

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF sections 34, 100 and 101 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 as amended;

-and-

IN THE MATTER OF sections 38 to 48 of the *Environmental Bill of Rights*, S.O. 1993, c. 28;

-and-

IN THE MATTER OF an appeal by the Citizens Against Melrose Quarry against the decision of Gillian Dagg-Foster, Director, Ministry of the Environment, under section 34(6) of the *Ontario Water Resources Act*, R.S.O. 1990, c.O.40, as amended, to issue Permit To Take Water No. 7742-9E9TGN dated June 27, 2014, to C.H. Demill Holdings Inc. to authorize industrial water takings at the Long's Quarry located at 13 Melrose Road, Lot 6, Concession 3, Township of Tyendinaga, County of Hastings, Ontario.

NOTICE OF APPEAL

TAKE NOTICE that pursuant to sections 100 and 101 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 (“OWRA”), and pursuant to the decision of the Environmental Review Tribunal (“Tribunal”) in Case File 14-053 dated October 27, 2014 granting leave to appeal to the Citizens Against Melrose Quarry (“the Appellant”), the Appellant hereby requires a hearing before the Tribunal in respect of the decision of Gillian Dagg-Foster, Director, Ministry of the Environment (“MOE”), to issue Permit to Take Water (“PTTW”) No. 7742-9E9TGN dated June 27, 2014 to C.H. Demill Holdings Inc. (“Demill”) under subsection 34(6) of the OWRA.

AND FURTHER TAKE NOTICE that the Appellant hereby appeals the above-noted PTTW in its entirety, including all general and special Conditions therein, and that the Appellant respectfully requests that the Tribunal grant:

1. An Order revoking the PTTW in its entirety;
2. In the alternative, an Order directing the MOE Director to substitute further and better Conditions in the PTTW, as may be specified by the Tribunal; and
3. Such further or other Orders as the Appellant’s counsel may advise and this Tribunal permit.

AND FURTHER TAKE NOTICE that the grounds for the Orders requested by the Appellant are as follows:

1. The PTTW and its Conditions are inadequate to protect the environment and the interests of local landowners, and do not require appropriate and effective measures to ensure the timely identification, assessment and mitigation of the direct, indirect

and cumulative impacts which may be caused by the industrial water takings authorized by the PTTW. In particular, the PTTW does not impose:

- (a) reasonable water quantity limits;
 - (b) appropriate seasonal restrictions on increased water takings;
 - (c) effective monitoring, data collection or site investigation requirements;
 - (d) viable contingency plans;
 - (e) meaningful water conservation measures;
 - (f) proper financial assurance; or
 - (g) stringent public reporting and consultation obligations.
2. The PTTW and its Conditions were issued by the MOE Director without:
- (a) adequate consideration or application of the precautionary principle, ecosystem approach, cumulative effects analysis, adaptive management, sustainable development, and other relevant matters mandated by Ontario Regulation 387/04, the MOE's 2005 PTTW Manual, and the MOE's Statement of Environmental Values ("SEV") under the *Environmental Bill of Rights* ("EBR");
 - (b) sufficiently detailed information on existing baseline conditions of the local environment, particularly in relation to geological stratigraphy, the risk of "pop-ups" (stress-induced buckling of rock strata) in the quarry floor, and hydrogeological conditions at the Long's Quarry and its vicinity;
 - (c) adequate consideration of the common law rights of landowners beside or near the Long's Quarry, or downstream along Blessington Creek; or
 - (d) adequate consideration of Demill's history of non-compliance with provincial environmental laws and statutory instruments pertaining to the Long's Quarry.
3. Allowing the environmental risks or impacts of industrial water takings at the Long's Quarry to be investigated, monitored and reported upon under the deficient Conditions in the PTTW is contrary to the public interest and inconsistent with the purposes and provisions of the OWRA, EBR, Ontario Regulation 387/04, the MOE's 2005 PTTW Manual, and the MOE's *Water Management Policies, Guidelines and Provincial Water Quality Objectives*.
4. Sections 0.1, 1, 2, 34, 53, 100, 101 and 107 of the OWRA, and sections 1, 2, 11, and 38 to 48 of the EBR.

