

**SUBMISSIONS OF THE CITIZENS AGAINST THE ED-19 DUMP
TO THE MINISTER OF THE ENVIRONMENT, CONSERVATION AND PARKS
RE: RECONSIDERATION OF *ENVIRONMENTAL ASSESSMENT ACT*
APPROVAL OF THE ED-19 LANDFILL**

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PART I – OVERVIEW

1. These are the submissions filed by the Canadian Environmental Law Association (“CELA”) on behalf of the Citizens Against the ED-19 Dump (“CAD”) in relation to CAD’s request that the Minister reconsider and revoke the unused 1998 approval issued to the United Counties of Leeds and Grenville (“the Counties”) under the *Environmental Assessment Act* (“*EA Act*”) for the ED-19 Landfill.

2. CAD’s reconsideration request was first filed with Minister Murray in May 2017 pursuant to section 11.4 of the *EA Act*. Since that time, CAD has filed supplementary materials and additional information to successive Ministers in support of the reconsideration request. These submissions by CELA should be read in conjunction with all previous documentation provided by CAD to the Ministers since 2017.

3. On June 28, 2019, the current Minister advised CELA that it would be “appropriate” for him to exercise his authority under section 11.4 to reconsider the 1998 approval “because information has been brought to my attention that indicates there is a change in circumstances and/or new information concerning the application.” The Minister also invited CAD to provide “additional information” to “assist in the reconsideration review process.”

Letter to CELA from the Hon. Jeff Yurek (June 28, 2019), page 1

4. CAD fully agrees with the Minister that the 1998 approval should be reconsidered, and welcomes this opportunity to provide further factual, technical and scientific evidence regarding the undeveloped ED-19 Landfill. This evidence is set out in the attached affidavits and exhibits, which form part of these submissions.

5. For the reasons described below, CAD submits that the outcome of the Minister’s reconsideration review must invariably lead to the expeditious revocation of the stale-dated and inadequate *EA Act* approval. In CAD’s view, revocation is both necessary and desirable in order to safeguard the environment, human health, and the public from potential adverse impacts arising from the approved undertaking, particularly in light of new information and significant changes in circumstances which have emerged in this case since the original EA process was conducted in the early to mid-1990s.

PART II – THE FACTS

6. The material facts and basic chronology of events are not in serious dispute among the parties, and have been outlined in CAD's previous correspondence to the Minister in relation to the reconsideration request. Accordingly, these submissions will not repeat the factual history of this dispute, and will instead focus on key changes in circumstances and other new information concerning the ED-19 Landfill.

(i) Changes in Environmental Conditions

7. While the basic hydrogeological setting of the ED-19 Landfill property (e.g. underlying geologic formations, hydraulic conductivity, etc.) has not changed since the 1990s, major changes in the local environment have occurred over the past two decades, both on-site and in the vicinity of the ED-19 Landfill property.

Affidavit of Wilf Ruland, para 7, and Exhibit B: Independent Review of Information, page 17

Affidavit of Kim Logan, para 7, and Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 10-11

8. In relation to surface water resources, the amount of land covered by surface water at the ED-19 Landfill property has significantly increased over time, and has resulted in moisture conditions, vegetation communities, and wildlife habitats that are dramatically different from what was described by the Counties' studies in the 1990s.

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, pages 17-19

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 10-11

Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, page 9

9. The largest on-site surface water body is considerably greater than 1 hectare in size, and there is evidence that this water body has been in existence (and has continuously expanded) for over 16 years.

Affidavit of Kyle Johnston, para. 16

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, page 18

Reply Affidavit of Wilf Ruland, para 5(b); Exhibit A: Reply Report, pages 3-4; and Attachment A: 1991 and 2014 aerial photographs

10. There are headwater tributaries (watercourses) located within and beside the ED-19 Landfill property.

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 5, 8

11. In relation to wetland resources, the extensive open water wetlands upon the ED-19 Landfill property have become larger and have shifted toward the west and southwest since the Counties' studies were conducted in the 1990s.

