the proposal.

Reference: *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment*, July 21, 2008, Environmental Review Tribunal, Cases Nos. 07-164/07-165 ("Greenspace"), at p. 10, attached hereto as Appendix "A".

34. With respect to permits to take water applied for pursuant to section 34 of the *OWRA*, section 3 of the Classification Regulation states as follows:

3. The following is a Class I proposal for an instrument:

1. A proposal for a permit under section 34 of the *Ontario Water Resources Act* that would authorize the taking of water over a period of one year or more, except a proposal for a permit to take water only for the purpose of irrigation of agricultural crops.

35. This section of the Classification Regulation was recently interpreted by the Tribunal in the case of *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment*. In that case, the proponent sought to dismiss an application for leave to appeal the decision of the Director to issue to the proponent a permit to take water which expired eight months after its issue date. In dismissing the proponent's motion to dismiss the application for leave to appeal, the Tribunal found that:

[I]t 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”. [emphasis added]

Reference: *Greenspace, supra* at p. 11.

36. To determine whether a proposal for a permit to take water is a Class I instrument, therefore, the Tribunal must have regard to the nature of that proposal.

37. FORCE respectfully submits that the nature of the PTTW in this case is such that the PTTW is a proposal for a Class I instrument within the meaning of section 3 of the Classification Regulation.

THE PTTW IS A CLASS I INSTRUMENT

38. The PTTW was granted for approximately 11 months and three weeks, which resulted in the MOE indicating in the Registry posting notifying the public of the issuance of the PTTW, that leave to appeal provisions did not apply to the decision.

39. FORCE submits, however, that the MOE cannot now rely on the duration of the PTTW to circumvent the public’s right to seek leave to appeal when:

- (a) the MOE’s own actions have suggested that the PTTW was a proposal for a Class I instrument;
- (b) the PTTW is virtually one year long;
- (c) the water taking activities are likely to extend over a period of more than one year;
- (d) the risk of significant environmental harm is the same as if the PTTW had been issued for a period of one year or more; and
- (e) the public has shown a real interest in the decision.

MOE Considered the PTTW to be a Class I Instrument

40. As noted above, section 22 of the *EBR* requires that the Minister give notice to the public of a Class I, II or III proposal for an instrument under the consideration of his ministry.

41. In this case, the MOE notified the public of the Application as an “Instrument Proposal Notice” (as opposed to an “Information Notice”), and invited the public to make comments on the proposal.

42. It is apparent that, although St. Marys’ had applied for a permit authorizing the taking of water for a period of less than one year, the MOE considered the PTTW to be a proposal for a classified instrument for which notice had to be given pursuant to section 22 of the *EBR*.

43. This is supported by the July 8, 2008 Registry posting notifying the public of the issuance of the PTTW which indicates that the permit is *no longer* considered a “classified instrument”.

44. If the MOE did not consider the application for the PTTW to be a proposal for a Class I instrument, it would not have posted it as such on the Registry.

The PTTW is Virtually One Year Long

45. The PTTW, which was issued on July 8, 2008, expires on June 30, 2009, which means that it is eight days short of authorizing the taking of water for a period of one year. For all intents and purposes, the PTTW applies for a period of one year.

46. There is no reason to issue a permit to take water for a period of one year less eight days, other than to circumvent the public’s appeal rights under the *EBR*.

The Water Taking Activities Are Likely to Continue Over a Period of One Year

47. It is a realistic assessment that the water taking activities will continue over a period of one year or more.

48. As evidenced by the fact that the MOE took almost two years to issue the PTTW, 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 a *theoretical*, unproven, dewatering mitigation system.

49. As such, the PTTW requires, after each test is conducted, that St. Marys engage in a detailed reporting and reviewing process with the MOE and the City of Hamilton Combined Aggregate Review Team (“CART”).

50. Specifically, condition 3.3 of the PTTW requires St. Marys to obtain, prior to conducting the second and third pumping tests, approval from the Director prior to initiating each of those tests. As indicated in the PTTW, approval must be based on the results of the previous pumping test being acceptable to the Director, and therefore, requires St. Marys to provide to the Director a report in the form set out at condition 4.2 detailing those results.

51. In addition, condition 3.4 of the PTTW requires that the reports for the individual phases of the pumping tests must be provided to CART, the City of Hamilton Public Health Services Department, Conservation Halton, the Hamilton/Halton Source Protection Committee, and the Regional Municipality of Halton.

