

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 as amended;

AND IN THE MATTER OF an application by the Citizens Against Melrose Quarry, pursuant to section 38 of the *Environmental Bill of Rights*, S.O. 1993, c. 28, for leave to appeal the decision of the Director, Ministry of the Environment, under section 34 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended, in issuing Permit No.7742-9E9TGN, dated June 27, 2014, to C.H. Demill Holdings Inc., 13 Melrose Road, Lot 6, Concession 3, Township of Tyendinaga, County of Hastings

**APPLICATION FOR LEAVE TO APPEAL BY
CITIZENS AGAINST MELROSE QUARRY**

**EBR REGISTRY NUMBER: 012-0410
PTTW NUMBER: 7742-9E9TGN
MOE REFERENCE NUMBER: 5148-9D7Q78**

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PART I - APPLICATION FOR LEAVE TO APPEAL

1. Pursuant to section 38 of the *Environmental Bill of Rights, 1993* (“*EBR*”), Citizens Against Melrose Quarry (“*CAMQ*”) hereby applies to the Environmental Review Tribunal (“*Tribunal*”) for an order granting *CAMQ* leave to appeal the decision of Gillian Dagg-Foster, Director under section 34 of the *Ontario Water Resources Act* (“*Director*”) in issuing Permit to Take Water (“*PTTW*”) No. 7742-9E9TGN, dated June 27, 2014, to C.H. Demill Holdings Inc. (“*Demill*”), 13 Melrose Road, Lot 6, Concession 3, Township of Tyendinaga, County of Hastings.

2. The grounds for this application for leave to appeal are that pursuant to section 41 of the *EBR*, it appears that:

- (i) there is good reason to believe that the Director’s decision was unreasonable in that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision to issue the *PTTW* to *Demill*; and
- (ii) the Director’s decision to issue the *PTTW* to *Demill* could result in significant harm to the environment.

3. The evidence, arguments and particulars regarding these grounds are described below in Parts II and III of this application. The specific Order respectfully requested from the *Tribunal* by *CAMQ* is set out below in Part IV of this application.

PART II - FACTS

(a) Description of the Applicant

4. *CAMQ* is an incorporated, not-for-profit group whose membership consists of local residents, farmers and other persons concerned about new or expanded aggregate operations at or beside the current location of *Demill*’s existing quarry known as the Long’s Quarry. This quarry is located at Lot 6, Concession 3, Township of Tyendinaga.

Reference - **Tab 2**: Affidavit of Susan Munro (April 30, 2014), paras. 2-3; Exhibit A: *CAMQ* Letters Patent (May 23, 2013); and Exhibit T: *CAMQ* letter to MOE Director (January 6, 2014), page 1

5. Most *CAMQ* members live beside or near *Demill*’s existing aggregate quarry, and are highly concerned about the nuisance impacts and adverse environmental effects associated with quarrying activities at the Long’s Quarry and the Melrose Quarry proposed upon adjoining lands. Since there is no municipal drinking water system in this area of Tyendinaga Township, these *CAMQ* members are wholly dependent upon their dug or drilled wells for drinking water, domestic uses, livestock watering and other agricultural purposes.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 4-8; and Exhibit T: CAMQ letter to MOE Director (January 6, 2014), pages 1-2

6. The potential impacts of large-scale quarry dewatering upon nearby domestic wells is of particular concern to CAMQ and its membership because there are no other viable groundwater sources of drinking water in the local area. CAMQ expressed this concern to the MOE Director as follows:

The vulnerability of private domestic wells to de-watering impacts is particularly alarming since there appears to be no other potable source of groundwater except for the shallow overburden aquifer that supplies water to most wells in the area. The deeper aquifer may not be usable or viable due to elevated iron, hydrogen sulphide and chlorides that are expensive or difficult to effectively treat for drinking water purposes. Indeed, the shallow aquifer itself may be vulnerable to impacts from surface activities, and must therefore be safeguarded to the maximum possible extent.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 5; and Exhibit T: CAMQ letter to MOE Director (January 6, 2014) at page 4; **Tab 4:** Affidavit of John McLennan (July 4, 2014), paras. 2-3

7. CAMQ and its members are also concerned about the potential impacts of quarry dewatering upon local environmental features and ecological functions, including Blessington Creek which is located in close proximity to the Long's Quarry and ultimately flows into the Bay of Quinte.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 11; **Tab 4:** Affidavit of John McLennan (July 4, 2014), Exhibits D and E (aerial photographs taken April 28, 2014)

8. Within 3 kilometres of the Long's Quarry, there are approximately 20 family farms, five of which are dairy operations which draw large volumes of well water for herd health and milk production purposes. A number of these farmers are members of CAMQ, and Blessington Creek flows through some of these farm properties downstream of the Long's Quarry.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 12; **Tab 4:** Affidavit of John McLennan (July 4, 2014), Exhibits E, F and G (aerial photographs taken April 30, 2014)

(b) Overview of Demill's Current and Proposed Aggregate Operations

9. Since the 1930s, limestone has been extracted from the Long's Quarry, which became licenced under provincial law in 1975. At the present time, the extraction area at the Long's Quarry is approximately 24 hectares in size, and approximately 20 metres deep. Extraction has occurred below the water table since the mid-1990s. While the current *Aggregate Resources Act* ("ARA") licence allows extraction to 99 metres above sea level ("masl"), the current quarry floor only extends downward to approximately 104 masl. However, it is anticipated that the final phase of quarrying activity will occur shortly in order to extract limestone lying between 104 and 99 masl. Under the current

ARA licence, up to 500,000 tonnes/year of limestone can be extracted from the Long's Quarry. CAMQ has been advised by the proponent's representatives that it will only take another year or two to extract the remaining aggregate from the Long's Quarry.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 13-16, 20; and Exhibit T: CAMQ letter to MOE Director (January 6, 2014), page 2

10. Since the Long's Quarry operates well below the current water table elevation, it receives shallow groundwater inflow as well as surface runoff and direct precipitation. Drainage at the Long's Quarry is directed to the southwestern corner of the site where a settling pond, sump and pumping station has been established. Water collected at this on-site location is pumped towards a small wetland/ditch which discharges into Blessington Creek downstream of the Long's Quarry. Blessington Creek contains fish species, receives some groundwater inflow, and has been identified as a potentially sensitive surface water feature.

Reference - **Tab 4:** Affidavit of John McLennan (July 4, 2014), Exhibits A, B and C (aerial photographs taken April 28, 2014); **Tab 6:** Memorandum to D. Joyner from B. Metcalfe (April 11, 2011), page 2

11. Demill has also applied for an ARA licence to establish the proposed Melrose Quarry immediately beside the Long's Quarry. If approved, the Melrose Quarry would include an extraction area of approximately 20 hectares, and would have a quarry floor elevation of 104 masl. Up to 500,000 tonnes/year of limestone could be extracted from the Melrose Quarry if approved under the ARA. There would be no separation distance, fencing or permanent physical barrier between the two quarries, and it would be open to Demill to apply to consolidate the two ARA licences into a single licence (and one overall site plan) for the combined quarries to permit extraction of up to 1 million tonnes/year (or more) of limestone. To date, however, the Ministry of Natural Resources ("MNR") has not issued the ARA licence to Demill for the proposed Melrose Quarry. Similarly, rezoning approval for the proposed Melrose Quarry has not been issued to date by Tyendinaga Township.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 17-20, 25; Exhibit H: Email correspondence between CAMQ and Steve Kilby (March 19, 2014); and Exhibit T: CAMQ letter to MOE Director (January 6, 2014), page 2

12. In addition, both the MOE and Quinte Conservation have raised concerns about the potential impact of the proposed Melrose Quarry on Blessington Creek, particularly in light of the inadequate setback/buffer (35-40 metres) proposed by Demill as the separation distance between the creek and the quarry operations.

Reference - **Tab 6:** Memorandum to D. Joyner from B. Metcalfe (April 11, 2011), page 3; **Tab 7:** Letter to Steve Kilby from Tim Trustham (February 17, 2011), pages 2, 4; **Tab 8:** Letter to Steve Kilby from Tim Trustham (January 30, 2013), pages 1-2

(c) Chronology of PTTW's for the Long's Quarry

13. Over the past decade, there has been a checkered history of various PTTWs that have been issued – or refused – by the MOE Director pursuant to section 34 of the *Ontario Water Resources Act* (“OWRA”) in relation to the Long's Quarry.

14. In 2004, the former operator of the Long's Quarry (Warren Paving & Materials Group Limited) was issued a 10-year PTTW for water taking at the site. The MOE specifically advised Demill that the Warren Paving PTTW was not transferable to Demill. Accordingly, Demill applied for its own PTTW in 2005 to authorize continued dewatering at the Long's Quarry.

Reference – **Tab 9:** Warren PTTW No. 7777-5ZLPX3 (June 10, 2004); **Tab 6:** Memorandum to D. Joyner from B. Metcalfe (April 11, 2011), pages 1-2

15. In July 2005, the MOE denied Demill's PTTW application. Among other grounds, this MOE denial was based upon on well-founded concerns about the possibility of another “pop-up” (i.e. stress-induced buckling or heaving of rock strata) in the quarry floor, and consequential impacts upon local groundwater users, including nearby residents. Such a pop-up had occurred at the Long's Quarry in 1994, and water level data in a monitoring well indicated that the stress relief was connected with an underlying aquifer. Accordingly, the MOE Director denied the 2005 PTTW application and closed the file.

Reference – **Tab 10:** Letter to Demill from Clyde Hammond (July 27, 2005); **Tab 11:** Memorandum to D. Joyner from Titia Praamsma (April 21, 2011), pages 1, 4-5

16. Nevertheless, Demill continued dewatering activities at the Long's Quarry without its own PTTW for a number of years before this situation was detected by the MOE. It appears that Demill erroneously believed that it was entitled to rely upon the 2004 PTTW issued to Warren Paving. In its 2011 hydrogeological report, Demill's consultant attempted to explain away this situation as follows:

Previous water takings at the subject quarry have been conducted under the auspices of several PTTWs for different uses, including separate permits for dewatering and for dust suppression.

The Permit allowing water takings for quarry dewatering expired in March 2004; however, the Permit covering dust suppression is still valid. The applicant misinterpreted the valid permit as allowing all water takings. This was clarified by the Ministry of the Environment at which time the applicant was requested to submit an application for approval of a new PTTW and Sewage Works.

Reference – **Tab 12:** Oakridge Environmental Ltd., *Hydrogeological Study Category 3 Permit to Take Water Application Long's Quarry (C.H. Demill Holdings Inc.)* (September 2011), page 1

17. Rather than prosecute Demill for non-compliance under the OWRA, the MOE instead simply requested Demill to apply for a new PTTW (and a related approval for

quarry water discharges which Demill had been undertaking without authorization under section 53 of the *OWRA*). According to an MOE email in 2011, “there is a pressing need to bring the quarry into compliance as soon as possible.”

Reference – **Tab 2**: Affidavit of Susan Munro (April 30, 2014), para. 23; and Exhibit F: Email correspondence between CAMQ and Al Sudds (March 25, 2013); **Tab 11**: Memorandum to Dan Joyner from Titia Praamsma (April 21, 2011), page 2; **Tab 13**: Email to Oakridge Environmental Ltd. from Dan Joyner (April 26, 2011)

18. However, the MOE’s regional hydrogeologist stated in April 2011 that she had various concerns with “several groundwater issues that exist at the proposed Melrose Quarry and the adjacent Long’s Quarry.”

Reference - **Tab 11**: Memorandum to Dan Joyner from Titia Praamsma (April 21, 2011), pages 4-6

19. In September 2011, Demill formally applied for a new Category 3 PTTW that authorized water-takings, but with “somewhat more strict compliance conditions.” In filing the application, Demill’s consultant further claimed that the proposed water-takings “will not impact groundwater or surface water resources.”

Reference – **Tab 14**: Letter to MOE from Oakridge Environmental Ltd. (September 30, 2011)

20. However, to CAMQ’s knowledge, the MOE did not post notice of the original proposal to issue a PTTW to Demill on the EBR Registry, nor did the Ministry solicit public or agency comments on its proposal to issue a PTTW to Demill. CAMQ submits that this fundamental failure by the MOE to comply with its legal obligations under Part II of the EBR deprived MOE of lawful jurisdiction to issue a PTTW to Demill in 2012, and effectively rendered the 2012 PTTW void *ab initio* (or, in the alternative, voidable pursuant to section 118(2) of the EBR). However, for the purposes of deciding of whether leave should be granted in relation to the new PTTW issued on June 27, 2014, it is not necessary for the Tribunal to rule upon the validity of the preceding 2012 PTTW.

Reference – **Tab 2**: Affidavit of Susan Munro (April 30, 2014), paras. 26-30; and Exhibit I: Email correspondence between CAMQ and MOE Director (April 3, 2013)

21. In any event, in February 2012, the MOE purported to issue a PTTW to Demill which permitted the proponent to take large volumes of water at the Long’s Quarry for approximately two years, subject to certain conditions contained within the PTTW. These water takings were to be drawn from the settling pond and a well located at the Long’s Quarry. Among other things, this PTTW required the proponent to submit a groundwater/surface water monitoring program for review and approval by the MOE.

Reference – **Tab 15**: Demill PTTW No. 6270-8PJLN9 (February 3, 2012); **Tab 16**: MOE PTTW Technical Review Reference No. 8633-8MYP2Q

22. Demill submitted its proposed monitoring program in April 2012, and the MOE accepted Demill’s proposed monitoring program (with some minor modifications) in

May 2012. In reviewing the proposed program, an MOE hydrogeologist expressed reservations about the adequacy of Demill's proposed Contingency Plan:

The viability of the Contingency Plan is a concern to me since it does not acknowledge that cessation of water taking may be needed in the future to address unacceptable impacts.

Reference – **Tab 17**: Memorandum to Dan Joyner from Robert Holland (May 9, 2012)

23. Significantly, when the first annual monitoring report for 2012 was submitted by Demill's consultants to the MOE in 2013 (well after the March 1st deadline prescribed by the PTTW), the consultants noted that Demill had failed to comply with the PTTW condition which only allows increased water-takings during spring months. This non-compliance was attributed by the consultants to Demill's "mis-interpretation" of the PTTW condition:

A mis-interpretation of the Permit by the operator led to continuous pumping after a few major precipitation events in September, October and November. In accordance with the Permit, the Permit holder is allowed to take water continuously (i.e. 24 hr/day) only during the spring thaw and melt periods. Unfortunately, the Permit holder was under the impression that the continuous water takings could occur at any time of the year after a major precipitation event, provided the allowable number of days of continuous pumping (i.e., 60 days per year) was not exceeded.