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, page 11

Affidavit of Kyle Johnston, paras 15-16; Exhibit A: wetland photographs; and Exhibit B: Letter to MECP (February 2018), attached aerial photographs

12. While the local, regional or provincial significance of these wetlands have not been evaluated to date, there is a Provincially Significant Wetland (“PSW”) located southwest of the ED-19 Landfill property, and there are other pockets of unevaluated wetlands between the PSW and the eastern boundary of the ED-19 Landfill property.

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, page 8

13. In relation to fish species, there is evidence that local residents have launched motorized boats and caught fish in the surface water body located upon the ED-19 Landfill property.

Affidavit of Kyle Johnston, para 16, and Exhibit B: Letter to MECP (February 2018)

14. In light of the expansion and west/southwest shift of the on-site wetlands, the large (and currently thriving) heronry is now much closer to the ED-19 Landfill than previously described in the Counties’ studies in the 1990s. The heronry predates the 1998 approval, and provincial guidelines specify 300 metre setbacks and 1 kilometre seasonal restrictions on development near heronies.

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 3, 8, 11

Affidavit of Kyle Johnston, para 15, and Exhibit A: photograph of heronry

15. The Counties’ studies in the 1990s did not assess impacts to species at risk, although there is evidence that numerous species at risk now occur (or have the potential to occur) on-site and/or surrounding lands, including endangered species, threatened species, and species of special concern.

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 9-10

16. The on-site vegetation communities (e.g. trees, bushes and cover plants) have become more mature than the conditions recorded in the Counties’ studies in the 1990s.

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 10-11

17. After the 1998 approval was issued, there is evidence that a number of new residences and domestic wells have been established within 1,500 meters of the ED-19 Landfill property.

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, pages 17-18

(ii) Changes in the Legislative and Regulatory Framework

18. The *EA Act* approval for the ED-19 Landfill is subject to only three “boilerplate” conditions (e.g. proponent must comply with statutory approvals; filing of the public record; financial/operational responsibilities are binding on the proponent). However, after the *EA Act* approval was issued to the Counties in 1998, a number of new laws, regulations, standards, and best practices have been developed in Ontario in relation to landfill siting, sizing, design, operation, and mitigation of adverse effects upon natural features and functions. These changes include the following:

- (a) Regulation 347 (Waste Management) under the *Environmental Protection Act* (“*EPA*”) was amended in 2009 to require proponents of large landfills to evaluate the need for improved collection of landfill gas in order to reduce greenhouse gas emissions;
- (b) provincial landfill standards (O.Reg. 232/98) were passed under the *EPA* in 1998 to impose new operational requirements upon landfill proponents;
- (c) the Ontario Drinking Water Quality Standards under the *Safe Drinking Water Act, 2002* have been revised to lower the maximum acceptable concentrations of two key parameters (e.g. benzene and vinyl chloride) that were used in the hydrogeology impact assessment conducted by the Counties in the 1990s;

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, page 19

- (d) subsection 27(3.1) was added to the *EPA* in 2004 to prohibit the disposal of waste into water bodies that are caught by the subsection 27(3.2) definition of “lake”;

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, page 20

- (e) the Ministry no longer permits leachate recirculation at landfills, although the 1998 *EPA* approval allows this practice at the ED19 Landfill;

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, pages 13-15

- (f) pursuant to the Counties’ Official Plan and Ontario’s *Clean Water Act, 2006*, the ED-19 Landfill property has been designated as a “Highly Vulnerable Aquifer” and a “Significant Groundwater Recharge Area”;

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 4-6

Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, page 3, and Figure 1

- (g) the *Fisheries Act* has been amended to protect commercial, recreational or Aboriginal fisheries, and to establish a permitting system for activities or works that may cause serious harm to fish habitat;

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, page 2

- (h) the 2014 Provincial Policy Statement issued under the *Planning Act* (and the associated implementation manuals and guidelines) provides provincial direction on protecting significant natural heritage features and functions (e.g. surface water, groundwater, wetlands, woodlands, and habitat for fish, wildlife and endangered or threatened species);

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 2-3

- (i) Ontario's *Endangered Species Act, 2007* now protects species at risk and their habitat;

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, page 4

- (j) the local Conservation Authority's cut/fill regulation (O.Reg.170/06) passed under the *Conservation Authorities Act* prohibits site alteration or development in or near unevaluated wetlands that may interfere with hydrologic functions of such wetlands;

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, page 4

- (k) the Township's Official Plan contains policies that are aimed at protecting natural heritage features (e.g. wetlands, woodlands and watercourses); and

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 5-6

- (l) Ontario's *Resource Recovery and Circular Economy Act* (and Waste-Free Ontario Strategy) was enacted in 2016 to achieve "zero waste" and "circular economy" objectives, and to ensure that is not an oversupply of landfill capacity.