5. Such further or other grounds as the Appellant's counsel may advise and this Tribunal permit.

AND FURTHER TAKE NOTICE that the material facts and particulars that the Appellant relies upon in relation to the above-noted grounds of appeal include, but are not necessarily limited to, the following:

Background

1. The Long's Quarry is located at Lot 6, Concession 3, Township of Tyendinaga, and is currently being operated by Demill.
2. While the Long's Quarry has existed for several decades, Demill is presently extracting aggregate, and deepening the quarry, well below the local water table.
3. The current licence under the *Aggregate Resources Act* ("ARA") allows Demill to extract aggregate down to 99 metres above sea level ("masl") at the Long's Quarry.
4. Demill has also filed applications under the ARA and the *Planning Act* to establish and operate the Melrose Quarry on lands immediately adjacent to the Long's Quarry; however, this large quarry proposal remains unapproved at the present time.
5. Because the residential and farming properties in the vicinity of the Long's Quarry are not serviced by a municipal drinking water system, local residents and farmers are dependent upon a low-yield shallow aquifer as the source of water for drinking water, domestic uses, livestock watering and other agricultural purposes.
6. In the event that this shallow aquifer becomes depleted or degraded, there is no other potable groundwater that can be utilized by local residents or farmers as an alternate water supply.
7. Since the Long's Quarry receives direct precipitation, surface runoff and shallow groundwater inflow, Demill applied to the Director in the fall of 2013 for a PTTW under the OWRA.
8. On June 27, 2014, the Director issued the PTTW to Demill, despite objections from the Appellant regarding the potential impacts of the proposed water takings upon nearby domestic wells, environmental features and ecosystem functions, including Blessington Creek.
9. The PTTW conditionally authorizes Demill to take millions of litres of water per day for three industrial purposes: quarry dewatering, dust suppression and water supply.
10. On October 27, 2014, the Tribunal found that it appeared the Director's decision to issue the PTTW was unreasonable and could result in significant environmental harm, and

the Tribunal granted the Appellant unrestricted leave to appeal the PTTW in its entirety pursuant to sections 38 to 48 of the EBR.

Ground 1: Inadequate Terms and Conditions

11. The Long's Quarry is located in a vulnerable and complex hydrogeological setting, and large-scale industrial water takings by Demill at this location have considerable potential to cause unacceptable impacts upon local groundwater and surface water resources, and to cause interference with nearby domestic wells.

12. However, the PTTW and its six main Conditions (including sub-clauses) do not contain sufficient safeguards to ensure that the above-noted impacts are prevented, minimized or mitigated, or that such impacts are carefully monitored and subjected to viable contingency measures.

13. For example, although the PTTW is limited to a one-year term, Condition 3.2 and Table A of the PTTW unjustifiably authorize excessively large water takings to occur at the Long's Quarry, particularly for dewatering purposes.

14. The PTTW further fails to impose an appropriate seasonal restriction on when higher volumes of water may be taken at the Long's Quarry, and instead confers discretion upon Demill to take up to 3.9 million litres per day during any 60 days of the calendar year (and up to 1.3 million litres/day for 305 days/year) for dewatering purposes.

15. A seasonal restriction on water taking volumes at the Long's Quarry (e.g. 24 hour/day pumping only during spring thaw/meltwater conditions) was included in the previous PTTW issued to Demill in 2012, and it is also included in the Environmental Compliance Approval issued to Demill in 2013 to govern discharges of quarry water into Blessington Creek.

16. Condition 4.2 of the PTTW requires Demill to implement an MOE-approved monitoring program for Long's Quarry, but the current monitoring program contains procedural deficiencies and substantive gaps, and will not ensure that water-taking impacts are properly identified, assessed and reported upon by Demill.

17. In particular, Demill's current monitoring program does not address how the following data gaps will be resolved:

- adaptive changes to the program based on updated yearly data;
- limited data beneath the quarry floor;
- effects on domestic well users of potential dewatering of wells, within the area of predicted drawdown, which are completed in low yield aquifer(s);
- impacts to aquifers south and east of Blessington Creek; and

- positive or negative impacts to Blessington Creek.