We have subsequently advised the Permit holder that continuous pumping is only permitted during the spring period (i.e., March and April, or April and May)...

Reference – **Tab 18**: Oakridge Environmental Ltd., *2012 Annual Compliance Monitoring Report: PTTW No. 6270-8PJLN9* (March 29, 2013), page 2

24. This late-filed monitoring report for 2012 also confirmed that exceedances of Provincial Water Quality Objectives ("PWQO") for a number of parameters were detected at monitoring Station 1 located on Blessington Creek directly downstream of the quarry water discharge point. The report suggested that some exceedances had also occurred upgradient of the discharge point, but stated that the boron exceedance "appears to be the direct result of the quarry discharge." PWQO exceedances were also detected in discharge water from the settling pond. The report further noted that because of "minimal" creek flow and "minimal groundwater seepage" in Blessington Creek in the summer months, "there is essentially no mixing capacity" in the watercourse during such months. For this reason, the report concluded that "the quarry discharge will ultimately affect the creek at times."

Reference – **Tab 18**: Oakridge Environmental Ltd., *2012 Annual Compliance Monitoring Report: PTTW No. 6270-8PJLN9* (March 29, 2013), pages 7-8, 11, 13

25. PQWO exceedances in 2013 at Station 1 (and elsewhere in Blessington Creek) and in quarry discharge water were again confirmed in the technical report prepared by Demill's consultant in support of the proposed PTTW renewal.

Tab 19: Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013), pages 8-10

(d) Summary of the Proposed PTTW Renewal

26. In the fall of 2013, Demill applied to the MOE for a renewal of the 2012 PTTW in order to authorize continued water-takings at the Long's Quarry.

Reference – **Tab 19:** Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013); **Tab 20:** EBR Registry Notice 012-0410 (posted November 8, 2013) re proposed renewal of Demill PTTW

27. In essence, Demill applied to the MOE for a 10 year renewal of the 2012 PTTW to authorize the following industrial water-takings (e.g. quarry dewatering, dust suppression and water supply):

- 3,945,600 litres/day for 60 days/year (quarry sump);
- 1,315,200 litres/day for 305 days/year (quarry sump);
- 164,400 litres/day for 300 days/year (quarry sump);
- 2,250 litres/day for 365 days/year (well).

Reference – **Tab 19:** Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013); **Tab 20:** EBR Registry Notice 012-0410 (posted November 8, 2013) re proposed renewal of Demill PTTW

28. The above-noted volumes generally correspond with the maximum water-takings ostensibly permitted under the 2012 PTTW. However, Demill requested that the 60 days/year of significantly increased water-taking (i.e. 3.9 million litres/day) should not be restricted to spring months, but should instead be allowed at any time of the year when deemed appropriate in the proponent's discretion. In all other aspects, Demill requested that the renewed PTTW should remain subject to the same conditions found in the 2012 PTTW.

Reference - **Tab 19:** Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013)

(e) CAMO Comments on the Proposed PTTW Renewal

29. The *EBR* Registry Notice for the proposed PTTW renewal was first posted on November 8, 2013, and indicated that the public comment period would end on

December 8, 2013. This Registry Notice did not include any links to any supporting documentation or the proposed PTTW.

Tab 20: EBR Registry Notice 012-0410 (posted November 8, 2013) re proposed renewal of Demill PTTW; **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 39-40

30. While the public comment period was well underway, Demill's consultant subsequently provided the MOE with an amended technical report in relation to the proposed PTTW renewal. Upon learning of this supplementary information, CAMQ requested the MOE to provide a copy of this report, which was received by CAMQ on or about November 26, 2013.

Reference – **Tab 19:** Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013); **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 42-43; and Exhibit P: Email correspondence between CAMQ and MOE Director (November 22, 2013)

31. In light of this newly obtained report, CAMQ wrote to the MOE to request an extension of the public comment period under the *EBR*. The MOE refused to extend the public comment period or to re-post the *EBR* Registry Notice, but indicated that the MOE would accept comments from CAMQ until January 6, 2014.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 44-45; Exhibit Q: CAMQ letter to MOE (November 27, 2013); and Exhibit R: Email correspondence between CAMQ and MOE Director (November 28, 2013)

32. On December 3, 2013, CAMQ wrote to the MOE to express concerns about the proposed PTTW renewal, and to confirm that CAMQ would submit additional comments on or before the new January deadline.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 46; and Exhibit S: CAMQ letter to MOE Director (December 3, 2013)

33. On January 6, 2014, CAMQ provided further and more detailed comments to the Director regarding the proposed PTTW renewal. Among other things, CAMQ's submission raised various factual, technical, and policy-based objections to the proposed PTTW renewal, including the following considerations:

- (i) The proposed PTTW renewal is contrary to the ecosystem approach and precautionary principle;
- (ii) There has been inadequate consideration of the direct and cumulative effects of the water-takings upon the environment and the legal rights and interests of neighbouring residents, especially well owners south of Blessington Creek;
- (iii) There is no evidence that the proponent actually requires or uses the maximum water-takings being proposed by the PTTW renewal;

- (iv) There is concern about the inadequacy of the proposed PTTW terms and conditions, particularly in light of the proponent's history of non-compliance with statutory requirements; and
- (v) The proposed PTTW renewal is contrary to the objectives of water sustainability, water conservation and adaptive management.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 47; and Exhibit T: CAMQ letter to MOE Director (January 6, 2014), page 3

34. The CAMQ submission also criticized the inadequate and incomplete nature of Demill's supporting documentation for the purposes of describing baseline conditions and evaluating environmental effects that may be caused by the water takings:

- (i) Existing reports are incomplete in characterization of the hydrogeologic setting of the site, interactions between the aquifers, surface water and water supply wells. The reports provide conflicting information regarding these interactions and should be resolved by the proponent. Further, the groundwater quality impacts of the quarry and proposed quarry are not adequately assessed.
- (ii) Details regarding the environmental monitoring and management plan (EMMP) are vague with inadequate detail. The proponent should provide a more detailed plan, including additional monitoring of groundwater and surface water. The plan should include triggers for additional monitoring and define how impacts will be resolved with timelines. The proponent should identify how they will implement an adaptive plan. Will they be proactive in reporting anomalies or exceptions to the MOE or wait for the annual report? Surface water and groundwater quantity and quality should be protected in the EMMP.
- (iii) Previous pop-up events and historic structural concerns have not been adequately addressed by the proponent. The available information is conflicting. Previous pop-up events have led to widespread aquifer dewatering. Considering the proximity of the site to Blessington Creek, residential properties and agricultural communities, the proponent should provide additional geologic characterization of the site, an assessment of potential pop-ups, potential impacts of pop-ups and include monitoring and contingency within the EMMP.
- (iv) The proponent has not identified what the impacts of the proposed quarry would have on the PTTW and in turn the overall hydrologic and hydrogeologic setting of the site. The proposed boundaries of the new quarry approach Blessington Creek more closely the existing quarry. The proponent has inadequately assessed or addressed potential impacts from the quarry expansion.
- (v) The cumulative impacts of the current quarry and proposed quarry expansion have not been adequately addressed. This includes the effects to potable water supplies, surface water and groundwater resources in the vicinity of the quarry. Further, the historical incidence of a pop-up has not been adequately addressed

given the regional experience of such events (Westbrook). As such, in both the short term and long term, serious impacts to the natural environment may occur.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit T: CAMQ letter to MOE Director (January 6, 2014), pages 7-8

35. Given the nature, duration and magnitude of Demill's proposed water takings, and given the close proximity of CAMQ members and their various interests (e.g. private wells, Blessington Creek, etc.) that may be adversely affected by Demill's proposed water takings, the CAMQ submission specifically advised MOE of the potential for interference with the rights and interests of CAMQ members at common law and as a matter of statute.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit T: CAMQ letter to MOE Director (January 6, 2014), pages 3-4

36. After the filing of CAMQ's written comments, CAMQ representatives continued to exchange emails and other written materials with MOE staff. In addition, CAMQ and its hydrogeological consultants met directly with MOE staff on March 31, 2014 to again raise questions and concerns about the proposed issuance of the Demill PTTW. Prior to this meeting, the MOE provided CAMQ with a draft short-term PTTW that it was proposing to issue to Demill, and this proposal triggered considerable discussion at the March 31st meeting.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 49-50, 54-55, 62-63; Exhibit DD: Minutes of March 31, 2014 meeting between CAMQ and MOE

37. During such meetings and communications with MOE, it has become increasingly apparent to CAMQ that there is disagreement or uncertainty among MOE staff as to whether Demill will require a separate PTTW if the proposed Melrose Quarry is approved under the ARA. However, CAMQ's understanding is that Demill plans to manage accumulating water at the proposed Melrose Quarry by directing it towards the existing settling pond at the Long's Quarry, and then pumping the collected water from both quarries through the single existing discharge point at the nearby wetland/ditch for eventual discharge into Blessington Creek. Under this scenario, CAMQ concludes that there is no legal guarantee that Demill will apply for a second or separate PTTW for the proposed Melrose Quarry. In short, Demill may instead rely solely upon the massive water-taking volumes permitted under the current PTTW (or its successors) issued for the Long's Quarry.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 58-61

38. CAMQ's understanding has been confirmed in a 2014 email from the MNR staff person who oversees the Long's Quarry and who is handling the ARA licence application for the Melrose Quarry:

The groundwater from Melrose Quarry will run by gravity to the existing sump & pumping location in Long's Quarry. There would be one PTTW and ECA for the

entire site (i.e. it would include both quarry licences). MOE could clarify this point further if required (emphasis added).

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 61; and Exhibit CC: Email correspondence between CAMQ and Steve Kilby (April 7, 2014)

39. The CAMQ and MNR position is substantiated by an earlier 2013 MOE email that clearly links water-takings at the existing Long’s Quarry and the proposed Melrose Quarry:

I am of the understanding that the quantities of water allowed under the 2011 permit included the dewatering of the existing and anticipated dewatering from [the] proposed quarry. The next application will be needed to confirm this understanding. As previously discussed, I also understand that the existing dewatering sump will be used for the existing quarry and the proposed quarry, thus only one discharge point to Blessington Creek (emphasis added).

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 60; and Exhibit D: Email correspondence between CAMQ and Dan Joyner (March 14, 2013)

40. Similarly, a recent MNR email confirms that Demill has proposed that the final rehabilitation plan for both quarries is to establish a single large water body straddling both the Long’s Quarry and Melrose Quarry.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit CC: Email correspondence between CAMQ and Steve Kilby (April 7, 2014)

41. CAMQ further notes that the April 2012 groundwater/surface monitoring program submitted by Demill (and approved, without soliciting public comments, by the MOE in May 2012) covers both the Long’s Quarry and the proposed Melrose Quarry. CAMQ submits that this further affirms the factual nexus between the two quarries for water taking, management and monitoring purposes.

Reference – **Tab 5:** Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, page XX

(f) Director’s Decision to Issue the PTTW

42. Despite CAMQ’s submissions, and despite numerous objections from other local residents, the Director decided on June 27, 2014 to issue a new PTTW to Demill, subject to certain conditions. The new PTTW purports to “cancel and replace” the previous 2012 PTTW, which had already expired on its face on January 31, 2014 (assuming, without deciding, that the 2012 PTTW had been lawfully issued in the first place).

Reference - **Tab 21:** Demill PTTW 7742-9E9TGN (June 27, 2014)

43. The new 2014 PTTW authorizes Demill to take the same volumes of groundwater for the same industrial purposes as had been permitted in the expired PTTW, and as had been requested by Demill for renewal purposes. However, the new PTTW expires on

June 30, 2015, and contains a new condition that requires Demill to conduct an “investigation” of “the structural geology in and around Long's Quarry.” The new PTTW also requires Demill to continue to monitor and report upon water-takings at the Long's Quarry.

Reference – **Tab 21:** Demill PTTW 7742-9E9TGN (June 27, 2014), Conditions 3.1, 4.1, 4.2 and 4.3

44. Notice of the Director's decision to issue the new PTTW was placed on the EBR Registry approximately two weeks after the PTTW was issued to Demill.

Reference – **Tab 22:** EBR Registry Notice re Demill PTTW 7742-9E9TGN

45. Since CAMQ's concerns about the proposed industrial water takings (and their potential off-site impacts) were not considered by the Director adequately or at all, CAMQ is now seeking leave to appeal the MOE Director's decision to issue the new PTTW to Demill. This application for leave to appeal has been served and filed within the 15 day timeframe prescribed by section 40 of the *EBR*.

Reference – **Tab 3:** Affidavit of Susan Munro (July 4, 2014), paras. 9-10; **Book of Authorities (“BOA”)**, **Tab 1:** *EBR*, section 40

PART III - ISSUES AND LAW

46. CAMQ respectfully submits that the main issues arising on this application for leave to appeal are as follows:

1. Does CAMQ have standing to seek leave to appeal under section 38 of the *EBR*?
2. Does CAMQ meet the test for leave to appeal under section 41 of the *EBR*?

47. For the reasons outlined below, CAMQ submits that both of the foregoing questions should be answered in the affirmative.

ISSUE 1: CAMQ Has Standing to Seek Leave to Appeal

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

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

1. The person seeking leave to appeal has an interest in the decision.
2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal.

Reference – **BOA, Tab 1:** *EBR*, subsection 38(1)

49. The Tribunal’s jurisprudence has held that section 38 of the *EBR* establishes four requirements for standing to bring an application for leave to appeal:

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

Reference – **BOA, Tab 2:** *Safety-Kleen Canada Inc. v. Ontario* (2006), 21 C.E.L.R. (3d) 88 at para. 7 (Ont. Env. Rev. Trib.); **BOA, Tab 3:** *McIntosh v. Ontario* (2010), 50 C.E.L.R. (3d) 161 at para. 6 (Ont. Env. Rev. Trib.)