Affidavit of Kyle Johnston, Tab B: Letter to MECP (February 2018), page 2

(iii) Significance of the Above-Noted Changes

19. The significance of the foregoing facts has been outlined in opinion evidence prepared by independent hydrogeologist Wilf Ruland, who was retained by CAD in relation to this matter. Among other things, Mr. Ruland's professional opinion is that:

- (a) the documentation tendered by the Counties in the 1990s in support of its landfill application was incomplete, inadequate and did not reflect sound scientific investigation and analysis;

- (b) the factual, technical and scientific data obtained over 20 years ago for the ED-19 Landfill are no longer valid and are not representative of current site conditions;
- (c) the ED-19 Landfill does not reflect or comply with new or amended Ministry requirements for groundwater and surface water protection;
- (d) the construction and operation of the ED-19 Landfill at its approved location and design would pose an unacceptable threat to off-site groundwater supplies and off-site surface water resources; and
- (e) the ED-19 Landfill would not be approved in its current form today.

Affidavit of Wilf Ruland, paras 7-11, and Exhibit B: Independent Review of Information, pages 23-25

20. The above-noted facts have also been considered in opinion evidence from an independent ecologist Kim Logan, who was retained by CAD in relation to this matter. Among other things, Ms. Logan's professional opinion is that:

- (a) the Counties' site assessment documentation from the 1990s did not demonstrate that the ED-19 Landfill project will not cause any negative impacts to local natural features or functions, the on-site wetlands, or the heronry;
- (b) the proponent's site assessment documentation from the 1990s contains significant data gaps which should be addressed through the collection and analysis of updated information on natural heritage features and functions.
- (c) an ecological site assessment for the ED-19 Landfill project has not been conducted by the Counties to date, despite the 2017 recommendation from the Ministry of Natural Resources and Forestry that such an assessment should be conducted to evaluate natural heritage features and to identify whether species at risk (or their habitat) are present; and
- (d) proceeding with the ED-19 Landfill project at the present time may cause adverse impacts to natural heritage features and functions.

Affidavit of Kim Logan, paras 8-11, and Exhibit C: Environmental Site Assessment (ESA) Biological Review, pages 13-15

(iv) Proposed Changes in the ED19 Landfill Design and Operation

22. Based on the exchange of affidavits and reports during the Counties' recent *EPA* appeal to the Environmental Review Tribunal (in which CAD was a party), there appears to be general agreement among the parties' experts that if the ED-19 Landfill proceeds at all, it should not be designed, constructed or operated as originally approved in 1998.

Reply Affidavit of Wilf Ruland, para 5(a), and Exhibit A: Reply Report, pages 2, 4-9

23. In fact, number of post-approval design and operational changes have been recently proposed for the ED-19 Landfill, including the installation of a landfill gas collection system and a continuous leachate collection layer at the landfill base.

Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, pages 5-8, and Attachment D: Golder memorandum (April 2016), pages 2-5

24. To CAD's knowledge, no change is being proposed in the ED-19 Landfill's approved disposal capacity, which was intended to receive the predicted waste volumes (e.g. 980,000 tonnes) generated within the Counties for a 20 year period from the mid-1990s until 2014. However, there is no current evidence confirming that the capacity of the unbuilt ED-19 Landfill remains properly sized or is appropriate to meet local waste disposal needs projected over the next 20 years (e.g. 2019 to 2039).

Affidavit of Kim Logan, Exhibit C: Environmental Site Assessment (ESA) Biological Review, page 1

25. In addition, it appears that a service area expansion beyond what was approved under the *EA Act* and *EPA* is being proposed if the ED-19 Landfill proceeds.

Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, page 5, and Attachment D: Golder memorandum (April 2016), page 5

(v) Settlement Agreement between the Ministry and the Counties

26. The settlement agreement reached between the Ministry and the Counties (and conditionally accepted by the Tribunal during the above-noted appeal hearing) inserts new Condition 9.1 into the 1998 *EPA* approval. In essence, this condition leaves the 1998 *EA Act* approval unchanged, but requires the Counties to prepare three new reports (e.g. monitoring wells, natural features, and groundwater impacts) and a revised Design & Operations Report to the satisfaction of the Ministry.

27. CAD remains highly concerned about various shortcomings in Condition 9.1, and in a separate proceeding pending before the Minister, CAD has appealed the Tribunal's endorsement of the settlement agreement. No decision has been rendered by the Minister to date in relation to CAD's appeal under the *EPA*.

Affidavit of Kyle Johnston, paras 11-13

28. CAD's independent experts have also identified a number of unresolved concerns about Condition 9.1.

Affidavit of Kim Logan, paras 13-14

Affidavit of Wilf Ruland, para 13, and Exhibit B: Independent Review of Information, page 22

Reply Affidavit of Wilf Ruland, para 6

29. For example, from his hydrogeological perspective, Mr. Ruland's professional opinion is that Condition 9.1 is unacceptable for the following reasons:

- (a) the Minutes of Settlement do not provide for protection or conservation of the natural environment; instead, they represent a threat to the natural environment and to the public interest, because they open the door to landfilling at the ED-19 site without properly addressing the multitude of deficiencies associated with the ED-19 Landfill proposal;
- (b) the Minutes of Settlement do not meaningfully address the multitude of deficiencies associated with the existing ED-19 Landfill approvals and with the technical studies which provided the basis for those approvals;
- (c) Mr. Ruland strongly disagrees with the claim in Paragraph 5 of the Minutes of Settlement that “the Amendment to the ECA set out in Schedule “A” to the Order will protect and conserve the natural environment and is in the public interest;”
- (d) it is a mistake to try to amend the 1998 approval under the *EPA*, which is now 20 years old and which should not have been issued in the first place; and
- (e) none of the technical documents in Schedules A, B, C, D, and E of the *EPA* approval (written over 20 years ago) are suitable for a landfill proposed to be built today. Instead, all of these technical documents (not just the Design and Operations Report) require revision to account for changes/evolution in real-world land use and the natural environment, as well as changes in regulations, drinking water quality and surface water quality standards, and practices regarding landfill design and operation.

Affidavit of Wilf Ruland, para 13, and Exhibit B: Independent Review of Information, pages 22

30. Similarly, from her ecological perspective, Ms. Logan’s professional opinion is that Condition 9.1 does not adequately address the numerous concerns described in her independent review of the ED-19 Landfill, such as:

- (a) the Counties’ original site assessment work contains various deficiencies and shortcomings, and does not demonstrate that the ED-19 Landfill will not adversely affect the natural environment;
- (b) there are significant data gaps regarding the ED-19 Landfill and environs which must be addressed through the collection and analysis of updated information, but which are not specifically mentioned by Condition 9.1;
- (c) Condition 9.1 does not explicitly commit the Counties to assess or report on significant wildlife habitat, significant woodlands, or whether the on-site wetland is regionally or provincially significant;

- (d) the work required under Condition 9.1 does not constitute an ecological site assessment as recommended by the Ministry of Natural Resources and Forestry; and
- (e) the nature and extent of the groundwater recharge area has not been adequately assessed to date, and an appropriate water balance has not been completed to demonstrate that post-construction inflow/outflow will meet or match pre-construction inflow/outflow.

Affidavit of Kim Logan, paras 13-14

31. In addition to the foregoing opinion evidence, CAD submits that on the facts, there are numerous red flags, unresolved concerns and outstanding issues about the ED-19 Landfill (and its potential impacts) that are not addressed adequately or at all by the Condition 9.1 or, more importantly, the underlying *EA Act* approval.

32. For example, the April 2016 Golder memorandum claims that while there is no proposal to “alter any aspects of the project that were fundamental to the EA approval (i.e. ... approach to landfill design to protect groundwater and surface water...), Tomlinson has identified a number of changes to aspects of the currently approved design that would either be beneficial... or are required because of changes to provincial regulations since that time.”