18. However, Demill's sparse monitoring efforts to date in relation to Blessington Creek have detected exceedances of the MOE's Provincial Water Quality Objectives for various parameters, including some potentially related to the discharge of quarry water into the creek.

19. While Conditions 4.3 and 4.4 of the PTTW require Demill to carry out and report upon an "investigation" of the "structural geology" at the Long's Quarry, the nature, scope and parameters of the investigation are unduly limited and will not gather long-overdue information about the risks of pop-ups in the quarry floor, or about the likelihood or significance of unacceptable impacts to surface water or groundwater resources which may be caused by industrial water takings at the Long's Quarry.

20. A pop-up occurred at the Long's Quarry in 1994 which allowed groundwater to flow into the quarry, and the risk of another pop-up (and consequential impacts on local groundwater users) was the primary basis for the Director's refusal to issue a PTTW to Demill in 2005.

21. In issuing Conditions 5.1, 5.2, 5.3 and 6 of the PTTW, the Director failed or refused to address a wide range of substantive deficiencies and procedural flaws in the current contingency plan proposed by Demill in the event that water takings at the Long's Quarry cause unacceptable impacts to Blessington Creek or interfere with nearby domestic wells.

22. In issuing the PTTW, the Director failed or refused to include any Conditions relating to:

- financial assurance, contrary to MOE Guideline F-15;
- water conservation, contrary to the OWRA and the MOE PTTW Manual; or
- local low water or drought conditions, contrary to the OWRA and the MOE PTTW Manual.

Ground 2(a): Failure to Consider or Apply Binding MOE Principles

MOE SEV Considerations

23. The MOE SEV mandates the application of a "science-based precautionary approach in its decision-making to protect human health and the environment."

24. In relation to the PTTW for the Long's Quarry, the precautionary approach required the Director to consider the water takings to be as hazardous as they could possibly be in the circumstances.

25. However, the Director imprudently issued the PTTW in the face of considerable uncertainty about environmental risks regarding off-site impacts of water takings at the Long's Quarry, and she simply required Demill to carry out further (and highly constrained) investigations during the term of the PTTW.

26. The Director's "wait-and-see" (or "approve first, gather data later") approach is not consistent with the precautionary principle, and does not represent an appropriate exercise of adaptive management, which is also entrenched as a fundamental principle in the MOE SEV.

27. While the MOE SEV entrenches the ecosystem approach as a fundamental principle to guide MOE decision-making, the Director issued the PTTW to Demill despite sizeable evidentiary gaps in Demill's supporting documentation regarding baseline environmental conditions and the likelihood or significance of ecological and biophysical impacts which may be caused by industrial water takings at the Long's Quarry.

28. In particular, prior to the Director's issuance of the PTTW, there was a paucity of adequate information, at an appropriate level of detail, about a number of key facts and technical considerations regarding water takings at the Long's Quarry, including:

- the site stratigraphy and the quantitative interactions between local groundwater resources (e.g. 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 PTTW; and
- rock strata thickness, and the likelihood of further "pop-ups", in the existing or deepened quarry floor through which groundwater may flow freely.

29. Although the MOE SEV stipulates that a key aspect of an ecosystem approach is the consideration of cumulative effects, the Director, when issuing the PTTW, did not consider cumulative effects adequately or at all, nor did she require Demill to conduct any cumulative effects analysis prior to issuance of the PTTW.

30. The MOE SEV entrenches sustainable development as a fundamental principle, but the Director's issuance of the PTTW (particularly without water conservation requirements) does not ensure sustainable (or equitable) water use in order to safeguard local users' needs or natural functions of the ecosystem.

31. The MOE SEV further requires the Director to ensure meaningful public participation in environmentally significant decisions, such as those relating to PTTWs intended to regulate water takings.