50. For the reasons outlined below, CAMQ submits that each of these four requirements are satisfied in this case.

(a) CAMQ is a Person Resident in Ontario

51. CAMQ is incorporated under the laws of Ontario as a not-for-profit corporation, and its registered office is located at 120 Melrose Road, Shannonville, Ontario.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), para. 2; and Exhibit A: CAMQ Letters Patent (May 23, 2013)

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

Reference – **BOA, Tab 1:** *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F. section 87

53. There are approximately 60 members of CAMQ living in the vicinity of the Long’s Quarry. As such, the members of CAMQ also constitute persons resident in Ontario, many of whom submitted objections to the MOE regarding the proposed PTTW.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 3-5

(b) The Director’s Decision Implements a Proposal for a Class I Instrument Requiring Notice under Section 22 of the EBR

54. The MOE Director’s decision to issue the new PTTW to Demill implements a Class I proposal requiring notice under section 22 of the *EBR* within the meaning of sections 1.1 and 3.1 of Ontario Regulation 681/94.

Reference – **BOA, Tab 1:** O. Reg. 681/94, ss. 1.1, 3.1

(c) CAMQ Has an Interest in the Director's Decision

55. Subsection 38(3) of the *EBR* states that the fact that a person has exercised a right given by the *EBR* to comment on a proposal is evidence that the person has an interest in the decision on the proposal.

Reference – **BOA, Tab 1:** *EBR*, subsection 38(3)

56. CAMQ filed detailed written comments to the MOE in relation to the proposed water takings that form the subject-matter of the Director's decision to issue the Demill PTTW. In addition, representatives of CAMQ have had ongoing communications with MOE staff in person and by telephone and email regarding the proposed PTTW renewal. Such communications occurred before, during and after the *EBR* comment period.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 31-36, 41-50, 54-55, 63-64; Exhibit S: CAMQ letter to MOE (December 3, 2013); and Exhibit T: CAMQ letter to MOE (January 6, 2014); **Tab 3:** Affidavit of Susan Munro (July 4, 2014), paras. 4-8

57. The term “interest” also can mean a pecuniary, proprietary, or personal interest in the matter under dispute. Many of the members of CAMQ have such an interest as registered owners of property in and around the Long's Quarry for which the PTTW was issued by the Director. As described above, CAMQ's submissions specifically noted that the proposed water takings have the potential to adversely affect the rights and interests of CAMQ members at common law and as a matter of statute.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 4-6, 10-12, Exhibit T: CAMQ letter to MOE (January 6, 2014), pages 3-4

58. It is therefore submitted that CAMQ has an interest in the Director's decision within the meaning of subsections 38(1) and (3) of the *EBR*.

(d) Demill Has a Right Under another Act to Appeal the Director's Decision

59. Demill has a legal right under section 100 of the *OWRA* to appeal the Director's decision. Accordingly, it is submitted that the decision of the Director to issue the PTTW to Demill entitles CAMQ to seek leave to appeal the same decision pursuant to section 38(1).2 of the *EBR*.

Reference - **BOA, Tab 1:** *OWRA*, section 100

60. The availability of CAMQ's right to seek leave to appeal is confirmed by the new PTTW, and by the *EBR* Registry Notice posted in relation to this instrument decision.

Reference – **Tab 21:** Demill PTTW 7742-9E9TGN (June 27, 2014), page 8; **Tab 22:** *EBR* Registry Notice re Demill PTTW 7742-9E9TGN

61. Accordingly, CAMQ respectfully submits that it satisfies all four requirements for standing to bring this application for leave to appeal under section 38 of the *EBR*.

ISSUE 2: CAMQ Meets the EBR Test for Leave to Appeal

(a) It Appears There is Good Reason to Believe that the Director’s Decision is Unreasonable

62. 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.

Reference – **BOA, Tab 1:** *EBR*, section 41

63. The Tribunal has held that there is a close relationship between the “unreasonable” and “significant harm” branches of the *EBR* leave test:

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

Reference – **BOA, Tab 4:** *Hannah v. Ontario*, [1998] O.E.A.B. No. 13 at para. 6 (Ont. Env. App. Bd.)

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

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

Reference – **BOA, Tab 5:** *Federation of Ontario Naturalists v. Ontario*, [1999] O.E.A.B. No. 18 at para. 19 (Ont. Env. App. Bd.)

i. Burden of Proof

66. CAMQ accepts that it has the onus of establishing that the leave test has been met.

Reference – **BOA, Tab 3: *McIntosh v. Ontario*** (2010), 50 C.E.L.R. (3d) 161 at para. 8 (Ont. Env. Rev. Trib.)

ii. Standard of Proof

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

Reference – **BOA, Tab 6: *Simpson v. Ontario*** (2005), 18 C.E.L.R. (3d) 123 at para. 8 (Ont. Env. Rev. Trib.); **BOA, Tab 7: *Grey (County) Corp. v. Ontario***, (2005), 19 C.E.L.R. (3d) 176 at para. 16 (Ont. Env. Rev. Trib.); **BOA, Tab 8: *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*** (2008), 36 C.E.L.R. (3d) 191 at paras. 41-42, 45 (Ont. Div. Ct.)

68. At the leave to appeal stage under the *EBR*, the appropriate standard of proof is an evidentiary one, *viz.*, leading sufficient evidence to establish a *prima facie* case, or showing that the appeal has “preliminary merit”, or that a good arguable case has been made out, or that there is a serious question to be tried. All of these phrases point to a uniform standard which is less than the balance of probabilities, but amount to satisfying the Tribunal that there is a real foundation, sufficient to give *EBR* applicants permission to pursue the matter through the appeal process.

Reference – **BOA, Tab 8: *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*** (2008), 36 C.E.L.R. (3d) 191 at para. 45 (Ont. Div. Ct.); **BOA, Tab 9: *Barker v. Ontario***, [1996] O.E.A.B. No. 27 at paras. 42-47 (Ont. Env. App. Bd.)

iii. Merits Not Decided at Leave Stage

69. The role of the Tribunal when deciding an application for leave is not to determine the merits of the intended appeal. As recently noted by the Tribunal in the *Guelph* case involving quarry dewatering, the “leave to appeal hearing is not meant to be a written version of the ultimate hearing on the merits.”

Reference – **BOA, Tab 3: *McIntosh v. Ontario*** (2010), 50 C.E.L.R. (3d) 161 at para. 9 (Ont. Env. Rev. Trib.); **BOA, Tab 10: *Corporation of the City of Guelph v. Ontario***, 2014 CarswellOnt 5932 at para. 16 (Ont. Env. Rev. Trib.)

70. Accordingly, it is not necessary at this stage for the Tribunal to determine whether the decision of the Director was unreasonable, or whether significant harm to the environment will materialize. In short, section 41 of the *EBR* does not require the CAMQ to definitively establish that that no reasonable person could have made the decision, or that significant harm will result. These questions should be left to be determined at the hearing of the appeal on a full evidentiary record. Instead, to be granted leave to appeal, CAMQ must show that it *appears that there is good reason to believe* no reasonable

person could have made the decision in question, having regard to relevant law and government policies, and that it *appears that the decision could result* in significant harm to the environment.

Reference – **BOA, Tab 11:** *Residents Against Company Pollution Inc. v. Ontario*, [1996] O.E.A.B. No. 29 at para. 54 (Ont. Env. App. Bd.); **BOA, Tab 6:** *Simpson v. Ontario*, (2005), 18 C.E.L.R. (3d) 123 at para. 10 (Ont. Env. Rev. Trib.); **BOA, Tab 7:** *Grey (County) Corp. v. Ontario*, (2005), 19 C.E.L.R. (3d) 176 at para. 16 (Ont. Env. Rev. Trib.); **BOA, Tab 3:** *McIntosh v. Ontario*, (2010), 50 C.E.L.R. (3d) 161 para. 9 (Ont. Env. Rev. Trib.); **BOA, Tab 12:** *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 at para. 12 (Ont. Env. Rev. Trib.)

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

71. Finally, CAMQ is not required to show how each ground raised for leave to appeal meets both parts of the section 41 test. Applicants seeking leave to appeal under the *EBR* may list numerous grounds in their leave to appeal materials. Some may relate solely to the first part of the test. Some may relate to the second part. Some may (but are not required to) relate to both parts. CAMQ accepts that it must provide evidence and arguments that satisfy both parts of the test, and that relate to the Director’s decision to issue the new PTTW to Demill. However, there is nothing in the *EBR* or in decided case law that requires each ground or argument raised to simultaneously meet both parts of the section 41 leave test.

Reference – **BOA, Tab 7:** *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176 at para. 42 (Ont. Env. Rev. Trib.)

v. The Director’s Decision and the MOE Statement of Environmental Values

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

Reference - **Tab 22:** MOE, *Statement of Environmental Values* (2008); **BOA, Tab 13:** *Dillon v. Ontario* (2002), 45 C.E.L.R. (N.S.) 9 at para. 63 (Ont. Env. Rev. Trib.)

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

Reference – **BOA, Tab 12:** *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 at para. 31 (Ont. Env. Rev. Trib.)

74. In light of sections 7 and 11 of the *EBR*, it is reasonable for the Tribunal to regard the SEV as relevant policy that should have guided the PTTW decision-making of the Director in this case. Under section 7, the Minister is required to prepare an SEV that explains how the purposes of the *EBR* are to be applied when a decision that might significantly affect the environment is made by MOE. Moreover, pursuant to section 11, the Minister is required to take every reasonable step to ensure that the MOE SEV is

considered whenever a decision that might significantly affect the environment is made in the MOE. There is no exclusion for a Director when he or she is making a decision whether or not to implement a proposal for a Class I instrument, such as the PTTW in this case. The MOE SEV falls within the section 41 phrase “government policies developed to guide decisions of that kind”, and requiring the Director’s decision to consider the SEV would be consistent with the Tribunal’s jurisprudence on this point of law.

Reference – **BOA, Tab 1:** *EBR*, sections 7, 11; **BOA, Tab 8:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at paras. 56-57 (Ont. Div. Ct.)

75. Although the current version of the SEV was promulgated in 2008 (having replaced the 1994 version of the SEV in effect at the time of the *Lafarge* case), the Tribunal has held that the interpretation in *Lafarge* (i.e., that the SEV applies to Class I and II instruments) remains applicable with respect to the 2008 SEV, including in the context of PTTW decisions made under section 34 of the *OWRA*.

Reference – **BOA, Tab 14:** *Protect Our Water and Environmental Resources v. Ontario* (2009), 43 C.E.L.R. (3d) 180 at paras. 49, 55-59 (Ont. Env. Rev. Trib.); **BOA, Tab 3:** *McIntosh v. Ontario* (2010), 50 C.E.L.R. (3d) 161 at para. 60 (Ont. Env. Rev. Trib.)

76. The MOE’s SEV contains commitments to a number of fundamental environmental principles that are relevant to the Director’s decision in this case, including: (i) ecosystem approach; (ii) cumulative effects; (iii) sustainable development; (iv) precautionary approach; and (v) adaptive management. As described below, CAMQ submits that it appears that the Director’s decision failed to take into account, is not consistent with, misapplied, or directly contravened, these SEV principles.

Reference - **Tab 23:** MOE, *Statement of Environmental Values* (2008)

77. Moreover, most of these principles have been directly incorporated within the *OWRA* water-taking regulation (O.Reg.387/04) and the MOE’s PTTW Manual (2005). These two documents clearly form part of the “relevant law and governmental policy” within the meaning of section 41(a) of the *EBR*. Thus, to the extent that the Director failed to consider these SEV principles adequately or at all in this case, she similarly failed to properly consider or apply these principles despite their express inclusion in the MOE law/policy framework developed to guide PTTW decision-making, as described below. On this point, the Tribunal has held that in leave applications under section 41 of the *EBR*, applicants can address not only apparent failures by the MOE Director to consider applicable law/policy, but can also pursue grounds related to whether the impugned instrument decision properly reflects applicable law/policy.

Reference - **BOA, Tab 10:** *Corporation of the City of Guelph v. Ontario*, 2014 CarswellOnt 5932 at paras. 22, 24-26, 30 (Ont. Env. Rev. Trib.)

The Director’s Decision Failed to Take into Account the Ecosystem Approach

78. The MOE’s SEV under the *EBR* contains a commitment that MOE will apply an “ecosystem approach” when making environmentally significant decisions. In this regard, the SEV states:

The Ministry adopts an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.

Reference - **Tab 23:** MOE, *Statement of Environmental Values* (2008)

79. The water-taking regulation under the *OWRA* similarly requires the Director to consider protection of the natural functions of the ecosystem when considering a PTTW application.

Reference – **BOA, Tab 1:** O. Reg. 387/04, section 4

80. The MOE’s PTTW Manual and the MOE’s Technical Guidance Document in support of Category 3 PTTW applications also note that consideration of this matter is necessary, and that this includes ensuring that the water-taking does not cause unacceptable impacts to: (a) natural variability of water flow or water levels; (b) minimum stream flow; (c) habitat that depends on water flow or water levels; and (d) interrelationships between groundwater and surface water, including water quality and quantity.

Reference - **Tab 24:** MOE PTTW Manual, pages 4, 11-12; **Tab 25:** MOE, *Technical Guidance Document for Hydrogeological Studies in Support of Category 3 Applications for Permit to Take Water* (2008), page 3

81. Indeed, the 2005 Manual identifies the “ecosystem approach” as its first principle in meeting MOE’s water management policy of ensuring “the fair sharing, conservation and sustainable use” of Ontario waters:

Principle # 1: The Ministry will use an ecosystem approach that considers both water takers’ reasonable needs for water and the natural functions of the ecosystem.

Reference - **Tab 24:** MOE PTTW Manual (2005), page 4

82. However, the Demill application and supporting documentation did not address a number of the above-noted ecosystem impacts adequately or at all, thus bringing into considerable doubt whether the ecosystem approach was properly considered and applied by the Director in this case. Indeed, it appears that the PTTW was issued by the Director without correcting, addressing or filling in the significant gaps in the Demill material regarding potential impacts upon ecosystem functions and persons who rely upon the local groundwater resource.