52. CART specified in its May 22, 2008 response to St. Marys’ Hydrogeological Work Plan dated March 25, 2008 that St. Marys cannot progress to Test 2 or Test 3 of the GRS testing until results of the previous tests are provided to CART for review and comment. St. Marys is, therefore, required to obtain the approval of both the MOE and CART to proceed with the second and third pumping tests.

53. As noted above, the dewatering mitigation system which St. Marys is proposing is a theoretical system which has only been explained through computer modeling. It has never been physically tested. In the circumstances, it is probable that St. Marys will encounter difficulties in the testing stages. In fact, St. Marys has already experienced difficulties with its first test. As a result, St. Marys has had to request permission from the MOE, as it is required to do pursuant to the PTTW, to extend the water taking for this test.

54. Any such problems in the testing stages will delay the sequencing of the tests and review process by the MOE and CART such that it is more than likely that the water taking will be required to continue for a period of over one year. A delay of only eight days could result in a such a situation.

There is a Risk of Environmental Harm

55. The risk of significant environmental harm is the same as if the PTTW had been issued for a period of one year or more. In other words, the PTTW is as likely to result in significant environmental harm as a permit authorizing the taking of water over a period of one year.

56. As explained in paragraphs 96 to 118 of FORCE's Supplementary Application for Leave to Appeal, the decision to issue the PTTW could result in significant harm to the environment.

The Public Has Shown a Real Interest in the Decision

57. The PTTW has attracted a high level of public attention. As noted above, the MOE received 532 comments from the public when it initially posted the PTTW on the Registry, and 460 comments from the public when it posted the draft PTTW. As well, several hundred members of the public attended at a public meeting which St. Marys held in April, 2008.

58. It is unfair for the MOE, knowing that the public has a high level of interest in the PTTW, to now attempt to prevent the public from applying to seek leave to appeal.

Summary

59. Although the PTTW applies for a period of less than one year, this is not determinative of whether the PTTW is a classified instrument for the purposes of subsection 38(1) of the *EBR*. The nature of the PTTW is such that it is a Class I proposal for an instrument, notice of which was required to be, and was, given pursuant to section 22 of the *EBR*.

60. The MOE treated the PTTW as a Class I proposal for an instrument and cannot now attempt to circumvent the public's right to seek leave to appeal, especially in light of the public interest which the PTTW has received.

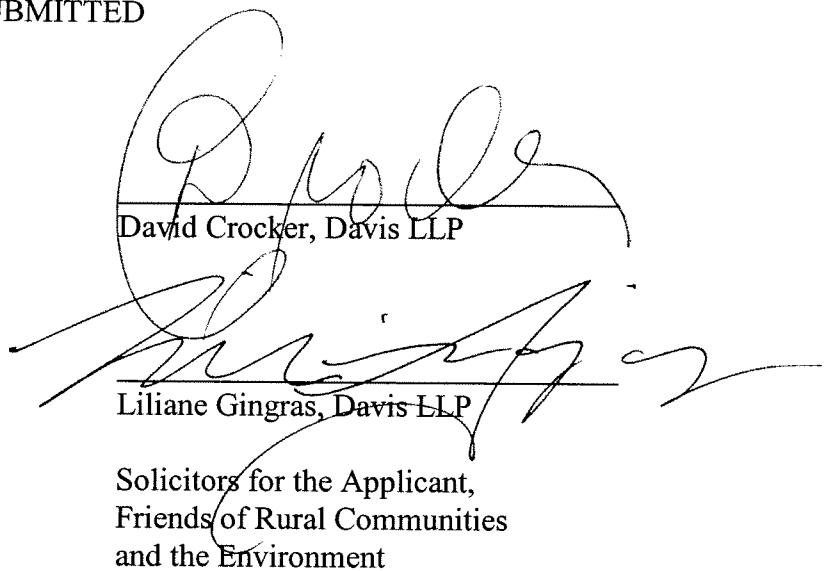
61. In the circumstances, on this issue, FORCE has standing to seek leave to appeal the decision of the Director to issue the PTTW, and conversely, the Tribunal has jurisdiction to consider FORCE's application

PART IV-RELIEF REQUESTED

62. FORCE respectfully requests that the Tribunal finds that it has jurisdiction to consider FORCE's application for leave to appeal the decision of the Director to issue the PTTW, and for an interim stay of the PTTW pending the Tribunal's decision on FORCE's application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 25, 2008



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