32. However, the PTTW and its Conditions do not make adequate provision for meaningful public participation in the development, review, amendment or approval of environmental monitoring requirements, contingency plans, or remedial measures at the Long's Quarry.

33. To the contrary, neither the Appellant nor the public at large were offered any opportunities by the Director to review and comment upon Demill's proposed monitoring program or proposed site geology investigation before they were accepted by the Director behind closed-doors, and adopted by cross-reference in Schedule A of the PTTW.

Considerations under O.Reg. 387/04 and the MOE PTTW Manual

34. To the extent that O.Reg. 387/04 and the MOE's PTTW Manual similarly require consideration of the ecosystem approach, cumulative effects, sustainable resource use, and adaptive management, the Appellant repeats and adopts the above-noted statements in paragraphs 23 to 33.

35. In essence, the PTTW was issued by the Director to Demill without due regard for, or proper consideration of, the above-noted environmental principles entrenched within O.Reg. 387/04 and the MOE PTTW Manual.

Ground 2(b): Failure to Consider Baseline Environmental Conditions

36. The evidentiary basis upon which the Director relied to issue the PTTW was fundamentally incomplete and plagued by significant data gaps and considerable uncertainty.

37. In particular, the Director:

- lacked adequate baseline information regarding surface water, groundwater and geological stratigraphy at or near the Long's Quarry;
- lacked adequate data or information on potential environmental and landowner impacts that may be caused by large-scale water-takings at the Long's Quarry; and
- failed to address the need for a robust and comprehensive assessment of the risk of further "pop-up" events at the Long's Quarry as aggregate extraction occurred deeper toward 99 masl.

38. In the absence of this and other critically important information, it was premature and unreasonable for the Director to have issued the PTTW to Demill. In particular, the Director should have refused to issue the PTTW, rather than impose vague and inadequate Conditions which purported to require further study and reporting by Demill, but which nevertheless still authorized massive water takings to occur at the Long's Quarry.

Ground 2(c): Failure to Consider Common Law Rights of Landowners

39. The PTTW confers statutory authority upon Demill to undertake large-scale industrial water takings at the Long's Quarry, subject to various Conditions, including those relating to monitoring, reporting, and contingency activities at the Long's Quarry.

40. The inadequate PTTW conditions, particularly those relating to water taking, monitoring, and contingency plans at the Long's Quarry, fail to protect the common law rights of site neighbours against unacceptable impacts arising from the activities authorized under the PTTW.

41. Prior to issuing the PTTW, the Director did not adequately consider and weigh the common law rights of landowners (including riparian owners) in the vicinity of the Long's Quarry, or the potential consequences of the activities permitted under the PTTW upon the interests of local landowners.

Ground 2(d): Failure to Consider Demill's History of Non-Compliance

42. The PTTW was issued by the Director despite Demill's lengthy and well-documented history of non-compliance not only with Ontario's environmental legislation, but also with the terms and conditions of previous PTTWs.

43. This history of relevant non-compliance by Demill includes (but is not necessarily limited to) the following contraventions:

- Demill took water at the Long's Quarry for years without its own PTTW under section 34 of the OWRA;
- Demill discharged water from the settling pond at the Long's Quarry for years without approval under section 53 of the OWRA;
- Demill failed to submit a proposed monitoring program to the MOE by the deadline prescribed in the 2012 PTTW;
- Demill failed to comply with the 2012 PTTW condition that restricted higher-volume water-takings to spring months; and
- Demill failed to comply with setback and fencing requirements established under the ARA.

44. In the circumstances, it was incumbent upon the Director to refuse to issue the PTTW to Demill. In the alternative, if the Director was otherwise inclined to issue the PTTW, she should have imposed further and better Conditions in the PTTW (e.g. enhanced record-keeping requirements; timely public reporting; financial assurance; on-site supervision by an independent qualified person, etc.) to ensure compliance by Demill at all material times.

Ground 3: Inconsistency with MOE's Environmental Statutes and Policy

45. In respect of Ground 3, the Appellant pleads and relies upon the facts and particulars set out in the foregoing paragraphs.

DATED at Toronto, this 7th day of November, 2014.




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