83. For example, the technical report prepared by CAMQ’s hydrogeological consultant has identified significant shortcomings and deficiencies in Demill’s PTTW application and supporting documentation. For example, CAMQ’s consultant has concluded, *inter alia*, that:

- the proponent's claims that quarry dewatering will not cause adverse groundwater or surface water impacts have not been adequately substantiated by scientifically sound investigations, and appear contrary to the proponent's own modelling which predicts impacts upon nearby domestic wells;
- the proponent's claims that Blessington Creek serves as a hydraulic barrier to dewatering impacts south of the quarry lands has not been adequately substantiated to date by the proponent's documentation;
- the nature, extent, duration and magnitude of the potential direct (and cumulative) impacts of quarry dewatering upon the quantity and quality of groundwater and surface water have not been adequately identified or assessed in the proponent's supporting documentation to date;
- the monitoring program required under the PTTW is inadequate, unduly limited in geographic scope, and lacks sufficient detail regarding triggers, parameters, methodology and other key matters;
- the structural geology investigation required under the PTTW is unlikely to produce the types of information and data needed to fully describe baseline conditions, to assess the risk of additional "pop-ups" in the quarry floor, or to predict, with a high degree of confidence, that dewatering activities will not cause any unacceptable or significant environmental impacts; and
- the proposed "contingency measures" required under the PTTW are insufficient to detect, mitigate or remediate the effects of quarry dewatering upon groundwater or surface water, particularly since there are no other identified viable sources of potable groundwater in the event the dewatering adversely affects the quantity or quality of the upper aquifers which currently supply drinking water to nearby residents.

Reference - **Tab 5**: Affidavit of John Pyke (July 7, 2014), paras. 3, 5, 7; and Exhibit A: Malroz Report

84. The Tribunal has held that where the proponent's supporting documentation is inadequate, flawed, or contains significant information gaps, then it would be clearly unreasonable for the Director to issue the instrument requested by the proponent. Similarly, where such information problems exist, there will be resulting uncertainty about the environmental impacts, which raises the potential for significant (and possibly unanticipated) environmental harm. This is true even if the missing information is to be collected, monitored and reported at some point in the future after the instrument has been issued.

Reference – **BOA, Tab 13**: *Dillon v. Ontario* (2000), 36 C.E.L.R. (N.S.) 141 at paras.11, 29-32, 34 (Ont. Env. App. Bd.)

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

It is open to the Tribunal to find that a seriously inadequate scientific foundation can form the basis for concluding that there is good reason to believe that no reasonable person could have issued the PTTW, without specific reference to relevant law and policy. As the Tribunal stated in *Quinte West (City) v. Ontario (Director, Ministry of the Environment)* (2009), 46 C.E.L.R. (3d) 237 (Ont. Environmental Review Trib.), at para. 23:

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

Reference - **BOA, Tab 3:** *McIntosh v. Ontario* (2010), 50 C.E.L.R. (3d) 161 at para. 7 (Ont. Env. Rev. Trib.)

86. On the authorities and on the evidence, CAMQ submits that the Tribunal should refrain from accepting any claims by Demill or the Director that the ecosystem-based analysis required by the SEV, O.Reg.387/04, and the PTTW Manual was somehow satisfied in this case despite fundamental evidentiary gaps. Indeed, the recent history of the MOE's PTTW program underscores why the Tribunal should be concerned about the unreasonableness of the Director's decision in this case in the context of the ecosystem approach.

87. Prior to the current version of O.Reg. 387/04, the Environmental Commissioner of Ontario ("ECO") had long called for an overhaul of the MOE's PTTW program. For example, in a 2001 brief to the Walkerton Inquiry, the ECO pointed out several weaknesses with how the predecessor regulation (O. Reg. 285/99) was being applied.

Reference - **Tab 26:** ECO, 2004-2005 Annual Report, page 119

88. The 2001 ECO brief to the Walkerton Inquiry further noted that:

One of the guiding principles of MOE's [SEV] is that the "ministry will adopt an ecosystem approach to environmental protection and resource management"... MOE committed to reflecting this principle in applicable Acts and regulations but also in the permits issued under these Acts... The ECO, in its review of MOE's [PTTW] program, found that this principle was not being applied consistently across the program [footnotes omitted].

Reference - **Tab 27:** ECO, "Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief to the Walkerton Inquiry" (2001), pages 25, 30

89. The above-noted problems were meant to be corrected by O.Reg.387/04. However, the ECO reported in 2004-2005 that:

The new regulation provides greater specificity in terms of ecosystem functions to take into account, but only requires that these factors be considered to the extent the information is available. It gives ministry staff the power to require the applicant to submit additional information on potential ecosystem impacts...

How the ministry chooses to interpret and implement the Water Taking and Transfer Regulation will therefore be the key factor determining its effectiveness in safeguarding ecosystems from excessive water extraction. For example, consideration by the Director of ecosystem impacts will depend on how such impacts are defined by the ministry, on the amount, type and quality of information that applicants will be required to submit to support a PTTW application, and on the ministry's allocation of technical capacity to review the application. MOE currently possesses little ecological expertise (emphasis added).

Reference - **Tab 28:** ECO, 2004-2005 Annual Report Supplement, page 100

90. Furthermore, the ECO noted that:

The ministry provided a very cursory statement of how its SEV was considered in this decision, citing positive impacts of the decision on environmental protection, the ecosystem approach, and resource conservation.

Reference - **Tab 28:** ECO, 2004-2005 Annual Report Supplement, page 102

91. The ECO also observed that:

Many issues require further clarification, including...the extent to which applicants will be responsible for providing information on ecosystem function...and on the interests of other parties...

Reference - **Tab 28:** ECO, 2004-2005 Annual Report Supplement, page 103

92. Unfortunately, the above-noted implementation concerns regarding O.Reg.387/04 raised by the ECO have not been fully resolved by the 2005 PTTW Manual, and CAMQ submits that such concerns have been replicated in this case in relation to the Demill PTTW. In the 2005-2006 Annual Report Supplement, for example, the ECO noted that:

- Several commenters criticized the 2005 Manual for not requiring a water balance assessment in all cases. The final version of the 2005 Manual appears deliberately vague on who will be responsible for conducting and funding water balance assessments for subwatersheds, watersheds, or aquifers;
- Many commentators criticized the 2005 Manual (and O. Reg. 387/04), which call for the MOE Director to consider certain ecological factors "to the extent that

information is available to the Director” as inadequately protective of the environment, and called for a more precautionary approach that puts the burden of proof on proponents when data are lacking;

- The MOE provided a cursory assessment of how MOE’s SEV was taken into account, briefly citing the principles of environmental protection, the ecosystem approach, and resource conservation; and
- No explanation is provided as to when MOE will require water balance studies, nor is there clarity on who will be responsible for conducting such studies.

Reference - **Tab 29:** ECO, 2005-2006 Annual Report Supplement, pages 148, 150, 152, 153

93. In its 2011-2012 Annual Report, the ECO noted improvement in certain aspects of the MOE’s PTTW program, but also identified continuing problems of a material nature that CAMQ submits are directly relevant to the Demill application and the Director’s decision to issue the PTTW in this case. These include:

- MOE’s ability to evaluate possible impacts of proposed water takings has long been hampered by the lack of water budgeting tools and data. Unfortunately, the framework and methodology by which MOE would integrate new water budget information into its day-to-day work evaluating PTTW applications remains very unclear;
- Information sharing between MOE and Conservation Authorities (“CAs”) on PTTW applications varies considerably and is not formalized by a protocol. Some CAs and MOE district offices have collaborative relationships enabling CAs to submit site-specific information if it exists, but MOE approves most PTTW applications after minimal data exchange between the agencies;
- MOE does not monitor stream flows itself, nor does it generally require permit holders to do so, relying mostly on downstream users to complain if water flows are interfered with. MOE also does not monitor the condition of fish and invertebrates;
- In a 2010 report on watershed governance, Conservation Ontario emphasized that more attention should be paid to ecosystem needs when decisions are made about water taking and watersheds. But MOE is the decision maker on water takings, and CAs have only a commenting role.

Reference - **Tab 30:** ECO, 2011-2012 Annual Report, pages 107-109

94. On this latter point regarding CA’s, CAMQ notes that during its March 31, 2014 meeting with MOE staff, the MOE Director verbally indicated that Demill’s PTTW application had been circulated to Quinte Conservation in late 2013 for review and comment. However, the hydrogeologist for this CA has recently confirmed with CAMQ that he has not seen or reviewed the PTTW application. In addition, the MOE’s technical

review of the 2014 PTTW indicates on its face that there has been no MOE consultation with the conservation authority, municipalities, First Nations, MNR, or the federal Department of Fisheries and Oceans. This apparent non-consultation appears contrary to the notification principles and responsibilities outlined in the MOE's PTTW Manual and section 7 of O.Reg.387/04.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 56-57; Exhibit AA: Email correspondence between CAMQ and Quinte Conservation (March 28, 2014); **Tab 31:** MOE PTTW Technical Review Number 5148-9D7Q78; **Tab 24:** MOE PTTW Manual (2005), pages 35-36; **BOA, Tab 1:** O.Reg.387/04, section 7

95. In summary, the ECO has identified ecosystem approach concerns in connection with O. Reg. 387/04 and the 2005 PTTW Manual due to, among other things:

- the discretion given the Director under the PTTW regime to only require consideration of specific ecosystem functions to the extent that information is available;
- the little ecological expertise possessed by MOE;
- the cursory to very cursory statements by MOE regarding how the SEV was considered when the regulation and manual were being developed;
- the lack of water budgeting tools and data;
- minimal data exchange between MOE and CAs;
- lack of real-time water-taking data on actual amounts of water being drawn; and
- lack of monitoring data on stream flow and the condition of fish and invertebrates.

96. CAMQ respectfully submits that the manner in which the Director purported to apply the Regulation and the 2005 Manual with respect to the issuance of the new PTTW to Demill provides a classic illustration of what the ECO feared can (and does) go wrong within the PTTW decision-making process, particularly when inadequate attention is given to satisfying the evidentiary requirements of the ecosystem approach. In short, CAMQ submits that the Director's decision-making in this case manifested exactly what the ECO has been concerned about in relation to the PTTW program.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit T: CAMQ letter to MOE (January 6, 2014); **Tab 5:** Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report

97. At the same time, CAMQ wishes to clarify that it is not making a collateral attack on the existence of MOE discretion in O.Reg.387/04, or on the lack of detailed guidance in the PTTW Manual, in relation to the ecosystem approach. Instead, CAMQ submits that it is the manner in which the Director purported to interpret and apply the Regulation and the PTTW Manual to make her permitting decision in this case that appears unreasonable.

As held by the Tribunal in the recent *Guelph* case, exercises of MOE discretion under the Regulation and/or PTTW Manual must be consistent with the overall purpose of the *OWRA*. In this case, CAMQ submits that the MOE's discretion was exercised in a manner that thwarts – not advances – the water protection, conservation and sustainability objectives of the *OWRA*. The MOE Director's instrument decision therefore warrants closer examination by the Tribunal, upon a full evidentiary record, at an appeal hearing.

Reference – **BOA, Tab 10:** *Corporation of the City of Guelph v. Ontario*, 2014 CarswellOnt 5932 at paras. 90-91 (Ont. Env. Rev. Trib.)

The Director's Decision Failed to Take into Account Cumulative Effects

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

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

Reference - **Tab 23:** MOE, *Statement of Environmental Values* (2008)

101. Cumulative effects have been defined as "changes to the environment that are caused by an action in combination with other past, present and future human actions".

Reference - **Tab 32:** Canadian Environmental Assessment Agency, *Cumulative Effects Assessment Practitioners Guide* (CEAA: Ottawa, 1999), Section 2.1

102. Based on O.Reg.387/04, the 2005 PTTW Manual specifically states that the MOE will consider the cumulative impacts of water takings. In particular:

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

Reference – **BOA, Tab 1:** O.Reg.387/04, section 4; **Tab 24:** MOE PTTW Manual (2005), page 4

103. However, despite such provisions, the Director decided to issue the new PTTW without requiring Demill to provide sufficient information, at an adequate level of detail, regarding the cumulative effects of the proposed industrial water-takings. It further appears that the MOE itself did not undertake a robust cumulative effects study for the

purposes of assessing the environmental impacts of the proposed industrial dewatering at the Long's Quarry and/or the proposed Melrose Quarry.

104. Although unacceptable and unreasonable, this failure to properly identify and evaluate cumulative effects in this case is not surprising since the MOE has traditionally taken a questionable approach to cumulative effects analysis. For example, in the 2005-2006 Annual Report Supplement, the ECO noted in connection with the 2005 PTTW Manual that:

- Several commenters criticized the 2005 Manual asking what conditions would trigger a consideration of cumulative effects. The final version of the 2005 Manual appears deliberately vague on who will be responsible for conducting and funding cumulative impact assessments for subwatersheds, watersheds, or aquifers; and
- No explanation is provided for when MOE will require cumulative impact studies, nor is there clarity on who will be responsible for conducting such studies.

Reference - **Tab 29:** ECO, 2005-2006 Annual Report Supplement, pages 150, 152-153

105. The 2011-2012 ECO Annual Report continued to raise the alarm in this regard. Under a heading "Limited Evidence that Cumulative Impacts are Considered", the ECO stated:

The PTTW Manual states that the ministry will consider cumulative impacts of water takings, but it appears MOE is requiring proponents to assess cumulative effects only in a few special cases. MOE has advised ECO of five instances province-wide where cumulative impact assessments have been undertaken, including two cases involving quarry operators. The ECO's sampling of 20 recently issued PTTWs for golf courses found no references to cumulative effects. In some watersheds, cumulative impacts could be significant; for example, the Grand River watershed has over 700 active PTTWs, with permits constantly being issued, renewed and expiring, including significant municipal water takings. It is hard to envision how MOE could have evaluated cumulative impacts in such watersheds prior to the development of water budgets....MOE's methodology for mining the new water-taking database and new water budgets to reveal cumulative effects remains unclear. As a result, it may not be surprising that the ministry states it "is not aware of situations where cumulative permitted water takings in a specific stream are exceeding the needs of the natural functions of the ecosystem."

Reference - **Tab 30:** ECO, 2011-2012 Annual Report, page 110

106. CAMQ respectfully submits that in issuing the new PTTW to Demill, the Director failed to consider, apply, or take into account cumulative effects. Therefore, it appears that there is good reason to believe that the Director's decision is unreasonable in the circumstances.