Reply Affidavit of Wilf Ruland, Exhibit B: Reply Report, Attachment D, page 1

33. However, Mr. Ruland has accurately characterized these proposed changes as a “wholesale redesign” of the approved ED-19 Landfill, particularly in relation to leachate collection and management, which are “fundamental aspects of landfill design and operation.”

Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, pages 5-7

34. CAD submits that this prospect immediately raises the question of whether these or other fundamental changes in the approved undertaking should themselves trigger a new environmental assessment pursuant to the *EA Act* before they can be approved under the *EPA*:

12. If a proponent wishes to change an undertaking after receiving approval to proceed with it, the proposed change to the undertaking shall be deemed to be an undertaking for the purposes of this Act.

***EA Act*, section 12**

35. The Golder memorandum goes on to suggest that all of the proposed changes to landfill design and operation can be processed as mere amendments to the *EPA* approval, which is essentially how Condition 9.1 has been crafted.

Reply Affidavit of Wilf Ruland, Exhibit B: Reply Report, Attachment D, pages 2-5

36. CAD submits that this flawed approach will likely raise a serious legal barrier to meaningful public involvement in relation to any future proposed amendments to the ECA. This is because section 32 of the *Environmental Bill of Rights* (“*EBR*”) provides that if an instrument implements an *EA Act*-approved undertaking, then the mandatory public notice, comment and third-party appeal rights under Part II of the *EBR* are inapplicable to the instrument.

***EBR*, section 32**

37. This problem is compounded by the fact that proposed Condition 9.1 under the Minutes of Settlement contains no meaningful opportunities for CAD to review and comment upon the various reports to be prepared and submitted by the Counties.

Affidavit of Kyle Johnston, para 13

PART III – ISSUES AND ARGUMENT

38. CAD submits that the overarching issue in the reconsideration review is whether the Minister should revoke the 1998 *EA Act* approval pursuant to section 11.4 of the *EA Act*.

39. For the following reasons, CAD submits that this question should be answered in the affirmative.

(i) The Broad Scope of Section 11.4

40. Section 11.4 of the *EA Act* currently reads as follows:

Reconsideration of decisions

11.4 (1) If there is a change in circumstances or new information concerning an application and if the Minister considers it appropriate to do so, he or she may reconsider an approval given by the Minister or the Tribunal to proceed with an undertaking. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Same

(2) The Minister may request the Tribunal to determine whether it is appropriate to reconsider an approval. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Same

(3) The Minister may request the Tribunal to reconsider an approval given by the Minister or the Tribunal. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Minister may require plans, etc.

(3.1) For the purposes of making a decision under this section, the Minister or the Tribunal may, by order, require the proponent of the undertaking to provide plans, specifications, technical reports or other information and to carry out and report on tests or experiments relating to the undertaking. 2019, c. 9, Sched. 6, s. 2 (1).

Amendment, revocation

(4) Where the Minister or the Tribunal reconsiders an approval under this section, that approval may be amended or revoked. 2019, c. 9, Sched. 6, s. 2 (2).

Rules, etc.

(4.1) A decision under this section shall be made in accordance with any rules and subject to any restrictions as may be prescribed. 2019, c. 9, Sched. 6, s. 2 (2).

Non-application

(5) Section 21.2 (power to review) of the *Statutory Powers Procedure Act* does not apply with respect to decisions made under this Act. 1996, c. 27, s. 3.

41. Section 12.4(4) of the *EA Act* further provides that section 11.4 can be applied to reconsider approvals of applications filed under the former *EA Act* before it was overhauled in 1996:

Transition

12.4 (1) Subject to subsection (4), this Part, as it read immediately before the coming into force of section 3 of the *Environmental Assessment and Consultation Improvement Act, 1996*, continues to apply with respect to the following:

1. An environmental assessment submitted before the coming into force of section 3 of that Act.
2. Subject to subsection (2), an environmental assessment submitted within one year after section 3 of that Act comes into force. 1996, c. 27, s. 3; 2019, c. 9, Sched. 6, s. 3 (1).

Election

(2) A proponent who wishes the predecessor Part to apply shall notify the Ministry in writing when submitting the environmental assessment. 1996, c. 27, s. 3.