The Director's Decision Failed to Take into Account Sustainable Development Principles

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

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

Reference - **Tab 23**: MOE, *Statement of Environmental Values* (2008)

108. Sustainable development is not defined in the SEV, *OWRA* or *EBR*, but is defined under federal law to mean development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.

Reference - **BOA, Tab 1**: *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 2(1).

109. If sustainable development principles includes water conservation (which CAMQ submits that it does), then O.Reg.387/04 and the 2005 PTTW Manual address the former by reference to the latter. For example, the 2005 Manual states that: "Water conservation will be considered as a factor in decisions regarding permits to take water", and further stipulates that:

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

Reference - **BOA, Tab 1**: O. Reg. 387/04, section 4; **Tab 24**: MOE PTTW Manual (2005), page 27

110. Nevertheless, in this case, the Director issued the new PTTW to Demill despite evidence suggesting that massive industrial water-takings may cause adverse impacts on area water levels; that is, an impact harmful to water conservation. In this regard, the CAMQ's hydrogeologist has concluded that "despite the terms and conditions contained within the new PTTW, the large-scale dewatering activities at the existing Long's Quarry and/or proposed Melrose Quarry have the clear potential to cause unacceptable or significant impacts to local domestic wells and Blessington Creek."

Reference - **Tab 5**: Affidavit of John Pyke (July 7, 2014), para. 5(a); and Exhibit A: Malroz Report, pages 15-16

111. Moreover, it is reasonable to expect further stresses on groundwater resources in the vicinity of the Long's Quarry due to climate change, new development, and other pressures which may recur, if not intensify, in the future. In such circumstances, CAMQ submits that issuing the new PTTW to Demill (and allocating multi-millions of litres of water to this single industrial use) effectively provides no margin for error with respect to

potential impacts to area water quantity. In CAMQ's view, this approach is inconsistent with, or contrary to, sustainable development principles.

112. In addition, the Director's decision imposes no mandatory water conservation plan on Demill as a term or condition in the new PTTW, as discussed below. In this regard, the new PTTW is virtually identical to countless PTTWs issued by the MOE which have been soundly criticized in the ECO 2011-2012 Annual Report under the heading "Little Progress on Water Conservation":

Mandatory water conservation plans have...stalled; although amendments to the OWRA were passed in 2007 that would authorize MOE to require permit holders to prepare mandatory water conservation plans, these provisions have never been proclaimed into force. Instead, MOE has employed a softer approach; since 2005, the ministry has been asking water-taking applicants merely to declare their existing or planned water conservation measures. But the ministry has no summary on the status of water conservation measures taken by permit holders. The ECO's sampling of recently issued PTTWs in a high-use watershed observed that only two of eight permits required permit holders to report on water conservation measures. Since permit approvals are valid for up to ten years, this soft approach on water conservation (combined with free or very cheap water) may perpetuate wasteful water practices far into the future...

Reference - **Tab 30:** ECO, 2011-2012 Annual Report, page 110

113. In the circumstances, the Director's issuance of the new PTTW to Demill (without meaningful or enforceable conditions relating to water conservation) appears inconsistent with the purposes of the OWRA, which are "to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being." In any event, CAMQ respectfully submits that in issuing the new PTTW, the Director failed to consider, apply, or take into account sustainable development principles. Therefore, it appears that there is good reason to believe that the Director's decision is unreasonable in the circumstances.

Reference - **BOA, Tab 1:** OWRA, section 0.1

The Director's Decision Failed to Take into Account the Precautionary Approach

114. The MOE's SEV also contains a commitment that MOE will apply the "precautionary, science-based approach" when making environmentally significant decisions. In this regard, the SEV states:

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

Reference - **Tab 23:** MOE, *Statement of Environmental Values* (2008)

115. The Tribunal has stated that the term “precautionary approach”, as used in the SEV, may be used interchangeably with the term “precautionary principle”.

Reference – **BOA, Tab 15:** *Erickson v. Ontario* (2011), 61 C.E.L.R. (3d) 1 at paras. 519-520 (Ont. Env. Rev. Trib.)

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

This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.

Reference – **BOA, Tab 16:** *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 at para. 20

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

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

Reference – **BOA, Tab 17:** *Spraytech v. Hudson (Town)*, 2001 SCC 40 at para. 31

118. However, the MOE’s 2005 PTTW Manual does not refer explicitly to the precautionary principle (or approach) as a guiding principle of the PTTW program. Nevertheless, the PTTW Manual does identify the ecosystem approach, cumulative effects, and adaptive management as guiding principles.

Reference - **Tab 24:** MOE PTTW Manual (2005), page 4

119. As noted above, the ECO has expressed concerns about the very cursory nature of MOE’s explanation for how its SEV principles, including the precautionary approach, were adopted in O. Reg. 387/04 and the 2005 PTTW Manual.

Reference - **Tab 28:** ECO, 2004-2005 Annual Report Supplement, page 102 (re Regulation); **Tab 29:** ECO, 2005-2006 Annual Report Supplement, page 152 (re PTTW Manual)

120. The ECO also has noted the concerns of others in this regard by remarking that many commentators criticized the 2005 PTTW Manual and O. Reg. 387/04 (which direct the MOE Director to consider certain ecological factors “to the extent that information is

available to the Director”) as inadequately protective of the environment, and called for a more precautionary approach when key data or relevant information is lacking.

Reference - **Tab 29:** ECO, 2005-2006 Annual Report Supplement, pages 152-153

121. CAMQ submits that the MOE’s overall inability to satisfactorily demonstrate precisely how SEV principles (such as the precautionary approach) are applied to instruments (such the Demill PTTW) may be attributable to the MOE’s long-standing policy of simply not applying the SEV directly to instruments, despite the ECO’s repeated urgings that MOE do so. In any event, in this case, there appears to be little or no evidence on the record that the Director specifically or adequately considered the precautionary principle – or any other SEV principle – when deciding to issue the new PTTW to Demill.

Reference – **Tab 33:** ECO, 2002-2003 Annual Report Supplement, pages 58-59; **Tab 34:** ECO, Special Report to the Legislative Assembly of Ontario (2005), page 4

122. On this point, CAMQ notes that the MOE released a new SEV in October 2008 that does not mention instruments, let alone SEV application to them, despite the June 2008 judgment in the leading *Lafarge* case wherein the Divisional Court held that Directors, by operation of section 11 of the *EBR*, are not excluded from having to consider the SEV in relation to instruments.

Reference - **Tab 23:** MOE, *Statement of Environmental Values* (2008); **BOA, Tab 8:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at para. 56 (Ont. Div. Ct.)

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

Reference – **BOA, Tab 14:** *Protect Our Water and Environmental Resources v. Ontario* (2009), 43 C.E.L.R. (3d) 180 at paras. 44, 55 (Ont. Env. Rev. Trib.)

124. In any event, even if the MOE Director in this case concedes that the SEV is applicable to prescribed instruments such as PTTWs, CAMQ is unaware of any evidence on the record that demonstrates how the Director specifically considered the SEV (including the precautionary principle) before deciding to issue the new PTTW to Demill.

125. In its submissions to the Director, CAMQ expressly urged the Director to adopt the ecosystem approach and to apply the precautionary principle in the decision-making process. The CAMQ submission also flagged the absence of critically important information in this case:

In this case, the CAMQ’s review of the relevant technical materials suggests that there is a dearth of adequate information, at an appropriate level of detail, about a number of key facts and considerations, including:

- the site stratigraphy and the quantitative interactions between local groundwater resources (i.e. basal overburden aquifer and upper limestone aquifer) and Blessington Creek;
- the actual number, nature, and location of all drilled or dug wells which may experience interference by the massive water-takings authorized under the proposed PTTW renewal; and
- rock strata thickness, and the likelihood of further “pop-ups”, in the existing/expanded quarry floor through which groundwater may flow freely (such as the early 1990s quarry floor fissure that allowed a significant amount of groundwater inflow).

In summary, the CAMQ submits that there is nothing prudent or precautionary about renewing a PTTW in circumstances where critically important baseline information has not been collected, where there remains considerable uncertainty about potential environmental impacts, and where there are significant data/analytical gaps which have not been addressed to date by the proponent.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit T: CAMQ letter to MOE (January 6, 2014), pages 3-4

126. CAMQ’s concerns in this regard are underscored by the numerous flaws, gaps and inadequacies identified by CAMQ’s hydrogeological experts with respect to Demill’s technical documentation tendered in support of the proposed PTTW renewal. For example, CAMQ’s experts have concluded that: (a) the quarry dewatering has clear potential for significant impacts in several areas (e.g. impacts to nearby domestic wells, Blessington Creek, etc.); and (b) the Demill materials are deficient in several key respects, particularly in relation to baseline conditions, environmental monitoring, and contingency planning.

Reference – **Tab 5:** Affidavit of John Pyke (July 7, 2014), paras. 5, 7; and Exhibit A: Malroz Report

127. The Tribunal’s jurisprudence under the *EBR* has emphasized the importance of undertaking a precautionary approach to environmentally significant decisions, and it has been recognized that the precautionary approach is an important consideration under the “significant harm” branch of the *EBR* leave test:

If there could be significant harm resulting from the decision, then give benefit of the doubt to the environment and allow another look through an appeal (emphasis in original).

Reference - **BOA, Tab 18:** *Ridge Landfill Corp., Re*, (1998), 31 C.E.L.R. (N.S.) 190, page 200 (Ont. Env. App. Bd.)

128. In *Davidson*, the Tribunal held that:

A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be.

Reference – **BOA, Tab 19:** *Davidson v. Ontario* (2006), 24 C.E.L.R. (3d) 165 at para.44 (Ont. Env. Rev. Trib.); **BOA, Tab 20:** *Concerned Citizens' Committee of Tyendinaga & Environs v. Ontario* (2012), 67 C.E.L.R. (3d) 94 at paras.38, 45 (Ont. Env. Rev. Trib.)

129. On the authorities and on the evidence, CAMQ respectfully submits that it stretches credulity to accept that the precautionary principle played a prominent or, indeed, any role in the Director's decision to issue the new PTTW to Demill. In the absence of adequate technical information from Demill, there is no persuasive evidence that the Director considered the massive water-takings to be as harmful or impactful as they could be upon the local ecosystem or the interests of nearby domestic well owners.

130. In CAMQ's view, there is nothing "precautionary" or "science-based" about the Director's decision to authorize high-volume industrial water-takings at this sensitive location, even for just one year, without a full understanding of structural geology in the vicinity of the Long's Quarry (including the risk of additional "pop-ups"), or without knowing the full extent of potential impacts to the natural environment or nearby domestic wells relied upon by quarry neighbours. In the alternative, CAMQ submits that the Director misapplied the precautionary principle by failing to acknowledge the nature and extent of the uncertainties and fundamental gaps in the information supporting the Demill PTTW application in key areas of concern.

131. In summary, the MOE's "approve first, gather data later" approach is the antithesis of the precautionary principle. In the *Lafarge* case, the MOE Directors issued waste-burning approvals subject to certain conditions which, *inter alia*, directed the proponent to conduct post-approval test burns in order to gather information about the type, concentration and environmental fate of air contaminants that may be emitted from the proponent's cement kiln. Similarly, in the *CCCTE* case, the MOE Director issued amendments to a landfill approval which, *inter alia*, required post-approval information-gathering and environmental monitoring plan development by the proponent within a specified timeframe. In both cases, the Tribunal granted full leave to appeal on the grounds that the MOE's decision to issue the impugned approvals, in the face of fundamental evidentiary gaps, appeared to be unreasonable and insufficiently precautionary.

Reference – **BOA, Tab 12:** *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 at para. 58 (Ont. Env. Rev. Trib.); **BOA, Tab 20:** *Concerned Citizens' Committee of Tyendinaga & Environs v. Ontario* (2012), 67 C.E.L.R. (3d) 94 at paras. 40-41, 45 (Ont. Env. Rev. Trib.)

132. In this case, CAMQ similarly submits that it appears that there is good reason to believe that the decision of the Director is unreasonable in the circumstances. In short, the

new PTTW was issued despite considerable uncertainty about baseline conditions (e.g. structural geology), and despite the absence of fundamentally important data (e.g. domestic wells south of Blessington Creek) that would be required by the MOE in order to reach an informed decision about the PTTW and its potential impacts. CAMQ submits these evidentiary deficiencies are exacerbated by the fact that both the MOE and Demill's consultant have conceded the known potential for quarry dewatering to cause off-site impacts, as described below.

The Director's Decision Failed to Take into Account Adaptive Management Principles

133. The MOE's SEV also contains a commitment that the MOE will apply "adaptive management" techniques when making environmentally significant decisions. In this regard, the SEV states:

Planning and management for environmental protection should strive for continuous improvement and effectiveness through adaptive management.

Reference - **Tab 23:** MOE, *Statement of Environmental Values* (2008)

134. The MOE's 2005 PTTW Manual similarly identifies "adaptive management" as one of the principles of the PTTW program:

Principle # 3: The Ministry will employ adaptive management to better respond to environmental conditions. Adaptive management is a process that explicitly recognizes changes in natural systems, stresses learning from experience and monitoring, and revisiting management goals and objectives to adapt them as required in light of new information gained. As applied to the PTTW program, it comprises evaluating permit applications in light of available information on potential impacts, setting of permit conditions, monitoring, evaluating, and adjusting of water taking and permit conditions, as necessary. In cases where the Director believes that the taking poses an unacceptable adverse effect, or where there is no additional water available, the Director may refuse to issue the permit in response to an application, or curtail or revoke an existing permit.

Reference - **Tab 24:** MOE PTTW Manual (2005), page 4

135. In this case, the hydrogeological report prepared for CAMQ has identified significant problems with Demill's monitoring program and understanding of baseline conditions in the vicinity of the Long's Quarry. CAMQ submits that these fundamental problems undermine any claim that the Director has properly employed adaptive management techniques as a basis for evaluating, justifying, or overseeing the new PTTW in this case.

Reference – **Tab 5:** Affidavit of John Pyke (July 7, 2014), paras.5, 7; and Exhibit A: Malroz Report, pages 15-16

136. Since adaptive management is predicated, in substantial degree, on having a robust monitoring program in place in order to make appropriate adjustments to PTTW conditions over time, CAMQ submits that the current absence of a sound monitoring regime in this case severely undermines the ability to adaptively manage in response to future changes in environmental conditions and/or impacts.

137. In this regard, the Federal Court of Canada has described the relationship between adaptive management and the precautionary principle as follows:

An approach that has developed in conjunction with the precautionary principle is that of ‘adaptive management’. In *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 FC 672 (F.C.A.) at para. 24, Evans, J.A. stated that ‘the concept of adaptive management responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge’ and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts, to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists” (emphasis added).

Reference – **BOA, Tab 21:** *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at para. 32

138. CAMQ submits that where, as in this case, the informational foundation for relying on adaptive management is not present, then the technique should not be relied upon by the MOE, and the Demill PTTW should have been refused accordingly in the proper exercise of the precautionary principle.

139. In summary, CAMQ submits that in issuing the new PTTW to Demill, the Director misapplied, or failed to properly consider, adaptive management principles in the face of significant information gaps, particularly in relation to Demill’s proposed monitoring program and mitigation measures. Therefore, it appears that there is good reason to believe that the decision of the Director is unreasonable in the circumstances.

vi. The Director’s Decision and Common Law Rights of CAMQ Members

140. CAMQ provided submissions to the MOE which noted that the water quantity, water quality, and water-dependent ecosystem adverse effects associated with the proposed PTTW renewal could interfere with the common law rights and interests of CAMQ members and other local residents, particularly in relation to domestic wells and Blessington Creek. The common law causes of action that exist to safeguard landowner interests include riparian rights, negligence, private nuisance, and strict liability.

Reference - **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit T: CAMQ letter to MOE (January 6, 2014)

141. Moreover, the hydrogeological report prepared for CAMQ has concluded that “the proponent has not adequately demonstrated that the impacts from the water taking will not cause adverse impact or that impacts can be reasonably mitigated.”

Reference - **Tab 5:** Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, page 16

142. Both the Tribunal and the Divisional Court have made it clear that nothing in the *EBR* excludes the common law as relevant law to be considered under section 41(a). Since regulatory approvals may negate common law rights through the “statutory authority” defence, CAMQ submits that when a Director considers proposed activities that might constitute a tort to persons or their property interests, then it may be necessary for the Director to: (a) refuse the approval to prevent such impacts; (b) reduce or downsize the scale of approved undertaking to minimize such impacts; or (c) impose more stringent terms and conditions in the approval to mitigate (or ensure remediation of) such impacts. Put another way, it is unreasonable for a Director to overlook or ignore such factors, and CAMQ is unaware of any evidence on the record which demonstrates that the Director specifically addressed her mind to these key legal considerations before deciding to issue the new PTTW to Demill.

Reference – **BOA, Tab 12:** *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 at paras. 70-74 (Ont. Env. Rev. Trib.); **BOA, Tab 8:** *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at paras. 63-65 (Ont. Div. Ct.)

143. Common law rights may be diminished in several ways by the issuance of an instrument, including: (a) approvals protecting facilities from liability; (b) influencing the standard of conduct considered to be negligent; and (c) by courts deferring to regulatory officials’ assessments of environmental dangers. On this point, the MOE’s PTTW Manual itself recognizes that:

While section 34 of the OWRA is designed to control the taking of water in the province, there are also common-law rights to the use of water. Section 34 is an added control mechanism, and a person must comply with both the legislation and common law precedents and would generally be subject to the more limiting provisions. Thus, while common law rights are not superseded, they will likely be limited by the permit legislation

Reference – **Tab 24:** MOE PTTW Manual (2005), page 2; **BOA, Tab 12:** *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 at para. 73 (Ont. Env. Rev. Trib.)

144. Because PTTWs may effectively limit neighbours’ common law rights, it is necessary to consider whether the Director actually addressed her mind to this key matter prior to making her decision regarding the Demill PTTW, and whether she should have imposed further and better conditions to protect against unreasonable interference with the common law rights of CAMQ members.

Reference – **BOA, Tab 22:** *Tomagatick v. Ontario* (2009), 42 C.E.L.R. (3d) 39 at paras. 104, 109-111 (Ont. Env. Rev. Trib.)

145. In her response to this leave application, the Director may claim that such legal matters were considered prior to issuing the new PTTW to Demill. However, since the Director did not specifically aver to the legal concerns of CAMQ or its members prior to making her decision to issue the PTTW, she can hardly be said to have considered the possible interference with their common law rights if the PTTW was issued. Therefore, CAMQ submits that the apparent failure of the Director to consider common law rights appears unreasonable in the circumstances. On this point, CAMQ notes that the MOE's technical review of the Demill PTTW indicates the public letters of concern received by MOE "encompass the standard scope of considerations dealt with in the PTTW program", but this MOE technical review contains no specific mention of landowners' common law rights.

Reference – **Tab 31**: MOE PTTW Technical Review Reference Number 5148-9D7Q78

146. In summary, CAMQ submits that it appears that there is good reason to believe the decision of the Director is unreasonable in the circumstances. In particular, the Director's decision to issue the PTTW failed to:

- consider the MOE SEV, O.Reg.387/04 and the PTTW Manual by either not taking into account, or misapplying: the ecosystem approach; cumulative effects; sustainable development; precautionary approach; and adaptive management principles contained in the SEV; and
- consider the common law rights of CAMQ members in the area.

(b) It Appears that the Director's Decision Could Result in Significant Environmental Harm

147. Pursuant to section 41(b) of the *EBR*, CAMQ accepts that it must establish a *prima facie* case that it appears that "the decision in respect of which an appeal is sought could result in significant harm to the environment". Thus, at the leave stage, the question for the Tribunal is "whether the decision has the potential to cause significant environmental harm" (emphasis added).

Reference – **BOA, Tab 23**: *Quinte West (City) v. Ontario* (2009), 46 C.E.L.R. (3d) 237 at para. 13 (Ont. Env. Rev. Trib.); **BOA, Tab 8**: *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 at para. 47 (Ont. Div. Ct.); **BOA, Tab 10**: *Corporation of the City of Guelph v. Ontario*, 2014 CarswellOnt 5932 at paras. 109-110 (Ont. Env. Rev. Trib.)

148. Section 1 of the *EBR* defines "harm" as follows:

Harm means any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation.

Reference – **BOA, Tab 1**: *EBR*, section 1

149. The word “significant” is not defined in the *EBR*. The Environmental Appeal Board has stated that because of the inherent subjectivity of the concept of “significant harm”, the Board should attempt to use a test that does not rely on the individual view of its members as to what may be significant. Where possible, significance should be determined by reference to scientific principles and evidence of legal criteria.

Reference – **BOA, Tab 11:** *Residents Against Company Pollution Inc. v. Ontario*, [1996] O.E.A.B. No. 29 at para. 40 (Ont. Env. App. Bd.).

150. In this case, CAMQ submits that the Tribunal should take a similar “objective approach” for assessing the significance of the environmental harm arising from the issuance of the new PTTW to Demill.

i. Existing Environmental Conditions Already at Risk

151. There are several existing conditions in the geographic area of the Long’s Quarry that individually and collectively create the potential for significant environmental harm arising from the water takings authorized under the new PTTW. CAMQ submits that these existing conditions include that: (a) the Long’s Quarry sits within an area identified as a Highly Vulnerable Aquifer by the local Source Protection Committee pursuant to the *Clean Water Act, 2006*; (b) Blessington Creek may already be impacted due to other contaminant sources, seasonal low flow conditions and attendant loss of mixing capacity for quarry water discharges; (c) PWQO exceedances have already been detected in Demill’s monitoring station directly downstream of the discharge point, including boron (which Demill’s monitoring report attributes to quarry water discharge); and (d) nearby domestic wells have already experienced water quantity and quality problems. In short, the sensitive location of the massive water takings, the proximity of an already stressed watercourse, and the vulnerability of nearby domestic wells appear to constitute a “perfect storm” of pre-existing site conditions that will only be exacerbated by the large-scale water takings authorized by the new PTTW. Several of these matters are expanded upon briefly below.

152. Demill’s own hydrogeological study confirms that: (a) “virtually all of Tyendinaga Township is considered to have highly vulnerable aquifers;” (b) during the 1994 pop-up at the Long’s Quarry, there was “significant groundwater inflow through a fissure in the quarry floor;” (c) the water takings at the Long’s Quarry “have created, and will continue to sustain, a drawdown effect which extends outward (to the north and west);” (d) “development and dewatering associated with the proposed new quarry will extend those drawdown effects;” and (e) water collected at the proposed new quarry “will be conveyed to the existing settling pond area situated at the southern boundary of Long’s Quarry.”

Reference – **Tab 35:** Oakridge Environmental Ltd., *Level 1 and 2 Hydrogeological Study Category 2 Proposed Melrose Quarry* (December 2009), pages 24, 27, 37, 39-40

153. In addition, Demill’s monitoring program (April 2012) acknowledges that local residents have already reported low yields and water quality problems. However,

Demill's monitoring report (March 2013) concedes that "sufficient data to determine baseline conditions is not yet available" in the context of well water quality.

Tab 36: Oakridge Environmental Ltd, *Groundwater and Surface Water Monitoring Program: Long's Quarry/Melrose Quarry* (April 27, 2012), pages 2-3; **Tab 18:** Oakridge Environmental Ltd., *2012 Annual Compliance Monitoring Report: PTTW No. 6270-8PJLN9* (March 29, 2013), page 10

154. The Long's Quarry and proposed Melrose Quarry are located in a location identified under the *Clean Water Act, 2006* as a "vulnerable area". In particular, aquifer vulnerability mapping prepared for the Quinte Conservation Source Protection Committee confirms that the quarry lands are situated upon a highly vulnerable aquifer ("HVA").

Reference - **Tab 5:** Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, page 5 and attached Quinte Regional Groundwater Study: Map 4.8 – Vulnerability of Water Table Aquifer

155. Overall, CAMQ submits that these pre-existing conditions (HVA, Blessington Creek, domestic wells) in the geographic area of the proposed water takings clearly create the potential for significant environmental harm arising from the new PTTW, as described below.

ii. Classification of the PTTW as an Environmentally Significant Instrument

156. PTTW applicants, such as Demill, are required to classify their applications into one of three categories, based on the proposed water taking's anticipated risk to existing users and the environment. According to the MOE, Category 1 applications are unlikely to pose adverse impacts, while Category 2 and 3 applications have a "greater potential to cause adverse environmental impact or interference". Category 2 and 3 applications are subject to additional application requirements and allegedly "greater scrutiny by MOE". According to Demill's application and supporting documentation, the company's PTTW application is classified as a Category 3. Accordingly, it is clear on the face of the material filed by Demill that its application is in an MOE category that, by definition, has a greater potential to cause adverse environmental impact or interference.

Reference – **Tab 24:** MOE PTTW Manual (2005), pages 6-8; Reference – **Tab 19:** Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013)

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

Reference – **BOA, Tab 1:** O.Reg. 681/94, sections. 1.1, 3.1; **BOA, Tab 7:** *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176 at paras. 77-78 (Ont. Env. Rev. Trib.); **BOA, Tab 12:** *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281 at para. 18 (Ont. Env. Rev. Trib.)

iii. **Potential Environmental Impacts arising from the PTTW**

158. By any objective standard, CAMQ submits that: (a) taking multi-million litres of groundwater from within an HVA; (b) in a sensitive geographic area that includes Blessington Creek which may already be under stress; (c) where numerous domestic wells exist nearby and are wholly relied upon by CAMQ members, constitutes an environmentally significant activity with considerable potential to cause off-site impacts to the environment and nearby residents. Therefore, CAMQ submits that the Director's decision to issue the new PTTW must, at the very least, be regarded as having the potential to cause, or materially contribute to, significant environmental harm.

159. Significantly, Demill's own technical documentation concedes that the proposed water-takings at the quarry lands may cause adverse off-site impacts, such as lowering the local water table and resulting in at least a 2.5 metre drawdown in nearby domestic wells. In its submission to the MOE, CAMQ discussed the significance of such impacts upon the local environment and nearby residents:

For example, the hydrogeological report submitted in support of the ARA licence for the proposed Melrose Quarry concludes that the proponent's de-watering activities may cause a 2.5 metre drawdown (or lowering) in nearby private wells, which significantly reduces the residents' available water supply, particularly during seasonally dry periods. The predicted extent of this drawdown impact is at least 750 metres off-site from the quarry boundaries. This drawdown area also extends to Blessington Creek. However, the proponent fails to consider or address the potential impacts of quarry de-watering upon the numerous wells south of Blessington Creek.

While the proponent acknowledges that de-watering activities at the current/expanded quarry may cause these off-site impacts, the CAMQ sees no evidence in the proponent's materials that assesses the long-term or cumulative effects of such drawdowns, particularly in conjunction with other nearby high-volume groundwater users (i.e. the 20 farms (5 of which are dairy farms) within 3 km of the quarry) or other environmental factors or stresses (i.e. climate change).

It further appears to the CAMQ that the proponent's materials have not adequately evaluated the current (or future) effects of quarry de-watering on water quantity within Blessington Creek (i.e. streamflow depletion), which is a concern shared by the Quinte Conservation Authority. Moreover, the information provided by the proponent about key attributes of Blessington Creek (i.e. presence of bare bedrock vs. depth of sediment on the creek bed) is contradictory or inconsistent.

Reference: **Tab 2:** Affidavit of Susan Munro (April 30, 2014), Exhibit T: CAMQ letter to MOE Director (January 6, 2014), page 4.

160. These and other concerns have been validated in the hydrogeological report prepared for CAMQ:

The [PTTW] application in section 7 asks if the proponent is aware of any complaints or impacts resulting from water takings at the site. The proponent has indicated no. We request that the proponent clarify this response as we understand that that quarrying activities have resulted in reported complaints related to water quality as noted in section 5 of the technical report...

Section 6.2.1 indicates that water takings are not impacting groundwater quality or quantity. We disagree. The consultant's groundwater model predicts impacts to the groundwater. The consultant should clarify this statement.

Reference: **Tab 5:** Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, pages 11, 13

161. Similarly, the MOE's technical review of the Demill PTTW expressly acknowledges the risk of significant impacts from dewatering activities:

Evaluate Risk for Impact: Moderate to high due to the relationship of the quarry to nearby wells, questionable contingency aquifer, and groundwater surface water interactions...

Wells directly to the west and east of the site within a few hundred metres could be impacted by this quarry; however, the degree of impact can vary depending on the nature of the well (dug or drilled), and available drawdown (emphasis added).