Same

(3) Despite subsection (1), the Minister may by order direct that all or any portion of this Part or Part II.1, as they read after section 3 of the *Environmental Assessment and Consultation Improvement Act, 1996* comes into force, apply with respect to an environmental assessment described in subsection (1). 1996, c. 27, s. 3.

Application of s. 11.4

(4) Despite subsection (1), a notification given under subsection (2) or any order made under subsection (3), section 11.4 applies in respect of an environmental assessment to which all or part of the predecessor Part applied and such an environmental assessment is deemed to be an application for the purpose of section 11.4. 2019, c. 9, Sched. 6, s. 3 (2).

42. In this case, the Counties' *EA* process started in the early 1990s under the previous *EA Act*, but the approval was granted in 1998 under the current version of the *EA Act*. Accordingly, CAD submits that the Minister enjoys ample authority to reconsider and revoke the 1998 *EA Act* approval for the ED-19 Landfill.

(ii) Condition 9.1 does not Obviate the Need to Revoke the EA Act Approval

43. CAD submits that the above-noted new information and material changes in circumstances make it incumbent upon the Minister to revoke the unused 1998 *EA Act* approval. In CAD's view, revocation is both long overdue and clearly necessary in order to achieve the public interest purpose of the *EA Act* (e.g. protection, conservation and wise management of the environment). The mere fact that the Tribunal endorsed Condition 9.1 in the proponent's *EPA* appeal is neither relevant to, nor determinative of, the Minister's separate and independent decision-making authority under section 11.4 of the *EA Act*.

EA Act, section 2

44. CAD further submits that the information-gathering requirements of Condition 9.1 in the *EPA* approval cannot be relied upon by the Minister as the basis for refusing to revoke the *EA Act* approval. As noted above, CAD has identified procedural and substantive problems within Condition 9.1, and, in any event, the Tribunal's endorsement of Condition 9.1 remains under appeal to the Minister in a separate proceeding. Therefore, the ultimate fate of Condition 9.1 remains unknown at the present time.

45. This same concern exists in relation to the 1998 *EPA* approval in its entirety. In short, the Ministry has agreed to review this approval pursuant to *EBR* Applications for Review filed by CAD and other local residents. This review process was supposed to be completed by May 2019, but this timeline has been extended by the Ministry. In any event, there are no mandatory opportunities for CAD to be meaningfully involved in the Ministry's internal review or its outcome, and any subsequent amendments to the 1998 *EPA* approval are likely subject to the section 32 "exception to public participation" under the *EBR*.

Affidavit of Kyle Johnston, paras 5-6

46. More fundamentally, CAD submits that the approach entrenched in the Minutes of Settlement (e.g. leaving the 1998 *EPA* approval intact and inserting new Condition 9.1 to require the Counties to prepare a small handful of reports) does not adequately recognize that the environmental features and other constraints to be studied by the Counties may, in fact, turn out to be "show stoppers" that mean either that the large landfill cannot proceed at all at the current site location, or, alternatively, that the landfill will have to be considerably downsized, relocated or substantially redesigned.

47. From an environmental planning and approvals perspective, CAD submits that it is preferable to revoke the 1998 *EA Act* approval, and thereby require the Counties (or its successor) to file a fresh *EA* application that is evaluated against current landfilling requirements now in place in Ontario.

Affidavit of Kyle Johnston, para 7

48. For example, the *EPA* was amended in 2004 to prohibit waste disposal operations in areas or upon lands that meet the statutory definition of “lake”:

(3.1) Despite subsection (1), no person shall use, operate, establish, alter, enlarge or extend a waste disposal site where waste is deposited in a lake.

(3.2) In subsection (3.1),

“lake” includes,

(a) a body of surface water that,

(i) results from human activities, and

(ii) directly influences or is directly influenced by ground water, and

(b) an area of land that was covered by a body of water described in clause (a) or a lake on the day this subsection came into force,

but does not include,

(c) a body of water described in clause (a) or a lake, if the body of water or lake is less than one hectare in area, or

(d) an area of land described in clause (b), if the body of water described in clause (a) or lake that covered the area of land on the day this subsection came into force was, in total, less than one hectare in area on that day (emphasis added).