Reference – **Tab 31:** MOE PTTW Technical Review Reference Number 5148-9D7Q78

iv. Inadequate PTTW Terms and Conditions

162. While the fact that a proposal for an instrument has been classified as a Class I proposal is evidence that a decision to issue the instrument is capable of causing significant environmental harm, the Tribunal must remain open to the possibility that terms and conditions contained in the instrument may eliminate environmental harm from a facility.

Reference – **BOA, Tab 7:** *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176 at paras. 77-78 (Ont. Env. Rev. Trib.)

163. In this case, the Director's decision was a conditional one; that is, she decided to issue the PTTW subject to certain terms and conditions. These conditions form part of the Director's decision, but CAMQ submits that these conditions appear wholly inadequate for the purposes of identifying, evaluating, preventing, monitoring or mitigating significant environmental harm emanating from the high-volume water takings

authorized by the new PTTW. The Tribunal has held that inadequate terms and conditions may satisfy the section 41 leave test.

Reference – **BOA, Tab 24:** *2216122 Ontario Inc. v. Ontario*, [2010] O.E.R.T.D. No. 14 at paras. 89-90 (Ont. Env. Rev. Trib.)

164. CAMQ submits that the six perfunctory Conditions (including sub-clauses) attached to the new Demill PTTW do not remove the instrument from having the potential to cause significant environmental harm. Specific examples of the serious gaps, flaws, and interpretive difficulties within the PTTW conditions are set out below. In light of these intractable problems, CAMQ submits that the appropriate and reasonable response from the MOE Director in this case would have been a decision refusing to issue the PTTW, rather than attempting to tinker with, or rely upon, a small number of conditions of approval which purport to address serious environmental risks and impacts. This conclusion is shared by CAMQ’s hydrogeological consultant:

My overall conclusion is that it was premature and unreasonable for the MOE Director to have issued a new PTTW (whether short- or long-term) in this case unless and until the above-noted information gaps, uncertainties, and documentary deficiencies have been satisfactorily addressed by the proponent, particularly in relation to baseline conditions, local stratigraphy, environmental monitoring, and contingency planning.

Reference: **Tab 5:** Affidavit of John Pyke (July 7, 2014), paras. 5(a) and 7

165. For example, the various provisions contained within Conditions 1 and 2 of the Demill appear to be standardized “boilerplate” that is found in countless PTTWs, and that have not been carefully crafted to address the site-specific circumstances of the Long’s Quarry. Indeed, the MOE’s simplistic rationale for these general Conditions is that they will assist in the interpretation and enforcement of the Demill PTTW. Therefore, for the purposes of the *EBR* leave test, these two Conditions *per se* do not obviate the risk of environmental harm, nor do they demonstrate that the MOE Director’s decision is reasonable.

Reference – **Tab 21:** Demill PTTW No. 7742-9E9TGN (June 27, 2014), Conditions 1, 2

166. Condition 3.1 stipulates that the PTTW expires on June 30, 2015, rather than the 10-year duration originally requested by Demill. However, in the circumstances of this case, CAMQ draws no comfort from the approximate one-year term of the PTTW, particularly if the underlying intent is to generate further documents from the proponent which will be used as the pretext for re-issuing the PTTW for 10 years. In her response to this leave application, the MOE Director may claim that this short-term PTTW will allow Demill to collect another year’s worth of monitoring data, and will enable Demill to conduct an “investigation” of the “structural geology” of Long’s Quarry and its vicinity. As described below, however, CAMQ submits that it highly unlikely that this additional work will produce any meaningful or reliable information for permit-issuing purposes. Accordingly, the one-year term of the PTTW should not be viewed as

“precautionary” in nature; instead, it can only be regarded as an objectionable attempt to allow Demill to shore up or bootstrap its otherwise deficient and questionable application for a 10-year PTTW at this sensitive location. In short, the extensive data gaps and other documentary problems should have been rectified by Demill before (not after) the new PTTW was issued by the Director in this case.

Reference – **Tab 31**: MOE PTTW Technical Review Reference Number 5148-9D7Q78

167. Condition 3.2 and Table A of the Demill PTTW impose various limits on the periods, amounts and rates that the proponent can take water pursuant to the PTTW. First, CAMQ notes that Condition 3.2 allows the proponent to take the exactly the same (and excessively large) water volumes that had been requested in Demill’s application to renew the 2012 PTTW for 10 years. Therefore, despite the MOE’s allegedly precautionary approach, and despite widespread public concern and ongoing scientific uncertainty, the MOE has made no attempt to reduce the scale or magnitude of the water takings that may be undertaken by Demill at the Long’s Quarry.

Reference – **Tab 21**: Demill PTTW No. 7742-9E9TGN (June 27, 2014), Condition 3.2 and Table A

168. Second, CAMQ notes that the MOE has also inexplicably acceded to Demill’s unjustified request to remove the seasonal restrictions on when the higher volume water takings may occur. As described above, the 2012 PTTW had only allowed these increased water takings (i.e., 3.9 million litres/day) to occur during the spring months (although Demill failed or refused to comply with this restriction in 2012). According to the 2012 PTTW, this seasonal restriction was imposed by the MOE in order to protect the environment and to ensure beneficial use and fair sharing of local water resources. CAMQ therefore objects to the MOE’s sudden failure or refusal to carry forward this public interest restriction into the 2014 PTTW. On this point, the MOE’s technical review simply indicates that Demill had requested the removal of this restriction, and that the MOE reviewer had “no objection” to the proponent’s request. CAMQ submits that this cryptic statement falls far short of explaining or justifying the abrupt deletion of a common sense provision that had previously existed for two years in the 2012 PTTW. In addition, CAMQ submits that Demill should not be “rewarded” by removing a Condition that the proponent had neglected to comply with in the recent past. Alarming, despite the Demill’s consultant’s above-noted advice to the proponent in the 2012 monitoring report that increased water takings could only occur in the spring months, it appears that the proponent again continuously took increased water takings in January 2013, contrary to the PTTW restrictions in effect at the time.

Reference – **Tab 5**: Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, pages 13-14; **Tab 31**: MOE PTTW Technical Review Reference Number 5148-9D7Q78; **Tab 19**: Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013), pages 3-4

169. Third, there is no air of reality to the maximum water taking volumes that will be allowed under the 2014 PTTW. Under the new PTTW, Demill would be allowed to withdraw up to 3.9 million litres/day for 60 days, and up to 1.3 million litres/day for 305

days (plus additional daily amounts for dust control and water supply purposes). However, Demill's own reports confirm that the actual water-taking volumes have been far below the allowable maximum amounts. For example, Appendix C of Demill's water taking records for 2012 and 2013 demonstrates that it has not been necessary for Demill to dewater Long's Quarry at volumes anywhere near the maximum amounts permitted under the new PTTW. Since the available evidence suggests that Demill generally withdraws only a small fraction of the maximum totals permitted under the PTTW, CAMQ submits that there is no public interest justification for the 2014 PTTW to arbitrarily set such high maximum amounts, particularly at a sensitive location where there is acknowledged potential for off-site adverse impacts. Moreover, if the higher volumes under the PTTW are intended to accommodate dewatering of the proposed Melrose Quarry, then CAMQ submits that it is premature, unreasonable and unacceptable for the MOE Director to do so since that quarry proposal remains unapproved to date, and there is no indication when – or if - it might get approved under the *ARA* and/or *Planning Act*. In short, the PTTW should have only allowed Demill to withdraw water amounts which are reasonably and demonstrably needed in relation to the Long's Quarry, not both quarries.

Reference – **Tab 19**: Oakridge Environmental Ltd, *Category 3 PTWW Renewal Application: Technical Report* (October 2013; revised November 21, 2013), Appendix C (water taking records for 2012 and 2013)

170. Fourth, CAMQ submits that there is a significant disconnect (if not operational conflict) between the 2014 PTTW and the 2013 Environmental Compliance Approval (“ECA”) that the MOE has issued for Demill's industrial sewage works. In particular, the new PTTW purports to allow Demill to pump 24 hours/day (at any time of year) to take up to 3.9 million litres/day from the pond, provided that the number of days does not exceed 60 days in total. However, the ECA governing the discharge of such water allows 24 hour/day pumping only “under spring thaw and melt water conditions.” In addition, the hydrogeological report prepared for CAMQ has raised a number of serious questions and concerns about the interplay between the PTTW and the ECA, and about the potential impact of high-volume discharges into Blessington Creek (i.e. flooding, erosion, etc.).

Reference – **Tab 37**: Demill ECA 4008-93RJMM (September 5, 2013); **Tab 5**: Affidavit of John Pyke (July 7, 2014), para. 5(f); and Exhibit A: Malroz Report, page 11

171. Fifth, CAMQ notes that the 2014 PTTW exponentially increases the water taking amounts that had been allowed under the Warren PTTW (which Demill apparently relied upon after its own 2005 PTTW application had been refused by MOE). In particular, while the 2014 PTTW issued to Demill allows up to 3.9 million litres/day to be taken, the Warren PTTW only allowed a maximum of 136,380 litres/day to be taken. CAMQ further notes that the Warren PTTW only allowed water taking to occur up to 10 hours/day, but the Demill PTTW allows the pond sump to run continuously for 24 hours/day on those dates when Demill is withdrawing the maximum 3.9 million litres/day.

Reference – **Tab 9:** Warren PTTW No. 7777-5ZLPX3 (June 10, 2004), Condition 3.2 and Table A

172. Sixth, the MOE’s PTTW Manual confirms that the amount of water to be taken under a PTTW should bear a reasonable resemblance to what is actually required (or has been used) by the proponent. This direction has not been complied with in relation to Demill’s new PTTW since the proponent has traditionally not taken – and has no reasonable intention of taking - all of the multi-million litres of water permitted under the PTTW for dewatering the Long’s Quarry:

A person who is applying for a Permit to Take Water should have a reasonable intention to use the water requested during the duration of the permit. If a Permit has been issued and the water is not being used, the Director will consider whether to cancel, amend or impose conditions on the Permit. This would occur in cases where a Permit is issued and there does not appear to be a reasonable intention to use the water.

Reference – **Tab 24:** MOE PTTW Manual (2005), page 29

173. Condition 4.1 of the 2014 PTTW simply requires Demill to maintain records of all water takings. While data collection is important, CAMQ submits that this mere record-keeping requirement provides no substantive protection against well interference or unacceptable impacts upon the natural environment. Condition 4.2 of the PTTW requires Demill to conduct an annual monitoring program. CAMQ has no objection to monitoring *per se*, but submits that Demill’s current monitoring program is substantively inadequate for the numerous reasons outlined by CAMQ’s hydrogeological consultant.

Reference – **Tab 21:** Demill PTTW No. 7742-9E9TGN (June 27, 2014), Conditions 4.2 and 4.3; **Tab 5:** Affidavit of John Pyke (July 7, 2014), para. 5(g); and Exhibit A: Malroz Report, pages 12-14, 16

174. While MOE staff has opined that Demill’s monitoring program is “intensive” (at least compared with other quarry PTTWs), CAMQ submits that the current monitoring regime is far from robust or comprehensive, and that it needs to be substantially expanded and improved in order to address the above-noted deficiencies.

Reference - **Tab 31:** MOE PTTW Technical Review Reference Number 5148-9D7Q78

175. Condition 4.3 of the 2014 PTTW is a new Condition that simply requires Demill to conduct an “investigation” of the “structural geology” in and around the Long’s Quarry. Condition 4.4 requires Demill to submit a report to the Director on the results of the proponent’s monitoring and investigation activities if an amendment or renewal of the PTTW is proposed by Demill. CAMQ submits that these vague provisions contains no prescriptive detail on the nature, scope, methodology, parameters or other key components of the so-called investigation, and similarly fails to provide any meaningful opportunities for public review/comment on Demill’s work plan for the “investigation” prior to its implementation. Alarming, the narrowly focused site geology plan fails to address one of the most pressing and long-standing concerns at the Long’s Quarry (and

proposed Melrose Quarry), *viz.*, the risk of another pop-up in the quarry floor. Similarly, there are no provisions requiring Demill to provide copies of the geology investigation report to CAMQ, local residents, municipalities or other interested agencies after the report is filed with the Director. Moreover, CAMQ notes that the MOE Director did not solicit comments from CAMQ or local residents on the adequacy of the structural geology work plan proposed by Demill. In short, the existence of the draft work plan was disclosed by the MOE Director to CAMQ mere days before the MOE Director announced that she had decided to issue the PTTW to Demill.

Reference – **Tab 21**: Demill PTTW No. 7742-9E9TGN (June 27, 2014), Condition 4.3 and 4.4; **Tab 3**: Affidavit of Susan Munro (July 4, 2014), paras. 6-7; **Tab 5**: Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, page 14

176. Conditions 5.1 and 5.2 of the 2014 PTTW simply replicate the usual language in PTTWs regarding notification and/or remediation of adverse impacts attributable to the water takings. CAMQ submits that these Conditions are essentially reactive rather preventative in nature, particularly since they are largely aimed at the proponent's obligations after negative impacts have already occurred. Moreover, the standardized wording in Conditions 5.1 and 5.2 provides no comfort to CAMQ or its members (including local dairy and beef farmers) who are 100% reliant upon groundwater for drinking water and other purposes. If, for example, if a pop-up occurs and mineralized groundwater upwells into the quarry and upper aquifer, it will not be possible to deepen neighbouring wells as a contingency measure. On this point, CAMQ notes that Condition 5.3 requires Demill to “adhere” to “Contingency Measures”, but a close perusal of these “measures” does not reveal any specific mitigation or remedial measures to be undertaken in the event that Demill determines, in its discretion, that quarry dewatering is causing adverse groundwater or surface water impacts. Indeed, Demill's vaguely worded “contingency measures” document (PTTW Schedule A, Item #2, page 4) acknowledges that the proponent is still trying to determine whether there are any “available options for restoration or replacement of affected water supplies.”

Reference – **Tab 21**: Demill PTTW No. 7742-9E9TGN (June 27, 2014), Condition 5; **Tab 5**: Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, pages 14-15

177. Condition 6 of the 2014 PTTW states that the MOE Director may amend the PTTW in the future by suspending or reducing the amounts or water that may be taken. In CAMQ's view, this discretionary provision simply amounts to a re-statement of the Director's general jurisdiction under subsection 34(6) of the *OWRA*, and therefore adds nothing new, significant or noteworthy to the PTTW.

Reference – **Tab 21**: Demill PTTW No. No. 7742-9E9TGN (June 27, 2014), Condition 6; **BOA**, **Tab 1**: *OWRA*, subsection 34(6)

178. In summary, the Demill PTTW is notionally subject to six Conditions, most of which are either boilerplate provisions, or are marred by substantive and/or procedural shortcomings. In addition, there are a number of key matters for which no conditions have been included in the PTTW, despite CAMQ submissions to the MOE Director.

179. For example, at the March 31, 2014 meeting with MOE staff, CAMQ recommended that the PTTW (if issued) should contain a condition requiring Demill to provide satisfactory financial assurance. On this point, CAMQ notes that the MOE's financial assurance guideline specifies that the Director "should" require financial assurance in a PTTW where, *inter alia*, the permitted activities could interfere with "the operation or use of municipal or private wells" or could "increase health or environmental risks," or where there have been non-compliance issues with the proponent. At the March 31st meeting, MOE staff acknowledged that financial assurance could be imposed in PTTWs, and referred to an Ottawa-area quarry PTTW where financial assurance had, in fact, been required. However, the 2014 PTTW issued to Demill does not include any financial assurance provisions, although the above-noted MOE guideline criteria appear to have been satisfied in this case.

Reference – **Tab 38**: MOE Guideline F-15 (2011), sections 4.4 and 4.4.4; **Tab 2**: Affidavit of Susan Munro (April 30, 2014), para. 63

180. In addition, although water conservation forms part of the purpose of the *OWRA* and is highlighted in the MOE's PTTW Manual, the Demill PTTW does not contain any express conditions requiring the proponent to undertake water conservation measures or best management practices in order to minimize the rate or amount of water takings at the Long's Quarry. To the contrary, the PTTW allocates a massive amount of water to this single industrial activity that is far in excess of what has been actually required for dewatering purposes at the Long's Quarry. CAMQ submits that this over-allocation is wholly unjustified and clearly inconsistent with water conservation principles espoused by the MOE's PTTW Manual.

Reference – **BOA, Tab 1**: *OWRA*, section 0.1; **Tab 24**: MOE PTTW Manual (2005), pages 11, 27-28; Reference: **Tab 5**: Affidavit of John Pyke (July 7, 2014), Exhibit A: Malroz Report, page 11

181. Similarly, the Demill PTTW does not contain any express provisions which prescribe clear definitions, triggers, protocols or requirements for reducing (or ceasing) water takings during low water or drought conditions at the local level. CAMQ submits that this significant omission is contrary to the MOE's water management goals of fair sharing, sustainable use, and protection of the natural environment. This omission is also puzzling since the need for appropriate low water response mechanisms is discussed in detail in the MOE's PTTW Manual. Moreover, CAMQ notes that under the local low water response program, Quinte Conservation found it necessary in 2011 and again in 2012 to issue low water declarations (Level 1 and 2). Accordingly, it remains unclear why the MOE Director declined to impose an appropriate low water condition in the new PTTW, despite the fact that the MOE has imposed such conditions in other large-volume PTTWs (i.e., Nestle PTTW, where the maximum daily water taking is generally 1.3 million L/day, which is the same volume that Demill is allowed to withdraw for 305 days/year).

Reference – **BOA, Tab 1**: *OWRA*, section 0.1; **Tab 24**: MOE PTTW Manual (2005), pages 4-5, 11, 24-25; **Tab 2**, Affidavit of Susan Munro (April 30, 2014), para. 57; and Exhibit BB: Email

correspondence between CAMQ and Quinte Conservation (April 17, 2014); **Tab 39**: Nestle PTTW No.3176-8UZMCU (September 28, 2012), Conditions 3.2 to 3.5

v. MOE Enforcement Limitations

182. Even if the new PTTW contained the most stringent terms and conditions possible, CAMQ remains concerned about the MOE's institutional capacity to undertake timely and effective inspection and enforcement activities to ensure Demill's compliance with the PTTW.

183. As noted above, Category 3 PTTW applications are meant to be subject to "greater MOE scrutiny". Indeed, the ECO has noted that: "An essential component of [MOE's] broad mandate to protect the environment includes its responsibility to enforce compliance with environmental laws and regulations." However, the findings of the ECO 2007 special report to the Ontario Legislature on MOE budget and staffing shortfalls raise concerns about the extent to which MOE will be able to undertake this function in relation to the Demill PTTW:

MOE is responsible for inspecting the numerous facilities in Ontario to ensure that they are complying with all of the provincial environmental laws and regulations. The case study notes that MOE has the capacity to inspect only about 2-4% of all regulated facilities each year, and that many facilities may go decades without inspection. When inspection sweeps are conducted, extremely high levels of non-compliance are often found. Despite MOE's concerted efforts to refocus its inspection resources, MOE's inspection program continues to face significant challenges.

Reference - **Tab 40**: ECO, *Doing Less with Less: How Shortfalls in Budget, Staffing and In-House Expertise are Hampering the Effectiveness of MOE and MNR – A Special Report to the Legislative Assembly of Ontario* (2007), pages 13, 23

184. CAMQ is unaware of any dramatic improvement in the MOE's inspection capabilities in the intervening seven years since the ECO's special report was released. Indeed, in relation to PTTWs in fiscal years 2011-2012, the MOE inspected just under four per cent of all PTTWs (there are over 6,000 active PTTWs in the province) for general compliance, including conditions on maximum takings and interferences. At that rate, the MOE is only able to inspect each current PTTW once every 25 years. Moreover, the overall budgetary picture for MOE appears to be getting worse. In its 2012-2013 Annual Report, the ECO noted:

For the past five years, the ECO has raised concerns that the capacities of the two provincial ministries chiefly responsible for protecting Ontario's environment and natural heritage [MOE and MNR] have not kept pace with their responsibilities...

Reference - **Tab 30**: ECO, 2011-2012 Annual Report, pages 105, 109; **Tab 41**: ECO, 2012-2013 Annual Report, pages 57-59

185. CAMQ respectfully submits that limited MOE enforcement capability in the context of the new PTTW can contribute to the significance of the environmental harm that the water-takings may have on the natural environment and local residents. This concern not merely hypothetical or speculative. To the contrary, it is underscored by Demill's own history of non-compliance with provincial environmental laws, as described below.

vi. Proponent's History of Non-Compliance

186. In the context of the *EBR* leave test, the Tribunal has held that a proponent's compliance track record is a relevant consideration when the Director is deciding whether an instrument should be granted or refused. Similarly, CAMQ submits that a proponent's non-compliance should also be considered by the Director in deciding whether more prescriptive terms and conditions (particularly in relation to monitoring and reporting) should be included in an instrument if issued. As noted in *Marshall*, "past performance may have some bearing on predicted future performance," and "a Director's decision that fails to take into account the likelihood of future compliance by, for example, ignoring a proponent's track record may be the proper subject of a challenge under section 41 of the *EBR*."

Reference - **BOA, Tab 25:** *Scharfe v. Ontario* (2009), 49 C.E.L.R. (3d) 142 at para. 54 (Ont. Env. Rev. Trib.); **BOA, Tab 26:** *Marshall v. Ontario* (2008) 38 C.E.L.R. (3d) 291 at para.63 (Ont. Env. Rev. Trib.)

187. In *McRae*, in relation to a PTTW issued for quarry dewatering purposes, the Tribunal held that:

Environmental violations under any statutory regime reveal the regard with which a proponent views its legal obligations and reflect the likelihood that the proponent is likely to commit further violations in the future, including the terms and conditions in a PTTW. A company's entire environmental compliance history is relevant, not just its history under the provision being applied by the Director in deciding whether to issue a permit or approval...

Since compliance with the terms and conditions of a PTTW is important to achieve the conservation, protection and management of Ontario's waters, and since a proponent's history of environmental compliance is relevant to whether the conditions in a PTTW will be complied with, it would be unreasonable for a Director to disregard the environmental compliance record of a proponent before issuing a PTTW. The Tribunal concludes that under Ground 1, the Applicant has met the first branch of the section 41 test, that it appears there is good reason to believe that no reasonable person, having regard to the relevant law and to government policies developed to guide decisions of that kind, could have made the decision in question without considering Cavanagh's environmental compliance history (emphasis added).

Reference – **BOA, Tab 27: *McRae v. Ontario***, 2009 CarswellOnt 5958 at paras. 20, 25 (Ont. Env. Rev. Trib.)

188. Given the close relationship between the two branches of the section 41 leave test under the *EBR*, CAMQ submits that a Director’s failure to adequately consider a proponent’s non-compliance not only satisfies the “unreasonableness” branch, but also satisfies the “significant harm” branch. In short, no reasonable Director would issue a new instrument (with simplistic “boilerplate” conditions that are inadequate to protect the environment) to a proponent with a known history of non-compliance with Ontario’s environmental laws. This is irrespective of whether provincial authorities have, in the exercise of prosecutorial discretion, subsequently declined to lay charges against the non-compliant proponent.

189. In this case, CAMQ submits that there has been a troubling history of serious non-compliance by Demill with applicable statutory requirements and PTTW conditions. As described above in Part II of this leave application, it appears that Demill:

- (i) undertook water taking at the Long’s Quarry for years without its own PTTW under section 34 of the *OWRA*;
- (ii) discharged water from the settling pond at the Long’s Quarry for years without approval under section 53 of the *OWRA*;
- (iii) failed to submit a proposed monitoring program to the MOE by the deadline prescribed in the 2012 PTTW; and
- (iv) failed to comply with the 2012 PTTW condition that restricted higher-volume water-takings to spring months.

Reference – **BOA, Tab 1: *OWRA***, section 107

190. However, to CAMQ’s knowledge, none of the above-noted non-compliance by Demill triggered any prosecution activity or administrative orders by MOE. Instead, the Director has now purported to issue yet another PTTW to Demill, and has further failed to incorporate effective and enforceable conditions in the PTTW. CAMQ submits that the Demill PTTW appears to follow the same “cookie cutter” template used for virtually all PTTWs issued in Ontario, and contains inadequate conditions which have not been carefully tailored to address the site-specific circumstances in this case. Accordingly, CAMQ concludes that the risk of significant environmental harm (and further non-compliance) under the new PTTW remains undiminished and omnipresent.

191. In addition, there appears to be evidence that Demill contravened requirements imposed under the *ARA* in relation to the Long’s Quarry. In January 2010, for example, an MNR site inspection found two infractions: excavation within the 15 metre setback along the eastern boundary, contrary to provincial standards under the *ARA*; and removal of fencing along the eastern boundary, contrary to the approved site plan. These two infractions were again described in a January 2013 inspection report by MNR staff, but the MNR has declined to take enforcement action against Demill.

Reference – **Tab 2:** Affidavit of Susan Munro (April 30, 2014), paras. 22, 24; Exhibit E: MNR Notice of Inspection (January 15, 2010); and Exhibit G: MNR Notice of Inspection (January 25, 2013)

192. On the record, it is unclear whether – or what extent – Demill’s non-compliance under the *OWRA* and/or *ARA* was considered by the MOE Director, or how such non-compliance influenced the content of the terms and conditions contained within the new PTTW. However, given that the new PTTW is substantially similar in most respects to the previous PTTWs issued in relation to the Long’s Quarry, CAMQ submits that it is reasonable to conclude that Demill’s non-compliance track record played little or no role in the Director’s decision to issue another PTTW to Demill.

193. In summary, CAMQ submits that it appears that the Director’s decision could result in significant harm to the environment. In particular, existing conditions in the vicinity of the Long’s Quarry, in combination with the extensive water takings authorized by the new PTTW, have clear potential to result in significant environmental harm. Furthermore, this concern is aggravated by the inadequacy of the perfunctory terms and conditions in the Demill PTTW, the limitations on the MOE’s capability in enforcing the PTTW conditions, and the proponent’s own history of non-compliance with Ontario’s environmental laws.

PART IV – CONCLUSIONS AND ORDER REQUESTED

194. CAMQ respectfully submits that when all the evidence available at this stage is considered, it appears that there is good reason to believe the Director’s decision to issue the new PTTW to Demill is unreasonable in failing to consider at least five key components entrenched within the MOE SEV, O.Reg.387/04 and/or 2005 PTTW Manual (e.g. ecosystem approach, cumulative effects, sustainable development, precautionary approach, and adaptive management), as well as the common law rights of CAMQ members in the area. Accordingly, the Director’s decision appears unreasonable within the meaning of section 41(a) of the *EBR*.

195. CAMQ further submits that on the available evidence, it appears that the Director’s decision to issue the new PTTW to Demill could result in significant harm to the environment due to the existing hydrogeological conditions in the area; the massive water-takings purportedly authorized by the PTTW; the inadequate terms and conditions in the PTTW; and the MOE’s enforcement limitations, particularly in light of the proponent’s history of non-compliance. Accordingly, it appears that the Director’s decision could result in significant environmental harm within the meaning of section 41(b) of the *EBR*.

196. For the foregoing reasons, CAMQ respectfully requests an Order from the Tribunal granting the CAMQ unrestricted leave to appeal the Director’s decision to issue the PTTW to Demill. In particular, CAMQ requests leave to appeal the Director’s decision in its entirety (including the general and special conditions contained in the PTTW) on all grounds described in this application, and such further or other grounds as

counsel for CAMQ may advise, unless ordered otherwise by the Tribunal. At this interlocutory stage, CAMQ submits that the scope of the appeal should not be limited or constrained on the basis of the record filed by the parties in this leave application.

197. If leave is granted, CAMQ intends to serve and file a Notice of Appeal that, *inter alia*, requests the Tribunal to issue an Order wholly revoking the Director's problematic decision to issue the PTTW to Demill.

Reference – Tab 3: Affidavit of Susan Munro (July 4, 2014), para. 10

198. CAMQ further submits that if leave is granted, the Director's decision to issue the PTTW should remain fully subject to the automatic stay under section 42 of the *EBR*. In the event that Demill brings a motion to have the stay lifted in whole or part, CAMQ respectfully requests an opportunity to respond to such motion before the Tribunal makes a ruling regarding the statutory stay.

Reference – **BOA, Tab 1: *EBR***, section 42

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 11, 2014



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