EPA, subsections 27(3.1) and (3.2)

49. In previous jurisprudence, the Tribunal has considered and applied the *EPA*’s “lake” prohibition to uphold a Director’s amendment to a landfill approval that prohibited waste disposal within certain cells covered by 2.5 hectares of water, although these parts of the waste footprint were approved in the 1990s prior to the enactment of subsection 27(3.1) of the *EPA*. Despite the instrument holder’s argument that the areas would be dewatered and bermed prior to the deposit of waste, the Tribunal concluded that:

The prohibition with respect to depositing waste into a lake expressly overrides any provision in a CofA. To put the matter simply, according to section 27(3.1) of the *EPA*, one cannot deposit waste into a lake even if one has a CofA that ostensibly allows such activity. The Tribunal finds that there is no ambiguity with respect to the plain words of the *EPA* on this matter.

Inter-Recycling Systems Inc. v. Ontario, 2009 CarswellOnt 5472 at paras 8, 14, 18, 39-40, 63

50. In the instant case, there is uncontradicted evidence that: (i) the area of land covered by water on the ED-19 Landfill property is greater than 1 hectare (and still expanding); (ii) this surface water body has been in existence for at least 16 years (e.g. since 2003); and (iii) this surface water body now extends onto and around the approved waste footprint.

Affidavit of Wilf Ruland, Exhibit B: Independent Review of Information, page 20
Affidavit of Kyle Johnston, paras 16-17
Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, page 3, and Figure 1 aerial photographs

51. Accordingly, CAD submits that subsection 27(3.1) effectively overrides and nullifies the 1998 approvals under the *EA Act* and *EPA*, and does not allow waste to be deposited on lands that have been covered by an ever-growing body of surface water since 2003.

52. Put another way, CAD submits that rather than keeping the door open to the deposit of waste upon lands that are currently submerged by surface water, the Minister should be closing the door by taking all necessary steps under the *EA Act* (e.g. revocation) to ensure compliance with subsection 27(3.1) of the *EPA*.

53. CAD further submits that triggering subsection 27(3.1) of the *EPA* in this case is an appropriate prospective (or retrospective) application of the current law to attach new consequences to prior events, acts or situations.

Re Hopkinson, 1993 CarswellOnt 5333 at paras 86-90

54. CAD further notes that Ontario's current landfill standards require proponents to own the entire waste disposal site in fee simple.

O.Reg. 232/98, section 3

55. In this case, however, there is uncontradicted evidence that a significant portion of the ED-19 Landfill is not owned by the Counties, and that much of the critical landfilling infrastructure would be located upon these privately owned lands. Condition 9.1 does not address or resolve this issue.

Reply Affidavit of Wilf Ruland, Exhibit A: Reply Report, pages 4-5; Attachment B: Golder Figure 5; and Attachment C: land ownership map

56. In summary, CAD submits that there is a substantial and continuing disconnect between the 1998 *EA Act* approval and the current legislative and regulatory regime governing landfilling in Ontario. It is also abundantly clear that after 20 years, the Counties have no need or intention to actually develop this landfill, and now want to sell it to a private company for a different purpose than what was approved in 1998.

57. Moreover, the Ministry's 2018 Made-in-Ontario Environment Plan expressly recognizes the need to ensure that "valuable resources in waste do not end up in landfills." Similarly, the Ministry's recent Discussion Paper on Reducing Litter and Waste in Our Communities notes that "sending waste to landfill is economically inefficient and unsustainable," specifically commits to decreasing the amount of waste going to landfill, and calls for renewed emphasis upon waste reduction, diversion programs, and producer responsibility initiatives. In CAD's view, revoking the ED-19

Landfill's *EA Act* approval is entirely consistent with this new provincial policy direction regarding waste management in Ontario.

Made-in-Ontario Environment Plan, page 43
Discussion Paper on Reducing Litter and Waste in Our Communities, pages 5-6

PART IV – ORDER REQUESTED

58. For the foregoing reasons, CAD respectfully requests the Minister to order the revocation of the 1998 *EA Act* approval forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



August 30, 2019

Richard D. Lindgren
Counsel for Citizens Against the ED-19
Dump